Abstract

The number of people with less than permanent migration status in Canada has increased in recent decades. While such people often have social and economic ties to Canada, and live and work within its territory, they do not have legal permanent membership by way of permanent residence or citizenship, and experience differential access to legal rights and entitlements. This dissertation examines the role of migration status in the lives of people who identify themselves as having “uncertain” migration status. In this study, I draw on interviews with migrants and representatives of migrant-serving agencies as well as legal and policy texts, deploying Dorothy Smith’s institutional ethnography as a methodology to ground the dissertation both analytically and structurally in the interview data. This study enlarges the understanding of the nature and effects of migration status as it is enacted in local institutional sites. Using the construct of “precarious migration status” as a theoretical frame, I focus specifically on the nature and effects of precarious migration status. I explore the effect of precarious migration status on working life and on migrants’ interactions with state institutions governing health care, education, and income security. I conclude that precarious migration status has a deleterious effect on the employment relationship itself as well as access to worker protections, even though the law creates no formal barrier to such protections on the basis of status. With regard to social state, individuals with precarious status are often formally excluded in the text of the law as well as through various exclusionary policies and practices within local institutional sites. I conclude that institutional sites in which precarious migration status functions to exclude should be understood as forms of enforcement. I further conclude that human rights and anti-discrimination strategies through Charter and provincial human rights statutes, while valuable, are unlikely to improve inclusion for precarious migrants, while contestation of membership at the level of local institutions has greater potential to do so.
Preface

This dissertation is an original intellectual product of the author, Sarah Grayce Marsden. The fieldwork reported in Chapters 2-6 was covered by UBC Ethics Certificate number H11-01061.

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<td>CBSA</td>
<td>Canada Border Services Agency</td>
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<td>CIC</td>
<td>Citizenship and Immigration Canada</td>
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<td>EAAT</td>
<td>Employment and Assistance Appeal Tribunal</td>
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<td>EI</td>
<td>Employment Insurance</td>
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<td>Employment Standards Branch</td>
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<td>Live-in Caregiver Program</td>
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<td>Medical Services Plan</td>
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<td>NAFTA</td>
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<td>TRP</td>
<td>Temporary Resident Permit</td>
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<td>VHHSC</td>
<td>Vancouver Hospital and Health Sciences Centre</td>
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<tr>
<td>WCAT</td>
<td>Workers’ Compensation Appeal Tribunal</td>
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<tr>
<td>WCB</td>
<td>Workers’ Compensation Board (WorkSafe BC)</td>
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Acknowledgements

I would first like to thank the individuals who participated in interviews for this study. Their courage and generosity in sharing their perspectives and experiences with me gave life and meaning to this work. I am grateful for the trust, energy, and time they gave to this project, in welcoming me into their homes and speaking openly about their lives alongside the risk and vulnerability often inherent in their situations. I hope that this work contributes in some way to documenting the inequalities they experienced and working toward inclusion and dignity for all precarious migrants.

I cannot say enough to thank my supervisory committee: Catherine Dauvergne and Emma Cunliffe of the Faculty of Law at UBC, Geraldine Pratt of the Faculty of Geography at UBC, and Donald Galloway of the Faculty of Law at UVic. I could not have done this without their support and guidance. Catherine, your intellectual contribution alone would merit my gratitude, but the way you made time to read my work, share your thoughts, and lend support in so many other ways gave me a sense of belonging at UBC. Emma, your deep commitment to your students is well known in the law faculty, and as a graduate student I have benefited tremendously from the chance to work closely with you. Your mentorship helped me to know my own potential, a gift which will serve me well beyond this thesis. Gerry, you approached my work with patience, insight, and an intellectual clarity that I often struggle to find as a legal scholar. Don, your feedback and positive approach have been invaluable. Within the graduate program, I also owe a debt of gratitude to Joanne Chung, Doug Harris, and Gordon Christie for their support.

I also had the privilege of working with two brilliant interpreters for this project. Both Liliana Castaneda Lopez (Spanish) and Jane Deasy (Mandarin) lent me not only their eloquence in word and thought, but also their flexibility, patience, and knowledge in reaching out within communities in Vancouver. The difficult and essential work of interview transcription was carried in part by Sandra Choromanski and by my sister, Lauren Marsden. Furthermore, I would like to express my gratitude to the individuals who
facilitated access to information at government institutions, and specifically Daniel Kipin of the Canada Border Services Agency, Jennifer Hagen of the Employment Standards Branch, Ruth Boyd of the South Coast Transportation Authority, and Anthony Moffatt of WorkSafe BC.

This work was supported financially by the University of British Columbia, the Liu Institute for Global Issues, and the Social Sciences and Humanities Research Council. This funding allowed for a depth of fieldwork and research which would otherwise not have been possible.

Finally, I would like to thank my family and friends who have journeyed with me in this work. Quentin, you have shared in this work: your strength, humour, and gentleness have carried me in more ways than I can say. I also owe thanks to Tim Bailey, the most ethical lawyer I know and my wisest friend.
Dedication

This work is dedicated to the memory of Ken MacMillan, who knew that intellect is nothing without kindness.
Chapter 1. Precarious Migrants in Canada

1.1 Introduction

This study is about uncertain migration status. Federal law assigns people’s migration status in Canada, resulting in a spectrum of status ranging from complete lack of authorization to be in Canada to permanent residence and citizenship. The focus of this project is migration status that conveys less than permanent status. In the course of conducting fieldwork, it quickly became evident that status distinctions were far from binary. Various iterations of status, including both documented and undocumented migration situations, had common features which tended to draw a line between permanent residence and everything less than permanent residence, rather than between undocumented and documented per se. Furthermore, it became clear that possession of a valid temporary migration document did not necessarily legitimize all activities necessary to daily life. A majority of the participants in the study had some type of current or past immigration status, yet had been unauthorized in their interaction with the Canadian labour market, in accessing services, or in extending their stay in Canada. Even for those few who had never transgressed the formal limits of their legal authorization to be or work in Canada, status uncertainty functioned as a disciplining force within employment relations, access to state-based social protection, and social and family life more generally.

This research arose from encounters with precarious migrants during my practice as an immigration and refugee lawyer. For example, I advised one woman who had entered Canada as a live-in caregiver, overstayed her work permit, and become pregnant during her time in Canada. The father of the child was her employer, who prevented the woman from leaving his home/her workplace. I met her when she was about 6 months pregnant, with no authorization to remain legally in Canada, and she was having difficulty obtaining prenatal care while making a decision about whether to stay in Canada or to return to her country of origin. On another occasion, I was called to advise several workers who had
entered Canada without documentation to take up construction projects. One worker had fallen and broken her arm, but did not wish to seek medical attention because she did not want her lack of status to come to the attention of immigration authorities. In a third instance, several migrants with expired work permits were ticketed while riding public transit to work for the minor infraction of riding a bus without a ticket. Transit police detained them and handed them over to immigration authorities who subsequently deported them. Prior to starting this research I had met and worked with dozens of people in situations similar to these.

All of these people were resident in Canada and had specific attachments to Vancouver through work, family, community, and social life. While they were actively participating in life here, however, they also seemed to be systematically excluded from social state entitlements, and at particular risk of exploitation in employment situations. Not only are such situations compelling from the perspective of advocacy, but they invited an exploration of the broader dynamic which arises through specific experiential contexts, which led to the genesis of this project. In this dissertation, I will examine the role of law and state institutions in governing people with less than full migration status. In so doing, I will use as a framing concept the idea of “precarious migration status” as described by Goldring et al.\(^1\) The goals of this research are threefold: 1) to document the nature and role of migration status as understood by precarious migrants, 2) to explore how statutes, regulations and policies interact with migration status in working life and the social state, and 3) on the basis of this information, to examine existing and potential remedies to rights shortfalls in law and policy.

In this introductory chapter, I situate this research by introducing the framing concept of precarious migration and how it applies in the context of Canada as a migrant-receiving state, and by providing a brief overview of main themes in the research, before turning to the methodology employed in this work and the presentation of research data.

\(^{1}\) Luin Goldring, Carolina Berinstein & Judith Bernhard, "Institutionalizing precarious migratory status in Canada" (2009) 13 (3) Citizenship Studies 239 [Goldring, “Institutionalizing”].
1.2 Migration and Legality in the Canadian Context

Concern about "illegal migrants" *per se* within Canada on a large scale arose for the first time in the early 1970s. This section provides a brief outline of the migration policy context in which this issue arose, situating the issue of "illegal migration" alongside a definitive shift toward more a liberal migration regime and the concurrent legal entrenchment of economic viability as the basis for permanent membership in Canadian society.

Starting in the late 1960s, Canada's migration policy underwent a wholesale liberalization, characterized by the removal of explicitly racist laws, the introduction of procedural safeguards, and the acceptance of large numbers of refugees on humanitarian grounds subsequent to the 1969 ratification of the Refugee Convention. This liberalizing shift was accompanied by a change in the composition of permanent resident populations. In 1967, the “points system” of permanent residence was established, by which foreign nationals could migrate to Canada as part of an economic class by proving their potential for economic integration through formal education, language skills, and work experience. Family class numbers decreased starting in the 1970s and economic class numbers increased, with economic class permanent residents eclipsing family class in the 1990s. For the first time, the primary nexus of naturalized permanent membership in the Canadian state was based not on national, ethnic, or familial ties, but on the economic potential of the individual. In tandem with the shift toward an economic nexus for permanent residence was the initiation of a large-scale temporary labour migration program. Historically, Canada used temporary migration programs for targeted countries of origin and labour segments as far back as the 1910s, but the numbers were small in

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comparison to permanent migration, and the programs were limited.\(^4\) The Non-Immigrant Employment Authorization Program began in 1973, allowing employers to hire foreign workers on the basis of labour market need from any country of origin and across a wide range of labour segments; the program meant that the number of temporary workers often rivaled or exceeded the number of economic-class permanent residents entering Canada.\(^5\) The timing of this shift was consistent with a global increase in both labour migrant and refugee flows in the first part of the 1970s.\(^6\)

In the early 1970s, the Canadian state also turned its attention for the first time to the issue of large numbers of irregular migrants living in Canada, offering an estimate of an undocumented population of 200,000 in 1973, most of whom had originally entered Canada legally as visitors or workers.\(^7\) The government offered a one-time regularization program for undocumented migrants in 1973, and 50,000 people participated. By the early 1980s, although estimates of numbers had been reduced, illegal migration had come to the attention of the state once again. The 1976 \textit{Immigration Act} created a pathway for in-Canada refugee claims via incorporation of the obligation of non-refoulement, alongside existing procedural safeguards which prevented arbitrary deportation, leading to the perception of greater numbers of people in Canada without formal status, but whom the state could not deport quickly.\(^8\) The 1980s also saw “an increasing public association [of] refugees, asylum seekers, and illegal immigration.”\(^9\) At the same time, another amnesty was offered for “long-term illegals,” regularizing approximately 4,000 people.\(^10\)

\(^9\) \textit{Ibid} at 430.
\(^10\) \textit{Ibid} at 430.
The pattern of state and public attention to irregular migration since the early 1970s has been aptly described by Norm Buchignani as making undocumented migration a “sometime social issue” in Canada. That is to say, it is not only the actual fluctuation of the undocumented population, but the public characterization of “illegal” migrants in terms of their perceived lack of entitlement to membership in Canada that determines the construction of such migrants. Buchignani describes the division of precarious migrants into two classes in public consciousness: meritorious (though undocumented) industrious workers and deserving “compliant” refugees on the one hand, and “bogus refugees” or “queue jumpers” on the other hand. The latter continue to appear in current government discourse on the topic of refugees. In this analysis, the presence of irregular or precarious migrants itself is not viewed as a problem, but notions of unfairness and illegality are deployed to condemn migrant groups which deviate morally or otherwise from the imagined status quo of the deserving migrant. Thus, while there was considerable public support for amnesty in the 1970s, by the 1980s the increase in inland claimants came to appear “threatening, inauthentic and large.” This led to a decline in public support of an amnesty and controversy over backlog clearance programs subsequent to the Supreme Court of Canada’s landmark decision in Singh v Minister of Employment and Immigration.

As a result of Singh, the federal government was required to provide an oral hearing for inland refugee claimants as an aspect of procedural fairness.

A report commissioned by the federal government in the early 1980s describes the effect of undocumented migrants as follows:

11 Ibid at 434.
13 Buchignani, supra note 8 at 434.
14 Singh v Minister of Employment and Immigration, [1985] 1 SCR 177 [Singh].
Many Canadians wrote to express their views as to the deleterious effect of illegals on the economy and, particularly, in relation to unemployment, the burden on welfare and the failure to pay taxes. However, in the absence of better evidence, it is far from clear that such adverse consequences do occur. The most obvious consequence of illegal migration to Canada is that our carefully established and administered selection criteria are not applied... the greatest negative feature of illegal migration to Canada may be its impact on the integrity of our country. The right and duty to control immigration across a country’s borders has been described as a universally recognized and fundamental characteristic of a sovereign state.\textsuperscript{15}

Although visible from a somewhat different angle, this conclusion fits with Buchignani’s analysis as well. The presence of irregular migrants within Canada was problematic primarily on a symbolic level because it represented some breach of national integrity and offence to the principles of sovereignty, not because of any measurable detrimental effect. Policy and public rhetoric, both then and now, blame individual migrants and the “pull factors” which supposedly entice them to stay in Canada through the development of the “bogus refugee” or migrants taking advantage of Canada’s social system. Available data support a different conclusion: there is no evidence to show a disproportionate burden on social systems, and in this thesis I will show that migrants with less than full status face barriers and disincentives to relying on social benefits at all. Furthermore, laws often function to promote and maintain lack of status, thus creating a situation in which irregular migrants are “unwelcome but tolerated.”\textsuperscript{16} This is so even while on a symbolic level such migrants are constructed as the Other of permanently regularized migrants or citizens, through racialization, criminalization, or other forms of exclusion.\textsuperscript{17} This draws attention to what Galloway calls liberalism’s “basic dilemma” of maintaining a resident population with no political voice and differential access to the social and economic benefits of membership.\textsuperscript{18} Although liberal values prescribe inclusion and non-discrimination for

\begin{itemize}
\item \textsuperscript{15} W.G. Robinson \textit{Illegal Migrants in Canada: A Report to the Honourable Lloyd Axworthy} (Hull: Minister of Supply and Services Canada, 1983) at xi.
\item \textsuperscript{16} Zeina Bou-Zeid, \textit{Unwelcome but Tolerated: Irregular Migrants in Canada} (PhD Dissertation: Osgoode Hall Law School, York University, 2007) [unpublished].
\item \textsuperscript{17} Sharma, “Social Organization,” \textit{supra} note 5.
\end{itemize}
members, the absolute right of the state to determine membership functions as a filter for membership, usually on the basis of state sovereignty. Law justifies the exclusion of nonpermanent migrants using the logic of border protection and restricting entry, but applies it to people who already live here. This gives shape to the “illiberal tendencies” of liberal states. Such tendencies are evident not only in the situation of irregular migrants, but also within the larger category of migrants with less than full status through the concept of precarious migration, to which I will turn next.

1.3 Precarious Migration Status

I have chosen the concept of “precarious migration status” as the central organizing tool for this dissertation, drawing on the work of Luin Goldring. Within the framework Goldring describes, many legally distinct migrant situations are brought together in a single spectrum by virtue of their less-than-full status and their dependence on external factors to maintain status. Thus, a sponsored spouse waiting for approval within Canada can be understood as having precarious status until she receives permanent residency, as can an authorized temporary foreign worker with a work permit which may be revoked if he ceases to work for the single employer named on the permit. A refugee claimant in Canada waiting for determination of her claim would fit within the definition of precarious migrant, as would a migrant working without a permit after failing to extend their stay, or a migrant who had never possessed any type of permit authorizing his stay.

Those who fit within the definition of precarious migrants number far more than those who can be considered “undocumented” in the strictest sense, and the relevance of precariousness as a unifying category becomes more visible in imagining the complex situations in which status becomes relevant. For example, when the authorized temporary worker is laid off after making a complaint about workplace safety, he is legally prohibited from working for another employer without a second employer “sponsorship” and labour

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market authorization process. Although he still has legal status in Canada, he may be vulnerable to employer exploitation through limited labour mobility and reduced bargaining power because he cannot circulate in the labour market. Similarly, a sponsored spouse in Canada awaiting an initial decision on a permanent residence application, if faced with abuse from the sponsor, may be forced to choose between remaining in the relationship with the hope of becoming a permanent resident, and leaving the relationship with little chance of obtaining permanent residence through legal channels. While both of these migrants would fall on the “legal” side of the legal/illegal migrant binary, their status is contingent on factors beyond their control and they face risks of deportation and marginalization which render their situation quite distinct from a person with confirmed permanent residence or citizenship.

One of the primary conclusions of this research is that migration status functions similarly to race, class, and gender insofar as it is an attribute beyond the control of individuals through which categorical subjugation occurs at the level of social relations. This is not to say, however, that precarious status is singularly determinative of one’s position, but rather that it is one factor which should be understood alongside others. My research demonstrates that migration status operates within social relations in a manner similar to gender, class, and race, and thus merits support as a basis of protection pursuant to human rights regimes in Canada. A corollary to this argument is that, similarly to other categorizations which tend to order social relations, migration status does not affect everyone equally, but that these differences also occur on the level of social organization, often in reference to the presence or absence of privilege on the basis of other categories, including nationality. Migration status should thus be understood as an aspect of social relations, but, necessarily, in the context of the privilege or disadvantage which accrues by

\[\text{footnote}\]

\[\text{footnote text}\]
other means.\textsuperscript{21} There are individuals with less than permanent status who enjoy labour mobility, wage parity, and full access to the social state, and there are those who are cushioned from the detrimental potential of their status by other aspects of their position. Precarious status will have a different impact on a student studying English from an upper-class Japanese family than it will on a construction worker from Central America. Precarious migration status thus functions to condition life in a manner similar to, and in conjunction with, other bases of social stratification.

This project deals specifically with the experiences of those who identified difficulties in their working life or in obtaining social state entitlements. It describes the way that status was implicated in these situations and traces the concept of status through a range of laws, policies, and practices through which status becomes associated with exclusion or disentitlement. Thus, while there are many situations in which a person who meets the definition of “precarious migrant” experiences no disadvantage on this basis, the specific focus of this research is on the manner in which migration status functions to create and maintain inequality, and to consider ways in which to bring about a situation in which “all temporary migrants, not just the privileged, enjoy full social and civil rights.”\textsuperscript{22}

Although it is difficult to ascertain exact numbers, there is good reason to believe that, even using the most conservative estimations, at least 700,000 people in Canada are here with less than permanent status, and that this number has increased over the past ten years. Federal government data indicates that as of December 1, 2011, there were 705,231 temporary residents present in Canada, of which 300,211 were authorized foreign


\textsuperscript{22} Rajkumar et al, \textit{supra} note 21 at 505.
workers. These data do not include undocumented entries. Furthermore, recent legal and policy shifts form part of an ongoing pattern in which this number is likely to continue to increase, especially on the more vulnerable end of the spectrum. In Goldring’s recent work, she provides longitudinal study data to support the proposition that the social and economic effects of precarious status persist beyond the lack of status itself, and that status thus functions similarly to racialization. Goldring argues that the detrimental effects of precarious migration status are “sticky”: even after they obtain permanent status, many migrants who had experienced precarious status continue to experience its negative socio-economic effects on a long-term basis. If precarious migrants constitute a large and growing proportion of the population in Canada, there is a pressing need to critically assess whether, and on what basis, it is justifiable to exclude such people from membership, whether political or social, and the implications of such exclusion for Canada as an ostensibly liberal state.

The notion of precariousness serves as a way to provide a lens for analysis of the effects and functions of the law because it uses a category which is not in itself defined by law. By framing the analysis in a manner which is not limited to inclusion or exclusion from legal status in a binary manner, I can consider not only the effects of various degrees of legal status but also the function of the law in its categorization of migrants. That is to say, rather than accepting “legal” and “illegal” as the primary terms of reference and most relevant distinction between migrant groups, stepping away from these clarifies the effects which flow from the operation of legal distinctions themselves. In shifting the focus from individual people as authors of their lack of status to the creation of precarious status through immigration and related policy, the discursive function of specific texts becomes more susceptible to analysis.

24 Judy Fudge & Fiona MacPhail, “The Temporary Foreign Worker Program in Canada: Low-Skilled Workers as an Extreme Form of Flexible Labour” (2009) 31 Comp Lab L & Pol’y 5 at 11.
In the context of this dissertation, the idea of legality is complex, and is used in two different ways which I will distinguish here. I am aiming to describe here the function of laws, and their corollary regulations and policies, through the experiences of specific subset of individuals. I am framing migration status as a legal construct, and tracing the ways in which concepts used in federal laws to describe migration status appear in more local institutional interactions. In this sense, the idea of something being “legal” is descriptive, insofar as it is a description of the impacts which flow from particular legal forms and distinctions. The notion of migrant “illegality/legality,” on the other hand, has a particular history with regard to discourses surrounding migration. In the American scholarship, for example, this term is associated with a perjorative and racist orientation, often toward Mexican migrants. While the law does prescribe ways in which people can be in Canada without authorization, the notion of migrant “illegality” is neither used in the legislation nor accurately descriptive of any particular status. The notion of migrant “illegality” and the binary it implies is descriptively inaccurate, but, more problematically, carries built-in implications about the relationships of migrants to the state. The use of this term to categorize migrants privileges the state perspective “with all of its ideological conceits more or less conspicuously smuggled in tow.” It thus obscures the work done by the use or prevalence of a particular term. While I do use various terminology to describe migrant situations in terms of authorization, I do so with the explicit recognition that all of these terms carry political significance. My purpose is not to defend a particular version of this labelling, but rather to uncover the function of the categorization of precarious

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26 For a compilation of work in the United States detailing local institutional practices pertaining to migration governance, see Monica Varsanyi, Taking local control: Immigration policy activism in US Cities and States (Stanford: Stanford University Press, 2010).
migrants as non-members, by any label. Irrespective of the content of specific labels, the labelling itself forms part of the operation of construct of status in institutional contexts, which is at the heart of what I am exploring here.

Using precarious migration status as a framing concept also opens up analytical choices to include conditions such as labour vulnerability and access to social services as the binding characteristic between migrant groups, cutting across the dichotomy of status or non-status, and, importantly, across qualitative distinctions made between migrant groups by legal regulation and policy. For example, the identification of the “economic migrant/bogus refugee” is often employed to justify restrictions within the inland refugee process and on potential temporary entrants from abroad. In the context of government and media rhetoric, the “legitimate refugee” is constructed as a person fleeing persecution and violence with no economic motivation to enter Canada, and the “economic migrant/bogus refugee” is constructed in opposition, as a person whose primary basis for entering Canada is to improve their material conditions (a highly desirable characteristic in permanent and temporary migrants who are not refugees). In reality, the two may be entwined in ways which are not easily susceptible to this simple distinction. It is likely that many migrants entering Canada through the inland refugee process often experience some combination of persecution and economic desperation, and similarly, foreign workers may be motivated by risk-based factors not limited to the economy of sending country. Using the concept of precarious status as a unifying category allows us to shift the focus from scrutiny of a person’s basis for entering Canada through a specific category to an exploration of the effects of differential status as created in law. In other words, precarious status provides an alternative analytical frame in which the range and texture of social membership for both migrant workers and refugee claimants is foregrounded as an aspect of residence in Canada. It offers the chance to move beyond assessing legitimacy or the exclusionary border control to an assessment of potential rights and membership claims for those who are already here.
1.4 The Expansion of Migrant Precariousness in Canada

Although degrees of migrant precariousness exist in many categories of migration, here I will introduce the three groups which comprise the vast majority of precarious migrants in Canada. Each of the migrant participants I interviewed belonged to at least one of these groups.

1.4.1 Temporary Foreign Workers

Temporary foreign workers admitted through formal programs comprise the largest proportion of precarious migrants in Canada, and their numbers have grown considerably over the past ten years. This category includes people participating in employer-driven work programs and working holiday programs, as well as others with work permits, such as for sponsored spouses in Canada who have obtained first stage approval for their permanent residence applications. In 2012, 213,516 temporary foreign workers entered Canada.\(^{30}\) The current top source nations for foreign workers present in Canada are Mexico and the United States, followed by the Philippines.\(^{31}\) Over the past ten years, the number of workers classified as low skilled has been increasing as a proportion of total foreign workers.\(^{32}\)

Temporary foreign workers are precarious migrants in terms of the definition given above because they do not have the permanent right to enter and reside in Canada. The nature and degree of precariousness for temporary workers varies depending on the legal basis

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under which their permits are issued. In terms of labour mobility, about two-thirds of temporary foreign workers are only permitted to work for the employer specified on their work permit. They are thus dependent on the employer for their status, and unable to circulate freely in the labour market, thereby suffering a relative disadvantage in bargaining power. For some workers, most notably live-in caregivers, the workers do not choose their place of residence, but must reside with their employers as a condition of the permit. Workers classified as “high skilled” are much more likely to obtain permanent residence through federal and some provincial programs\(^33\) than those classified as “low-skilled,” despite the length of time for which the latter may have contributed to the Canadian economy or resided in Canada. Foreign workers are legally entitled to participate in provincial health care and to register their children in publicly-funded schools. In terms of working life, they are entitled by law to the same regulation of working hours, pay, working conditions, and compensation for workplace injuries as permanent workers, but they face specific barriers to accessing these protections. Although temporary foreign workers pay into the federal Employment Insurance program, they are often unable to qualify for its benefits because they are not considered to be “available for work” due to their bonded work permit status.\(^34\) Temporary foreign workers generally do not have access to provincial social assistance benefits.

### 1.4.2 Inland Refugee Claimants

Canada ratified the *Convention Relating to the Status of Refugees* in 1969, 18 years after its adoption by the United Nations. By 1973, the Immigration Appeal Board was legally

\(^{33}\) Although the vast majority of low-skilled workers do not qualify for permanent residence under federal economic classes, there are provincial initiatives underway to provide permanent residence to a number of low-skilled workers. See, for example, WelcomeBC, “Entry-level and Semi Skilled Pilot Program, Who Can Apply?” Government of British Columbia, online: <http://www.welcomebc.ca/Immigrate/immigrate-BC/Provincial-Nominee-Program-Home/Strategic-Occupations-Home/Entry-Level-and-Semi-Skilled-Workers-Home.aspx>.; Manitoba, “Determine your Eligibility,” Government of Manitoba, online: <http://www.immigratemanitoba.gov.ca/how-to-immigrate/eligibility/>.

\(^{34}\) Sandra Elgersma, *Temporary Foreign Workers* (Ottawa: Political and Social Affairs Division, Library of Parliament, 2007) at 4.
enabled to hear deportation appeals on the basis of bona fide refugee claims in Canada. In 1980, 1,600 refugee claims were made from within Canada, and by 1988 the annual number had increased to 34,353.35 In 1987, Canada ratified the *Convention Against Torture*, which led to the expansion of protection to persons found to be at risk of torture even where they did not fit the Convention Refugee definition. In 1988, three years after the decision in *Singh*,36 and facing a backlog of over 80,000 claimants, the government started a regularization program and on a rolling basis about 160,000 migrants were regularized by 1992.

There is no formal cap on the number of inland claims in Canada, which has remained high through the 90s and into the last decade. While there is ongoing political and public interest in debating the genuineness of refugee claims and the legitimacy of claimants’ presence in Canada, the focus of this dissertation is not to take a position on the merit or procedure of refugee claims. Rather, I consider the claimant population already in Canada as a subset of the precarious population on the basis of contingency of status, actual residence in Canada, and participation in the labour market and Canadian social state. Over the past ten years, the number of inland claims annually has ranged from under 20,000 to almost 45,000 per year, and the number of claimants with unresolved cases in Canada at any time has generally been at least 80,000. As of December, 2011, there were 94,756.37

Refugee claimants are entitled by law to obtain an open work permit, and basic services such as education and social assistance while they await determination. Prior to 2012, refugee claimants had access to health care benefits which were comparable to those of

36 *Singh*, supra note 14. In this decision, the Supreme Court of Canada held that the adjudication procedures for refugee claimants at the time were insufficient to protect the section 7 rights of claimants, and effectively required an oral hearing process to claim determination, which led to more thorough and detailed procedures for processing refugee claims, and a concomitant backlog of claimants awaiting processing.
citizens and permanent residents. Pursuant to regulatory changes, refugee claimants are now eligible for emergency services only, and only certain categories of refugee claimants are eligible: claimants from designated countries of origin are limited to service required to protect public health.Labour market participation of refugee claimants is not specifically recorded or monitored, but a high participation rate can be assumed based the number of claimants who obtain work permits. Although refugee claimants have access to a number of membership benefits in Canada, as well as a degree of labour mobility pursuant to work permits which allow them to work for any employer, their status fits within the rubric of precariousness because their status is contingent of the success of their refugee claim. This is underscored by the fact that each person claiming refugee status in Canada is issued a deportation order when a claim is made, which is removed only if a claim is successful. There are no quantitative data available to indicate the types of jobs filled by refugee claimants, but for the purposes of this dissertation it is assumed that many claimants are working in jobs which would be considered relatively “low-skilled,” or generally requiring less than a university education; this is confirmed in the interview data discussed below.

The countries of origin for most claimants would preclude direct application of foreign-earned credentials in the Canadian job market, even for those who have a postsecondary degree or professional designation, leading to deskilling upon entry to the Canadian labour market. As such, refugee claimants comprise a significant portion of the precarious migrant population in Canada likely to have a high labour market participation rate in low-skilled work, and with relatively strong labour mobility and access to the social state, but whose security of status is extremely limited.

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39 Immigration and Refugee Protection Regulations, SOR/2002-227, ss 228(3) and 206(a).
1.4.3 Unauthorized Migrants\textsuperscript{41}

The final group of migrants included here are unauthorized migrants. Those whose presence or work in Canada is unauthorized form a subset of precarious migrants, and have been noted in government and policy documents dated at least as far back as the 1970s. This is a class of migrant particularly vulnerable to exploitative conditions of work and other forms of marginalization. The ubiquitous presence of unauthorized migrants combined with the lack of major enforcement efforts on the part of immigration authorities may imply that they are a permanent and necessary component of the Canadian economy. It has been cogently argued that the structure and policy of the Canadian immigration regime itself actually functions to produce large scale irregular migration, creating a situation in which undocumented workers are “unwelcome but tolerated.”\textsuperscript{42} There are currently no precise data concerning this group, and little in the way of specific law or policy beyond the basic prohibitions on working or hiring a worker without a permit, and the state’s prescribed ability to enforce these prohibitions. Recent hearings and a subsequent report issued by the House of Commons estimate the number of undocumented workers in Canada at 50,000-800,000. The report notes that undocumented migrants are “are vulnerable to marginalization and mistreatment” but offers no analysis except the general recommendation to “stop the problem from getting any bigger.”\textsuperscript{43}

Although quantitative data do not exist, it is likely that a majority of undocumented migrants participate in the labour force, particularly given the material necessity which flows from their almost universal disentitlement to services. Without documentation, such migrants much rely on the variable policies of specific agencies, and even then the fear of

\textsuperscript{41} For the purposes of this dissertation, several separate but related terms will be employed to describe the status of non-permanent migrants: the term “undocumented migrants” and “undocumented workers” refer to people in Canada without current migration status, and the term “irregular” or “unauthorized” refers to situations in which an aspect of a person’s presence in Canada is not in compliance with the law or any term of their authorization (i.e. including undocumented migrants as well as those with documentation who are not in compliance with any aspect of their permit). The term “illegal” is not used to describe migrants, but rather to explore the use of this concept within government policy and its broader discursive function.

\textsuperscript{42} Bou-Zeid, supra note 16.

\textsuperscript{43} David Tilson, Temporary Foreign Workers and Nonstatus Workers (Report of the Standing Committee on Citizenship and Immigration) (Ottawa: Library of Parliament, 2009) at 65.
deportation or isolation can prove a formidable barrier. There is anecdotal evidence to indicate that much work performed by workers without status would be categorized as low skilled. Although some undocumented migrants enter Canada undetected, the vast majority likely enter with legal status of some kind and maintain residence in Canada beyond the expiry of their status. Furthermore, the structure of immigration law at the federal level is such that it produces migrant precariousness via removal of status in a variety of situations, and precariousness is thus institutionalized as an aspect of legal regulation of migrants. If it is difficult to renew work permits or switch employers, for example, a worker may continue on a job without status and an employer may willingly hire her. This category of migrant represents the most acute form of migrant precariousness, but also the most dynamic, as migrants may be without legal status before or after a period of regular status. The undocumented/unauthorized population thus interacts dynamically with the temporary worker and inland refugee programs in the institutional production of migrant precariousness through immigration laws, but also through multiple sites in employment and state interactions, as I will explore in detail through the chapters which follow.

1.5 Work and the Social State

In addition to elaborating on the nature and function of precarious migration status in general, this research has a specific focus on the role of status in working life and in terms of migrants’ interactions with the social state. For the purposes of this dissertation, I have chosen to use the expression “social state” rather than “welfare state” to refer to the

constellation of institutions, laws, and practices by which the state performs its redistributive function.47

While not all migrants are workers, all of the participants in this study were involved in the paid labour force in Canada, and many identified work as a primary site of their participation and contribution to Canada. Furthermore, employment-based problems like wage disparity, poor working conditions and inability to unionize are well documented in the literature concerning migrants with precarious status.48 This invites consideration of the role of law in both the production of these difficulties and its potential responses. Finally, a focus on work places this research in the broader conversation on the relationship between migration and economy. Not all migration is based on an economic impetus for the individual migrant, but the role of national and global economies is implicated as a major factor in explaining patterns of temporary migration, much of which is premised on labour. Saskia Sassen, for example, challenges the characterization of migration as a “unilateral incursion” of migrants seeking economic improvement. Instead, she argues that migration is “conditioned on the operation of the economic system in receiving countries.”49 Thus, factors such as demographic change, labour force restructuring, and the erosion of the welfare state contribute to the demand for both skilled and unskilled migrant labour in receiving states may condition the inflow of migrants in a “global social geography.”50 The relationship between migration and economy is not unilateral, though: rather than a simple equation in which labour migration is an inevitable consequence of inevitable market forces, migration and labour can usefully be understood

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47 I do not intend any association with the historical use of the term in the European context. Rather, I use this term to reframe the redistributive function as a process integral to governing social relations rather than simply a mechanism for allocation of benefits.
as a dialectical pair in which migration also regulates labour markets.\textsuperscript{51} For scholars in the neo-Marxist tradition, the presence of migrant labour is understood as a necessary source of unfree labour in capitalist economies which as a rule rely on some mix of free and unfree labour.\textsuperscript{52} In liberal states, it is migrant labour, rather than slavery or indentured and colonial work regimes, that fulfils this role, governed by political and legal institutions on a national level.\textsuperscript{53}

The purpose of this research is not to document in quantitative terms the degree of workforce participation on the part of precarious migrants, but the limited available data bear mentioning here. One of the few overall measurements useful for painting a broad picture of temporary residents’ engagement with the labour force is the Canada Revenue Agency’s record of individual tax filers whose returns are based on a temporary Social Insurance Number (“SIN”), which shows an increasing number of people who are filing tax returns, but do not have permanent status in Canada. This number has increased each year for almost a decade: in 2004, the number of tax returns filed by those holding temporary SINs was 193,250, and by 2010 the number had increased to 338,840.\textsuperscript{54} These numbers represent a conservative, partial estimate, as they capture only those jobs for which taxes are filed and paid, and do not account for informal jobs, which are likely a source of workforce engagement for precarious migrants. Quantitative data on migrants’ involvement with the informal work sector do not exist, but it is likely that a degree of informal work sector involvement can be implied from available data confirming the presence and labour force participation more generally.

In a traditional welfare state arrangement, tax revenues are allocated by the state to provide a basic level of subsistence and participation to all members. For temporary

\textsuperscript{52} See, eg, Cohen, \textit{supra} note 6 at 14; Vic Satzewich “Unfree labour and Canadian Capitalism: The Incorporation of Polish War Veterans” (2010) 28 Studies in Political Economy 89.
\textsuperscript{53} Cohen, \textit{supra} note 6 at 60.
\textsuperscript{54} Data released to the author by the Canada Revenue Agency on March 23, 2011 as part of Access to Information Request A-054461, requesting numbers of individual tax filers with a Social Insurance Number starting with the number “9,” which denotes persons who are neither citizens nor permanent residents.
residents, the available qualitative data show shortfalls in access to services, entitlements, and social inclusion of precarious migrants. In one example of a qualitative, interview-based, peer reviewed multidisciplinary study, Bernhard et al. considered the impact of living with precarious status in Toronto using a mixed-method study combining interviews with a small sample of persons with precarious status with a phone survey conducted with agencies potentially serving newcomers in the same geographic area. Interviews were conducted in the native languages of the participants and were comprised of open-ended questions based on immigration and status history, social networks, and experiences accessing services. The findings within the sample included lack of access to health care and education, fear and social isolation, and a negative impact on family members and children of those with precarious status.\textsuperscript{55} While the researchers found that most agencies surveyed were willing to provide services regardless of status, migrant respondents reported difficulties in obtaining necessary services. The authors attributed this disconnect in findings to fear and distrust of perceived authorities flowing from precarious status.

Another qualitative primary source study interviewing health care practitioners and organizations serving uninsured and/or undocumented persons in Montreal detailed health problems observed by the participants that were associated with poor access to health care on the basis of migration status.\textsuperscript{56} In that study, a majority of health care practitioners reported an increased burden of care for uninsured or undocumented persons which they attributed to tighter immigration controls, worsening of medical conditions and several deaths which they attributed to lack of status and delay in accessing health care, and a disproportionate burden of medical care for undocumented persons falling on the specific agencies which were willing to provide services. Further studies in Montreal and Toronto have identified laws and policies governing access to health care,

education, and social benefits as sites of disentitlement for undocumented migrants.\(^{57}\) Larger-scale studies in the United States have associated undocumented status with greater need for a variety of medical and social services, with a lower likelihood of accessing services despite greater need, and with a reduction in the level of service available from service providers.\(^{58}\)

The migrants in this study identified their presence and belonging in Canada not only through economic participation, but through kinship and social and community life. Interview data confirmed many of the same problems for precarious migrants in Vancouver as have been documented in other cities. In the case of work, while the text of the law and institutional practice do not exclude people from protection on the basis of status, the operation of status within the employment relationship functioned to exaggerate power differentials and reduce labour mobility and bargaining power, creating effective barriers to protection. Entitlements in education, health care, and income security were often based on status directly or through policy and practice, but even where migrants were legally entitled, they were reluctant to claim benefits because they feared it would have an impact on their status in some way. Beyond the bare text of the law, then, this information allows us both to see shortfalls in formal entitlements and also to identify “exclusionary practices that persist in the face of the extension of rights to a subset of legal noncitizens.”\(^{59}\) These laws, policies, and practices in various state and non-state sites are all locations in which status catalyses the potential of state power and in which migrants are not only excluded directly, but subject to disciplining effects through the implication that status could be removed at any time. As such, I argue that the effect of status in both working life and with regard to the social state can be understood as part of a complex of enforcement, enacted through local sites. In identifying the specific ways in which enforcement and discipline occurs beyond the prerogative of the federal immigration

\(^{57}\) Magalhaes, *supra* note 44.


authority, it is possible not only to document exclusion, but also to identify the means by which membership could be contested at a local level.

1.6 Rights and Membership

The question of access to social state entitlements for temporary residents goes to the heart of what troubles the liberal state: if such people reside, live, and work analogously to permanent residents, on what basis is it justifiable to exclude them from the benefits associated with membership? If enforcement exists in multiple sites in both working life and interactions with the social state which serve to reproduce unequal relations, to what extent can rights and membership strategies provide a meaningful response?

The exclusion of nonpermanent residents within a state from benefits is often justified on the basis of social closure or communitarian arguments; that a state has the right to determine its own members, and to enforce its boundaries politically and territorially.60 There is a distinction, however, between control of entry to a state and control of those already within it—the difference between “border control” and “migrant control.” Linda Bosniak describes this in terms of a citizenship model which is constructed as hard on the outside, and soft on the inside; those within the borders are treated equally as members, and those outside have no such claims as long as they remain on the outside.61 However, she notes, this model is inaccurate insofar as it fails to capture the way in which “bounded citizenship often operates inside the community’s territorial perimeters, especially by way of exclusionary laws on immigration and alienage.”62 In this dissertation, I will show that this exclusion within Canada’s territory is not limited to immigration laws, but includes multiple sites in the regulation of workplaces and the social state; a complex of laws,

policies, and practices which span various fields and jurisdictions are involved in the work of
that Macklin calls “structuring the vulnerability” of people who have migrated to Canada.63

In exploring the effects of migration status, this thesis provides many examples of such
exclusion, including not only immigration law but a wide matrix of institutions and
relationships in which status informs exclusionary practices. This gives rise to a tension
Benhabib calls the “paradox of democratic legitimacy” in which a closed polity necessarily
excludes some of those who are subject to governance within it.64 Different degrees of
status give rise to social and economic hierarchies. Cohen uses three broad categories to
classify these distinctions within a state: citizens, denizens (who have permanent status but
lack complete political inclusion), and helots, whose migration status is less than
permanent and for whom the lack of citizenship is often more detrimental.65 An increase in
the number of migrants present with less than full status who nonetheless participate in
daily life socially and economically creates a “disjunction between the reality of daily
practice and legal status” in which “nationality is defined relative to those excluded from
it.”66 This is consistent with the observations that liberal states demonstrate “illiberal
tendencies”67 and tend to operate through the basic equation of “rights vs. numbers” for
temporary labour migrants.68

Ethical arguments in favour of rights for temporary residents fall into two main camps,
each of which understands the role of the sovereign state differently. First, there are those
based on a universalist or cosmopolitan notion of rights in which entitlements do not
depend on association with a specific bounded community, including such concepts as
global citizenship and international human rights, and in which state sovereignty is not the

63 Audrey Macklin, "Freeing Migration from the State: Michael Trebilcock on Migration Policy" (2010) 60:2
University of Toronto Law Journal 315 at 332.
64 Seyla Benhabib, The Rights of Others: Aliens, Residents, and Citizens (Cambridge: Cambridge University
Press, 2004) at 43.
65 Cohen, supra note 6 at 145.
66 Harris, supra note 6 at 110.
67 Stasiulis, supra note 19.
68 Martin Ruhs and Philip Martin, “Numbers vs. Rights: Trade-offs and Guest Worker Programs” (2008) 42:1
International Migration Review 249.
primary frame for membership.\textsuperscript{69} Second, there are those in which any rights are predicated on membership in a particular community, and in which the sovereign state maintains a strong role.\textsuperscript{70} In this research, both state and non-state sites are described as locations of enforcement and discipline which serve to exclude temporary residents from effective membership, but throughout these sites, the legal construct of migration status is a common factor. This construct is generated in the legal texts of the federal immigration regime as an aspect of direct state control but is picked up through other state structures, policies, and practices, many of which are present at a local level in a variety of sites. State power appears in multiple disparate sites, through different jurisdictions which are not formally or hierarchically connected. However, because the construct of migration status can be traced through these multiple sites, status functions as an aspect of social relations beyond particular institutional practices.

Short of unitary or indivisible state sovereignty, state institutions and constructs thus maintain a fundamental role in governance within a delineated territory. The role of various state institutions needs to be addressed in order for rights and membership claims to become meaningful. While rights have been “partially disembedded from the nation” in response to global economics and labour flows, the challenge is to “rethink how basic human needs should be protected against economic injustice.”\textsuperscript{71} In order to do this, it is not necessary or useful to frame the state as a singular entity, but rather as a constellation of texts, institutions, and practices united through the dispersion of particular functions, in this case, enforcement of status-based boundaries. Contesting exclusion in the context of specific local practices serves to unsettle the singular notion of status as enshrined by federal immigration structures, thereby to establish concrete alternatives. Recognition of

\textsuperscript{69} See, eg, Yasmin Soysal Nohuglu \textit{Limits of Citizenship: Migrants and Postnational Membership in Europe} (Chicago: University of Chicago Press, 1994); Benhabib, supra note 64.


membership within local institutions can thus function as an important element of a “firewall” between immigration enforcement and other entitlements.\textsuperscript{72}

1.7 Overview

In this dissertation, I am committed to grounding all stages of work in the lived experience of precarious migrants. I have chosen to use Dorothy Smith’s institutional ethnography as a primary methodology, drawing specifically on the idea of using experiential information as an entry point to understandings of greater social relations. For Smith, institutions serve as sites in which specific practices can be understood as constituting relations beyond the level of individual experience. This dissertation explores practices in various socially organized sites, focusing specifically on those relevant to employment and working life, as well as those in which the social state is implicated. Building on Smith’s work, I posit the examination of institutions as a way of understanding the law through actual practices and applications. The role of law in creating and maintaining particular social relations thus becomes visible through examining institutional practices as informed by participant data gathered through interviews. In this way, legal constructs governing the lives of migrants are traced through the various institutional and administrative structures in which the law lives. In Chapter 2, I describe Smith’s vision of institutional ethnography and provide a detailed description of the way in which this study was conducted, as well as its contributions and limitations.

In the process of interviewing, the construct of migration status emerged as a major organizing feature in the lives of migrants. Status is defined in the legal texts which form the basis for the federal immigration regime, and applied through multiple other legal and institutional sites. Through the lived experience of participants, however, status emerged as something much more textured and dynamic that that described in the bare text of the

\textsuperscript{72} Carens, “Irregular Migrants” supra note 70 at 168.
law. In interviews, status was prevalent as a framing construct of daily life, and often served as a touchstone by which migrants assessed membership and belonging. To reflect the overarching role of migration status in the lives of study participants, I have prioritized it among data chapters. In Chapter 3, I first provide a brief overview of migration status as it is framed by legal texts in the federal immigration regime. The remainder of the chapter explores in detail the nature and effect of precarious migration status as described by study participants, which forms an essential backdrop in which the subsequent chapters are developed.

In Chapter 4, I focus specifically on the institutions and relationships which arise in the sphere of work for precarious migrants. Specifically, I explore their experiences with job deskilling, labour mobility and stability, and working conditions, including pay, hours, health, and safety. Within this context, I focus on the remedies offered through law and the effect of migration status therein, particularly with regard to provincial legislation designed to protect minimum working conditions and worker health and safety. While the text of the law does not discriminate among workers on the basis of migration status, the experience of workers nonetheless shows that migration status interacts with working life to create deleterious conditions as well as barriers to legally available remedies.

In Chapter 5, I turn to the relationship between migration status and social entitlements, with a specific focus on health, education, and income security through Employment Insurance and social assistance programs. Laws and policies which govern the distribution of these entitlements often do employ migration status as filter through which benefits may be allocated or denied. Compared to workplace protections, social entitlements contain more explicit forms of exclusion and restriction, but also show deeper enmeshment with moral regulation and stereotyping of migrants.

Having established the exclusionary effects of precarious migration status, in Chapter 6, I propose that this exclusion is best understood under the rubric of enforcement. Specifically, I argue that enforcement of membership boundaries is woven into institutions and relationships far beyond the federal state, within provincial laws and local policies and
practices. In the second part of the conclusion, I argue that rights claims through provincial and constitutional rights regimes can be made out logically in terms of the similarity of migration status to protected grounds of discrimination. Despite the analytical ease with which migration status can be understood analogously to other grounds of discrimination, however, this analysis is not borne out in court and tribunal decisionmaking. Instead, the ability of a state to determine its membership acts as a trump on equality concerns, even for those already within its territory. Furthermore, within social state jurisprudence, the membership claims of precarious migrants are denied in reference to their contravention of immigration laws, which is framed as a legal and moral wrong. Membership is thus positioned as a necessary precursor to rights, but precluded in reference to migrants’ transgression of immigration laws.

Informed by the rich literature on post-national membership and citizenship, in the final part of the conclusion I argue that while contesting membership is an essential component of addressing exclusion, national citizenship is not the only basis on which membership can occur. Specifically, I conclude that local sites of enforcement also serve as potential sites in which membership can be contested and established through “a set of practices that lead to the establishment of rights, access and belonging.”73 The specific components of citizenship can thus be disaggregated in service of contesting specific entitlements and enacting membership.

Chapter 2. Methodology

2.1 Introduction

Existing research considering precarious migrants in Canada generally falls within one of the following three categories: 1) sociological or multi-disciplinary qualitative localized work drawing on migrants’ experiences and access to services within urban areas; 2) sociological scholarship on the role of law in the production of precarious migration status, and 3) legal scholarship describing and theorizing the structures governing precarious migrants in Canada. The present study shares aspects of each of these types of research, but differs insofar as it uses localized data sources as an access point to analyze broader social relations and the role of legal structures and the policies and practices associated with particular legal texts.

In this research, I draw on interview data provided by migrants who identify their own migration status as “uncertain,” as well as agency representatives who have observed the situation of such migrants, to determine the primary ways in which the construct of migration status becomes relevant in the lives of migrants. On the basis of the information given by study participants, I incorporate data from legal and policy textual sources with regard to two broad spheres which arose as primary focal points for participants: working life, and interactions with the social state. Thus, while both interviews and legal texts

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3 See, eg, Judy Fudge & Fiona MacPhail, “The Temporary Foreign Worker Program in Canada: Low-Skilled Workers as an Extreme Form of Flexible Labour” (2009) 31 Comp Lab L & Pol’y J 5.
provide data sources for this study, it employs a purposeful directionality in which the structure and shape of analysis follows from the lived experiences of study participants. While the roles of legislation, policy, and practices are the objects of the study, they are placed in context through a deep engagement with the perspectives shared by participants. Because the study moves from localized experiences to an analysis of broader social relations as connected by the construct of migration status, I chose to employ institutional ethnography as the primary methodology for this study. Institutional ethnography is a methodology developed by sociologist Dorothy Smith in which specific lived experiences are taken as an essential entry point for the understanding of larger patterns of social relations, and in which the function of text is theorized dynamically as a coordinating force in those relations.4

The empirical aspect of this project was based on two primary sources of data: interviews with migrants and representatives of community agencies serving precarious migrants, and textual sources including legislation, regulations, and policy documents. Study participants included precarious migrants as well as individuals working in Vancouver-based migrant-serving non-profit agencies who were able to speak about the experiences of their clients in precarious migration situations. Textual data were obtained from federal, provincial, and municipal sources, such as Citizenship and Immigration Canada, the British Columbia Employment Standards Office, and Vancouver Coastal Health. To augment the more readily available textual data in legislative and case law databases, I also collected legal and policy data through Access to Information requests, focusing on texts relevant to the way in which decisions are made in reference to migration status.

Although analysis is possible in a dataset limited to textual sources, law lives and takes shape through relationships in which people are actively engaged. Data gathered from interviews are thus employed to illuminate the meaning and effects of migration status from the perspective of the governed. The methodological approach of this work is framed by two related assumptions: that a bare analysis of the text of the law can produce, at best, 

a detailed understanding of the state perspective on status, and that this state perspective is not only incomplete but operates hegemonically. I do not assume that it is ever possible to obtain a complete picture of the governing operation of law. Rather, this project focuses in detail on the perspectives of migrants subject to status distinctions to provide analytical space in which status distinctions can be critically assessed from a frame of expertise and experience that is not itself directly state generated. Using an institutional ethnographic approach, study participants are not seen as the “subjects” of research, but rather as an experiential frame through which institutional relations inherent to law and state are more thoroughly and critically approached as research subjects.

In her own work on institutional ethnography, Dorothy Smith does not deal specifically with the role of the law as text in institutional relations, but her conception of texts provides an appropriate toolkit for understanding the power of legal texts. Smith’s articulation of the hierarchical organization of texts is particularly applicable to the written law, which by definition imputes a governing force, but also through the manner in which the stability and replicability of legal texts support the replication of specific policies and practices. As noted by Cunliffe and Cameron, the hierarchy of legal texts is visible through the effect of “authoritative texts” such as statutory requirements and superior court decisions, but beyond the traditional legal method, Smith’s approach to the “hierarchical nature of inter-textuality allows us to glimpse the process by which ideologies are constituted and perpetuated within legal institutions.” In the case of precarious migration, the construct of status itself as well as the associated vocabulary (e.g. authorization, permit, foreign worker, refugee claimant) are generated by statute in the federal immigration regime. While the federal immigration laws do not have a formal hierarchical relationship to laws governing the workplace and social entitlements, these constructs are replicated and expanded in those areas of the law as well as within institutional practices. Smith’s approach to texts thus facilitates an understanding of the manner in which legal constructs

can operate inter-textually, as well as providing an analytical tool with which to frame the activities of institutions in terms of their integration of particular governing legal texts.

Drawing from the information gathered in interviews to set the structure, analysis is organized on the basis of three major themes: the nature and impact of precarious migration status, working life, and interactions with the social state. Within these fields this research examines the constellation of legal and policy structures at play in the lives of precarious migrants, including provincial laws, policies and procedures concerning health care, education, employment standards, and welfare, as well as federal laws, policies and procedures with regard to Employment Insurance, immigration, and enforcement.

In this chapter, I provide an overview of institutional ethnography and its application to this project. I then give a detailed explanation of study design and the use and analysis of data sources. Finally, I describe the contributions of this research, as well as its limitations.

2.2 Institutional Ethnography

2.2.1 Institutional Ethnography

Dorothy Smith describes institutional ethnography as “a method of inquiry into the social that proposes to enlarge the scope of what becomes visible from a specific site of interaction, mapping the relations that connect one local site to others.” By using local knowledge to understand translocal relations, it resists the objectification of people within sociological research, and encourages inquiry that begins from inside the situations of interest to researchers. Thus, while talking to people provides a venue for inquiry grounded within local experience, it is actually the specific institutions and structures themselves that are the objects of study, rather than the people. In this way, institutional ethnography aims to “reorganize the social relations of knowledge of the social, so that

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6 Smith, supra note 4 at 29.
people can take that knowledge up as an extension of the ordinary knowledge of the local activities of our lives.”

Smith distinguishes institutional ethnography from other sociological approaches, and in particular the extended case method. She contrasts institutional ethnography with the case method employed by Burawoy et al., which bears an initial resemblance to institutional ethnography. Although both approaches involve talking to people, and concern themselves with the examination of social relations and inequality, Smith notes that categories were pregiven in the case method, and “[b]rief ethnographic glimpses are given as instances or expressions of pregiven categories.”

Thus, in Burawoy's method the priorities and analytical categories of the study are predetermined at the outset.

Institutional ethnography, on the other hand, commits the researcher to start with the actualities of life for a person or group, and move from there to understand how that experience is embedded in social relations and institutional functioning. In order to commit to research which meaningfully includes people and recognizes my own position as an outsider/ally, I needed to ensure that participant data served to structure the direction and analysis in this dissertation so that, in Smith’s words “[t]heir perspective and experience would organize the direction” of this research.

Smith’s initial development of institutional ethnography was grounded in a feminist analysis which recognized the exclusion of women from the ruling apparatus, and expanded to provide a method of inquiry “for people,” rather than about them. The critical feminism inherent in this approach is appropriate in part because the majority of study participants from both migrant and agency populations are women, a small sample of the larger-scale feminization of labour through migration. In addition to this direct connection to women’s experience, however, is the idea that institutional ethnography as a feminist approach is not only appropriate for women’s experience as such, but for all those who are categorically excluded from control of the ruling apparatus. Precarious migration status can function in a manner similar to race, gender, and class, amplifying power differentials and excluding

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7 Smith, supra note 4 at 29.
8 Smith, supra note 4 at 29.
9 Smith, supra note 4 at 31.
precarious migrants on a categorical basis. It is therefore necessary to refigure research approaches seeking to understand social relations in which precarious migrants participate to work toward adequate representation of these perspectives in legal research. Institutional ethnography is an appropriate choice for this project because it explicitly commits to this inclusion.

As explained by Smith, institutional ethnography “may start by exploring the experience of those directly involved in the institutional setting, but they are not the objects of investigation. It is the aspects of the institutions relevant to the people’s experience, not the people themselves, that constitute the object of inquiry.”\textsuperscript{10} The aims of the present research were not bound by specific hypotheses or causal relationships articulated at the outset, but arose and developed through the process of exploration of people’s experience within particular settings. The orientation and potential of institutional ethnography in terms of power relations is described by Campbell and Gregor as follows:

Institutional ethnographers agree that the question of power is important to researchers, to those who are the subject of research, and to how research is used. We are particularly aware that the production of knowledge itself integral to the relations of ruling and to the exercise of power in official, and perhaps even unofficial, ways. The radical potential of institutional ethnography is to rethink social settings taking existing power relations into account, institutional ethnography is theorized and its research design developed in such a manner as to produce an analysis in the interest of those about whom knowledge is being constructed. It is that frame for the research that established the orientation of the analysis in the interest of those about whom knowledge is being constructed.\textsuperscript{11}

Although this research does not seek to establish objective, causal links between the law and people’s experience in a hierarchical manner through its findings, or to sway a particular policy audience, neither is it limited to the specific personal experience of

\textsuperscript{10} Smith, supra note 4 at 38.
\textsuperscript{11} Marie L Campbell & Frances Gregor, Mapping Social Relations: a primer in doing institutional ethnography (Aurora: Garamond Press, 2006) at 68.
participants, for the exact reason described by Smith above: it is the institutional relations themselves which are subject to study, not the people.

2.2.2 Texts and Institutions

One essential concept in Smith’s institutional ethnography is the dynamic role of texts. Smith’s application of the concept of the “text” is not limited to the written word, but spans various media and may include material transmitted through writing, speaking, or performing. The key element of texts for Smith is their replicability. Texts may be reproduced and create interactions in multiple sites, with multiple different actors, and texts can thus serve as a connecting and organizing force between disparate sites and individuals. Smith distinguishes between the “territories” based in experience, and those coordinated by texts. She argues that, in contrast to direct, sense-based experience, texts perform a coordinating function as they play out within actions. They function to organize and connect people, meanings, and experiences in ways particular to the employment of a specific text; texts thus function to render and organize the social. Furthermore, Smith argues that textually mediated interactions within institutional contexts operate in a distinctive way that can be seen through certain linguistic markers. She argues that institutional discourses function not only to prescribe particular actions, but rather to produce “what participants can recognize as rational and objective” and “the terms under which what people do becomes institutionally accountable.” In this process texts subsume the particularities of lived experience by treating such actualities as instances of the categories already enumerated in the institutional text, displacing subjects except as

12 Smith, supra note 4 at 165.
13 Smith explains the distinction as follows: “The distinction between experience-based and text-based interindividualities is between the resources that the hearer/reader brings to making sense of what is heard or read. Texts that express or describe experience constitute, as the reader activates them, experientially based interindividuality.” Smith, supra note 4 at 91.
14 Smith, supra note 4 at 88.
15 Smith, supra note 4 at 113.
16 Smith, supra note 4 at 113.
17 Smith, supra note 4 at 113.
institutional categories. A legal construct such as migration status, then, plays a coordinating role and also functions as a “shell,” in which substance is drawn from the actualities of people’s lives and thus both the construct and the people become objectified.

In this research, the migration status related constructs function as texts. These texts are enacted in multiple sites through law, policy and practice, forming a web in which these constructs are applied as filters in multiple sites which mediate relationships. Migration status and associated texts have a legal genesis, and are often applied on an individual basis, but using Smith’s approach, their governing function through multiple coordinated sites become more visible in ways which are not immediately evident through a more static approach to textual analysis. For example, it is the constitutional jurisdiction of the federal government to determine and assign migration status and the consequences that flow from status distinctions, such as enforcement or removal. Through talking to migrants, however, it became clear that migration status was an extremely influential feature of their relationships with all levels of government and in working and social life. From this point, an exploration of regulations, policies, and practices revealed that the construct of status was a dynamic component of access and decision making for a wide scope of relationships outside the federal immigration power.

In practice, this methodology allows me to trace the effects and relations of specific texts and discourses through examples within lived experience, and also to understand the function of texts and discourses in shaping experience and social relations as particular iterations of ruling relations. As such, this methodology is an appropriate way to attempt to bridge the gap between findings that relate to the specific experiences of precarious migrants, and the texts and institutions through which ruling relations are produced. Through an analysis which includes what Smith calls “the coordinating function of texts,” the data collected from specific people in specific sites is used to explore the way in which social relations are produced. Thus, rather than starting with a research context which is

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18 Smith, supra note 4 at 113.

19 In Smith’s words, those “forms of consciousness and organization that are objectified in the sense that they are constituted externally to particular people and places.” Smith, supra note 4 at 13.
generalizing, this research will aim to “find the generalizing and standardizing processes in the ethnographic data.”

Another fundamental concept in Smith’s methodology is that of “institutions.” There are many examples of institutional ethnography in application to one particular site, exploring, for example, the management culture of one government department or corporate worksite. The application of this concept is not limited to singular sites, nor is it limited to government organizations. Rather, Smith defines institutions as “complexes embedded in the ruling relations that are organized around a distinctive function, such as education, health care, and so on...It is a specific capacity of institutions that they generalize and are generalized.” Multiple institutions can also be connected by a particular text. In this study, the construct of migration status plays a role in the federal taxonomy of citizens and non-citizens, in the determination of benefits and entitlements in provincial programs, and in individual work site, but all are connected through the viewpoint established in talking with migrants who identify their status as uncertain.

2.2.3 Applications of Institutional Ethnography

In my review of the existing literature, while I was unable to find any examples of the application of institutional ethnography using interview-based data in the field of migration in Canada, it has been applied in a similar field in the United States. Although the context of labour migration differs in some important ways between the United States and Canada, Nancy Naples’ longitudinal study of Mexican and Mexican American workers in a small American town provides a detailed example of the application of institutional ethnography in the field. The study took place over a twelve-year period commencing after the town’s formerly homogeneous ethnic makeup had changed rapidly by the

20 Smith, supra note 4 at 135.
21 Smith, supra note 4 at 225.
recruitment of Mexican and Mexican American workers by employers. Interviews with workers from both groups, and white workers, as well as other community members, provided a primary source of data. The data were then used to form an analysis of various services and institutions, including formal state agencies, non-state agencies, and “extended agents of the state” in their role in the social regulation of citizenship. This study used the information given by participants to trace patterns of segregation and exclusion through such policies as housing, motor vehicle, and policing, as well as the development and entrenchment of concepts of belonging and illegality within the community. In her analysis, Naples paints a complex and interwoven portrait of the state in terms of the lives of community members which would be unavailable through either narratives limited to perspectives or purely “top-down” inquiries based solely on legal and policy material. Although Naples’ study, as a multi-year longitudinal project, was much greater in scope than was possible within the limits of the current project, the application of institutional ethnography to data originating in interviews as well as legal and policy based information provides a close analogue to the intended trajectory and methodology of the present study. It is relevant particularly due to its undertaking of an institutional ethnography with regard to organizations, which is specifically addressed by the author as an application of Smith’s approach.

2.2.4 Developing the Problematic

Essential to the move from people’s local experience to a greater sociological arena in which broader social relations are visible is the development of what Smith calls the “problematic.” Borrowing the term from Althusser, Smith defines a problematic as that which “locate[s] the discursive organization of a field of investigation that is larger than a specific question or problem,” in which it is possible to translate actual properties of people’s ordinary doings into a topic for ethnographic research. The problematic which

23 Naples, supra note 22 at 115.
24 Naples, supra note 22 at 118.
25 Naples, supra note 22 at 114.
26 Smith, supra note 4 at 38.
arises in this dissertation originated in conversations and relationships with precarious migrants and community service organizations long before the research project itself actually started. It is further developed throughout the research chapters in the identification of the features of status in which greater social relations were engaged or rendered visible, particularly with regard to the operation of legal structures.

The problematic which provides the focal point of this research develops through apparent contradictions within the discourses surrounding immigration and presence in the context of precarious migrants. The laws governing immigration seem to produce and maintain conditions under which migrants enter and remain in Canada and become precarious, but these people are marginalized and rendered vulnerable through lack of access engendered by the categories implicit in governmental structures and institutions. Undocumented migrants, for example, are characterized as a flow to be stemmed or a problem to be solved, but historically, enforcement seems to have been strangely ineffective in decreasing their population. Government rhetoric emphasizes the protection of migrant workers through sanctions on both workers and employers, but also explicitly promotes employer interests through the validation of the story of labour shortage in Canada and the stratification and temporization of workers. The law purports to protect both migrant and permanent workers through mandatory wage requirements and labour market testing, but in effect makes it more desirable for employers to hire undocumented labour than authorized workers. Legitimation of social and economic participation by foreign nationals increasingly occurs via a state-based evaluation of individuals' capacity to form labour market attachments to specific employers, and in their

27 Campbell and Gregor describe the applied use of a problematic in contrast to a traditional hypothesis or research question it as follows: “The problematic in institutional ethnography is not the problem that needs to be understood as the informant might tell it, or as a member of an activist group might explain it. It is not the formal research question either. Institutional ethnographers do not study problems as members of settings explain them...To identify a problematic, you, as researcher, must become familiar with the experienced actualities Smith talks about. You will decide what to make problematic in a particular research undertaking.” Marie L. Campbell & Frances Gregor, Mapping Social Relations: a primer in doing institutional ethnography (Aurora: Garamond Press, 2006) at 47.


demonstration of economically viable skills, yet appears also to punish undocumented and low-skilled subclasses of workers whose work forms the bedrock of economically essential labour segments, such as construction and domestic work. This project aims to provide findings and observations whose significance goes beyond the specific circumstances of individual research participants to shed light on the governing social relations generated through these contradictions in lives of precarious migrants.

2.3 Data Collection and Analysis

This research project relied on two broad sources of data, namely: interview data gathered through interviews with both precarious migrant workers and key informants within relevant institutions, and texts, comprised of both legal texts, and policy and other documents originating within institutions. In keeping with an institutional ethnographic approach, interview data were the entry point through which legal texts and concepts were identified based on their role within the social relations evident in the information provided by interview participants, and text and interviews interacted dynamically throughout the course of the research. In this section, I outline the impetus for and initial assumptions underlying the design of this study. I describe the specific methods used to obtain interview and text data, and the manner in which I maintained a dynamic relationship between the two while holding the perspectives of participants in a privileged role to shape the trajectory of the research. Finally, I provide details on the methods of recruitment and basic information about the resulting participant cohort, as well as my approach to interviewing, data coding, and building the analysis for the remainder of this dissertation.

2.3.1 Study Design

As described above, I was drawn to this research through my involvement as a lawyer and advocate in the area of immigration and refugee law, and particularly through interactions
with people whose status fell short of permanent residence. Several aspects of this experience compelled me to learn more. First, it was clear that there was a wide variety of ways in which people could have less than full migration status which, although intimately related to the operation of law, were not specifically articulated in statutes or policies. While laws list ways in which people can become entitled to status or maintain status, and policies often use specific types of status that people have as a filter to determine treatment or entitlement, it seemed to me that there was more to know about the ways migration status could shape and govern people’s lives. Second, it was clear that migration status was a major priority for the people I met. Most of the goals that clients articulated to me pertained to obtaining status, making their status more stable, or moving from temporary to permanent status. Third, while I was trained initially to work mainly with federal immigration structures, it was evident that the experience of nonpermanent migrants brought them into multiple legal spheres, including those pertaining to the employment relationship and those governing access to the social state, which for operate separately from federal immigration structures, and are often governed by the provinces. Finally, I was troubled by the contradiction of membership which arose repeatedly in peoples’ experience: both the state and employers seemed to want migrants for their labour, but migrants had difficulty obtaining equal treatment both in workplaces and with regard to state-based entitlements. I thus wanted to examine the entire constellation of legal structures which would be likely to have an impact on the lives of nonpermanent migrants in a systematic way, but one which was also based primarily in the experience and aims of those governed by the law, rather than the law’s prerogative in governing them. Both interview-based and traditional legal research were thus essential in this study, but I privileged interview data insofar as I drew on it to refine and shape the doctrinal research.

In considering how to approach this problem, I wanted to ensure that I had a comprehensive and multi-jurisdictional approach to the law. I wished not only to enumerate a list of potential effects of migration status through the law, but also to capture the interaction of various laws and institutions. However, I was also committed to
grounding the research in the perspectives of migrants and to acting as an outsider ally insofar as this was possible. Part of what this means for me is trying to avoid further entrenching the privilege and authority of legal structures while striving to document and understand their impact. Thus, while I wished to provide a complete account of the law as an object of research, I also wanted to ensure that I did not present the law as a complete account on an epistemological level. Similarly, I wanted to rely on the experience and technical knowledge I had gained as an immigration and refugee lawyer, and to be as transparent as possible about the influence of my own perspective, but also to place primary importance on the perspectives of those governed by the structures this dissertation examines. I wished to maximize both the utility of my training as a legal scholar and the textured accounts of the experiences of migrants, but maintain my position as an ally to communities insofar as possible. Within resource and time limitations of the study, I knew only a small study cohort would be possible, and I chose to try to obtain detailed interview data within the metropolitan Vancouver area, rather than attempt a national study, which would have reduced the level of detail available from both interviews and institutional sites.

In order to gather data on legal texts, I started with a first pass at describing the regulatory frameworks relevant to status, supplemented by some access to information requests. In determining what was relevant, I relied on my existing understanding of migrants’ priorities through my advocacy experience. Rather than closing the set of textual data prior to commencing interviews, I kept it open and modified it on the basis of the information shared through interviews. Interview questions were determined partially on the basis of the texts I had identified, but I specifically included open-ended questions as well as a semi-structured format in order to encourage participants to speak about the experiences most relevant to their experience of migration status. When information was provided within interviews that indicated institutional practices or texts which had not already been obtained, I completed further textual research through both public sources

and access to information requests. In formulating access to information requests, I crafted questions based on experiences described in interviews. For example, when a parent told me that a school required him to attend regular interviews because of his nonpermanent status, I drafted an access request to all school boards for all materials relevant to interviewing parents on the basis of status. The texts and interviews interacted in a similar way throughout the process of gathering data.

In recruiting participants, I encouraged participation from migrants who identified their own status as “uncertain” and who identified difficulties obtaining services (health care, education, and social benefits were specifically mentioned) or within working environments, as well as representatives of migrant-serving agencies. I wanted to speak to people with less than permanent status and those who had worked closely with them, with a focus on employment and social entitlements, but I also wanted to avoid the use of legal jargon in recruitment. In recruiting representatives of agencies serving migrants with uncertain status, I assumed that the experience of those who had worked with many such migrants would provide helpful insight into institutional patterns, but I was also aware that agency participants might be more willing to speak without some of the fears likely to arise for migrants with less than certain status. My aim with agency interviews was to gather information about the experiences of migrants with whom the agencies had worked, rather than the personal experiences of agency representatives themselves. There was thus a difference in the approach to both recruitment and interviewing: in the case of migrants, I described the study and framed questions on the basis of their direct experiences. In the case of agency representatives, the recruitment and interview materials were topically identical, but framed instead on the basis of their clients’ experience. Agency representatives are not assumed in this study to provide an identical information source to that of migrants, but rather a complementary one. This approach benefits this study because agency participants are likely to have been in a position to see patterns through multiple client experiences, but also because they are able to provide their observations about the experiences of their clients while maintaining complete anonymity of the migrants, something which is not possible through direct migrant interviews. I limited the number of interviews for agency participants (N=5) in order to ensure that the majority of
participants were migrants. I also recruited in multiple languages to try to obtain diversity in the study cohort.

Beyond the dynamic interaction between texts and interviews in this study, during the process of coding data, I used the priorities articulated by participants to structure the dissertation. While the study was broadly circumscribed by recruitment aimed at “uncertain” migrants who identified difficulties in employment or services such as health and education, the content and ordering was determined primarily in reference to the specific themes that arose in interviews. For example, the chapter about status itself was not something which I had originally anticipated, but it became clear that much of what participants shared was about the nature and experience of uncertain status generally, rather than with regard to specific laws or institutions. Status was not experienced as a subset of particular institutional interactions, but rather formed a powerful backdrop in which multiple relationships were conditioned. I therefore organized this information such as to convey what I understood about status from the participants as an essential prelude to discussions of specific relations within employment relationships and the social state.

2.3.2 Texts

In terms of doctrinal legal research, I started by reviewing federal and provincial statutes and regulations in whose application migration status was likely to be relevant. Using the common experiences of nonpermanent migrant clients as a starting point, I traced back from their experiences to the statutes under which they were governed. When I was uncertain of which statute applied to a specific type of situation or entitlement, I used relevant keywords in a global search of case law and legislation in using the Canlii database to determine the relevant statute (for example, searching for “Canada” and “pension” results in a list including the Canada Pension Plan). In terms of federal structures, I identified the Immigration and Refugee Protection Act31 and the Employment Insurance

31 Immigration and Refugee Protection Act, SC 2001, c 27.
Act. In terms of provincial statutes, I identified the Medicare Protection Act, the Employment Standards Act, the Workers’ Compensation Act, the School Act, the Employment and Assistance Act, and the Employment and Assistance for Persons with Disabilities Act. In the Canlii database, each entry for a statute includes a tab listing all regulations enabled by that statute. In order to determine which regulations were most likely to employ migration status, I read through the regulations associated with each act to determine which aspects of the act they were associated with. For both acts and regulations, I read through the text and selected those sections of each which were likely to be relevant to status, either directly or indirectly. In so doing, I kept in mind the language of migration status itself, as well as federal vocabulary associated with migration status (work permit, temporary foreign worker, refugee, for example). I also selected sections through which migration status was likely to be relevant but not explicitly mentioned (such as regulations agricultural workers, knowing that a large proportion of agricultural workers are temporary foreign workers), and which were of general application to all workers but in which I had observed common problems for migrants (such as regulations governing hours of work and pay).

Having established a set of statutes and regulations and identified an initial subset of sections therein, I turned to their interpretation in case law through quasi-judicial tribunal and court decisions. The scope of jurisdiction for tribunals is limited to that which is given under statute; they are limited to making certain kinds of decisions on the application of their home statute and empowered only to provide remedies set out in that statute. As such, I approached tribunal level decisions in a fairly narrow and contained manner. I identified the tribunals enabled under the listed statutes in which migration status was likely to be considered in making decisions about workplace conditions or state

33 Medicare Protection Act, RSBC 1996, c 286.
34 Employment Standards Act, RSBC 1996, c 113.
35 Workers Compensation Act, RSBC 1996, c 492.
36 School Act, RSBC 1996, c 412.
38 Ibid.
entitlements, namely the Board of Referees, the Pension Appeal Board, the British Columbia Employment Standards Tribunal, and the British Columbia Employment and Assistance Appeal Tribunal, and the Worker’s Compensation Board. Where a tribunal’s decisions were available online (either through Canlii or through the tribunal’s own website), I used federal vocabulary associated with status (work permit, temporary foreign worker, refugee) as well as casual language associated with status (illegal, without status, overstay) to search for decisions in which status was mentioned. I also searched using the specific sections of the legislation I had previously identified and the language used in those sections which I had identified as potentially relevant to status. Where tribunal decisions were not available online, I made access to information requests to each tribunal requesting decisions in which migration status was a factor considered by the tribunal. Where necessary, I followed up with tribunal staff to clarify my request and obtain copies of decisions.

In contrast to tribunals, courts are able to consider a much wider range of legal structures and remedies. While some courts are created by statute, and thus limited with regard to the statutes within their jurisdiction, even those courts have a much broader role than any tribunal in terms of interpreting the law. Furthermore, courts are responsible for hearing judicial review applications of tribunal level decisions, and in this function may make findings that affect the manner in which tribunals render decisions, even if the court is in a different jurisdiction. As such, I used a global term search for court-based jurisprudence, but used the same initial set of search terms as were employed for tribunal decision searches. My search included all courts in Canada, regardless of jurisdiction or geography.

In addition, when I encountered language used by the court to make determinations relevant to migration status which was not in the statute itself, I added key terms to my

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39 A sample request is as follows: 1) Any decisions unavailable on the website in which the person’s migration status was a relevant issue (i.e. anything to do with refugee claimants, foreign visitors, foreign students, foreign workers, or people without immigration documents, etc.), 2) Any statistics, manuals, or other information relevant to any type of benefits available to persons without full citizenship or permanent residence.

40 The most obvious example of this is the Federal Court’s use of the “doctrine of illegality” in interpreting the Employment Insurance Act, of which there is a detailed explanation in Chapter 5.
search. Finally, I used Canlii’s citation tools to see how key cases had been interpreted and applied in other case law, and whether they had been overturned.

With regard to the application of laws through the policies of first-level decisionmakers, I first identified the organizations responsible for applying the legislation listed above, which included Service Canada, the British Columbia Employment Standards Branch, WorkSafe BC, the British Columbia Ministry of Social Development, the British Columbia Ministry of Health, Vancouver Coastal Health, Fraser Health, the British Columbia Ministry of Education, and all school boards in British Columbia. Some of these organizations publish policy manuals online, but I made access to information requests to all of them for statistics, policies and materials concerning the application of migration status, tailored to the function of specific organizations.41 This portion of the textual research interacted dynamically with interview data. That is to say, while I obtained initial policy data based on my existing knowledge of issues likely to arise for migrants, I amended and made further requests to these institutions on the basis of information gathered through interviews, thus allowing the focus of the work to evolve with the input of study participants.

2.3.3 Recruitment and Participant Cohort

The study sought to recruit approximately 25 migrant participants and 5 agency participants for a total of 30 study participants; the migrant participant response was somewhat greater than I originally expected, and I ended up interviewing 28 migrant participants and 5 agency participants.42 Prior to recruitment, I interviewed and hired

41 Eg, “1. Numbers of non-resident students for whom fees are requested from 2000 to the present date, including all available information concerning immigration status of the students and parents, year, basis of fee assessment, grade, and any other information collected.
2. Copies of any memorandum of understanding between the Ministry and CIC/CBSA concerning foreign students and families, and concerning students/parents without immigration status, if it exists.
3. Any documents generated pursuant to the application operational policy noted above specifying procedures for interviewing and determining the fee status of students (i.e. "how to" for school boards and schools).”
42 The numbers designating migrants go up to 31 for 28 migrants because of three non-assigned numbers.
interpreters in Spanish and Mandarin, and identified possible interpreters for Tagalog. I chose these languages on the basis of available data from Citizenship and Immigration Canada in which China, Mexico, and Central American countries were listed as major source countries of temporary foreign workers. This project employed a purposeful sampling strategy to include representatives of migrant-serving agencies who have knowledge of issues affecting migrants with precarious status, and participants who identify themselves as migrants to Canada who have experienced uncertain status or lack of status, whether past or present.

Participants were recruited through third party recruitment, multi-lingual posters at migrant-serving agency sites and high traffic public areas, and referral from existing study participants (snowball). Recruitment letters for both migrant and agency participants were produced in English and distributed by email to contacts in the legal community, paralegal advocates, and migrant-serving agencies. Posters and consent forms were produced in English, Tagalog, Spanish, Punjabi and simplified Chinese. Potential participants were asked to make contact by email or phone if they are interested in participating in the study. Interested participants were invited to contact the study by phone or email. This study also relied on snowball sampling: in initial contact with contacts and at the end of the interviews, study participants were offered copies of the recruitment letter and poster in the appropriate language and the option of passing this information along to other potential participants.

Initial recruitment letters to migrant-serving agencies and postering occurred from June-September, 2011, and interviews took place from July 2011-January 2012. Interviews were conducted in the greater Vancouver area. Interviews with agency participants took place in offices within the organization to which the participant belonged, and with migrant participants in locations convenient for them, which included community centre offices, migrants' homes, and rooms available in libraries and other publicly accessible places in which a reasonable level of privacy could be assured. Interviews lasted from 1-2 hours each, and were conducted in the language of choice for participants. For migrant
participants, when a native language was identified by the participant, the interview was offered in that language.

Although I conducted in-person interviews with all participants to facilitate more complete communication with migrants and informants, the general structure of the interview protocol shared some features with the Bernhard et al. study. Specifically, this study recruited both migrants and key informants from agencies providing services to migrants in the metropolitan Vancouver area, and used primarily open-ended questions, with a view to making space for the experiences of the research participants to shape the interviews as much as possible. To the same end, interviews were offered in the native languages of migrant participants. Many participants were of Central American and Mexican origin, and although I was able to participate in Spanish-language interviews to a limited extent, I worked with interpreters from within the communities to assist with direct interpretation and to facilitate cross-cultural discussion. I followed a similar protocol with regard to other language groups, but without personal knowledge of the languages my reliance on interpreters was greater. In the case of service providers, I offered interviews in English first even where it is a second or third language for the participants, but in the case of migrants, I offered the use of interpreters in the native language even where English was fluent, with the option of participating in English. I found that the willingness and interest in grounding interactions in peoples’ native languages wherever possible functioned both practically and as a gesture of respect; however, the same respect extended to the choice of migrants to participate in English should they choose to do so, and some interviews took place in English as well as English with “on-call” interpreter assistance.

Confidentiality in this study was of primary concern and subject to a high standard of protective measures due to the potential risk to migrant participants of being identified as unauthorized migrants. Consequences of enforcement for those engaged in any unauthorized activity can include detention, deportation, and charges under the Immigration and Refugee Protection Act, as well as potential loss of work and detrimental impact on social entitlements. Confidentiality concerns may also impact service providers, in terms of their potential to be perceived as complicit in the use of government funding or
provision of assistance to undocumented persons. As such, this project sought to minimize
the risk to participants through the use of codenames only: agency and migrant
participants were identified in my notes, all transcripts, and all other documents only by
numbers and the group to which they belonged (i.e. M4 for the fourth migrant participant
interviewed, A2 for the second agency participant interviewed). Participants were never
asked to provide names or any other identifying information, and where this was
mentioned, it was permanently redacted from the interview transcripts. Similarly, if I
encountered any potentially identifying information during the coding and writing up
stage, it was generalized beyond the point of potential recognition prior to inclusion in the
written dissertation. For example, if a participant named an employer as “Bob’s Pizza Shop
on Granville Street,” I would change it to “a local pizza restaurant.” This was not frequently
required, as most participants were careful to avoid giving too many specifics of this kind
during their interviews.

The cohort of participants included twenty-eight migrants who identified their status as
“uncertain,” as well as 5 agency participants. Agency participants were all frontline
workers at organizations who identified their work as dealing with migrants with
uncertain migration status in their day-to-day work, whether as part of the organizations’
formal mandate or otherwise. The migrant participants had a variety of current and past
migration statuses at law, including lack of status, temporary foreign work permits (both
open and closed), visitor visas, refugee claimants and post-determination claimants, and
permanent residents (who had past experiences of uncertain migration status to relate).
Migrant participants had been in Canada anywhere from several months to over a decade
at the time of their interviews. Status within the participant cohort is described in further
detail below, in Chapter 3. Of the 28 migrant participants, 21 were women and seven were
men. In terms of nationality, 11 were from mainland China, nine were from Mexico, three
were from the Philippines, two were from Columbia, one was from Bolivia, one was from
Guatemala, and one was from Korea.

In terms of marital and family status, nine of the migrant participants were single without
children, six were partnered with spouse and children overseas, five were partnered with
their spouse and children in Canada, four were single or separated with children outside Canada, two were partnered without children and the spouse lived in Canada, and two did not identify their family status. These data were captured on the basis of spousal/partner and child relationships due to the specific consequences of status that tend to accrue to these family members through the application of the law (i.e. ability to sponsor) as it arose in the interviews, but migrant participants’ understanding of family was by no means limited by this definition of family and regularly included references to parents and extended family as part of the central family unit.

It is impossible to quantify those who did not respond to the study and to understand their reasons, particularly in the absence of reliable data about irregular migrants in Canada. Given the risks inherent in making public a lack of migration status, however, I assume that the perception of this risk was a major influence on participation. If so, this would make it likely that people who had been entirely without status or had already experienced immigration enforcement were underrepresented in the study. A few study participants had obtained regular status, but spoke of times in the past when their status was less certain; I expect that the cohort was also shaped by this temporal factor. Finally, study materials were provided in several languages which did not aim to capture the totality of linguistic diversity in Vancouver. While I advised community contacts that materials could be made available in any language, this was not requested at any point in the study, and I assume that the cohort favoured the language groups for whom materials were available firsthand.

2.3.4 Interviews

Because interviews were an essential source of data for this project, the research design demanded specific attention in this area. Although not writing specifically for institutional ethnographers, Rubin and Rubin provide a detailed overview of various approaches to
qualitative interviewing based on the purpose of the research in question.\textsuperscript{43} I wished to ensure the primacy of detailed experiential information as an entry point, I developed interviews loosely in the format of elaborated case studies,\textsuperscript{44} which seek to explore not only participants' recollection of events as factual occurrences, but also to query the informants' perceptions of the reasoning and motivation that underlies their experiences. Of particular interest in this study was participants' perception of the factors underlying their experience and understanding of status, and its relationship to employment situations and interactions with the social state. Closely related in the Rubins' taxonomy is ethnographic interpretation, which seeks to explore participants' perceptions of “key norms, rules, symbols, values, traditions and rituals”\textsuperscript{45} which exist within groups in particular contexts. For my purposes, this adds the dimension of exploring any specific “cultures” or organized responses to institutional governance, such as, for example, particular community knowledge of the impact of status on obtaining access to Employment Insurance benefits.

Applying this approach provided access to information about unwritten policies, or cultures of policy implementation and understanding of specific texts which would not be evident from a reading of the text alone. This approach complemented the approach of institutional ethnography by focusing on the functioning of texts and policies within the actualities of implementation in particular contexts. Furthermore, the notion of the “responsive interviewing” model proposed as a primary method seems intuitive within the framework of institutional ethnography. The authors define it as follows:

\begin{quote}
The term “responsive interviewing” is intended to communicate that qualitative interviewing is a dynamic and interactive process, not a set of tools to be applied mechanically. In this model, questioning styles reflect the personality of the researcher, adapt to the varying relationship between researcher and conversational partner, and change as the purpose
\end{quote}


\textsuperscript{44} I would like to draw on this method as a general source of structure, while bearing in mind Smith's distinctions between the research orientation associated with case studies in contrast to institutional ethnography. See Smith, \textit{supra} note 4 at 35.

\textsuperscript{45} Rubin & Rubin, \textit{supra} note 43 at 7.
Rubin and Rubin argue for interviewers to consider interview participants upon whom the research is focused as “conversational partners” rather than “interviewee” or “informant” (which, the authors note, is also a term used by police to classify people who describe the crimes of others). In their view, this shift in language reframes the relationship to emphasize “the active role of the interviewee in shaping the discussion and in guiding what paths the research should take” in what becomes a more “congenial and cooperative experience, as both interviewer and interviewee work together to achieve a shared understanding.” Within the use of responsive interviewing the interviewer is also encouraged to recognize her own emotions, biases, and interests. This concurs with Smith's emphasis on resisting framing participants as the objects of study as well as her concept of “talking to people” as a preferred way of framing interview-based interactions within institutional ethnography.

In the context of this research, the use of responsive interviewing served both the methodological commitment to interactivity between text and interview, and the primacy of interview data and participant perspective. Although themes were established to a certain extent through recruitment and interview structuring, the majority of time spent in interviews was made up of more free-flowing conversation in which I was often asking the questions, but in which I attempted to base them closely on the concerns and experienced articulated by participants. Because I approached this research as an outsider, and because a main target group of the research has been subject to oppressive and unequal relations on the basis of colonial and imperial legacies which persist in the organization of the Canadian state with regard to migrants, I assumed that efforts to “make room” in a general sense were unlikely to be sufficient to meet appropriate ethical standards or my own sense of responsibility. It was necessary not only to ensure that the format and content of the interviews was dynamic in order to allow participant guidance and agency in terms of

46 Rubin & Rubin, supra note 43 at 15.
47 Rubin & Rubin, supra note 43 at 14.
48 Rubin & Rubin, supra note 43 at 17.
content and in terms of setting boundaries with regard to their own comfort level in responding, but also to make every effort to openly and appropriately recognize my individual stake and position with regard to the work within a complex set of colonial, racial, class, and gender-based relations. As such, I framed my own commitments in the interviews in terms of both transparency and solidarity, and actively pursued both during interviews. I worked to supplant the idea of researcher as objective, neutral observer with one in which I recognized my own place in the particular histories and relations which form the context of this work.

Specifically, in attempting to privilege the perspectives of participants as the basis for the analytical framing of this work, while remaining an outsider, I found it most appropriate to identify myself as an ally to the people and communities most affected by the legal and governance structures examined in this work. An ally position is not fixed. Drawing from the work of Vikki Reynolds, I recognize that an ally position is by definition fluid and imperfect: one is always “becoming an ally.” In acknowledging the relative privileges I have and the consequences of this within specific interactions in the research context and outside it, I held my own limitations alongside my willingness to act. Throughout interviews, recruitment, and writing, I remained cognizant of the risk of learning at the expense of study participants and took steps to reduce it, both in terms of exercising discretion as to the extent and nature of questions and in terms of giving priority to those issues that emerged as most important to the participants themselves, in keeping with institutional ethnographic practice. Reynolds ties this approach to respectful engagement, and specifically to obtaining what Paulo Friere calls an “authentic dialogue” in learning.

In conducting interviews, I worked to maintain transparency about my own role and position as an aspect of this authenticity. The most difficult aspects of this arose in navigating the boundary between my role as a lawyer and advocate, and my role as a researcher and interviewer. While I was committed to privileging the voices of those who

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49 Reynolds, supra note 30 at 15.
50 Reynolds, supra note 30 at 15.
51 Reynolds, supra note 30 at 14.
shared their experiences with me, at times I did share my opinion after hearing participants speak, but I kept the aim of solidarity in mind. For example, after a participant had described a flagrantly abusive or illegal action on the part of employers or the state, there were situations in which I empathized with the individual, condemned the activity, or named it as abusive or illegal. I spoke about the law in general, but I avoided giving legal advice by limiting what I shared to legal information which is generally publically available, such as the content of specific laws and policies, or where to find them. While I did not specifically identify myself as a lawyer, multiple participants asked for legal assistance for themselves or others. When this happened in the context of an interview, I would let the person know that we could talk about it at the end of the interview. After the interview was closed, I would give the person general information about the law insofar as I could without specifically advising, and I would direct them to resources for legal advocacy in the community.

2.3.5 Data Coding and Structure

Interviews were transcribed on a rolling basis, during and shortly after the interviews took place. Transcriptions were verbatim, and in English only. This means that where an interpreter assisted with the interview, the participants’ responses were captured by transcription only in the interpreter’s English versions of what they said. I chose to use TAMS, a qualitative data tracking tool. Although this software has the capacity to provide analysis based on text, I used it only for the purposes of coding text, organizing coded text, and looking at very basic information on frequency of specific codes. I chose this software as it was available for the computer and operating system that I use (Mac OSX), for which there are a limited number of affordable tools suitable for basic textual analysis. Because I was using this software only as an electronic analogue to hand-coding and counting rather than to do any kind of analysis, it was logical to select a simple, inexpensive software which would be stable in my operating system.
Once transcriptions were complete, I read through all of the interviews, making rough notes with regard to broad themes covered by the questions, such as enforcement interactions and effects of status uncertainty in interactions with the state. I also scanned for topics which seemed to be present in multiple interviews, particularly where similar topics and concerns arose between countries of origin, or between migrants with different types of status. At the broadest level of analysis, I identified several major topics within the interviews, and created a code set of these: status (in which migration status was discussed or defined as such by participants), work, law, Canada (i.e. perceptions of Canada, relationship with Canada as a state), family, enforcement, effects (i.e. when specific effects of status uncertainty were causally identified by participants), services (when participants described interactions with the social state) and identity (when participants specifically described themselves). I also tracked several other categories at this level for situational variables, namely: class, gender, and race. For the first set of codes (i.e. excluding race, gender, and class, which were tagged at all levels) I looked at the data coded under each of these first level codes, and went through the data again as organized by those codes, identifying subcategories for coding at a second level, where most codes had several themes associated with it for subcoding. An example of second level coding is work>power, work>pay, work>kinds, work>hours, work>abuse, work>jobsecurity, work>health. This allowed the potential to explore both broad themes and specific issues within those, both of which were searchable using the TAMS software. I treated all text as susceptible to multiple coding to allow for overlapping and concurrent themes which arise in the narration of experience.

Once the second level of coding was complete, I used the TAMS software to determine which second-level codes appeared most frequently, not as a strict determinant of analytical priority, but as a general guide. The most frequently used codes pertained to status, work (power relations with employers, rate of pay, and kinds of work), perceptions of the law, reasons for coming to Canada, family, enforcement, and stress-related impacts of status. I then reviewed the entire set of codes and subcodes, and read the associated coded text organized this way, to determine chapter structure and content for the dissertation. There were too many first level-codes for each to turn into a single chapter, and in any case
some of these were sufficiently related to be grouped together within chapters. In coding, I realized that participants had shared a vast amount of information about the nature and effects of status in their lives in general, rather than confined to particular interactions. As such, I grouped these data together under the heading of “status,” and structured the dissertation to consider these data first in order to situate the data concerning relationships within employment situations and with the social state. I attended specifically to those codes which tended to illuminate the workings of those relationships as well, and assigned them to two further data chapters, one to deal with each sphere of life. This is also connected to the problematic at the heart of this research, in which migrants are accepted in their roles as workers, but often unable to obtain parity with citizen workers in terms of conditions as well as access to the social state. Because the results were organized thematically on the basis of the entire dataset, first-level codes were sometimes dispersed between chapters. For example, in Chapter 4 (Work), two non-“work” codes were included: identity>worker and effect>dignity, because both of these were intimately connected to the employment relationship. Most of the codes were thusly assigned to the four chapters which follow. Further data selection occurred during the writing up stage in reference to the raw transcripts, but pertained mostly to minor organizational details such as flow of writing (e.g. expanding quotes selected in coding, or reading through to obtain contextual information about the participant’s quote).

2.4 Contributions to Existing Research

In this dissertation, I contribute to existing work in three ways: 1) in a topical sense with regard to the understanding of the legal regulation of precarious migrants in Canada, 2) in terms of refining the definition of migrant precariousness, and 3) with regard to the application of institutional ethnography to legal structures.

In terms of the legal regulation of precarious migrants, my research expands the current available information concerning precarious migrants in Canada in several ways. Firstly, this research takes place in the Metropolitan Vancouver area. While Vancouver is one of
the three largest urban centres in Canada likely to have significant population of precarious migrants, there is little published research along the lines of what has been done in Toronto and Montreal in terms of precarious migrants’ experiences specifically with regard to the application of the law. As such, it adds to existing research by providing information concerning precarious migrants in a metropolitan area which has not yet been extensively researched from this perspective.

This research also expands knowledge concerning precarious migrants on a topical level through providing an analysis in which the lived experiences of precarious migrants are used to understand governmental institutions and the texts through which they govern constitute ruling relations. Much of the existing literature concerning precarious migrants can be divided into two main categories: 1) work focusing on documenting the experiences of workers in order to better illustrate the impact of their immigration status on other aspects of their lives such as health, working conditions, and social participation, and 2) work which categories and analyzes specific institutions or legal and policy texts on their own to examine entitlements and categories based on status, many of which also aim to assess the potential impact of the law, but which do not include the perspectives of the governed. Both of these bodies of work are important, particularly in the context of supporting advocacy on behalf of undocumented persons and establishing policy analysis. The aim of this project is somewhat different. Using institutional ethnography, this project uses the situation of precarious migrants not as a conclusion, but rather as an entry point to an understanding of governing relations, including the texts and institutions through which governance occurs. What occurs in the experience of a particular worker or group of workers is inevitably and profoundly linked to relations and patterns beyond that particular experience; the institutional categories and texts relevant to that experience are incompletely described without the content of the particular ways in which they actually play out. It is necessary to examine not only the experience of the workers and/or the specific texts and policies of institutions, but to establish as a primary research focus on the ways in which ruling relations take place within the lives of individuals. In Smith’s words:

Institutional ethnography as a project proposes to realize an alternative
form of knowledge of the social in which people's own knowledge of the world of their everyday practices is systematically extended to the social relations and institutional orders in which we participate. This approach has been further defined here by differentiating it, first, from a study that subsumes material assembled ethnographically under concepts and theories that formulate social concerns but do not explicate the social organization of the problems that people are encountering, and, second, from an approach that deserts the ethnographic for theory at the point of entry into the macrosocial level of organization [citations omitted].

The second contribution of this research is to refine the notion of precarious migration status, building on existing work in the field. Leah Vosko describes precariousness in the Canadian labour market for all workers in terms of “limited social benefits and statutory entitlements, job insecurity, low wages, and high risks of ill-health.” She notes the essential role of particular economic and political conditions in combination with social stratification on the basis of factors such as gender and race. Migration status has a similar function within a labour market which is increasingly precarious for all workers. Furthermore, migration status is implicated in the production of precarious employment norms in the labour market at large. Both unauthorized and authorized temporary foreign workers have limited labour mobility through the operation of the Immigration and Refugee Protection Regulations. Differential entitlements to social protection also occur on the basis of status. Wage disparity, poor working conditions and inability to unionize are

52 Smith, supra note 4 at 43.
54 Ibid.
56 Immigration and Refugee Protection Regulations, SOR/2002-227, s 185(b)(ii).
57 See, eg, Health Insurance Act, RSO 1990, c H6. Status-based distinctions may also be due to conditions of the work permit-in the case of access to Employment Insurance, for example, foreign workers may have more difficulty meeting the statutory requirement of “availability for work” if their work permit is bonded to one employer (Employment Insurance Act, SC 1996, c 23, s 18).
also well documented. Sociologist Luin Goldring provides a framework for understanding precarious migration status as an alternative to the dichotomy of legal and illegal, or documented and undocumented migration. Goldring’s framework aims to capture both the complex nature of status as well as the institutional factors which contribute to the lack of full migration status. Goldring describes precarious status as being:

marked by the absence of any of the following elements normally associated with permanent residence (and citizenship) in Canada: (1) work authorization, (2) the right to remain permanently in the country (residence permit), (3) not depending on a third party for one’s right to be in Canada (such as a sponsoring spouse or employer), and (4) social citizenship rights available to permanent residents (e.g. public education and public health coverage).

Within this framework, many legally distinct migrant situations are brought together in a single spectrum on the basis of their less-than-permanent status and the resulting differential entitlement to membership benefits, rather than on the basis of legal authorization or lack thereof. Goldring’s articulation of precarious migration status provides a fundamental theoretical basis for my analysis. In exploring the nature of status from the perspective of study participants, I argue that migration status operates within social relations in a manner similar to gender, class, and race, and thus merits support as a basis of protection pursuant to human rights regimes in Canada.

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59 Goldring, "Institutionalizing," supra note 2 at 240.
Finally, this dissertation aims to contribute to understandings of the potential application of institutional ethnography. As described in detail above, Smith’s methodology aims to understand the function of texts as coordinating features of social relations, using the perspective of lived realities as an essential starting point. Following Smith, my focus is on the role of legal and administrative structures as objects of study. In this dissertation, several layers of the operation of these institutions become evident. First, migration status acts as a conditioning feature within employment relationships and with regard to the social state, and is evident through tracing the legal construct of status through regulatory and institutional practices. This conclusion, while it contributes topically, is a standard application of Smith’s methodology. In exploring the role of migration status, however, another feature becomes visible: the disciplining potential of the operation of law as text. Text coordinates social relations not only through institutional action, but also through its influence on self-policing. This leads to a complex understanding of enforcement: while some migrants described situations in which they encountered exclusionary or enforcement-based practices directly, just as often, they described the impact of status in terms of altering their own behaviour in anticipation of enforcement or exclusion, regardless of direct interactions. In this dissertation I expand the manner in which we can understand the function of text to include disciplinary features which occur outside of direct institutional interactions but nonetheless constitute an essential aspect of institutional functioning and social ordering.

2.5 Limitations

Some of the limitations of this research have been briefly mentioned throughout this chapter, but I summarize them here. First, in designing this project I recognized that there is a compelling need for quantitative data concerning the numbers, locations, entry points, and social and material well-being of precarious migrants in Canada, particularly with regard to undocumented migrants. This research does not provide data which can be extrapolated in this way. Similarly, the context in which this data is analyzed with regard to Canada’s migration regime and other social and economic factors will be limited to a
certain extent due the lack of such quantitative data. At best, there exist only guesses about the exact numbers and locations of people currently without status, and data about those who have been out of status. Without these data, the extent to which the problems I have herein identified exist outside the examples given herein is unknown.

Second, the sample is not random, and thus may not be understood as “representative” in the traditional sense. Due to recruitment concerns as described above, the study was not designed to obtain a representative sample; as such, the data gathered may be limited in its application because it will consist of those applicants who are less at risk, or more willing to participate for other reasons. This study may well have missed migrants in the labour force whose experience might be different from those who were willing to participate. Another data limitation arose in tandem with ensuring ethical conduct. Making sure that source information was collected with due regard to the potential risk to applicant meant a modest scope of questioning and the omission of interesting and important data, such as identification of employers and specific work sites or sites of social state interaction.

2.6 Conclusion

In this chapter, I have explained the use of institutional ethnography and ancillary methodological tools to undertake a study that explores social relations as they become visible through the actualities of life for precarious migrants within metropolitan Vancouver. I have chosen an approach which is by definition dynamic and not committed to a particular hypothesis from the outset. This approach not only differs markedly from what is accepted within the mainstream of social science research, but also constitutes a departure from traditional ways of understanding texts within doctrinal legal scholarship. In this chapter, I have provided an overview of why this research is necessary and relevant, as well as justification of the methodological approach in light of the particular aims and boundaries of this research as well as its limitations. The following three chapters will present both interview and text based data arranged thematically, starting with an exploration of the nature and effect of migration status (Chapter 3) as a backdrop for an
examination of migration status within employment relationships (Chapter 4) and with regard to participation in the social state (Chapter 5). The concluding chapters (Chapter 6 and 7) will provide an analysis of the implications of these data in terms of enforcement, rights, and membership in the Canadian state.
Chapter 3. Status

3.1 Migration Status

Through the interviews conducted for this study, the idea of status emerged as a major concern and feature of the way in which law permeates the lives of precarious migrants in Canada. The state, too, is preoccupied with migration status: the wording of the law fastidiously ensures that every person present in Canada is accounted for in terms of migration status, or lack thereof. Whether citizen or undocumented labourer, the legal regime governing migration provides in its language a taxonomy in which everyone is labelled. Migration status is foundational in terms of its primacy within the federal immigration structure. A person’s status or lack of status is the main basis on which they are subject to degrees of right and privilege, ranging from entry and residence rights to differential exposure to criminal sanctions and expulsion. Beyond migration law itself, migration status also serves as a filter through which other legal regimes are understood and applied. The control of borders and determination of status occurs primarily through federal immigration laws, but migration status is relevant beyond the determination of legal permission to be in Canada. The close relationship between the allotment of work permits and the labour market creates a situation in which status also functions to govern the employment relationship even where it is not included in the text of employment-based legislation. Furthermore, migration status appears in the text of non-immigration laws, particularly those governing benefits and entitlements. Law’s permissions and limitations thus determine a person’s ability to reside legally in Canada, whether and on what conditions she is allowed to participate in the labour market, and the extent to which she is able to obtain access to basic entitlements such as health care, education, and income support.

As described in the chapters above, status does not exist as a simple binary but rather as a spectrum in which there are degrees of precarious status which fall short of permanent residency as defined at law. The manner in which a person is legally authorized to be, to
work, or to avail herself of social protection in Canada can shape her life: in terms of physical and mental health, social life and community, wages and labour conditions, family relationships, and personal identity. In talking with migrants who identified themselves as having uncertain legal status, it was clear that the idea of status was a powerful and dynamic construct that affected their lives and relationships. As such, migration status is a state-determined assignment which, far beyond merely labelling, functions to frame the terms on which people live, work, and belong.

The power of status is in the contingency it creates for the governed in the most primary aspects of their lives. Status affects not only on the degree of entitlement available, but also the very opportunity to make requests: unless or until a person can demonstrate sufficient migration status, she is functionally a non-person from the perspective of state institutions responsible for the allocation of benefits. Migration status can thus be understood in its most literal sense as “standing.” Differential and precarious status is established not only through territorial exclusion, but also through the creation of borders within Canada’s territory, by way of economic and social barriers which are conceived and maintained in a variety of relationships governed by law. Legal status thus conditions people’s specific relationships to the Canadian state, but also has wide-ranging impacts on the social and economic position of migrants.

Throughout the interview process it became clear that migration status was much more than a preemptive category or static label for migrants. Status emerged as a significant influence on the ways in which participants identified themselves, organized their lives, and established a sense of belonging. Migrant participants not only spoke about status frequently, and in terms of a wide variety of meanings and effects, but also named it as a causal factor in their negotiation of other aspects of life which were canvassed in the interviews, such as conditions of work and access to social protection. Beyond the topics I specifically canvassed, migrants described status in several ways that were common across disparate migrant situations. Status was of primary concern despite different countries of origin, various migration statuses, job sector, family status and gender.
Participants were not explicitly requested to define migration status, but many of the scripted questions referred to status: asking if they had experienced times in which their status was uncertain, and about the impact of uncertain status generally and with regard to particular matters, including conditions of work, enforcement encounters, and obtaining social entitlements. Furthermore, participants were recruited on the basis of self-identification as having “uncertain migration status,” and thus the participant group consisted of people who had already organized their thoughts on migration in terms of status to a certain extent. In the coding stage, it was evident that participant responses discussing status described a diversity of experience that went beyond the scope of the specific questions concerning the impact of status. There were many responses which fell outside of direct information about enforcement, access to services and conditions of work, but still described the way in which life was conditioned by status, and how status was defined and understood. This information was organized into themes that arose across multiple interviews; in determining and organizing the categories, I attempted to capture the primary axes of reference for migrants in their experience of migration status, but also to describe the complexity of status through the diverse and simultaneous meanings it could have. Migration status was described from multiple angles by participants: it could be a piece of paper, a precursor to geographic uncertainty, a social marker, or an omnipresent stressor. The ways in which migrants defined status was also of interest: it could be understood literally (for example, in reference to legal standing), or through metaphor (for example, through the idea of “not being here” or being “invisible”), in reference to self-identity and community, or relative to other migrants. In analyzing interview data I attended specifically to the understandings of status which were likely to have a direct or oblique effect on the manner in which migrants relate to the law, employment relations, and the social state.

Participants in this study also had much to say about the way they understood and defined their own status, from which emerges a rich description of the way in which this legal construct plays out in the living world. The way in which status is understood by those most affected by its distinctions provides texture to the bare definitions given in the law itself, and provides detail on the manner in which migrants constitute and are constituted
by legal migration status. The effects of status distinctions are ascertainable in only the most abstract sense through an isolated reading of laws and policies. Through the narratives of migrants and community workers, status can be more fully understood as conditioning social relations in terms of both exclusion and the potential for emancipatory response.

This chapter starts with an overview of the structure in which migration status is formally determined through federal law. I then situate the migrant study participants in terms of their status under the federal structure. Finally, and for the majority of this chapter, I provide a detailed account of migration status based on the perspectives of migrant and agency study participants. Through the information shared by study participants, migration status emerges as a governing feature of life in Canada. While it is clear that migration status is a condition generated and maintained through law, the definitions and categories given in the text of the law itself do not suffice to fully describe the nature and function of migration status.

Precarious migrants defined migration status in terms of its necessity as an identifier within legal, social and economic structures, but also as a force enacted through multiple sites through which they often governed their own behaviour through fear. Beyond the bare structure of the law, then, migration status is a governing feature of life which is at once central and dynamic. Precarious migration status is a spectrum pervaded by uncertainty in which relatively more secure status is always desirable but may be contingent on unknown and known factors. In this spectrum, precarious migrants traverse both location and legality through their interactions in relationships with state and non-state actors. By privileging the definition of migration status given through participant interviews, I aim to enlarge the potential for critical assessment of the role of migration status in the application laws, policies, and practices. The understanding of status described by participants and organized in the present chapter will therefore form a necessary foundation for the following chapters, in which I consider precarious migrants’ interactions with work and the social state.
3.2 The Legal Basis of Migration Status in Canada

Pursuant to section 95 of the *Constitution Act, 1867* the power to make laws concerning immigration is an area of concurrent jurisdiction.1 A province may pass laws pertaining to immigration into that province, and the federal government may pass laws concerning immigration into any or all of the provinces.2 The federal power in this area takes primacy, however: any provincial laws in the area of immigration are constitutional only insofar as they do not conflict with federal laws in this area. In effect, the power to define the basic legal categories and conditions which constitute status rests with the federal government, although provinces participate in the selection of both temporary and permanent migrants.

In terms of formal legal structures governing immigration status, the most important piece of legislation is the federal *Immigration and Refugee Protection Act*3 and associated *Regulations*.4 At the most basic level, these laws divide people into three broad categories: Canadian citizens, permanent residents, and foreign nationals.5 Canadian citizenship is available in three main ways: automatically through birth on Canadian territory (jus solis), through Canadian parentage (jus sanguinis) with some limitations, and by naturalization for those who are already permanent residents, if they meet statutory requirements for citizenship.6

Permanent residence in Canada is associated with many, but not all, of the benefits of citizenship. Permanent residents of Canada are entitled by right to enter and remain in

2 The text of section 95 states:
   “In each Province the Legislature may make Laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time make Laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.” *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, s 95.
5 *Immigration and Refugee Protection Act*, supra note 3 at s 2(1).
6 *Citizenship Act*, RSC 1985, c C-29, ss 3(1), 5(1)(c).
Canada, are able to freely participate in the Canadian labour market on par with citizens with only a few exceptions (such as employment in the public service), and have access to education, health care, and social protections to the same extent as Canadian citizens. Permanent residents do not have voting rights. The status of permanent residents is also less secure than that of Canadian citizens, as they are subject to minimum residency period requirements to maintain their permanent residence, and may lose their status on the basis of serious criminality, through misrepresentation, or through failing to reside in Canada for the required period of time. Furthermore, some categories of permanent residence are contingent on the fulfillment of certain conditions, historically in the case of migrant entrepreneurs, but now also with regard to spousal sponsorships. Permanent residents in Canada may face discrimination, desktilling, and barriers to social and economic integration, but due to the rights and entitlements associated with their status are not considered to be precarious migrants for the purposes of this study. The Act also refers specifically to “Indians” as defined by the Indian Act, who have the right to enter and remain in Canada, regardless of whether or not they are otherwise a citizen or permanent resident of Canada.

In contrast to citizens and permanent residents, foreign nationals are defined by exclusion in the Immigration and Refugee Protection Act, in which section 2(1) states: “foreign national” means a person who is not a Canadian citizen or a permanent resident, and includes a stateless person. Whereas both "citizen" and "permanent resident" can be said to denote a particular status, as each is determinative in terms of political, social, and economic membership, "foreign national" is a residual category, under which a variety of different status and entitlement situations may occur. Foreign nationals include those

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7 Immigration and Refugee Protection Act, supra note 3 at ss 34(1), 35(1), 36(1), 37(1).
8 Immigration and Refugee Protection Act, supra note 3 at s 40(1).
9 Immigration and Refugee Protection Act, supra note 3 at s 41.
10 Immigration and Refugee Protection Regulations, supra note 4 at s 98 (1).
11 Immigration and Refugee Protection Regulations, supra note 4 at s 72.1. This section, introduced in 2012, requires those permanent residents sponsored by their spouses maintain a conjugal relationship for two years, and provide evidence of this, except in the case of abuse or the death of the sponsor.
12 Immigration and Refugee Protection Act, supra note 3 at s 19.
13 Immigration and Refugee Protection Act, supra note 3 at s 2(1).
authorized in be in Canada pursuant to the Act and Regulations, those without any legal authorization at all, and everyone else who is neither a permanent resident nor a citizen. There are three ways in which foreign nationals are authorized to be present in Canada: as visitors, as students, and as workers. All three categories are temporary by definition, but the law permits extension of temporary status if the person can justify their stay. There is some mobility between these different types of authorization, and also between authorized and unauthorized presence and work in Canada. Visitors to Canada are authorized to enter and be present in Canada, but not to work or study. Visitors do not have recourse to any form of political membership or social entitlements. Students are generally authorized to study in a specific program (i.e. their permits are attached to a particular institution), are authorized to work in certain circumstances, and are eligible for participation in some social entitlements, such as state funded health care.

Exceptional categories of foreign nationals have effective ongoing legal residence in Canada even if they do not qualify for temporary or permanent residence. This applies primarily to foreign nationals of countries to which Canada will not deport persons due to extreme risk or political instability, those who have been recognized as protected persons but have not obtained permanent residence, and those whose removal is stayed on the basis of humanitarian and compassionate or public policy considerations. Such individuals are often granted work permits and become eligible for social entitlements on an interim basis but the stability and duration of their authorization is contingent on the temporary situations listed above.

Temporary workers are a subcategory of foreign nationals authorized to work in Canada. They are also eligible for some aspects of social membership, such as Employment Insurance, and state-funded health care. Since the early 1970s, there has been a complex and specific federal regulatory structure governing the admission of foreign workers, often

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14 Immigration and Refugee Protection Regulations, supra note 4 at s 181.
15 Immigration and Refugee Protection Regulations, supra note 4 at s 230(1).
16 Immigration and Refugee Protection Act, supra note 3 at s 95(2).
17 Immigration and Refugee Protection Regulations, supra note 4 at s 233.
in reference to employer-based labour needs. Temporary workers are frequently admitted to Canada on the basis of a specific labour market need demonstrated by an employer. For the most part, preferential access to the Canadian labour market for Canadians and permanent residents is built in: employers must obtain specific authorization to hire a foreign national by demonstrating that a suitable candidate is not available within the Canadian labour pool. Foreign workers may also be admitted without this authorization pursuant to international agreements such as NAFTA and GATT, or occasionally on the basis of demand for a specific type of worker, but a job offer from an employer is required to obtain a work permit through either of these methods, and work permits are attached to one employer. Workers with such permits cannot change jobs or employers without obtaining a new work permit, which relies on a new job offer and labour market justification based on employer demand. For ease of reference, work permits which bind a worker to a specific employer and occupation will be referred to in this dissertation as “closed” work permits. “Open” work permits may be issued in the absence of a job offer or labour market need on the basis of public policy considerations. For example, the spouses of certain closed work permit holders and refugee claimants are eligible to obtain such permits. While temporary, their authorization is not attached to a specific employer, and these workers are thus able to circulate in the labour market. A majority of work permit holders, however, have closed permits and thus limited labour mobility relative to permanent residents and Canadian citizens.

Some temporary foreign workers have ready access to permanent residence from within Canada after several years of work. For the most part, these workers are those whose work is classified as "high-skilled" and who obtain admission pursuant to the Canada Experience Class of permanent residence. Workers whose labour is classified as "low-skilled" are generally ineligible for this category and thus much less likely to be eligible for permanent residence. 

\[\text{\textsuperscript{18} N Sharma, Home Economics: Nationalism and the Making of “Migrant Workers” in Canada (Toronto: University of Toronto Press, 2006) [Sharma, “Home Economics”].}\\ 
\text{\textsuperscript{19} Immigration and Refugee Protection Regulations, supra note 4 at s 204.}\]
\[\text{\textsuperscript{20} Immigration and Refugee Protection Regulations, supra note 4 at s 203(3).}\]
\[\text{\textsuperscript{21} Immigration and Refugee Protection Regulations, supra note 4 at s 87.1(1).}\]
residence. There are large-scale programs for the admission of foreign workers in certain categories of “low-skilled” work, notably in agriculture and live-in domestic work; the latter category forms the exception to the rule with regard to “low-skilled” workers and permanent residence under the auspices of the Live-in Caregiver Program.\(^\text{22}\) Pursuant to s. 113 of the *Regulations*, live-in domestic workers are eligible to apply for permanent residence after a 2 years of full-time live-in domestic service to an employer in Canada, within a four year period.\(^\text{23}\) Although this program offers eventual permanent residence to those who meet its requirements, there are many practical barriers in so doing, as discussed in detail below and in Chapters 3 and 4.

Unauthorized migrants are also not positively defined under the *Immigration and Refugee Protection Act*, but form a diverse residual category. Because the ways in which a person may have legal status in Canada are limited to citizenship, permanent residence, temporary visitors, students, and workers, those who do not fall within these categories are in Canada without authorization. In other words, the ways in which a person may be legally authorized to be in Canada are few and limited, but the ways in which she can be unauthorized are many and varied. The federal legal structure describes the assignment of status in terms that are relatively clear: those who are authorized to be in Canada permanently or temporarily have legal status. The ways in which a person may be without status are formed in the shadow of this legal status: a person whose presence in Canada is not authorized by law, whether through unauthorized entry or by overstaying their visa, is subject to offence and enforcement provisions. The reach of enforcement and offence provisions also extends to people with legal status when they transgress the terms and conditions on which their status is contingent. Enforcement and offence provisions thus apply even to people whose presence is not unauthorized, particularly with regard to labour market engagement. It is not only being in Canada, but also working in Canada which brings foreign nationals within the ambit of federal enforcement provisions. Conditions pertaining to basis of entry, length of stay, and participation in the labour

\(^{22}\) *Immigration and Refugee Protection Regulations*, supra note 4 at s 72(1).

\(^{23}\) *Immigration and Refugee Protection Regulations*, supra note 4 at s 113.
market and social state don't map neatly onto formal status per se, particularly for temporary migrants. As examples, an authorized visitor who works, an authorized worker who engages in work for an unauthorized employer or in an unauthorized job, and a student who works prior to obtaining permission to do so could all be subject to enforcement provisions despite the fact that their presence is authorized. Thus, the legal structure itself includes opportunities for the creation and maintenance of precarious migration status, which come into sharper focus in examination of the participants' interview responses below.

In addition to setting out a taxonomy of status in terms of authorization, federal immigration law contains enforcement provisions which govern the boundaries of status authorization. Section 183 of the Immigration and Refugee Protection Regulations specifically prohibits remaining in Canada beyond the authorized period of time as well as studying and working without specific authorization.\(^{24}\) Section 124(1)(a) of the Immigration and Refugee Protection Act makes it an offence to contravene the Act or Regulations, and to fail to comply with a condition, including those listed above for all categories of temporary residents;\(^{25}\) refugee claimants are excluded from this section.\(^{26}\) Section 124(1)(c) of the Act furthermore makes it an offence to employ a person who is not authorized to work, and imposes a positive obligation to exercise due diligence to determine whether a person is authorized to work.\(^{27}\) Both of these offences are hybrid: this means the Crown has the discretion to treat them as either a summary offence or as an indictable offence. If they proceed by indictment both can attract a fine of up to 50,000 and imprisonment of up to two years pursuant to s. 125 of the Regulations.\(^{28}\) While enforcement and prosecution under these sections is relatively infrequent, as discussed below in Chapter 6, the fear of state power pervaded the experiences of precarious migrants.

\(^{24}\) Immigration and Refugee Protection Regulations, supra note 4 at s 183.

\(^{25}\) Immigration and Refugee Protection Act, supra note 3 at s 124(1)(a).

\(^{26}\) Immigration and Refugee Protection Act, supra note 3 at s 133.

\(^{27}\) Immigration and Refugee Protection Act, supra note 3 at s 124(1)(c).

\(^{28}\) Immigration and Refugee Protection Act, supra note 3 at s 125.
While this dissertation frames precarious migration status as a dynamic factor in social relations, through which people may suffer socio-economic disadvantage, precarious migration status must be understood in the context of other systemic features of social ordering. Privilege and disadvantage occur through multiple sites and means, and the effect of precarious migration status is shaped by these interactions. For example, a financially independent, single, highly mobile professional worker from Western Europe would fit within the definition of “precarious migration status” if she had only a temporary work permit. Due to the privilege associated with her class, nationality, and family status, the way in which this migration status would condition her lived experience would clearly be very different from a construction labourer from Ghana who was working to support a family in their country of origin. Like other categories which tend to determine privilege, precarious migration status may have a more or less deleterious effect depending on the interaction of status with numerous other factors including gender, race, class, income, nationality, family status, (dis)ability, etc.

One of the main conclusions of this research is that precarious migration status can act in a manner similar to other systemic bases of privilege and ordering, and, like them, merits recognition and analysis on the basis of its particular role. For example, one of the few study participants who could be said to be class-privileged in a Canadian context (as a highly skilled professional with labour mobility in Canada, and part owner of a business) was subject to monitoring by his son’s school board due to his temporary status, and the son, a Canadian citizen, was at risk of losing his access to education. In his case, the negative effects would likely be mitigated to some extent through access to financial and social resources, but even in a privileged situation, migration status alone was sufficient to create a situation in which a Canadian citizen faced differential access to the social state. The formal legal structures of the state form primary interfaces of power, but concepts of status, and related constructs of legality and enforcement on the basis of status emerged through migrant interviews even in the absence of direct state or legal involvement. The following sections will draw on interview responses from study participants in order to provide a detailed perspective in which to understand this legal framework, grounded in
the lived experiences of those governed by it. First, I set out the legal status of study participants in terms of the federal criteria. I then briefly examine the distinction between the symbolic power of federal status and participants’ expressions of belonging. I explore several concepts which emerge through the interview data with regard to precarious migration status, namely: status as uncertainty, the relative nature of status, status as a site of tension about location, status and the idea of “illegality.” Finally, I touch on the impact of precarious migration status on family relationships.

3.3 Legal Status of Study Participants

This study was not limited to people who had a specific type or lack of status as defined by law, but instead aimed to recruit participants who identified their past or present status as being “uncertain,” which I have associated with an with the concept of precarious status, as described above. Migrants who participated in the study fit a variety of different legal categories, which ranged both between participants and in terms of changes in status over time for each participant. In terms of the legal distinctions described above, there was a wide array of permit types in evidence, from complete lack of status to permanent residence, along with various limiting terms and conditions. Here I set out the specific federal legal categories which applied to the migrant participants. I do not intend for any causal relationships or conclusions to be drawn from the numbers given here; I provide them as context for the analysis given in this chapter. Agency participants were not requested to provide status information, as they were providing information relevant to the clients of their organizations rather than their own experiences. I did not assume agency participants necessarily had secure status. As they were specifically recruited to speak about the experiences of the migrants they encountered in a work setting, I did not find it appropriate to ask about their own status experiences, and none proactively self-identified. A chart summarizing migrant participant profiles is attached at Appendix C.

All 28 migrant participants had spent time in Canada with no legal status or with temporary status at some point prior to the interview and/or at the time of interview. A
minority of migrant participants entered Canada with no status, (N=4) and a majority (N=24) entered with some kind of status, via work permit, study permit, or visitor visa. Of those who entered without status, three claimed refugee status at some point after entering Canada. Two of these participants eventually obtained permanent residence subsequent to positive refugee determination. Of participants who entered Canada with legal status, 13 entered with a work permit, 5 entered with a visitor visa only, 2 entered with a study permit, and 4 entered initially with a visitor visa but later re-entered with a work permit. Of participants who entered with a work permit, all 13 were in positions which required a labour market opinion, held “closed” work permits bonded to one employer and one job, and were in jobs classified as "low-skilled." The majority of these were participants in the Live-in Caregiver Program (N=12), and the remaining one was a participant in the Seasonal Agricultural Workers Program.

For the migrants who entered with a visitor visa, 3 made refugee claims, of which one was pre-hearing, one was post-hearing with a negative decision, and one was a permanent resident after a successful refugee claim. Of the remaining two, one remained without status after the expiry of the visitor visa, and the other was without status for a number of years, but eventually became a permanent resident after a family class sponsorship by her spouse. Of those who entered with a study permit, one had obtained a post-graduation work permit, and the other had obtained an off-campus work permit. Of the 4 migrants who entered with a visitor visa and subsequently re-entered with a work permit, all were in positions which required a labour market opinion, had permits which specified one employer and one job, but differed with regard to skill level and job sector. Two worked in jobs classified as "low-skilled," one was an inter-company transferee in a management position in a small business, and one was in a high-skilled public service position. All

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29 Goldring notes the role of terminology within Canada as compared to the United States on the basis of the shape of migration and politics in those countries:

“In the United States, word choice is associated with political perspective in politically charged debates over unauthorized migration and persons: advocates usually use ‘undocumented’ while critics use ‘illegal.’ In Canada, activists and academics introduced non-status as a replacement for undocumented because most people in this situation are documented. They are known to the state but no longer have lawful status.” Luin Goldring, Carolina Berinstein & Judith Bernhard, “Institutionalizing precarious migratory status in Canada” (2009) 13 (3) Citizenship Studies 239 [Goldring, “Institutionalizing”] at 239.
participants had labour force involvement of some kind, and a large majority identified times in which they had either worked when unauthorized, or in ways which did not conform to the terms and conditions attached to their status.

3.4 Identification and Belonging

Both agency and migrant interviewees referred to status in terms of physical legal documentation which was seen as conferring status. However, this recognition of the symbolic power of federally-created documents took place in contexts in which participants identified their relationship to the state quite apart from federal status determinations. Migrants often described interactions with state institutions in terms of a unified whole, which they identified with Canada as a nation. Specifically, migrants described their perceptions of Canada as a welcoming, diverse, and safe place. They expressed anger, frustration, and despair on encountering exclusion. For many, Canada had made promises through its migration programs that were not fulfilled even when migrants met its conditions. In an iteration of the fundamental problematic of presence without authorization, migrant narratives disclosed a deep tension between the definition of identity through formal immigration status and their own sense of relationship with the state.

As an example of the use of federal documents as conferring status, one service agency described status as being uncertain specifically when a migrant did not have a permit in hand, regardless of whether she had legal status as follows: “They experience uncertain status when...they are implied status, waiting for a new work permit. Hopefully that work permit comes, but if it is refused, then they lack status.”(A5) For study participants, the document itself held symbolic power beyond and in contrast to legal migration status under the federal immigration regime. For example, a person who has applied to renew status pursuant to the Immigration and Refugee Protection Act maintains the same status
until a decision is made on their application for extension, but without a document in hand, migrants experienced their own status as uncertain nonetheless. The certainty conferred by the physical document is also underscored by its relevance in terms of gaining access to social membership benefits. As detailed in Chapter 5, many state institutions require not only that a person have legal migration status to confer benefits, but require specific physical documents. Migrants also described status document requests by employers, schools, and landlords.

One migrant claimant elaborated on the identifying function of status documents: “the ID [work permit] helps you, it’s a socio-political and legal way to know who you are. If you are a good person or you have committed a crime, the ID [work permit] is like a business card to society, and society is everyone.” (M23) Thus, the permit itself carries meaning not only in terms of formal legal status, but also in terms of one’s place in society more generally, and the entitlement to hold such a place. In conveying legitimacy, it denotes membership beyond the basic permissions granted by law. As noted by the migrant participant quoted above, it also renders the migrant visible to “society” or “everyone.” However, this visibility is dynamic in the case of precarious migrants, because their status is by definition contingent; as seen below, the possession of a status document can serve to protect a migrant or facilitate access to services, but it may also render the migrant more susceptible to enforcement, surveillance, or discrimination by identifying a person as a member of a “helot” group, namely one whose status is socio-economically subjugated relative to permanent residents and citizens.31

Migrant participants disclosed a variety of reasons for wishing to enter Canada, and in so doing described their expectations and perceptions of Canada as well as their own place, or potential place, within Canada. While a minority of migrant participants identified economic factors as a primary reason for entering Canada, most had other reasons. In the case of live-in caregivers, most did not cite economic reasons as they were already well

30 Immigration and Refugee Protection Regulations, SOR/2002-227, s 183 (5).
educated, multilingual, and had sufficient opportunities to earn money in their countries of origin. As indicated by one caregiver: “There were no economical reasons. To my knowledge many of the live-in caregivers who come over from China don’t have these economical problems.” (M7) Participants disclosed a broad range of reasons for coming to Canada, including political asylum (M5); marital difficulties and a desire for distance (M9, M14); because “Canada is a good country” for a new life (M12); for a new direction (M11); “because Canada is a place of harmony and wealth and a friendly country” (M7); because it is beneficial to educate children here (M7); and for personal development, as articulated by one caregiver participant:

I wanted more challenges in my life. If I didn’t leave China, my life would remain a life that I don’t admire. So to immigrate to Canada, it was as if I opened a door to the world. Possibly by coming to Canada, I thought I could come here and somehow kind of ignite that innate abilities that I have and that are not yet discovered. (M16)

A Mexican participant working as a construction worker articulated both personal and political reasons for wanting to migrate to Canada:

Ok, I decided to come to Canada cause I find this place with a wide world of opportunities. It’s a better place to grow in your person and also your ideas and establish your future. Also, I find this place more comfortable cause of the diversity of culture and cause I think, I guess, the people respect each other cause they understand and they know the laws. (M3)

In these descriptions, Canada is cast in positive terms - as an inclusive, diverse, welcoming place in which rights are respected and in which people would want to develop their lives. Specific economic and political factors did play a role, but these were usually embedded in more complex trajectories in which migrants’ particular values were engaged. In this context, participants described frustration with Canada’s failure to live up to its promises and their expectations with regard to status and inclusion. One caregiver with previous legal coursework questioned whether Canada’s immigration law was “really not a law” in the context of extreme delays and failure to permanently regularize caregivers. (M9)
Understandings of migration programs are formulated before entering Canada, and form the basis for the relationship:

When I was in China before I came to Canada, I was told that if I was continuously employed for two years after arriving in Canada, within 8 months I would receive a maple card. This policy is always changing and there was an open period of 1 year and a half and it may take even longer to eventually become a citizen. It’s uncertain. (M7)

An agency participant implicated Canadian government-based pre-departure programs in making promises with regard to permanent status and family reunification:

The thing is, when they leave the Philippines, they really believe that they can stay here. And that’s what many of them are saying that in the pre-departure seminar that they have in the Philippines, they are really convinced that Canada is the best country where you can work, because of the possibility of becoming an immigrant. They never talk about that this is only for two years or four years and then you’ll have to come back again. They never talk about that.

Q: Are those CIC pre-departure or are they from the recruiters?

A: No, that’s from the government. (A3)

She also identified the contribution of foreign workers in expressing her frustration at the inequality she observed in clients’ experiences:

If there are workers, if they are contributing to the development of Canada, if they are making Canada rich, why can they not be considered as workers and given the rights of other workers? (A3)

A caregiver described the obligations of the Canadian state in terms of a contract:

At the time when we signed this contract, this means 3 years, right? It’s in there. It’s a part of it. It’s like as if you sign a contract and once somebody goes into that agreement, there should be an obligation for the government and their part with everything that was initially said, being fulfilled. And after that, a year ago, you must know that they are trying to change the policy in favour of nannies. And then we all expect that would be shorter the time but they didn’t even shorter and they’re way more longer than
Another caregiver saw the live-in caregiver program as part of Canada’s strategy to attract migrant investors, with associated obligations to those brought in as caregivers. She felt that being a “foreigner,” it was still reasonable to expect to be treated fairly by the government:

I feel that the government needs caregivers to provide for the investors that the government so desperately wants. I can understand the concern of the government. We are foreigners here in this country. We still have hope that the government could possibly treat us with dignity and humanity.

(M14)

An agency participant described the bitterness and disappointment of migrants upon encountering exclusion in Canada, in the case of a migrant who had spent eight years trying to regularize his status before he passed away of HIV-related complications:

“...there are a lot of people who through this process come to this place and come to hate Canada...his frustration—he was an educated man and I don’t think this is what he expected his life to become.” (A1)

While migrant participants recognized federally issued documents as one way in which status was symbolically conveyed as an identifying feature, they also described identification apart from the federal status structure. Specifically, in describing the diverse reasons for migration as well as their experiences with precarious status, migrants held Canada accountable for maintaining their rights and the obligations it had accrued through its relationship with them, though these obligations were not often fulfilled.
3.5 Status Contingency and Uncertainty

One of the major themes which emerged in the migrant interviews was the fear and stress associated with the experience of status contingency, even for those with legal temporary migration status. Many migrant participants related uncertain status directly to delay and perceived ambiguity in status while waiting for documents or status changes. This issue was most evident in talking with participants in the live-in caregiver program. For these workers, the majority of participants first came to Canada under the impression that they would be able to obtain permanent residence after two years of full-time work in Canada, and would be able to reunite with their family members at that time, as they could not bring their family members with them when they initially came to Canada. They were not remiss in this interpretation. As discussed above, live-in caregivers are eligible to apply for permanent residence after two years of full-time work within a four-year period. However, there is a long administrative delay between the completion of the 2-year work requirement and obtaining an “open” work permit (i.e. under which a worker is free to work in any job and for any employer), which is given in anticipation of permanent residence. Thus, even in the most straightforward trajectory in which they complete two continuous years of employment with their first employer, live-in caregivers are limited to working for that employer unless they find another employer willing to obtain a labour market opinion and work permit for them, which is far from straightforward.

Interview participants ascribed their uncertain status directly to delays in the process of obtaining new work permits and eventual permanent residence, during which time the restrictive conditions of their existing work permits continued. Many participants described situations in which the delay in processing lasted years.

The delay in obtaining an open work permit was often followed by further delay from the issuance of the open work permit to the granting of permanent residence to the caregiver and her family members. During this time, although workers have improved labour mobility due to the open permit, they do not have permanent status and are unable to
reunite with their families. For many of the participants in this study, family included children who were separated from their mothers for 4-6 years. Furthermore, if a worker had to change employers for any reason during the initial 2 year work period, the total processing time would be increased by the length of time it would take to process a new work permit—often 5 or 6 months. During those months, workers are still subject to the restrictions of the first work permit, and any work they do within this period is not authorized unless it is for the original employer. Even if caregivers had left their employers due to abuse or had been laid off due to lack of work, they were not legally able to work anywhere new until they obtained a new work permit, which requires not only finding work, but relying on a new employer to support the process of obtaining a new permit. One migrant participant gave an example of delay which was representative of migrant responses:

I feel like the Canadian government, their policies towards us live-in caregivers, the time in which we can immigrate, the time frame is too long because we have to stay with one employer for 2 years. If I have to change employers in the middle of this time frame, there would be a waiting period of 5 to 6 months. So the time line goes on again. And after that period ends, we have to wait an additional 16 to 17 months but in actual fact, the combined amount of time is 5 years. We have to wait for an open permit for 18 months. And we need to stay with the same employer for 2 years and then we apply for the open permit. So that's a total of 3 and a half years. And once the open permit comes down, we have to wait an additional 20 months. So from start to finish, it's about a 5 year period. (M12)

In this period of waiting, participants reported feeling uncertain and unfree, even though their temporary status was legally secure, and even when they had already obtained an open work permit. A caregiver who had obtained an open work permit, but had not yet obtained permanent residency explained: “It’s been over a year since I made that application for permanent residency, but I feel like my only choice is to wait, to wait for this liberty, to wait for this freedom.” (M16) Many participants described the anxiety of waiting, and some thought they would never be able to receive “a solid status” (M24) and felt unable to “expect or predict the result of getting status.” (M29) In addition to lack of labour mobility, uncertainty was also associated with other specific material aspects of life
such as the lack of opportunity to learn English and delaying reunification with their families. (M16)

Many participants related that some aspects of their lives were governed by fear that they associated with uncertain status. One (non-caregiver) migrant who was waiting for her refugee hearing noted that while her status was uncertain, she was afraid to ask her employer to improve poor working conditions. In her words: “I was afraid for my status (read “because of my status.” This was the participant’s literal translation of the Spanish “por”) I don’t get a fair trial…I was afraid I didn’t have the same rights or something.” (M20) The use of the language of the “trial” of obtaining immigration status not only illustrates the perception of state power and the criminalization of uncertain status, but also the perceived relationship between employment and the eventual outcome of a legally unrelated immigration proceeding. Other work permit holders echoed this sentiment: “...if you have a temporary status, you are always in fear, like I might not be able to complain about my rights, there is always that fear.” (M6) Migrants also reported being afraid not to meet the requirements of permanent residence as an aspect of status uncertainty, (M8) being afraid of losing their livelihood, (M29) and fear of not being able to return to Canada. In the latter case, the migrant answered that a work permit is not enough to get rid of the fear, but that “[i]t has to be a permanent status. If you have a work permit you can be denied.” (M26) For migrant participants, uncertainty was seen as coming from the operation of law in terms of its actual application. Even where migrants held formal legal status, and even where they possessed status documents, their lives in Canada were conditioned by uncertainty flowing from bureaucratic delay and the protraction of “bonded” work permit situations. This uncertainty was closely associated with a sense of fear and lack of control, which will be discussed in more detail below with regard to work (Chapter 4) and access to social entitlements (Chapter 5).
3.6 Status as a Relative Condition

In contrast to the fixity and objectivity implied by the legislation governing status, for interview participants, status was relative and dynamic, often framed in terms of other kinds of status, or the potential loss or gain of status. Specifically, I asked participants to speak about the difference between not having any permit and having a permit, between having a closed work permit and an open work permit, and between having a work permit and having permanent residence. The degree of status held by migrants and the potential trajectory toward more or less status emerged as a major concern. For many participants, permanent residence was the goal and status to which they aspired, and often a primary motivating factor in their decision to come to Canada. The perceived potential to gain or lose status was particularly influential on working life and employment relations. Although permanent residence or citizenship served as a general yardstick of “certain” status, participants identified their own positions comparatively on a spectrum corresponding to the degree of entitlement and labour mobility attached to different kinds of status.

In terms of the difference between a closed work permit attached to one employer and one job, and an open work permit, participants often described a lack of labour mobility. For example: “With an open work permit, I could look for other forms of employment. Now that I’m tied down to one employer, it’s difficult because I would have to work even if I don’t want to. I would (have to) just have patience and hold in those emotions.” (M7) Another participant in the live-in caregiver program noted the impact of this lack of mobility on her conditions of employment and the power or “personal jurisdiction” of the employer in her life:

Q: From your perspective, do you think your situation would be different if you were a permanent resident? What would be different for you if you were a permanent resident or had an open work permit?
A: The differences would be huge. I would never do a job like this if I was in that situation.
Q: Tell me more about what the difference would be.
A: I could do any job I desire. As a live-in caregiver under someone else’s roof, there is a phrase: you have to look at the eyes and the colour of one’s
Participants also noted the impact of differential migration status in terms of family reunification, socio-economic status, and autonomy. One migrant participant compared open work permits with permanent residence: “If I eventually receive a maple card [permanent resident identification card], I will be able to reunite with my son, my family. The economical stress and burden would be greatly lessened.” (M7) Another migrant noted the difference between any kind of work permit, open or closed, and permanent residence in terms of socio-economic potential: “If I were to get my maple card, it would be completely different because I would be able to further integrate into society. I would be able to learn. I would be able to work in my areas of interest. I’d be able to become more acquainted with the law of Canada.” (M14) A third participant attributed the termination of her employment and job security to her status as a “closed” work permit holder as compared to a citizen: “My employer said that if he hired a Canadian there would be no issues with the application, so my employer’s letting me go.” (M8)

The potential to lose the ability to apply for permanent residence loomed large for participants in negotiating employment relationships; specifically, many workers mentioned tolerating substandard or abusive working conditions because they thought it may have a detrimental impact on their permanent residence application. One live-in caregiver summarized it: “Even though we work under some kind of situation [in which] we’re not happy, we have to do it because we want the time [to put toward permanent residence].” (M9) Employers also held power insofar as their reference or confirmation was needed to prove employment for permanent residence: “For example, if you want to find a new employer, you can’t offend your former employer in any way...you can’t make them feel like you’re going to leave them or ditch them.” (M9) One caregiver put it plainly: “If I had permanent residency, there would be no way I would do a job like this. This job is torturing.” (M11) Another caregiver described the move from a closed work permit to an open work permit in terms of freedom from caregiving work: “As a live-in caregiver...I was completely stressed but now even though it’s more physically tiring my mood is so much
better. I feel now that I am free that I have some type of liberty, before I felt like I wasn’t free.” (M 24)

Migrant participants spoke directly about the impact of status differentials to their relationship with the law, particularly with regard to rights. One caregiver participant described the difference her status made to the potential of the law to protect her through the enforcement of her contract. While working for a new employer without authorization, she said, “I felt like I was protecting myself and the contract did not protect me,” but once receiving a work permit for a new employer, she said “I feel like the contract is protecting me.” (M11) A worker in the restaurant industry, originally from Mexico, echoed this sentiment: “…you need to be careful what you are doing and that’s the big difference. I know that I have rights because I become a resident. Before, you only struggle with one employer.” (M18) An administrative manager originally from the Philippines also described the difference between temporary and permanent status in terms of the inability to exercise rights due to fear:

Q: What is the difference between being here as a foreign worker or being here as a permanent resident? ...
A: Mostly it’s the security—that you are part of the Canadian residents and entitled to the same rights and benefits.
Q: What are the major differences in rights and benefits?
A: You can actually complain—sometimes if you have a temporary status you are always in fear, like I might not be able to complain about my rights, there is always that fear. (M26)

This quote highlights the distinction between awareness of legal rights and the ability to pursue rights claims. In experiencing precarious migration status, participants knew that they had rights, but also that these rights were not meaningfully available relative to those with permanent status.
### 3.7 Status and Location

Another common thread through the narratives of migrant participants was the association of uncertain status with tension about location, often expressed in terms of a pressure or contrast between disparate locations. This discordance was expressed in terms of space and nationality directly, but also using metaphor to evoke a sense of stress flowing from multiple, incompatible trajectories. The articulation of this sense of "being neither here nor there" as part of the experience of status uncertainty by various migrant participants was striking in its similarity across a diversity of national backgrounds and status situations.

One caregiver from China expressed this tension as an aspect of her employment relationship and the necessity of keeping a new employer happy in order not to endanger status: "...if I have a new employer, who somehow decides half way through this application process not to work with me, what do I do? I'll be left with two sides empty with two feet in two little boats, I should decide some place to stand. I want to continue living. So the power dynamic does increase for the party of the employer." (M10) In considering the difference between permanent residence and waiting for refugee claim determination, one refugee claimant explained that permanent residence "would be more stable and you wouldn't have this doubt, this dilemma of staying or having to go back to Mexico." (M15) A student from Korea described the need to maintain multiple options while she waited for authorization to work: "...here I had to wait, not knowing my status in the future, I always think about two options, two plans, what if I go back to Korea..." (E.g. M12, M29)

A Colombian migrant who had experienced a delay of years in obtaining his permanent residence subsequent to a positive refugee determination echoed this description when asked whether his status had been uncertain, and tied it in to a sense of belonging in neither of two places: "Yes. Because we don’t know what is going to happen...I have my license, I have a work permit, I have my social but then it's like feeling that I don’t belong here but I don’t belong there. We can’t think in the future because we don’t know what’s
going to happen. It's been 2 and a half years in the same situation and nothing happened." (M 21) Another participant from Mexico who had successfully obtained refugee status also explained that this feeling persisted into her sense of belonging, even after her refugee case was positively decided and permanent status granted: "...I already had it [the capacity to obtain permanent residence] but like I'm saying I feel all the time that I am one foot here, one foot outside, I don't feel security at all." (M20)

Throughout their interviews, many of the migrant participants referred to the possibility of returning or being returned to their countries of origin in the context of the struggle to regularize status in Canada, in terms of not being able to go back due to political or economic risk, (A1, M20) or having "nothing to go back to." (A3) Some maintained that they could go back if options were exhausted in Canada, and many also mentioned that they wished to be able to go back temporarily to see family, but had difficulty in doing so because of legal restrictions on re-entry, lack of time off, or fear of losing status or being unable to return. (M9)

Many participants associated uncertain status closely with the sense of not be able to move forward, and not being able to move backward: A business owner from China, one of the few participants in the study whose work would be categorized as “high-skilled,” described a feeling of being unable to return to China after years of temporary status in Canada with no permanent residence options on the horizon: "I decided not to practice law there anymore because I wasn't willing to engage in corruption and bribery, so I went into business. So after all these years it would be very difficult for me to go back to that environment, so I don't dare to think of the road ahead of me." (M25) A live-in caregiver expressed the same dilemma in terms of risk, cost, and the resulting sense of powerlessness and stress:

Even we can't move forward or move backward. Move forward is not [within] our control. We want to move forward and think no forget about that, Canada, I want to go back to China. I don't want to give up the four years of trying so hard but I mean I can go back to China and to live there but I couldn't. This status, when you ask them, they say you are not
supposed to go back, we will not guarantee you can come back. We didn’t
dare to do that, to take that risk. In this situation, it’s really nothing. I feel
like I have no hope right now. (M9)

Lack of information and uncertainty about options also increased the feeling of tension, as
described by another caregiver from China:

My work permit expires on this coming 19th of December and I’m not sure
what to do. I’m personally in conflict. I would really like to study but I’m
not sure if I can extend my work permit or if I can get some kind of study
permit. I’m not sure of my options. (M19)

A non-profit worker commented on a similar duality at play with regard to the law’s failure
to facilitate regularization. She spoke about people who had entered with work permits,
and were unable to obtain legal status to remain in Canada, despite their ongoing social and
economic roles in Canada. Many workers instead went "underground." She described it as
follows: "In Tagalog we say, you are holding onto a two-edged sword. Because there is
nothing else for you. You know that the law is not going to help you." (A3) A caregiver from
China expressed the contradiction in the role of law and the resulting paralysis in similar
terms: "Now I need to make a claim for EI before I get a record of employment and I am
working illegally now. I’m stuck. I can’t go ahead and I can’t go backward." (M8) Although
in the imagined world of immigration legislation, location is contingent on status
authorization, and presence or work in Canada can be initiated or curtailed on the basis of
permits and the whim of employers, the situation described by migrants reflects a different
reality, evoking the problematic of presence without status. In consideration of the various
risks, relationships, and trajectories articulated by participants, location emerges as
something in which status is a complicating and dynamic factor, rather than a linear and
determinative one.
3.8 Status and Illegality

The interview questions and recruitment information never used the terminology of illegality, but the idea of illegality was introduced by migrant participants as a way of describing their own actions and conditions. Migrants reported an acute awareness of the potential of being “illegal” or doing “illegal things” in relation to state power when their status was uncertain:

Q: Was your status uncertain at any time since you came to Canada?
A: I feel like it’s time waiting where follow the policy and I don’t do illegal things and I wait. I don’t feel like I’m secure. (M14)

For this participant, the fear of being seen as illegal in the eyes of the state was strong enough that she became reluctant to speak about it during interviews:

A: I needed money so I began to work while I was waiting for my permit.
Q: You only worked at that second job for 2 months right?
A: I don’t think this is a good question. According to the government’s legislation, this is most probably illegal so I feel kind of nervous. (M14)

Migrant participants used the language of illegality to describe various legally distinct situations. It was used to describe entering Canada without authorization, (A4) residing in Canada or the United States without authorization, (M18, M21) overstaying after the expiry of a permit, (M17) and also where people still had legal status, but saw themselves as being in breach of the conditions attached to their permits. (M8, M31) “Illegality” was used by migrants to describe people’s very presence in Canada, but also referred in some cases specifically to unauthorized work and workers (A4).

The potential for being seen as “illegal” or being asked “if you were illegal” also functioned proscriptively in the lives of precarious migrants, for example, as a disincentive from seeking police assistance (M15). In social life, migrants indicated that they had actively
tried to make sure no-one became aware that they, or their friends, were “illegal.” (M17) One migrant described the need to “avoid hav[ing] the evidence that I was working illegally.” (M18) Being “illegal” was also something that prevented migrants from asking for better work conditions and pay from their employers. (M29) One agency representative spoke at length about the production of status uncertainty in the application of the law, where workers had forgotten to renew their work permit or did not know they needed to, where documentation was lost, and where delays were long. In her experience, the administration of the law interacted with factors such as immediate employer demand for workers, and workers obtaining extra jobs beyond the authorization of their permits, producing situations where she met clients “out of status.” (A5) The problematic of presence without authorization arises through this conjunction of economic demand for migrant labour and the legal production of status uncertainty.

Illegality was described as something to be feared and avoided, and migrant participants made it clear that when they were “illegal,” it was due to circumstances they could not control, often resulting from the termination of employment, and always related to the need to support themselves financially: “I’m in a situation where I’m not willing to do anything illegal, but at the same time, I don’t have any choices.” (M8) The concept of illegality, like status contingency, also seemed to function to isolate the worker from state protection, particularly in employment relationships: “I know that working unauthorized is illegal but during that time I was only depending on my employer.” (M31)

The idea of illegality within the lives and experiences of migrants provides insight into the ways the law is activated through experience. Illegality was used by migrants both descriptively, in terms of actions, work, or themselves, and proscriptively to denote things that they should avoid doing or being. In both senses, the idea of illegality appeared to function to condition migrants’ agency through the avoidance of actions which would create, increase, or draw attention to what they perceived as illegal. Many of the conditions they described as “illegal” do have corresponding offence provisions in the *Immigration and Refugee Protection Act*, but nowhere in the legislative texts are persons themselves described as “illegal.” Rather, the fact that status distinctions and enforcement are
enshrined in law gives rise to the discourse of “illegality.” Migrants described “illegality” not only as the opposite of “having legal status” but as something more pervasive, which could attach to actions or persons regardless of status. Furthermore, migrants described an acute awareness of the potential to attract punishment through illegality, even when such illegality was a necessary consequence of actions taken to ensure survival.

3.9 Status and Family

A majority of migrant participants spoke about the impact of their migration situations on family members both in Canada and in countries of origin, especially with regard to children.

Migrant participants described difficulty in making ends meet with a family when the adult wage earners had precarious status, as well as the stress associated with the material needs. (M4, e.g.) In one example in which health and socio-economic concerns coincided, a migrant participant described the time in which she had no legal status in Canada:

[D]uring that time I didn’t have any right to anything, and even in terms of health I had 3 pregnancies, so because I couldn't study, I couldn't work, I just spent my time having babies. I had 3 babies and in those really poor conditions I had to live so even for the food bank I had to have a Canadian ID and I didn't have it. (M30)

In addition to direct material impacts, migrant participants often reported effects on their children and family relationships. Many workers, particularly those in the live-in caregiver program, spoke about the impact of separation and distance on their children, and on their relationships with their children. This came across as a source of considerable pain for the caregivers who were mothers, all of whom had been separated from their children for a number of years. They expressed concern about the impact of their absence on their children’s development, including sexual development and puberty for daughters, (M5)
and on a child’s education and daily life, (M21) as well as their own feelings of responsibility as parents. This confirms Geraldine Pratt’s observations about the effects of family separation on migrant communities.32

Although children were not included in the ambit of this study as participants, parents commented on the impact of uncertain status on their children, including stress about deportation. In the case of a mixed citizenship family claiming refugee status, one mother reported:

The family also feels the stress. My sons always ask what’s going to happen and they are afraid to go back to Colombia because it’s not their country anymore. They were raised in North America and they speak more or less Spanish but they belong here. They are typical adolescents of North America. (M21)

When asked about her children’s understanding of their status, she said:

They understand. They worry. The middle one is more open. The oldest is more closed minded and worried and stressed out. He says he doesn’t want to go back. He doesn’t want to be killed in Colombia…. The middle one says that because he was born in the United States, he can go back. The oldest, because he doesn’t have any status, he’s more worried about it. (M 21)

A father with a high-skilled work permit reported an alienating impact on his school-aged son, a Canadian citizen:

In the past half year he’s come to understand this as he is getting older and has more understanding of the situation. He feels inferior to others …When he was younger, we hid this [lack of permanent status] from him but now he can’t read or write Chinese but he still understands, so when we go to extend our visa, he hears about it and he picks it up. So he is very worried because it causes him anxiety because if one day he had to go back to China he would be worried about going back to China. (M 25)

As noted by one agency participant, the threat of deportation becomes an issue even for Canadian citizen children, because their parents and caregivers may be subject to enforcement proceedings, and the dependent children have the legal right to remain in Canada, but it becomes impossible for them to do so except at the expense of severing the parent/child relationship. (A1) Participants also identified the negative impact of separation on spousal relationships, which was also often for years at a time. (e.g. M16)

Migrant participants also identified precarious migration status as a precursor to marriage for women: one caregiver noted that in her community, caregivers sometimes marry Canadian citizens, but “even if they do genuinely love somebody, it isn’t respected as being genuine because people have certain reservations whether they really do love them or whether they are trying to form a relationship for legal status.” (M14) Another migrant participant described how she felt forced to marry her boyfriend in order to obtain status, particularly given the need to obtain prenatal medical care: “So I didn’t want to get married, I wasn’t sure if I could live with my husband, we have had some problems. I wasn’t sure if I was able to make that decision, but at that time it was the only way to get papers because at that time common law [common law partner sponsorship] was one of the approved ways.” (M30) The precarious status of migrant adults is limited to the individual in the wording of the law, but its shape and impact flow through relationships between adults and with children for whom those adults are caregivers.

Both agency and migrant participants identified support of family members abroad as a concern. The impact of this with regard to socio-economic status is twofold: for the migrant in Canada, the ability to meet basic material needs in Canada is affected when a portion of income is regularly devoted to the support of family members abroad. Furthermore, the situation of the worker in Canada can have a direct impact on the socio-economic status of the supported family members. As described by one agency participant:

Most of our clients are from developing countries so when their status here is uncertain and they can’t be working or they’re out of status, the whole family suffers. The husband, the kids, often the mother, the father, the niece, the nephew, everybody suffers because they are relying on that
person’s minimum wage. So, it really stresses them out that they can’t support their families. The children have to be pulled out of school because the mother can’t afford the tuition [fees assessed by a public school], so it affects the whole family’s life. (A5)

The majority of migrant participants were in Canada without their families, and among those, many identified that they were sending money home, and that it was often difficult to negotiate support of family abroad with low wages, or impaired ability to work. (M11, M5) Participants described sending money abroad to support the education of children, (M1) elderly parents, (M31) and in some cases multiple families. (M31) Workers did not generally discuss the proportion of income they were sending abroad, but one caregiver said that she had sent about $10,000 home over a period of three and a half years while earning just over $1000 per month after accommodation was deducted. During this time, she also paid off a recruitment debt of $10,000. (M24)

3.10 Conclusion

From an examination of the themes and patterns arising through migrant and agency interviews, the experience of uncertain migration status provides a redefinition of the nature, content, and effect of the construct of migration status. The idea of status is based in legal structures, and applied through regulation and policy, both formal and informal. By attending to the information gathered from a group of migrants identifying their own migration status as uncertain, particular features of status become visible which would remain undetected in a reading of the legal texts alone. Thus, while migration status remains a legal construct, one whose textual genesis is in the direct operation of the legislative function of the state, its nature and function are richly illuminated in the observation of the specific application and experience of migration status. Migration status does not cease to be a legal construct in its application or lived effect: in contrast, migration status gains potency as law through specific patterned situations in which social relations are activated. The definitions of the nature and function of migration status
arising from this chapter will thus provide a frame through which to examine the social relations evident in employment relationships (Chapter 4) and encounters with the social state (Chapter 5).

The federal legal structure governing status draws clear lines between status and lack of status. As described above, the degree of status determines the potential for enforcement on the basis of unauthorized presence or activities. So long as a person complies with the conditions of entry and ongoing presence, work, or study in Canada, according to the legal schema, there is no negative effect attached to her temporary status. Furthermore, in provincial legal regimes, various entitlements, notably those pertaining to access to education, health care, and basic minimum income, require a basic level of migration status and such benefits are presumed to be available or unavailable on the basis of a person’s status as determined by the federal structure.

The nature of status as described by migrants is much less dichotomous: within the group of migrants involved in this study, a majority of them had legal migration status of some kind which was certain according to the text of the law, but nonetheless described their status primarily in terms of contingency and uncertainty. This was an unexpected result of recruitment: I assumed in the initial design of the study that those who considered their status “uncertain” would be those who would be considered completely “out of status” or “undocumented” at law. I assume that migrants who had never had status were not well represented in the study, likely as a consequence of the perception of risk in disclosing their status in any forum. A majority of participants, however, had been either out of status or otherwise acting beyond their authorization in Canada. The idea of “uncertain” status as identified by study participants came to represent a variety of status situations. All of these status situations had precariousness in common, but precarious migration status itself was evident through a wide range of situations. As described above, the ways in which migration status can be authorized through the state are discrete, limited, and well-defined, but the ways in which a person can lack status are many and varied.
Alongside situations in which status was lacking or conditions breached, migrants identified as "uncertain" various authorized legal migration situations, including open work permits, closed work permits, and refugee claims both pre and post-hearing. None of these situations would fit into the statutory understanding of “non-status” or “undocumented,” yet through the experience of migrants they shared common fundamental traits in terms of the manner in which status was experienced and understood. The fundamental traits associated with status uncertainty demonstrate an order and shape beyond that visible in a static analysis of the legal text per se. That migration status was ever-contingent, relative rather than fixed, and fraught with tension over location for those whose status fell short of permanent residency, regardless of whether they had migration status at law, highlights the utility of using precarious migration as an organizing concept.

Although the nature of status through the perspectives of governed migrants is expansive and divergent relative to the status/non-status dichotomy given in law, it is by no means less “legal.” To the contrary, the power ascribed to legal authority is perhaps even more evident through this perspective than through the text alone. Although the language of “legal/illegal” was not introduced by the study, either in recruitment or in the process of interviewing, it emerged as a major concern for migrants, even beyond the “specter of deportation.”33 (I)legality arose as a circumscription of behaviour, as a precursor to enforcement, and as affecting behaviour in relationships with employers, the social state, and within social and family life more generally. Thus, migration status was understood by participants not only in a descriptive manner, but also, and essentially, in a proscriptive manner because it was understood to be inextricably legal. The concept of illegality was pervasive in the interviews as a governing factor in the lives of migrants, and it arises not so much from the specific content of status laws as from the very existence of laws in which status may be determined and enforced. In this way, law is not only lived but also lives through the experiences of the governed. By considering the particular nature and content of the legal construct of status as informed by the perspective of those who are governed by

it, the relationship between the legal construct of status and social relations can be more closely followed. As such, the identification of a category of migrants whose status is precarious, and the understanding of status as a dynamic governing force will inform a closer examination of the social relations evident in the context of employment and interactions with the social state.

From migrants’ understanding of status, there also arise specific understandings of the role and nature of the state. Although participants described encounters with various state institutions which are legally and jurisdictionally separate, migrants tended to see the state as a unified whole, which they identified as “Canada.” Furthermore, to this unified entity they often ascribed a specific role in their lives, and a set of obligations associated with their relationship with Canada. The perception of the state as a connected whole, while not accurate in terms of law and jurisdiction, provides insight into the function of migration status: when migration status becomes relevant in multiple sites, the state can appear as a unified but unpredictable whole, which lends power to the enforcement of status distinctions and the exclusion they entail, as discussed in Chapter 6.

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34 Jurisdiction is traditionally associated with geographic delimitation, but can also be understood in terms of qualitative governing features: see, eg, Mariana Valverde, "Jurisdiction and Scale: Legal 'Technicalities’ as Resources for Theory” (2009) 18:2 Social & Legal Studies 139.
Chapter 4. Work

4.1 Introduction

Migrant participants in the study came from various cultural, national, and class backgrounds, and experienced a variety of migration status situations from the completely undocumented to permanent resident and citizenship status, but all participated through their work. Paid work formed a primary axis of life and experience and was a major topic of discussion in the interviews. Paid work was necessary in order to meet the basic costs of living in Canada, and often, to do the same for family members abroad. Participants emphasized the difficulties they encountered with regard to hours of work, pay, health and safety at work, job security and mobility. They also spoke of their own trajectories, often from skilled to unskilled labour, in the process of coming to Canada for work. A dominant theme in participants’ discussions of their working lives was the power disparity they encountered in employment relationships, often associated with working conditions ranging from inadequate to abusive. The employer-employee relationship creates an unbalanced power relationship for any worker, but in the case of workers with precarious migration status, the structures governing their status amplify the power imbalance in the employment relationship to the detriment of the migrant.

Many of the workplace problems described by participants are in principle subject to rights-based protection through two main legal avenues: the employment standards system, and the workers’ compensation system, both of which are provincially governed. Both employment standards and workers’ compensation law in British Columbia explicitly commit to the redress of workers’ complaints regardless of migration status, and neither has policies which would serve to compromise workers’ migration status. On a static reading of the law, from the state perspective, all workers’ rights can be protected, and injuries can be reported and redressed universally. It is clear from data provided by these both the Employment Standards Branch and WorkSafe BC that some precarious migrant workers do obtain redress and protection within these systems. Through the state data
alone, it is impossible to determine the number of unreported breaches of employment standards and workplace injuries, or the manner in which access to these protections may be altered or reduced. Of migrant participants in this study, all reported incidents or conditions which would in some way have breached employment standards or workers’ compensation laws, but few had actually interacted with the state to obtain protection, and of those who did, access to these protections was often impaired or delayed through the employment relationship.

Before starting into an analysis of the study data, I would like to identify three theoretical commitments with regard to the definition and role of work. First, I rely on feminist critiques of the definition of work. As summarized by England and Lawson:

Feminists have long argued that the boundaries constructed around “work” are part of an ongoing process with its ideological, material, and historical roots in the separation of home and work. This separation was bound up with the rise of a domestic ideology which established the home as refuge supported by the unpaid domestic work of women. Feminist scholars argue that historically the social and spatial separation of waged work from sites of reproduction (like communities and homes) occurred throughout Europe and subsequently North America alongside the rise of patriarchal capitalist systems. [Citations omitted]¹

While work as remunerative labour figures prominently in both the narratives of participants and in the definitions given by legal texts, I do not intend the use of the term “work” to refer exclusively to paid labour or to omit non-remunerated forms of work. Examples of remunerative work situations should thus be understood as part of a range of work which includes not only unpaid physical labour, but also the work associated with maintaining family relationships, cultural bridging, and navigating institutional structures.

Secondly, while both work and the identification of migrants as workers played a central role in the social organization of study participants, I wish to contest the neoliberal construction of remunerative capacity as the primary basis for membership. The economic advantages of migrant labour to both state and employer are well established, and the economic contribution of migrants is can be used to make arguments in favour of rights and entitlements for migrants.2 While it is important to take account of economic contribution, it is also essential not to frame this as the primary basis for belonging or entitlement. In Chapter 3, migrant participants described belonging and entitlement beyond their function as workers, and identified multiple factors associated with their migration trajectories beyond the economic, spanning the social, familial, and political. Work in this chapter thus refers to just one example of the multiple ways in which precarious migrants are present and participate in life in Canada.

Finally, while the focus of this chapter is working life for precarious migrants, it is important to contextualize this information in terms of precariousness in the labour market for all workers. Multiple commentators note the increasing prevalence of casualization, contract work, and temporization of labour in Canada and globally for workers, both permanent and migrant.3 The working conditions and barriers to workplace standards described here are associated specifically with precarious migration status, but rather than framing this as an exceptional phenomenon, it is understood as one particular manifestation of the ways in which workers are subject to labour precariousness.

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Using migrants’ perspectives as an entry point, it becomes evident that the rights and protections of paid work environments as offered by the state are conditioned by the operation of migration status in a multilayered way. First, although not explicitly mentioned in statutes, regulations, or policies, the construct of migration status is implicitly a part of these structures, mainly through the assumption that all workers have the benefits and labour mobility associated with membership as a permanent resident or citizen. This assumption produces a differential effect on the basis of status by failing to account for the presence of a class of workers whose labour mobility and security is limited through the operation of law. Thus, insofar as the nature of workers’ employment situations are conditioned by status differences, differential effects of the provincial legislation are likely. Second, federal laws and regulations concerning migration status interact directly with the employment relationship to create a power disparity between worker and employer categorically greater in the case of workers with less than permanent status. This at once increases the likelihood of detrimental working conditions and decreases the likelihood of worker reporting or redress. The legal structure of status frequently relies on employers’ decisions to endorse workers through confirmation of employment or labour market opinions justifying the place of the worker in the Canadian economy. Without this endorsement, workers’ status is at risk. Without the security of permanent status, workers with precarious migration status are more likely to experience job insecurity and by definition are limited in their labour mobility. Third, even where a worker would have adequate recourse through existing legal protections, and where the employer is not directly empowered by federal immigration law, the construct of status itself imparts a fear of reprisal and loss of status to workers. This is a particular feature of the experience of work with precarious migration status, and is often sufficiently strong to discourage reporting or redress of illegally low pay, long hours, sexual and other abuse, and often extreme deskilling. This confirms the characterization of the labour of precarious migrants as what Fudge and MacPhail term “an extreme form of flexible labor.”

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4 Judy Fudge & Fiona MacPhail, “The Temporary Foreign Worker Program in Canada: Low-Skilled Workers as an Extreme Form of Flexible Labour” (2009) 31 Comp Lab L & Pol’y J 5. This article deals specifically with the low-skilled worker program in Canada, but the observations therein are confirmed by the present work with regard to workers with precarious migration status.
specific ways in which precarious status workers experienced conditions of work, the employment relationship, and the availability of state-protected standards and rights, this chapter will describe the legal standards which apply to govern workplace rights, and trace the way in which the legal construct of migration status conditions the sphere of paid work.

In this chapter, I draw on participant interviews to describe several themes which emerged in this study with regard to work and provincial legal protections available to workers. By way of background, I first describe the labour trajectories of migrant participants with specific attention to the deskilling of their labour through the migration process. I then address in turn several themes which arose in the study with regard to working conditions, namely job mobility and security, hours of work and pay, and worker health and safety, including relevant statutory standards. Finally, I discuss precarious migrants’ access to legal remedies through both employment standards and workers’ compensation systems.

4.2 Labour Trajectories and Deskilling

During interviews, workers were specifically asked about the type of work they were doing in Canada, as well as their work and educational experiences prior to entering Canada. Although the vast majority of participants were doing low-skilled work in Canada, which in the Canadian taxonomy of labour generally denotes work which does not require postsecondary education,5 many disclosed postsecondary education of some kind, whether in trades, college, or university. (e.g. M5, M9, M11, M12, M14, M23, M28, M29) Agency representatives confirmed that this was the case in their clients’ experience as well. (A3, A5)

The primary labour segments in which migrant participants had worked while in Canada were: domestic work and childcare, including both live-in and live-out domestic work;

construction/painting/site labour; food service and kitchen work; administrative assistance; and agriculture. Workers in the field of domestic work and childcare were, without exception, women. Workers in the area of construction-related fields and agriculture were almost all men, and those in food service, kitchen work, and administrative assistance were women. Only two migrant participants identified working in high-skilled fields: one woman who had student status and was working as a researcher, and a man who had entered Canada on a high skilled work permit in order to work for a business of which he was part owner.

Migrant participants who came into Canada pursuant to the live-in caregiver program made up the majority of those working in the domestic work sector. Most disclosed work and educational backgrounds which are associated in the Canadian labour market with high-skilled work. Before coming to Canada they worked as nurses, teachers, doctors, and export consultancy, and had university degrees in business administration, business English, nursing, education, and medicine. Although some of these workers stated specifically that they would not choose to do caring work if they had legal status which allowed them to do otherwise, (e.g. M11) one caregiver drew a direct connection between her role as a doctor in the Philippines and her work taking care of children in Canada. In this situation, the worker had described a psychologically abusive work environment in which she had no physical complaint, but was “emotionally injured” (in her words), yet maintained an ethic of care toward the family she worked for:

Q: You were trained as a physician. I’m interested to know how you feel about doing this kind of work.

A: Realistically speaking, I feel that back home I was taking care of sick people. Now I am taking care of this family and they are quite similar.

Q: Do you feel like you have a chance to use your skills?

A: I often recommend certain lifestyle recommendations and choices to this

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6 The live-in caregiver program requires applicants to have completed the equivalent of a Canadian secondary education. Immigration and Refugee Protection Regulations, SOR/2002-227, s 112.
family.

...

Q: Is there anything else you want to share about your experiences that we haven’t talked about already?

A: I feel like coming here to work, you need a certain sense of endurance. Even at the beginning, if it’s extremely difficult, I feel that one can conquer these difficult situations. I’m still full of hope even for these people I’m taking care of, even if they treat me badly. There is no way I could willingly hurt them or harm them. So I still believe that the future is quite bright. (M 11)

In the case of live-in caregivers, a majority of caregivers who spoke to me had earned a bachelor’s degree, and many had professional work experience as doctors, nurses, and teachers prior to coming to Canada. This is consistent with previous research confirming the prevalence of university credentials among live-in caregivers.7 Deskilling persists beyond regularization, and affect not only the caregiver herself, but also her family members, upon reunification in Canada.8

Migrant participants who worked in construction, painting, warehouse labour, and similar work in Canada disclosed backgrounds including human resources management training at the university level, (M3) skilled trades certificates, (M5, e.g.) and financial management experience. (M4) Workers ascribed the shift to lower-skilled work to their lack of ability to speak English sufficiently, (M3, M18, M20) or the lack of opportunity to convert their certification and education to a format that would be recognized in the Canadian labour market. (e.g. M5, M3)

For workers without authorization, the labour segments in which they worked were those in which informal labour markets were more readily accessible, notably in construction and related work. Certain types of work are formally associated with particular ways of having status through regulated work permit programs; for example, both the Live-in Caregiver program and the Seasonal Agricultural Worker Program specifically recruit foreign workers into particular labour segments, and for the most part they are explicitly limited to working with named employers. For workers outside of these programs who hold closed work permits, the type of work they undertake is also limited to a particular employer; even though they are not specifically restricted to a labour segment, the requirements to change a work permit are onerous and rely heavily on employers. Even for open work permit holders, who have a relatively greater degree of labour mobility, types of work may also be limited by their visible as a temporary work permit holder on the basis of the “9” designation on the social insurance number. Thus, although the particular ways in which workers had status or lacked status were associated with specific labour segments and deskilling trajectories, migrant workers experienced limitations in the types of work they could undertake across the spectrum of precarious status.

It is well established in the literature that foreign worker programs in Canada and elsewhere are often associated with work that is dangerous, dirty, or difficult (sometimes referred to as “3d” labour), work which cannot be done offshore, or is not sufficiently remunerated to recruit permanent resident and citizen workers. In the Canadian situation, although both high and low skilled temporary workers are recruited through authorized foreign worker programs, low-skilled workers comprise a growing proportion of total foreign workers admitted to Canada. The largest labour segments in which

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10 N Sharma, Home Economics: Nationalism and the Making of “Migrant Workers” in Canada (Toronto: University of Toronto Press, 2006) [Sharma, “Home Economics”].

foreign workers are legally admitted to British Columbia are as follows (numbers for 2011):

Agriculture, Forestry, and associated: 4590
Other Services: 4520
Accommodation and Food Services: 2830
Information and Cultural: 2335
Manufacturing: 1610
Arts and Recreation: 1520
Construction: 1515

The available numbers listing the top specific occupations in which Labour Market Opinions are issued in British Columbia give a more detailed picture (numbers for 2011):

Harvesting Labourers: 4505
Babysitters, Nannies and Parents' Helpers: 3405
Cooks: 1035
Food Counter Attendants, Kitchen Helpers and Related: 875
Actors and Comedians: 830
Other Performers: 785
Carpenters: 675

While the prevalence of domestic workers, restaurant workers, and agricultural workers represented in the study seems to be consistent with government data, one sector which does not appear in the top ten occupational groups is constructions trades helpers and

12 These statistics are based on the North American Industry Classification System (NAICS), in which “Other Services” is defined as including repair and maintenance services (i.e. electronics repair, auto repair), personal and laundry services (including hairdressing), religious and civic services (including nonprofits and labour organizations), and work in private households (including nannies). Statistics Canada, “North American Industry Classification System, 81-Other Services (except public administration),” Statistics Canada, online: <http://www23.statcan.gc.ca/imdb/p3VD.pl Function=getVDDetail&db=imdb&dis=2&adm=8&TVD=118464&CVD=118465&CPV=81&CST=01012012&MLV=5&CLV=1&CHVD=118466>. It is likely due to the inclusion of private households that this sector ranks second in British Columbia.
labourers, which includes “low-skilled” construction labourers and those who do not have a trade certification recognized in Canada. This could be explained by the association between the prevalence of informal labour within the construction industry and lack of formal authorization for foreign workers. Of study participants who identified having been completely without status at some point, many had worked in this occupational group. Without official data on occupations for unauthorized workers and workers with open permits such as refugee claimants, it is difficult to determine with any precision the industries in which workers without industry-specific permits are working. Several study participants referred to workplaces in which authorized and non-authorized workers worked side-by-side.

Deskilling trajectories are not unique to foreign workers. For new permanent residents in Canada, there is also evidence of significant labour deskilling upon arrival which includes barriers to labour market advancement in terms of language, certification requirements, and racial/cultural bias.15 Because of the particular disentitlements and limitations associated with less than permanent status, however, precarious migrant workers experience these barriers in a categorically distinct way. Unlike many of the workers’ concerns discussed in this chapter, deskilling is not subject to any specific rights or protections at law. Rather, because precarious migrant workers are overrepresented in lower-skilled, lower paid, or otherwise undesirable work, as well within the informal economy, the deskilling of labour is an integral part of the context in which migration status and the law operate in the lives of these workers.

The increasing concentration of precarious migrant workers in lower-skilled occupations16 contributes to the way in which status is a shaping force with regard to engagement in the Canadian labour force. Not only is the concentration of precarious migrant workers in low-

skilled positions associated with more hazardous and difficult jobs for which it is impracticable to find citizen or permanent resident workers at the offered rates of pay, but workers classed as lower skilled are much less likely than those classed as higher skilled to be able to obtain permanent residence.\footnote{Sarah Marsden, “Assessing the Regulation of Temporary Foreign Workers in Canada” (2011) 49:1 Osgoode Hall L.J. 39 at 48.}

4.3 Job Security and Mobility

Framing the experience of work for many precarious migrant workers were concerns about job security and mobility. Even where hours of work and pay are well protected, lack of job security and lack of labour force mobility remain pressing concerns for workers, and particularly for workers with precarious migration status.

Lack of continuity and sporadic work were issues for workers across the labour segments represented in the study, often intrinsically connected to their status. For example, one agency worker reported that within the seasonal agricultural worker program, workers who were sick or had a medical condition were reported to the recruiting program, and were more likely to be refused work permits in the following year. The same logic applied to women agricultural workers who had reported sexual abuse or harassment on the job. (A2) The potential for discontinuity of work arising from the refusal of a work permit also functioned as a disincentive to report illness, injury, or abuse on the job. (see, e.g. A2, A4, A5)

For those outside the formal labour market, participants identified job insecurity in addition to problems with pay. In one example, a painter had been told by his employer that he was a “contractor” despite strong evidence that he met the legal definition of “employee.” His employment proceeded as a series of short work projects. This worker linked both sporadic pay and lack of a formalized work arrangement with job insecurity:

\footnote{Sarah Marsden, “Assessing the Regulation of Temporary Foreign Workers in Canada” (2011) 49:1 Osgoode Hall L.J. 39 at 48.}
“there is insecurity in terms of getting paid and there’s no stability because it’s not something formal.” (M4)

For live-in caregivers, job security is tied directly to the potential to obtain permanent residence, which requires two years of full-time work within a four-year period. Because the law requires the endorsement of employers in order for workers to obtain authorization for a new job, and only work so authorized is countable toward permanent residence, threats to job security are amplified by the risk of loss of existing status, as well as the risk to potential permanent residence. Disruptions to job continuity were frequently reported as an aspect of lifestyle changes or changing needs of the families who had hired caregivers, such as the start of school for young children, or alternative care arrangements coming into place for children. (M14) One caregiver felt that a four-year work permit would “protect [her] work, without unemployment.” (M11)

Workers reported that employers threatened termination in order to ensure compliance with conditions of work as determined by the employers. Even where it was not specifically mentioned by employers, workers were often reluctant to complain or request changes to working conditions on the basis of the potential for termination of work, associated with termination of legal status. In one case, the employer used the worker's status directly in its threat to terminate:

The first time I was doing something wrong and I assumed I made a mistake. I arrived late at work and that was my mistake and for that I was fired. The thing I really don’t like is that they gave me a letter and in the letter they made sure that they were going to inform immigration about it. (M18)

Job mobility is a related concern. Migrant participants emphasized the difficulties they had in being able to leave a job or find a new job. The legal structure governing the assignment of migration status interacted with the operation of the labour market to render labour mobility for precarious migrants particularly difficult, as described by these two workers:

The thing about the work permits right, it’s really tricky, people have to get
one employer that name’s on the work permit. (M3).

... In my case, I always got the temporary work permit and they were restricted. I was only allowed to work for that employer. That makes a big difference. If they treat you well or not, they know that you are all the time willing to do whatever they want and this is a big problem, I left the place and there is one girl still working there and I know that they don’t treat her very well because they know that she will do whatever they want because they are the boss. If not, all the time there will be the pressure in the background, “We can fire you. We can fire you. And we did it once so we can do it twice.” (M18)

Once an open work permit is obtained, workers are able to circulate in the labour market. Despite this, discrimination in hiring on the basis of temporary status at all (as denoted by the “9” at the beginning of workers’ Social Insurance Numbers) was also a barrier to labour mobility in some cases, such as that of a construction worker who encountered bias in hiring once employers found out he had a “9”:

A: Because when you have the 913 social security number is what they tell you, they say on the paper that you can find a job in whatever but bottom-line this is not true because you are not applying for certain job and especially with government job they no accept you, they reject you because you have social security in 9.
Q: Tell me more about that, did you get rejected or did you get discriminated against because of your 9?
A: Yeah because of 9.
Q: So tell me more about that.
A: Because you know when you apply, I was unemployment for so long, I was on welfare, because when you apply for certain jobs for example security guard, they not accept you. I went and took the course and everything but late when they see you have the number 9, I have my BST 1 and my BST 2, because they sent me to jobways, to help me find me a job but the problem was not to find a job the problem was the social security was a 9.
Q: Did they tell you?
A: Yes because when they see 9 they not give a job at the time.
Q: How many times do you think that happened?
A: So many. (M5)
One live-in caregiver reported that an employer was unwilling to sign the paperwork to obtain a work permit for her because her old Social Insurance Number started with a “9,” and was different from that of other workers. In that case, it seemed as through the employer wanted to ensure that the caregiver was legally authorized before allowing her to start work, but did not wish to wait for the processing of her permit. (M8) As described above, every foreign worker with authorization to remain in Canada has a Social Insurance Number with a “9”, so it seems illogical for an employer to reject such a worker when the employer’s explicit aim is to hire a foreign worker.

Barriers to job mobility were identified not only in terms of lateral movement between employers in the same field, but also with regard to movement between labour segments, and in particular the movement from low-skilled work to work closer to that for which people had originally been trained:

> Once I have an open work permit, I'm not obligated to continue with the same employer. I can make use of my qualities and my skills. I can go to kindergarten to teach piano, singing, dancing. I am very willing to serve on behalf of the children of Canada. In China, I was considered to be an outstanding teacher. I could teach them Chinese language. I was very good. I was of high standards. I have this intention to serve. (M12)

Thus, while structures governing foreign worker regulation tend to stream workers into jobs less skilled than those they are trained for on arrival in Canada, the regulatory requirement of closed work permits also functions to preclude labour mobility once workers are here. The reduction of labour mobility compounds deskilling as it limits the chances of finding and being available for higher-skilled jobs. Barriers to job security and mobility as they arise for precarious migrant workers also function to enhance the power differential between employer and employee:

> Q: You mentioned that you could only obey. Can you tell me a little bit more about that? Why was that?

> A: I was working for them and I was living in their house so I had to follow by their rules.
Q: What would happen if you didn’t?

A: I was afraid of causing trouble because we had a pre-existing contract and also, I know it’s difficult to change employers and it’s not easy to have a consistent employee-employer relationship (M19)

This is also underscored by the ever-present risk of losing authorization:

...under the live-in caregiver program you are not allowed to work with anybody else unless with the one who is on the contract, that is the hardest part and like in my situation where I am not being released by my employer, I was not able to look for another job its just like taking the risk of working unauthorized (M31)

Refusal to supply references and recommendation letters were also used by employers as a threat to workers (M11, M12). The potential to lose one’s job with a particular employer was a major concern for caregivers and cemented the power relationship:

I’m completely without a will. I don’t dare to resist because my contract states that I have to stay with the same employer for two years. So I have to listen to them. I have to obey. If I don’t listen, there are huge implications in changing employer. (M11)

As described in Chapter 2, work authorization for precarious migrants relies profoundly on the discretion of the employer. The employer is cast in federal legislation as the arbiter of labour market need. In order to obtain a Labour Market Opinion, evidence of specific employment need is always required in the format of a specific job vacancy for which other workers cannot be obtained at the offered wage rate. Because foreign worker regulation is premised on the concept of the free market, and designed to meet the labour needs of employers, the employer can refuse to supply the required documentation for a work permit with little consequence to herself. The consequences for the worker, on the other hand, can be paralyzing in terms of loss of status, or at best, a waiting period of several
months while another employer makes an application for a new authorization for them, during which time the worker cannot work legally.

Similarly to labour trajectories and deskill, there is no statutory protection of job security and mobility. Employment Insurance, which is discussed in the next chapter, aims to provide a certain level of remediation for unemployed workers, but there is no right to stable, suitable work and free circulation in the labour market per se. Given the pivotal role of the employer in determining the immigration status of precarious migrant workers, however, the effect of reduced job mobility and security is of a different nature than that faced by permanent resident and citizen workers. Because these aspects of labour market involvement are conditioned in particular ways on the basis of status, they are included here as an integral part of the context in which precarious migrants are engaged in the labour force.

Job security is shaped by precarious migration status, both in terms of reasons for unemployment as well as the ability to regain employment. Although unemployment can be detrimental for any worker, it takes a particular form for workers lacking stable migration status. For workers without status or without work permits, the employer's ability to unilaterally terminate the employment relationship is greatly enhanced due to the particular vulnerability of workers in this situation. For temporary foreign workers with closed work permits, employer power is also categorically greater, as the process of obtaining and maintaining a work permit relies on the employer's whim and participation.

4.4 Hours of Work, Pay, and Duties

Many study participants commented on hours of work and pay as fundamental aspects of their working lives. While some conditions of work, including wage and hours of work, are subject to provincial laws and policies protecting minimum standards, participants
reported working conditions well below these minimums. This section will start by briefly reviewing the law as it applies to precarious migrant workers in British Columbia. Drawing on participant interviews, it will then provide detail on the shortfalls in working conditions experienced by precarious migrants.

The Employment Standards Act of British Columbia establishes employment standards for non-unionized environments in British Columbia as well as a complaint process, administered by the Employment Standards Branch. Section 1(1) of the Act defines employees and employers without reference to immigration status.18

The Act establishes standards with regard to minimum wages, hours of work and leave, notice and basis for termination, advertising of work, recruitment practices, and provides a framework for complaints, enforcement, and appeals to the Employment Standards Tribunal. All of the provisions in the Act apply without differentiation whether they are citizens, permanent residents, or temporary workers with or without status.19 With regard to hours of work, the Act requires that employees are not made to work more than 5 hours without a meal break of at least half an hour, 8 hours free between shifts, and 32 consecutive hours free from work each week.20

Concerning minimum rate of pay, the Act requires the payment of a minimum wage, as determined by regulation.21 The current minimum wage rate established by regulation as of May 2012 is $10.25 per hour.22 During the time periods described by the study participants, the minimum hourly wage ranged from 8.00-9.50 per hour. Despite piecework provisions of the Regulations23 which exempt farmworkers from the minimum

18 Employment Standards Act, RSBC 1996, c 113, s 1(1).
19 Pursuant to ss 31-45 of the Employment Standards Regulation, certain occupations and types of workers based on industry and job description are excluded from specific provisions of the Employment Standards Act. See BC Reg 396/95, ss 31-34.
20 Employment Standards Act, supra note 18, ss. 32, 36.
21 Ibid, s 26.
22 Employment Standards Regulation, BC Reg 396/95, s 15.
23 Ibid, s 18(3).
hourly wages under the Act, foreign workers under the Seasonal Agricultural Worker Program are paid on an hourly basis which is consistent with the statutory hourly wage.\textsuperscript{24}

The Act also prescribes the manner in which wages must be paid.\textsuperscript{25} With regard to the timely payment of wages, the Act stipulates that employers must pay employees at least semi-monthly.\textsuperscript{26} It also sets out the requirement to pay overtime after an employee has worked more than 8 hours a day or more than 40 hours a week, and the basis for determining the appropriate amount for overtime, ranging from 1.5 to 2 times the regular rate of pay.\textsuperscript{27} Furthermore, by way of general provision, the Act limits the number of total working hours on the basis of the health and safety of workers, namely that: “an employer must not require or directly or indirectly allow an employee to work excessive hours or hours detrimental to the employee’s health or safety.”\textsuperscript{28}

The Act applies to domestic workers, the definition of which would include those employed as live-in caregivers. It also sets out several requirements specific to domestic workers, including an employment contract indicating hours of work, duties, wages, and room and board. The same section specifically includes the requirement for employers to pay for overtime hours beyond those stipulated in the contract.\textsuperscript{29}

Workers reported unpaid overtime in various labour segments, but some of the most extreme examples were found within the live-in caregiver program. One agency worker described the situation of a caregiver who was “practically enslaved” by her employer, working 6 days a week from 6 a.m. to 9 or 10 p.m., plus working an extra job on Saturday as a cleaner. (A3) Based on those hours, this worker was working 98 hours a week, taking the


\textsuperscript{25} Employment Standards Act, supra note 18, s 20.

\textsuperscript{26} Ibid, s 17.

\textsuperscript{27} Ibid, ss 35, 40.

\textsuperscript{28} Ibid, s 39.

\textsuperscript{29} Ibid, s 14.
lower estimate from her regular job and assuming an 8 hour day for her part-time job. This was not an unusual number of working hours for a worker in the live-in caregiver program (see also M16, M19):

Q: Can you talk a little about the difficult conditions with your employer?

A: The biggest issue I have currently is that the employers very rarely respect the 8-hour work limit. You usually have to work over 8 hours.

Q: Can you give me some examples of that?

A: The first employer had two children and I had to wake up and start working at 7 in the morning. I would work all day with one hour of break in between.

Q: When did you your work day end?

A: In theory it should be that I should stop working at 7 in the evening. Because sometimes the employer, the parents of the children would be busy with different events and activities such as school activities, PTA meetings or if the husband came to Canada at that time, the wife would have to go socialize with the husband and sometimes I would finish work at 8 and the latest was 11:30.

Q: Did you ever talk to your employer about that?

A: I’d be afraid to voice those concerns. Once I expressed any dissatisfaction with the work conditions, the employer would be unhappy. (M7)

Another caregiver described very similar conditions:

I had to work 7:30am until 9:30, 14 hours in total, my friends who also apply for this program and work for the live-in care giver program they all seem to work a lot of overtime hours like myself. When I came to Canada I was completely alone I didn't know anybody here, so when my employer demanded to me work whatever hours, I complied. (M24)

Because caregivers were usually paid on the basis of a fixed amount per month, calculated on the basis of the theoretical 40 hour workweek at minimum wage, (e.g. M11, M16) the
actual hourly rate at which they were remunerated ended up being much lower than the statutory minimum wage, often $6 per hour or less. One caregiver explains:

Q: Were you doing the jobs that were described in your contract?

A: Yes. It was the job description that was stated in the contract. However, the house was large and I was doing everything and I was working non-stop.

Q: Were you paid by the hour or were you paid a certain amount each month?

A: Each month.

Q: How much were they paying you?

A: The total sum was about $1400. In the contract it stated that room and board would be deducted and after room, board and tax I was left with about $900 and that was going at 8 hours per day, 40 hours per week. (M19)

In another case, the employer had actually factored in about 6 hours per day of unpaid overtime on the worker’s schedule:

Q: Do you find that the pay and the hours are more or less what they’re supposed to be with your employer?
A: Lots of overtime.

Q: How many hours a day do you have to work?
A: At least 10 hours. I forgot to bring a document over today. I’m not sure if it’s important or not but my employer prepared a document that stated a daily schedule of what I should be doing from 7 am to 9:30 pm.

Q: How many hours are you getting paid for?
A: 8 hours. (M12)

Several caregivers reported that when they needed to find a new employer, which was often due either to layoff or poor working conditions, prospective employers would demand a “trial period” during which the worker would be forced to work without authorization, while the employer waited to decide whether they would complete the requisite applications to renew the worker’s permit. (e.g. M8) Until 1995, live-in caregivers
were specifically excluded from the minimum wage provisions of the Employment Standards Act. While the inclusion of caregivers in the statutory minimum wage requirements was undoubtedly a victory, subsequent research found that many employers disregarded the law in this respect, a pattern still clearly evident in the present study.

Wage problems were not limited to caregivers: A worker in the restaurant industry mentioned that she was making more money per hour as a babysitter than she was at her regular restaurant job, and another worker without authorization in the restaurant industry described working shifts without any meal or rest breaks, and also being required to do extra work and a variety of tasks (e.g. cashier and kitchen work) without receiving any extra pay. That worker was paid $200 for two months of work.

Unpaid overtime was also reported in construction work, where one worker described an employer’s preference for lower-paid unauthorized workers and “immigrants,” as reported by this worker, who was a naturalized Canadian citizen at the time of her interview:

A. Yeah they pay the minimum, I make, they pay $10 to me but the rest of the peoples, the illegals people they pay the minimum $9, when they work most time they augment to $9. My husband for example, they get paid for $9 and they make people to work for many, many hours...

... A. Because they need more people and there was no more people available to work night and days, so I saw many people from Mexico they didn’t sleep, during the week and I couldn’t understand how they do that, because I was working for 8 hours, maximum 10 hours and I was exhausted yeah, so at the beginning I was surprised why they do that, why they cannot sleep. I arrive to work and they say oh I didn’t go to sleep yesterday, I thought maybe Mexico people are (inaudible) or maybe, I was start feeling, like, weak because I was able to work only 8 hours with my break because I asked my break.

... A: At the end they fired me because I was weak; they say this company is to make money...

Q: What do you think is the real reason they fired you?
A: Because they knew I was Canadian.
Q: And what does that mean to them?
A: That means Canadian we know our rights and I know this pay is too low, the Canadian people know much information about dangerous materials and they have information safety and they have information about human rights, they have information about salary too...

That worker's husband was without authorization at the time, and she reported that he was working 19 hours daily. (M30)

Another worker in the construction industry commented on the impact of status differentials on both wages and tasks at his workplace:

They pay less [to workers without status]...and I know people who work and they don't get paid...because they are always afraid that the police are going to be stop them and to be caught, and it's hard to live like this for me it's stressful to live with constant fear. I lived 6 years in the US illegal, and it's difficult. (M 22)

...Lets say there is this roofing company and there are ten people working on a house, there are light, heavy, things that are more difficult and people who have papers get more than $15 per hour, the rest is less. So the heavy work always goes to the person who is getting less and the other people who are getting more are just outside with a little flag, or a sign, or doing something really easy or small, but who has to put themselves with shelves or any other material is the people who work for $15, which is me. (M 22)

Even where the wage was above the statutory minimum, the lack of sufficient or regular working hours was also a problem for workers, particularly where employers would attempt to limit the working hours in spite of a full-time contract in order to limit the cost of the worker. (M8, e.g.) One migrant participant who worked as a painter had been paid from 12-14 dollars an hour, which he said would be sufficient to support his family of four if he were to be given regular hours of about 50 hours per week. (M4)
Overall, it was not so much the fact of overtime work itself but rather the terms on which overtime work was completed which was problematic for migrants. On the basis of what they shared during interviews, many migrant participants would likely have accepted overtime work if it had been voluntary and paid at an overtime rate, or at all. Migrants in multiple fields of work felt they could not decline unpaid overtime, or unpaid regular time, because their status was associated so closely with their relationships to employers.

Migrant participants in the study performing both authorized and unauthorized work also stressed the inadequacy of their income to meet the basic costs of living, and associated it with their migration status. The wife of a migrant worker described the impact of not having status on his earning capacity and their family not only in terms of lower wages in combination with insecure employment:

> Because it was a short time, the period he was working for and he couldn’t work a lot of hours. So before I came here he had to pay for his rent, his pass, his transportation he had to send money to us for our kids school and food for us. It wasn’t enough he was making in comparison to the expenses. (M2)

One caregiver noted that she was being financially supported in part by a friend—she said “since you know how much wages is for nanny...paying taxes, I am paying for my MSP, life insurance and everything.” (M31) Food security also arose in interviews: for one refugee claimant family, one of the parents explained: “It’s hard for the couple because I didn’t eat so my wife and my kids could eat, or both. We took not so much food because the kids had to eat.” (M4) An agency participant described an occasion with one of her (caregiver) clients:

> They live on a very very limited budget. I had a client today, for example, who does not have a job yet. She doesn’t have her work permit yet and it’s been so long since her application has been at CIC Vancouver. So, she doesn’t have any money. So I saw her for about an hour and a half, helping her to prepare for her work permit interview and I said, “I’ve got another appointment, can you wait for another hour and I’ll see you again after that.” She said, “Yes. But the problem is I’m really hungry.” And she was obviously ashamed of telling me that. (A5)
Workers from various communities and in various job types generally indicated that wages were low enough that it was a struggle to cover basic necessities of life, and that payment from employers was uncertain. (M18, e.g.) However, two migrant participants indicated that income was sufficient for the basics, but barely: one respondent indicated that through receiving welfare plus a job was “enough to live on,” (M15) although collecting undisclosed income while receiving welfare is contrary to the law in British Columbia. Another migrant participant who was present as a student but working in authorized and unauthorized situations in low-wage jobs said that she was receiving “barely enough.” (M9) In contrast to other responses, one caregiver indicated that she had saved enough money to support herself without working for a time. (M10)

Extra hours of work in caregiver situations were also associated with being required to complete work beyond that which was stipulated in the contract—although caregivers are hired to care for specific people and their jobs are limited on paper to the tasks associated with that role, caregivers regularly reported doing extra work in housecleaning, cooking, shopping, and outside cleaning and maintenance. One caregiver reported that her job was terminated when she refused to do the extra work associated with cleaning an eight-bedroom house for the family by whom she was employed, (M8) and another stated that she was terminated for taking on a second job in her off-hours. (M26)

Several workers, most notably women live-in caregivers originally from China and the Philippines, described having incurred a debt in order to apply for a work permit to come to Canada, often through a recruitment agency or “middleman.” Participants from China reported recruitment fees ranging from the equivalent of CAD $10,000 to $25,000 paid to recruiters (M7, M9, M12, M14, M16, M19) and many indicated that this was a fee for which they incurred debt prior to leaving Canada, a debt for they would pay off from their working income once in Canada. Charging fees to prospective employees in order to place workers in jobs is an offence under the Employment Standards Act. For migrant workers, this not only creates a debt which imposes an immediate burden on already low wages in Canada, but it is a debt that is associated specifically with the potential to obtain status. It
is the very chance to work in Canada which is sold by recruiters, and it was clear through migrant interviews that this was a non-negotiable aspect of obtaining a work permit. Participants also indicated that they had found out about the live-in caregiver program through the same recruiter that they ended up paying in order to entry to the program. There were no examples of participants who had refused to pay the recruitment debt, but presumably such debts could be enforced formally or otherwise against family members remaining in the country of origin. This type of debt, then, operates both qualitatively and quantitatively: quantitatively because it adds debt to the situation of a low-income household, but qualitatively because unlike regular consumer debts, the debt is a necessary aspect of obtaining the permission required just to participate in the Canadian labour force.

While inadequate pay, work beyond the job description, and illegally long hours are not unique to precarious migrants, the manner in which these are experienced is shaped by migration status. Unlike permanent residents and citizens, precarious migrants are subject to circumscription of their ability to legally reside and work in Canada which bear directly on their experience of the employment relationship. As described through the narratives of precarious migrants, the power differential in employer-employee relationship is exaggerated when a worker has fewer options in the labour market, or when that worker depends on the employer's authorization to maintain legal status in Canada. Thus, while employment standards legislation does not formally exclude any worker, regardless of status, it also does not account for the effect of migration status on the employment relationship.

4.5 Safety and Health at Work

Study participants also emphasized difficulties with health and safety at work, including conditions arising as a direct result of employment duties. This section will start by reviewing the law and policy governing worker health and safety in British Columbia as it applies to precarious migrants. It will then provide interview data to illustrate the types of
problems encountered by precarious migrants with regard to health and safety standards at work.

Compensation for workplace-related injuries and illnesses and other matters related to workplace safety in British Columbia are governed by the *Workers’ Compensation Act* and associated *Regulations*. The legislation does not refer specifically to foreign workers, but s. 1 of the *Act* defines employers and workers in terms of their participation in an employment relationship or contract, express or implied, written or oral. There is no residency or immigration status requirement in the legislative regime, and WorkSafe BC, which is the agency responsible for administering the *Act* has confirmed that their policy is that “a worker is a worker,” regardless of immigration status.

Similarly to the legislation, WorkSafe’s policy does not refer specifically to immigration status, but defines workers in an inclusive and expansive way, listing hourly, salaried, piecework, and commission workers, including those who formally rent or purchase equipment from employers as a device to arrive at a wage, and contractors who choose not to be registered as independent operators.

The same policy manual provides also extensive detail on claims and assessments for all workers. Furthermore, although not part of their manual, WorkSafe BC has also published a presentation specifically with regard to “newcomer” workers in which they specifically state that foreign workers, both documented and undocumented, whether or not under a legal contract, are covered by workers’ compensation in British Columbia. The same presentation includes a sample analysis of foreign worker claims and a discussion of work

31 *Workers Compensation Act*, RSBC 1996, c 492.
35 Bogyo, *supra* note 33.
vulnerability and strategies in place at WorkSafe BC to increase access, notably by way of services in languages other than English.

As such, the *Workers’ Compensation Act* applies to workers in British Columbia regardless of status. Through Workers’ Compensation, workers are entitled to compensation for disabilities sustained, though wage loss benefits, health care, and rehabilitation benefits when an injury arises “out of and in the course of employment.”³⁶ In a recent addition to the *Act*, mental disorders arising from work-related stressors, including bullying and harassment, are now specifically covered as part of workers’ compensation where they result in a psychiatric diagnosis.³⁷

The *Workers’ Compensation Act* also mandates reporting of injuries by both workers and employers within a specific format and timeline. Workers are obligated to report injuries to employers as soon as possible,³⁸ and employers must supply the means by which to write a report. Employers are required to report in a specified format to Workers’ Compensation within three days of occurrence every injury claimed by a worker, and failure to do so is an offence pursuant to the *Act*.³⁹

Associated with the *Workers’ Compensation Act*, the *Occupational Health and Safety Regulation* mandates employers to maintain a safe workplace.⁴⁰ The *Regulation* stipulates specific standards of safety for workplace in great detail, and includes requirements for physical aspects of the workplaces and also specifically mentions violence and threats as potentially dangerous working conditions.⁴¹ While a complete discussion of the comprehensive workers compensation regime in British Columbia is beyond the scope of this thesis, it is clear from even a brief examination of this legal regime that the majority of

³⁶ *Workers Compensation Act*, supra note 31, s 5(1).
³⁷ *Ibid*.
³⁸ *Ibid*, s 53(1).
³⁹ *Ibid*, s 54(1).
⁴⁰ *Occupational Health and Safety Regulation*, BC Reg 296/97, s 4.1.
⁴¹ *Ibid*, ss 5.27, 4.28.
injuries and conditions reported by participants are covered by the workers’ compensation regime on the face of the legislation and associated policy.

Participants reported workplace injuries resulting in both chronic and acute health problems. In terms of physical health problems arising in the course of employment, migrant participants reported skin problems, (M12) joint mobility problems, (M7) arthritis, (A3) fever, chills and headache while living in quarters with no heat, (M12) insufficient food (M14, A5), digestive problems when eating fruit and vegetables was disallowed by the employer (M19), a compound fracture, (A4) and loss of appetite and vomiting associated with stress and anxiety (M14, M19). Participants also reported stress and mental health as a direct result of conditions of work.

Health concerns arose as a result not only of conditions of work, but also through stress arising from the interaction of precarious migration status with the employment relationship. Specifically, employers were often empowered by migrants’ lack of labour mobility and isolation from potential venues of protection for workers. While stress is not unique to workers with precarious migration status, participants described it in specific ways that were linked with status in the narratives of participants. As described by one migrant caregiver:

Q: What was the impact on you of having that uncertain status or the difference for you between having the status you have over having permanent residence or an open work permit?
A: There’s a huge difference. There’s a huge psychological and mental stress. People in my situation, it really is a stress because the way the employer treats us, it’s so different from a regular person. (M19)

Specific conditions arising directly in the course of employment are described in detail below in Chapter 4, and fall broadly into the categories of physical health and mental health. In the latter category I have included stress, emotional impacts, and impacts on the dignity of the worker.
Stress and impact on worker dignity were extremely prevalent themes in discussions of health impacts with both agency representatives and migrant participants across the lines of status and type of work. Stress was associated with low pay, (M4) the process of obtaining or renewing work permits and reliance on the employer, (A3) being out of status or having irregular status, (A5) delay in obtaining status documents or changes, (M7) non-enforcement interactions with immigration authorities, (M9) being harassed or humiliated by employers, (M11, M19, M24) including sexual harassment and assault, (A2) not being paid by employers because a worker did not have papers, (M15, M22) not being able to plan the future, (M 21) family separation, (M22, M19, M9) coerced marriage, (M30) unemployment based on status, (M4, M28). One worker described the mental impact of her tenure as a caregiver in terms of a felt loss: “There’s an emotion of the loss of the initial beauty of coming to Canada. A day goes by like a year.” (M7)

Participants also described the impact of humiliation and degrading treatment by their employers. This occurred through extreme scrutiny and surveillance of domestic work by employers, (M9, M19) blaming workers for various broken items and household problems, some unrelated to caregivers’ work, (M 11) prohibiting workers from leaving the house, (M 11) surveillance and questioning of caregivers’ food intake by employers and failing to provide nutritionally sufficient food, (M19, M26) and refusing to allow private phone conversations. (M12) In talking about humiliation in the domestic employment relationship, one worker described being forced to go through the garbage when her employer was trying to enforce rules about food consumption and conservation:

I’ve no intention of saying that my employer is bad. All that I’m expressing is these real events that have happened to me. Basically they don’t respect your character, your individual person. When I cook for the children, the remaining food that the children do not consume, I have to eat that food. If I don’t eat that food, my employer will be unhappy. There was one day I cooked a thick soup made with eggs for the children. One egg was that size (5 cm) there was about a radius of 2 cm remaining. The child coughed some kind of residue on the egg and I didn’t eat that piece. I threw it away. When my employer saw these he/she asked me, “where’s the remaining part of that soup.” I said, “I threw it away.” My employer said, “who told you to throw it away? Do you know how expensive eggs are?” I said, “I’ve
thrown it away this time I won’t do it the next time.” My employer proceeded to say, “I’m wasting this food.” I said, “Ok, I’ll give it back to you. I’ll buy an egg and reimburse you.” And my employer was silent. On that same day, there was 7 cherries remaining from the previous day. Of those cherries, 3 of them had gone bad. There were 4 good ones and 3 bad ones and I ate the 4 good ones but in actual fact they weren’t even that good. They were oldish. This is the same day as the egg incident. So I ate those 4 cherries and my employer saw the 3 remaining cherries on the table and proceeded to ask me, “where are the 3 cherries?” And I said, “3 of the cherries had gone bad so I threw them away. The 4 remaining, I ate them.” My employer said, “Did you really eat those cherries?” I said, “Yes, I did.” My employer then proceeded to say, “Is your mouth itching, are you just snacking? If you’re so prone to snacking, bite on yourself.” My employer didn’t believe me that I threw away the bad cherries. I said, “I truly did dispose them in the garbage.” My employer then proceeded to say, “go find the cherries.” I found the cherries in the garbage and I took them to my employer. I was basically rummaging in the garbage and finding these 3 missing cherries that my employer wanted to see. My employer then proceeded to say, “These are edible, they are completely acceptable.” And I had nothing to say. I had no words to reply to this. And I said, “for you to do this to me, I feel I have lost face. I feel like I’ve been humiliated and I have lost a sense of dignity.” (M12)

Another worker described the impact on her sense of dignity:

“I feel that at the beginning I was in a state of feudalism where I was a slave. I had no dignity whatsoever. To now, where I feel like I have a dignified life because I put some financial matters and distractions aside. This isn’t even the point but the point is that I can get through this period of time strongly. To change this dynamic.” (M11)

Both migrant and agency participants reported various types of abuse at work sites. Sexual abuse of women migrant workers was reported across different labour segments, including the restaurant industry, (A2) agricultural work, (A2) and domestic work. (M8, M7) In one case, an agency participant reported that where less than full-time work was provided, workers were exchanging sex with employers in order to obtain the extra hours necessary to bring the workweek up to full-time. (A2) Similarly to other dangerous or unjust working conditions, this agency worker reported the fear of being reported and the potential for the
employer to refuse to renew to the work permit and the worker’s status as reasons that a worker might not report sexual abuse at the workplace. (A2)

Many migrant workers described being regularly criticized and humiliated by their employers at work. This was prevalent particularly in the case of live-in caregivers, who were subject to close scrutiny by their employers. (M11, e.g.) The proxy for this harassment was often the failure to perform specific demands to the standards articulated by the employer, which were often extremely detailed and specific, and often outside the tasks included in the workers’ job description. For example:

Q: Are the jobs you’re doing the same jobs listed in the contract or are you doing other things that are not agreed in the contract?

A: My contract stated that I have to take care of children and to attend to simple domestic tasks. Now I am a cleaner and they live-in a big house. I do everything except tending to the rat holes in the house and cleaning the roof. Everything else I do it. We have a large gate outside the house and the asked me to scrub the fencing and if there’s certain areas I can get I have to use a toothbrush to clean the small areas. I have to do that work in the rain while holding an umbrella. (M12)

Live-in caregivers also reported that their employers would blame them for items that were broken in the household, and demand reimbursement, where there was no legitimate basis for this assessment. (M8, M19) For example, one employer deducted $250 from a caregiver’s paycheque on the basis that she had used the wrong finger to press a button on the stove, causing it to break. (M8) One worker associated her employer’s ability to continue humiliating treatment as contingent on the structure of the program and the employer’s role in the immigration process:

A: My employer wishes me to work to a level of 100% satisfaction.

Q: Do you feel like even if you were perfect, you could meet her standards?

A: It would be impossible for anyone to meet her standards. These episodes would be closely related with her moods. If her mood was somehow bad or negative, she would find an outlet.
Q: Why do you think your employer thinks it’s ok to talk to you that way?

A: Because, first of all she’s paying me and she knows that I need to work 2 years before I can begin my immigration. (M11)

Another worker in the restaurant industry attributed the employers’ abuse to their capacity to profit: “…people who have money are making money abusing workers.” (M30)

Caregivers also regularly reported control of basic aspects of physical life, such as food, private space, and ability to enter and leave the workplace. Even thought caregivers often cooked for the entire family, which is beyond the scope of their contract (usually stipulating that they are required to prepare meals only for the people for whom they are caring), they often reported being prohibited from sharing freshly prepared food, or otherwise restricted in their intake of household food. (M12, M19, M26) In one case where the worker had digestive problems which she attributed to lack of fresh fruit and vegetables in her diet, she explained that she felt compelled to comply with the employer’s demands:

Q: You are talking about you employer prohibiting you to eat fresh fruits and vegetables. How did they express that to you? How did they enforce that?

A: It was just face to face. She said, “you can only eat stuff in this area.” Just like that.

Q: How did you feel about that?

A: I could only obey and say ok. (M19)

One caregiver adopted a strategy to deal with an abusive employer in which she refused to accept pay, in order to give the employer the message that she was not only working for pay and that she could not be paid to tolerate abuse:

A: She would constantly say, “I’m paying you to work.” And I wanted to let
her know that I wasn’t working for the money. What I wanted to do was to help the family within my abilities.

Q: When you had that discussion did it change the dynamic?

A: I think that after that conversation, it’s slightly amusing, after that it seemed like on the exterior there were not many changes but I noticed that she know thinks and know that I’m not a person who holds onto the money issue and I’m not connected to money that closely.

Q: So did that change the dynamic between you and your employer? Did that give you something?

A: I felt that she’d still be angry or criticize me but I felt like I had a little bit of collateral to reply in certain instances. (M11)

Live-in caregivers also reported employers’ control over their waking and sleeping hours, access to food, ability to enter or leave the residence, and ability to access community services such as English lessons. (M12, M24, M19)

Some participants specifically identified the lack of sufficient protective measures by the employer:

At the beginning, I had one case. He was working at the meat-cutting industry and all the meat that they are cutting is frozen and after just a few months, he was already suffering from severe pain from the cold. And there were times when he could not work anymore. And he was so worried about that. I recommended him to Bridge clinic. He was still suffering from that and I said, “do they not give you gloves?” He said “sometimes we have gloves but sometimes we cannot also work when we have to cut thin slices, it’s hard to handle the cutter when you are wearing thin gloves.” His arms are already swollen from arthritis. (A3)

In other cases, employers were directly complicit in creating barriers to health care for injured workers:

Let me explain one case, the case of a migrant worker with an ear infection, he asked the manager because that’s usually the normal procedure for them to ask the manager for permission to go to a walk in clinic. The
manager ignored him. Three days he asked him could please take me to see a doctor I need to see a doctor. Ignored again. A week later he started bleeding then the manager brings him to a physician that has some kind of affiliation with them with the farm owner. And all these things cause lots of problems because what happens is these physicians that are somehow affiliated with the farm owners will not do a proper assessment will not fill out all the forms neither for example if the migrant worker needs to rest for a couple days for a week. Of course they are not going to do that because they work with the farm owners. (A2)

Like the legislation governing employment standards, workers’ compensation laws do not exclude workers on the basis of migration status. From the perspective of migrants, however, precarious migration status both increases the risk of health and safety problems at the workplace, and decreases the capacity of workers to obtain support in dealing with them.

4.6 Remedies

While precarious migrant workers are included within the scope of both employment standards and workers’ compensation laws in British Columbia, and do use these systems to some extent, the potential to activate these rights as workers is mediated by migration status within the employment relationship. In this section, I briefly describe the remedies available through both systems, review the available data relating to precarious migrants’ use of these systems, and explore the ways in which participants’ responses shed light on the role of migration status in the sphere of work.42

42 While a comprehensive review of the use of court-based litigation is beyond the scope of this dissertation (and in general less likely to be available as an option due to lack of access to legal counsel), one recent case bears mentioning here: In 2011, a group of temporary foreign workers filed a class action suit in the Supreme Court of British Columbia against Northland Properties, which operates Denny’s restaurants, claiming unpaid wages, compensation for recruitment fees, injury to dignity, and airfare. The case was settled before trial in March 2013. Migrant Workers Rights, “Denny’s Settles With Filipino Migrants” March 1, 2013, Migrant Workers Rights, online: <www.migrantworkersrights.net/en/resources/dennys-settles-with-filipino-migrants>.
The Employment Standards Act empowers the Employment Standards Branch the capacity to assess fines, file orders in court, seize property, and otherwise enforce decisions.\textsuperscript{43} The Act also establishes the Employment Standards Tribunal, to which parties can make an appeal if they do not agree with the decision of the Employment Standards Branch.\textsuperscript{44} Pursuant to the Act, any employee, former employee, or other person may make a complaint about a contravention of the Act. A complaint must be in writing, and should be made within 6 months of the breach of the Act, or within 6 months of termination for former employees.\textsuperscript{45} In order to obtain a remedy at the Employment Standards Branch, workers must provide their complaint through a “self-help” process, and the Branch forwards complaints to the employer for response. In some cases, this requirement is waived, including when there are language difficulties, or where the worker is a farm worker or domestic.\textsuperscript{46} These measures should make the complaint system more accessible to precarious migrant workers, as it would allow these workers to proceed directly to a complaint without having to engage their employer directly in a dispute.

In a response to an information request made under the Freedom of Information and Protection of Privacy Act, the Employment Standards Branch indicated that although its services were available to workers regardless of status, it did keep track of complaints made by “foreign workers” which includes both those with temporary work permits and those without. Since it started tracking this information in January, 2008, the Board heard between 56 and 98 complaints per year from this group of workers, and made determinations of contraventions of various sections of the Employment Standards Act by employers, including the following:

Section 21 - unauthorized deductions from wages
Section 18 - failure to pay wages on termination

\textsuperscript{43} Employment Standards Act, supra note 18, ss 98, 92, 91.
\textsuperscript{44} Ibid, s 102.
\textsuperscript{45} Ibid, s 74.
Section 28 - failure to produce payroll records
Section 8 - false representations as to the availability of a job, type of work, wages, or conditions
Section 16 - failure to pay minimum wage
Section 40 - failure to pay overtime wages
Sections 45 and 46 - failure to pay statutory holiday pay
Section 58 - failure to pay vacation pay
Section 17 - failure to pay wages within the prescribed time
Section 10 - charging money to employee for hiring or job placement
Section 12 - operating as an employment agency without license
Section 27 - failure to provide written wage statement
Section 63 - failure to pay compensation for length of service
Section 83 - mistreatment of employee because of complaint or investigation with the Board

Many complaints made under the Employment Standards Branch procedure by foreign workers are recorded as having been abandoned/withdrawn or subject to voluntary resolution or settlement agreement. Of those for which a determination was issued against the employer, in addition to the remedies ordered to compensate the worker, penalties were issued against employers in amounts ranging from $500 to $2500 per complaint, which amounts are prescribed by regulation on the basis of the number of previous contraventions by that employer.

Individual decisions of the Employment Standards Branch are not publicly available, but those of the Employment Standards Tribunal are. Decisions of the Employment Standards Branch can be appealed to the Employment Standards Tribunal. The bases for appeal are specified within the Act: where the Branch has made an error of law, where there was a breach of natural justice, or where evidence has become available which was not available at the initial hearing. The range of decisions available to the Tribunal is also determined by statute: it may confirm or vary the original decision, or cancel the original order, or refer

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48 Employment Standards Regulation, supra note 22, s 29(1).
49 Employment Standards Act, supra note 18, s 112.
it back to the Branch for redetermination.\textsuperscript{50} The Tribunal is the only formal avenue of review for decisions made by the Branch. While the Employment Standards Branch deals regularly with matters concerning precarious migrant workers, Tribunal decisions concerning precarious migration status are rare, and occur primarily in terms of the Tribunal’s interpretation of the Labour Market Opinion.

In one 2009 decision, the Tribunal considered an argument from an employer that the terms of a Labour Market Opinion (LMO) were not determinative of the job offer.\textsuperscript{51} The worker’s LMO indicated a higher wage rate than the worker ended up being paid, and the employer argued that the Tribunal did not have jurisdiction to enforce the terms set out in the Labour Market Opinion. The Tribunal found that the wage rate given in the LMO was relevant evidence of the agreement between the parties and could be considered by the Tribunal, and upheld the original decision against the employer. In a much older case,\textsuperscript{52} the Tribunal found that a Labour Market Opinion and work permit in themselves do not necessarily prove an employment relationship where there is evidence of a different kind of relationship between parties (in that case, a joint business venture). In a 2007 case,\textsuperscript{53} the Tribunal found that it had “no jurisdiction to award damages based on mistreatment of a foreign national working under visa” unless they fit within existing statutory standards. In another 2009 case,\textsuperscript{54} the Tribunal upheld a contract attached to an LMO: specifically, the standard form contract used for low skilled and live-in caregiver workers. It found in favour of an employer and awarded money back from wages owing to the worker for room and board as allowed by the contract.\textsuperscript{55}

In the area of worker health and safety, the Workers’ Compensation Board is empowered to make awards to workers, but also to make orders with regard to the safety of

\textsuperscript{50} Ibid, s 115.
\textsuperscript{51} BC EST # D121/09 (14 December 2009), online: BC EST <http://www.bcest.bc.ca/decisions/search.htm>.
\textsuperscript{52} BC EST # D483/98 (4 June 2001), online: BC EST <http://www.bcest.bc.ca/decisions/search.htm>.
\textsuperscript{53} BC EST # D094/07 (22 Oct 2007), online: BC EST <http://www.bcest.bc.ca/decisions/search.htm>.
\textsuperscript{54} BC EST # D094/09 (21 Sep 2010), online: BC EST <http://www.bcest.bc.ca/decisions/search.htm>.
\textsuperscript{55} But see Koo v 5220459 Manitoba Inc., 2010 MBQB 132, in which the Court found that the terms of a Labour Market Opinion cannot be enforced as terms of the contract.
workplaces and employers’ dealings with workers, including the unusual remedy of ordering employers to re-hire workers in certain circumstances.\textsuperscript{56} In response to a Freedom of Information request, WorkSafe BC disclosed records of worker claims for temporary and undocumented workers. Data were available for the number of claims, gender of the worker, age of the worker, and occupation type, dating back to the 1960s. Although the specific outcomes for workers were not available in this information release, it was clear that applications for benefits were processed regularly for temporary and undocumented workers. Over the past few years, claim numbers ranged from several hundred to over a thousand per year in both 2009 and 2010, across a wide variety of industries.\textsuperscript{57}

Workers who disagree with the initial assessment of their claim can appeal the decision to the Workers’ Compensation Appeal Tribunal (WCAT). This Tribunal has considered several cases in which the migration status of the worker may have affected the decision. In one case involving a temporary worker on a construction site, the worker argued that a language barrier and lack of information about how to report injuries prevented him from reporting an injury that he subsequently claimed; the board did not accept the argument in the specific facts of that case.\textsuperscript{58}

In another case, the Tribunal considered the situation of a temporary foreign worker originally hired as a truck driver. The worker did not meet certain licensing requirements, and the employer did not allow him to work as a truck driver as originally agreed. The worker ended up living at the employer’s house, and doing various household tasks without pay which he understood as being in exchange for room and board. The worker was injured while painting the employer’s house. The Tribunal found that the injury in this

\textsuperscript{56} Workers Compensation Act, supra note 31, s 153.


\textsuperscript{58} Case 2010-01513, (1 June 2010), online: WCAT <http://www.wcat.bc.ca/search/decision_search.aspx>.
case did arise “in the course of employment,” even though he was working outside the terms of his permit, and his work would have constituted an offence under the *Immigration and Refugee Protection Act.*

The rough outline of worker entitlements under employment standards and worker health and safety legislation present a picture which is generally favourable to precarious migrants: on the face of the law and policy governing them, precarious migrants are by and large treated as workers, equal in entitlement to protection and compensation without regard to status. Both systems are clearly cognizant of the presence of precarious migrant workers with British Columbia and to a certain extent have made efforts to include them. From the perspectives of study participants, however, status differentiation impacts upon the employment relationship in a manner that precludes access to these worker protections despite their formal recognition.

Migration status operated as a conditioning feature of the employment relationship for workers with and without status. For workers without status, their lack of status amplified the power dynamic with their employers due to the everpresent fear of deportation. Either through direct threat of status removal by employers, or through fear of the same even where no threat was explicitly made, lack of status contributed to workers’ sense that they couldn’t speak up about workplace abuses or lack of pay. (M17, M18 e.g.) For workers with temporary status, even when they were totally compliant with immigration requirements, the fear of losing status had much the same effect:

Without this status, without the status we need, we can be easily abused or mistreated. Because there is no extension of justice into this realm of our lives, she [the employer] could very well say that white is black and black is white. And even in instances where I was surely being reasonable and I had a voice of reason, it was completely disregarded. (M19)

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Another worker saw passivity as an unavoidable aspect of the time in which she needed to work as a caregiver in order to obtain permanent status:

This passivity, specifically speaking, means we have to be obedient toward our employers, secondly we have to listen to the government and what they say about our lives and our situations, we have to abide by their regulations in order to wait out this period. That’s it. (M16)

This was echoed by a third worker, who commented noted that consent to poor working conditions was implied by workers’ silence, which she saw as an aspect of Canadian culture: “...if you are silent, silence means yes here in Canada.” (M27)

The employer of this caregiver made oblique threats, but the worker interpreted them as being specific to her status:

A: My employer would say to me, “You know if you don’t work up to my standards, I have more severe ways to treat you.”

Q: What do they mean when they make these threats?

A: My employer knows that I am completely reliant and dependent on them for reference letters and my immigration application. They know you have no friends here, no people to help you. (M11)

Pursuant to the Employment Standards Act, employers are not precluded from terminating employees, but if they do so without just cause for termination, they are required to provide a minimum number of weeks of notice or payment in lieu thereof, in order to provide the worker with some time to obtain a new position. For citizen and permanent

60 Employment Standards Act, supra note 18, s 63. At common law, employees are often entitled to severance-based compensation beyond the statutory minimum, but for the purposes of this dissertation my focus is limited to the statutory regime for two reasons. First, it is a much more accessible venue, and thus much more likely to be relevant to precarious migrants. Unlike civil lawsuits for employment matters, which effectively require obtaining a lawyer at one’s own cost and thus are utilized by workers with above-average pay, the Employment Standards Branch is designed for public access and self-representation. Second, the
resident workers this provision may suffice, but the benefit of this provision for workers with precarious migration status is less certain: with a closed work permit, they will not be able to obtain legal authorization to work for a new employer on the basis of the labour market itself, but must find an employer willing to offer them a job and obtain a labour market opinion, which takes months. Thus, although status is not directly specified as a requirement to benefit from protection from arbitrary termination, in effect such protection is differentially available on the basis of migration status.

A few study participants spoke specifically about the availability of assistance for precarious migrants through the Employment Standards Branch procedures. Agency participants noted that they knew that workers could protect their rights through this method, and one reported being successful in doing so (M26) but that the fear of deportation or losing status could stop workers from making complaints, as described by these two agency participants:

One of our legal advocates focuses on employment standards complaints. And she helps a lot of caregivers with that. Clients will do it though not all of them. There are a lot of them that are reluctant to do it because they are afraid it will affect their immigration status. (A5)

Another agency participant noted that the Branch is willing to continue with complaints even after a worker has been deported, though, and will send the compensation cheque to the worker in their home country. (A4)

Of migrant participants who commented on the Employment Standards Branch process specifically, one commented that when she arrived, she and others in similar situations knew “nothing about laws.” (M17) Another migrant participant thought that working “illegally” would prevent her from making use of this option:

Q: Did you ever think of doing anything legal to try and get money from

Employment Standards Act represents the minimum to which workers are entitled, and thus functions as a part of the basic rights framework for workers.
that employer friend who didn’t pay you or compensation from your first employer?
A: I would like to do something to recover money from my friend, if I could say friend. But I don’t know what I could do because I was working illegally right. (M18)

One worker saw her assertion of rights as a determinative factor in her termination:

Actually it happened for the first family. …because I talked to them when I know more about Canada and the laws and talked to them after 3 or 4 months and then I just said it’s in the contract that I should work 8 hours and how much I should be paid. And then they agreed and I think that’s why they let me go at the end of the year because they were not expecting that to happen. They expected I stay there for any time they want. (M9)

Workers’ compensation legislation and policy do not formally bar any worker from reporting an injury, and one worker reported receiving workers’ compensation with no problems. (M22) However, the threat of immigration enforcement for some precarious migrant workers was described as a barrier to reporting:

Compensations, they don’t qualify because the owner is not reporting them and they are scared to be deported if they are in an accident. Some accidents, they prefer to deal by their own, seeing a doctor who doesn’t require any documents, just a payment. (A4)

A worker who had worked in the construction industry while unauthorized associated her involvement with the informal economy as a bar to workers’ compensation processes:

A: I said unfortunately I cannot not do anything about my...
Interpreter: Accident
A: Accident before because the condition to work was cash, yeah and if I work cash I cannot go to the authorities to ask for protection once I had my accident.
Q: Why not?
A: Because I work cash
Q: And you were worried about something happening?
A: Yeah because I work cash so that’s why I couldn’t go to the authorities. (M30)
Although this worker would have been protected through the workers’ compensation process, her status as an informal worker made her afraid to make a complaint to workers’ compensation authorities.

An agricultural worker working under a formal work permit described a barrier to workers compensation related to his migration status, but in his case it occurred through direct interference by the employer:

Q: Did you ever have any issues with your employer or with your workplace?

A: Yes. So this is my second year working with him. Three weeks [previously], when we started to work, I felt unwell. I had some problems some health problems. And on June 29th I asked him to see a doctor.

Q: What happened?

A: I mentioned to my boss that I wanted to see a doctor and he had a friend who was a chiropractor. But there was no result for me. So I talked to WCB and that bothered my boss. He wanted to fire me and his father didn’t let me take the cab to go to therapy and then I was reported to abandon my job and that was sent to Colima to the Consulate of Mexico. And I have no support by any agency. I don’t know what to do. My boss gave his version and it’s his word versus my word.

Q: What kind of injury did you have?

A: The injury was muscle inflammation from the neck to the lower back because of the weight of the liquid [carried on worker’s back as part of his duties].

... 

Q: So you reported it to your boss and your boss discouraged you from going to Worker’s Compensation but referred you to his own chiropractor. Do I understand?

A: His friend.

Q: Do you remember what your boss said to you?
A: That he was going to take me to his friend. And there was not going to be any problem with the pay and that I should go to work. So I have witnessed that he put some pressure on me to make a 3 day work on one day.

Q: So this was at the same time you were injured?
A: Yes.

Q: Was it possible for you to work at that time or was there too much pain?
A: I was taking pills and I didn’t feel the pain. But the pills got to a point where the pills didn’t work anymore and I couldn’t stand it. And that’s when I reported to WCB.

Q: So how long was the time from when you got injured to when you reported to WCB?
A: After 3 weeks of work on June 29th, I told my boss. That’s when XXXX, the person here, the lady here talked to his doctor called XXXX who’s doing the treatment.

....

Q: Did the boss declare that you abandoned your job?
A: My boss, not the father. He said I abandoned my job. (M1)

In the latter example, the employer was able to delay a worker’s claim for compensation and report of an injury, contrary to law—and as reported by the worker, in association with a report to the embassy that this worker had “abandoned” his job—a threat which carries the weight of the possibility of status termination, and the prevention of the worker from returning for another season.

This worker had legal status in Canada through his work permit, and was covered by workers’ compensation. However, because his status was tied closely to the employer’s potential to report him as having abandoned his job, his migration status effectively mediated his access to workers’ compensation, rendering the costs of reporting much higher than they would be for a worker with permanent status. The risks to workers in situations such as this are multifaceted: an injury may worsen if a worker is forced to work
past the point of injury (in this case, with an implied threat of non-payment for work), a worker may receive less compensation, an unsafe work site may cause risk to other workers while unreported. The employer’s threat to report the job as abandoned also has consequences for a migrant worker beyond those which would exist for other workers: the renewal of their status and livelihood through the seasonal agricultural work program depends on the employer’s selection of the worker for the next harvest season.

This dynamic is not unique to the agricultural workers’ program: it could occur in any situation in which a worker relies on an employer for status continuity, including all Labour Market Opinion-based work permits. Employers are obligated by law to report injuries. In the case of precarious migrants, however, the potential for discontinuity of status and the employer’s role in reporting workers’ performance renders employers able to refuse to report injuries with little fear of reprisal. In the case of the worker above, the worker had reported his injury and received workers’ compensation, but remained fearful that he would be removed from the foreign worker program on the basis of his employers’ report.

4.7 Conclusion

In this chapter, I have explored the impact of precarious migration status on labour force engagement and the protections offered by provincial laws and policies in the area of employment standards and workers’ compensation. Using the perspectives of study participants as an entry point, precarious migration status emerges as an influential force on migrants’ engagement with the labour market which results in differential access to legal protections. This occurs through deskilling and decreased job security and mobility which occur as features of non-permanent status and operate as contextual factors in the operation of employment relationships. Within this context, the operation of federal immigration structures within employment relationships serves to empower employers through the association of work status with immigration status, which in turn results in a
particular iteration of the employer/worker relationship in which workers are less able to seek to enforce their rights.

All precarious migrants either lack status, are subject to work permits restricted to a single employer, or have open work permits but are still legally differentiated through their social insurance numbers and their time-limited work permit. All three of these variations on precarious status were associated with job security and mobility problems, amplifying the power differential between workers and employers. As such, even where precarious migrant workers are ostensibly protected by provincial law, the risk of losing status undermines these protections as a function of status distinctions, which also flow directly from law. Although it is clear through the available data that both employment standards and workers’ compensation schemes have specifically contemplated the inclusion of precarious migrant workers within their ambit, these regimes do not account for the effects of migration status differentiation in terms of the ways in which immigration status interacts with the employment relationship, and the ways in which migrants’ relations with state-based protections are thereby mediated. The law entrenches precariousness occurs through both the institutional production of precariousness itself within the federal immigration system, but also through the interaction of the construct of status with the sphere of work, including relationships with employers as well as the application of worker protection laws which clearly attempt to include workers regardless of status.

For all precarious migrants, the stakes of unemployment are amplified; not only is there an increased power differential between worker and employer, but the migrant’s relationship with the state also interacts in specific ways with economic status. For example, workers without status or with a closed work permit may be compelled by poverty to accept unauthorized work even while they are aware of the potential consequences. Both the impetus to work without authorization and the stakes associated with undertaking such work are formed in the shadow of differential status. Because precarious migrants

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experience particular barriers to participation in state-based social protection, they are more likely to be in a position of poverty, and less likely to have access to financial alternatives to unauthorized work. Precarious migration status changes the stakes: where a citizen worker risks material privation in seeking labour force attachment, a precarious migrant risks deportation, criminal sanctions, and loss or preclusion of their ability to reside legally in Canada simply by seeking and accepting work.

Differential access to protection against exploitative and unsafe working conditions on the basis of status thus functions to create and maintain a class of workers whose labour is welcome and necessary, but who work without equal benefit of protective laws, and who are deprived thereof on the basis of a specific shared trait, namely, precarious migration status. The data provided by participants in this chapter show that inclusive legal structures exist alongside the reality of differential treatment, which often occurs through the interaction of precarious status with employment relationships. Provincial law and policy make it clear that those who enter Canada to provide labour may be seen as members when they seek protection in their role as workers. As will be discussed below, this is not the case with regard to the social state. However, through the mediating effect of migration status, inequality becomes structurally entrenched alongside the liberal gestures of the law. Through the federal immigration regime, law creates precarious status within Canada’s borders. While provincial legal provisions governing worker protections do not discriminate directly on this basis, migration status results in differential access to worker protections. Through the experiences of precarious migrants, law becomes visible as a complex and multivalent set of structures, functioning both as the catalyst for inequality and the promoter of egalitarian values.

Paid work is a primary axis of life for precarious migrants who live in Canada. It is one venue through which they become socially and economically connected to Canada, and in which they spend much of their time and effort. Canada’s migration policies strongly encourage temporary labour migration, but within federal legal structures, the maintenance of migration status is tied to the discretion of the employer. Although status is not explicitly used to differentiate workers within the provincial regimes responsible for
protecting standards and safety of work, precarious migration status is associated with barriers to adequate standards of work through its impact on the employment relationship. Work is not the only axis of membership and belonging, however, nor is it the only venue through which the governance of precarious migrants can be assessed. In the following chapter, this dissertation will explore access to the social state, following the ways in which migration status enlarges the disjuncture between precarious migrants’ presence in Canada and their participation in social entitlements commonly associated with membership in the Canadian state.
Chapter 5. The Social State

5.1 Introduction

Having established the participation of precarious migrants in work and life within the Canadian state in Chapter 4, this chapter will seek to trace their involvement with the social state. While access to state-funded health care, basic education, labour security, and a minimum level of income is subject to systemic barriers for many groups,¹ initial entitlement to these is associated with membership in the Canadian state for citizens and permanent residents. Such entitlement is not assumed in the case of non-permanent members, who are often excluded on the basis of migration status specifically. Migrants with less than full status encounter formal or informal institutional barriers to the social state, and their potential access to these benefits is often deployed to justify restriction of membership, regardless of their connection to life in Canada. Precarious migrants participate in social and economic life, often undertaking paid and unpaid work, but encounter barriers to membership entitlements at the level of the social state.

This chapter will provide an outline of the law in four major fields which form cornerstones of the social state, namely publicly-funded health care, education, Employment Insurance, and employment assistance (welfare), attending to the application of these laws to migrants with precarious status.² Within each of these fields, I draw on interview data to explore the ways in which precarious migrants interact within these areas of law, with specific focus on the role of migration status as a mediating factor in

² There are other state-based entitlements in which precarious migrants may experience exclusion, such as public pensions, child tax benefits, and drivers’ licenses. Here I have chosen to focus in detail on the four listed social state elements both because of their direct role in meeting basic needs as well as their association with membership and identity within the Canadian state.
participants’ access to the social state. In this chapter, I examine specific laws and policies relevant to the provision of entitlements as they pertain to precarious migrants, drawing on interview data to shed light on the ways in which the law is applied. I start with publicly funded healthcare, looking at federal and provincial statutes, provincial policies, and local practices in light of information provided through interviews. I then follow a similar structure with regard to publicly funded education, Employment Insurance, and employment assistance (welfare).

5.2 Health Care

As an aspect of the social state, health care is legally and culturally entrenched as an aspect of Canadian state membership, and functions as an integral part of identity discourses for permanent members of Canadian society. Universal healthcare forms a basis on which Canada sees itself as a more humane and equitable society, in particular compared to the United States. These values are repeated in the text of the Canada Health Act, which governs the provision of federal funding to provincial health care plans. At the same time, the exclusion of those identified as non-members from publicly-funded health care is touted as a moral victory against those who purportedly seek to take advantage of Canada’s generous system. For many precarious migrants, the need for health care is shaped by the particular conditions of work they encounter, which may include a heightened risk of injury or illness in the course of employment, paired with employer-based barriers to

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4 Canada Health Act, RSC 1985, c C-6. The Act doesn’t specify permanent members but refers instead to “residents” in section 3, which states: “It is hereby declared that the primary objective of Canadian health care policy is to protect, promote and restore the physical and mental well-being of residents of Canada and to facilitate reasonable access to health services without financial or other barriers.”
5 See, eg “News Release: Reform of the Interim Federal Health Program ensures fairness, protects public health and safety” Citizenship and Immigration Canada, online: <http://www.cic.gc.ca/English/departmen/media/releases/2012/2012-04-25.asp>, in which Immigration Minister Jason Kenney is quoted as describing Canadians as “a very generous people and Canada has a generous immigration system” and describing the purpose of changes (removing health care benefits from refugee claimants as “…taking away an incentive from people who may be considering filing an unfounded refugee claim in Canada.”
health care, as detailed in Chapter 4. Although the primary criterion for health care in British Columbia is residency, the definition of this requirement in policy and regulation often incorporates a further requirement for immigration status as a necessary component of residency. For those migrants subject to federal health coverage through the Interim Federal Health Program, access to coverage is explicitly tied to status. Study participants described barriers at the level of obtaining sufficient documentation to establish their status and obtain health care, and at points of service including medical offices and hospitals. In this section I describe the law as it applies to precarious migrants, and the ways in which study participants encountered the health care system in relation to their migration status.

5.2.1 Legislation

The Canada Health Act refers in its preamble to “access to quality health care without financial or other barriers,” and establishes basic requirements for provinces to establish non-profit, publicly funded health care with accessible health care for “insured persons.” “Insured persons” is not defined in reference to immigration status, but rather is a residual category—it means all residents of a province, other than those still serving a waiting period to become residents, and those covered by specific federal plans.6 “Resident” is defined as a person who is “lawfully entitled to be or to remain in Canada” who resides in the province in question, and specifically excludes “a tourist, a transient, or a visitor to the province.”7 Although the province governs access to health care for the vast majority of its residents, a specific federal program applies to some precarious migrants as an ancillary to its immigration jurisdiction, on a non-statutory basis.8 People making risk-based applications such as refugee and pre-removal risk assessment applications are covered by the Interim Federal Health (“IFH”) program, and thereby entitled to a minimal level of public health

6 Canada Health Act, RSC 1985, c C-6. ss 2, 3.
7 Ibid, s 3. The standards established by federal law are non-mandatory due to the division of powers in favour of provincial control of healthcare. However, because these standards function as a condition of federal financial transfers, the provision of services is toughly consistent between provinces and territories.
care\(^9\) on the basis of their status. Although the policy on who qualifies for this coverage appears clear, difficulties may arise between federal and provincial authorities where the question of federal or provincial entitlement is not obvious, or where policies are inconsistently applied. Furthermore, Interim Federal Health documents ("IFH documents") have a specific expiry date, and must be renewed prior to that date in order for people to have continuous coverage. For migrants covered by this policy, the provision of health care is tied directly to their ability to obtain an IFH document, which is separate from their immigration documents. Participants reported that the federal government’s delay in providing a renewed IFH document was a complete barrier to health care. This occurred both through the expiry of the immigration status document, and from the delay in waiting to obtain the IFH document, even where immigration status was continuous. Without this document, people were unable to obtain services from doctors or hospitals. (A1)

Health care is a matter of provincial jurisdiction pursuant to Canada’s constitution,\(^{10}\) and in British Columbia it is governed by the Medicare Protection Act,\(^{11}\) and associated Regulations.\(^{12}\) The Act itself does not make specific reference to temporary migrants, but entitlement to health services (or "MSP" as it is colloquially known) is determined on the basis of residency. A “resident” in this Act is defined as a permanent resident or citizen, who “makes his or her home in British Columbia” and is present in British Columbia for 6 months out of each year.\(^{13}\) As a matter of policy, the Ministry of Health also requires applicants to wait for up to three months after establishing residency before granting

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\(^9\) While coverage for refugee claimants under this program was once fairly robust, policy changes in 2012 cut services to refugee claimants. Depending on the country of origin of the claimant, they are now eligible either only for emergency services and services to prevent public health risks, or for services to prevent public health risks only (no emergency services). See Order Respecting the Interim Federal Health Program, 2012, SI/2012-26 and Citizenship and Immigration Canada, “Interim Federal Health: Summary of Benefits,” Citizenship and Immigration Canada, online: <http://www.cic.gc.ca/english/refugees/outside/summary-ifhp.asp>.

\(^{10}\) Constitution Act, 1867, 30 & 31 Vict, c 3.

\(^{11}\) Medicare Protection Act, RSBC 1996, c 286, s 1.

\(^{12}\) Although several regulations exist pursuant to the Medicare Protection Act, the only one relevant to this dissertation is the Medical and Health Services Regulation, BC Reg 426/97.

\(^{13}\) Medicare Protection Act, supra note 11, s 1.
coverage. The Act also creates a secondary category of “deemed residents.” Deemed residents are defined in the Regulations on the basis of specific immigration status. They include study or work permit holders with a minimum of 6 months of legal status, some Temporary Resident Permit holders, and spouses and children of residents where an application has been made or sponsorship has been confirmed. Medical insurance coverage for temporary residents is usually limited to the time period for which they have been authorized to remain in Canada, and coverage will end the last day of the month that their status document expires unless an extension is processed.

Within provincial legislation, at first glance, authorized temporary status seems to be coextensive with medical coverage, but there are situations in which even those with temporary status are unable to obtain care. For example, people waiting for their renewed work permits after the expiry of previous permits have implied status under the Immigration and Refugee Protection Act as described in Chapter 3. Migrants in this situation are not “out of status,” but they are waiting for confirmation of status by way of an updated work or study permit, but cannot obtain funded health care. People with implied status may be unable to extend their provincial health care coverage while they wait for their status document to arrive, as described by these two study participants:

So it is a big problem when clients don’t have status because MSP won’t extend their coverage. We had one case where it was critical that the caregiver have access to health care coverage because he had chronic renal failure and he had to be hospitalized and because he didn’t have coverage, he ended up with a medical bill of $50,000 (A5)

I needed to retake a pap smear because I took one before and it was irregular so they ask me to take one after 6 months, so that was something that was kind of important and I need to do it soon. So but my care card

15 Medical and Health Services Regulation, BC Reg 426/97, s 2. In practice, for inland spousal applicants, the provincial health authority often requires proof not only of filing an application, but a letter from CIC confirming that “first stage approval” has been issued (which is not usually available until several months after the date of application), or proof of sending the application plus a paper visitor's record of at least 6 months' duration.
was expired and when I called them they told me to just keep waiting, but nothing ever arrived, so I had to go to free clinic because as a foreigner I find medical service really expensive here. (M28)

One agency worker described a young HIV+ man dying without health care after his study permit expired:

There was a meeting of a bunch of different service agencies about a year ago for a young man who was in a situation where he was unable, he maybe wasn’t connected to community services, his education visa had ended and then he was in need of health care and somehow fell through the cracks and died. I don’t even know if he was thirty at the time. (A1)

The interaction between federal and provincial health care systems also created barriers to care:

The people who don’t have access to IFH, are in this nebulous time period of maybe trying to get work permits, and TRPs, who, every time they have to renew a work permit, there’s this period of time when their current work permit has expired, even though they’re within the timeline they should apply for their next one, and their MSP expires (A1)

5.2.2 Policy

The British Columbia Ministry of Health’s policy manual indicates that visitors to Canada are excluded from provincial health coverage, as are refugee claimants. All temporary migrants who are covered need to be able to show an immigration document with validity for at least 6 months (work permit, study permit, or temporary resident permit), and the waiting period for residency begins on the date their document is signed by immigration authorities. People who have applied to extend their temporary migration status can have their health coverage extended if they have applied for and obtained a new permit before the last one expires. The manual gives two different instructions for processing in such situations, which may affect the continuity of status: If the migrant applied for a new
permit before the expiry of the old one, but have not received it because of processing delays, they are entitled to have continuous coverage.\textsuperscript{16} Another section of the same manual, however, states that continuous coverage is only allowed if the new permit is issued before the end of the month the last one expired; if not, cases are transferred to a different decisionmaker.\textsuperscript{17} This may result in a lack of coverage while people are waiting for new documents from Citizenship and Immigration Canada, even where they are considered to have legal status via implied status within federal immigration law.\textsuperscript{18} If a person is out of status entirely, and then they have their status restored, they are required to meet the 6-month document requirement again, with the new document, and they must go through the waiting period again.

Precarious migrants lacking status entirely were often unable to obtain state-funded health care at all, including for childbirth and HIV-related medical concerns.\textsuperscript{19} (A2, A4) Although emergency services were available on a private-fee basis, some migrants reported their reluctance to use services because they feared deportation or were unable to bear the costs of treatment. In one reported case, immigration enforcement did arrive at a migrant’s house to initiate deportation shortly after an emergency room visit. (A4) One participant described paying $5000 for basic childbirth services in the 1990s, (M30) and another reported more recent figures of $12,000. In the latter case, the woman made alternate arrangements to give birth at home for a lower cost with a midwife:

\begin{quote}
Then her visa expired, she was still pregnant of course and then the information given to them was that they had to pay almost $12000 in the labour if they want service. Then we ended talking about a midwife then she got a midwife for $2500. Then what we end up doing is that because they don’t have status then they usually live-in a building with 8, 10 people
\end{quote}

\textsuperscript{17} Ibid at 61.
\textsuperscript{18} Immigration and Refugee Protection Regulations, SOR/2002-227, s 186(u).
\textsuperscript{19} Although as noted in interview A2, in 2011 a pilot project was commenced to provide medical care associated with HIV/AIDS was available to patients through the STOP AIDS program regardless of status or medical insurance.
and the delivery is obviously going to be at home, then in the case of somebody without status we have to negotiate with the landlord and tell the landlord, there is going to be a delivery here, please if you hear a lady screaming don’t call the police. We have to tell the neighbours don’t call the police if you hear a lady screaming it’s just that there is going to be a delivery at home. Then, taking all these extra measures, it’s ugly. (A2)

The same agency worker reported a case in which a migrant worker with immigration status, but without a provincial medical card, was unable to pay a $700 hospital fee for lab services, and the hospital staff called police on this basis. (A2)

There are a small number of clinics in the lower mainland which provide services to people without medical coverage, including both migrants and others without provincial medical cards. One participant had used such a clinic:

When I didn’t have any status, once I got sick and I was lucky that there are clinics that offer you service without asking what is your status in Canada. (M18)

After interviewing study participants, I made Freedom of Information requests to health districts responsible for the geographical areas covered by the study, namely Vancouver Coastal Health and Fraser Health.20

5.2.2.1 Vancouver Coastal Health

Vancouver Coastal Health indicated that it did not have any materials concerning information sharing with immigration authorities. They provided policies on access to health care, one of which states “residents of Canada should have access to full services of

20 A map of the area served by Vancouver Coastal Health is available online at: <http://www.vch.ca/media/map_vch_area.jpg>. A map of the area served by Fraser Health is available online at: <http://www.fraserhealth.ca/media/FH_map_municipal%281%29.pdf>. From both of these agencies, I requested policies and guidelines relevant to billing for uninsured persons and the determination of residency or immigration status, and any memoranda or policies relevant to information sharing with Citizenship and Immigration Canada and the Canada Border Services Agency.
the Canadian health care system. This encompasses Canadian citizens, landed immigrants, and visitors on work or student visas.” Emergency care “should be available to everyone” but on the assumption of cost recovery from patients excluded from coverage. For urgent care, the policy is “to stabilize and repatriate the patient.” Elective insured treatment (i.e. non-emergency care which is regularly available to Canadian residents) is not available to “foreign patients” unless they are admitted to Canada under a Minister’s permit, or other federal immigration approval (landed immigrant, study permit), the physician and other necessary specialists have agreed to treat the person, and the treatment is either extremely specialized and not available elsewhere, or the person requires the treatment for survival or reasonable quality of life.21 The policy further explains that the need for treatment should be the only basis for decision. It states that treatment should not be offered where the person could get access to health services elsewhere, or on the basis of “social criteria” (of which the policy gives examples: “marital status, social status, dependents...contributions to society, squeaky wheel considerations”). An exception to the rule of cost recovery is articulated as follows: “On occasion, the patient’s extreme need for treatment, or some other benefit accruing to VHHSC [the health authority] (e.g. improved public relations), may justify treating them on a charitable basis.”22

In interpreting the provincial regulations governing healthcare, Vancouver Coastal Health uses a chart of immigration status and documents to determine whether patients are resident or nonresident for the purposes of access to health care. People are considered residents when they have a work permit, study permit, or confirmation of permanent residence after the first three months of residence in Canada, and if they can obtain Medical Services Plan coverage. Refugee claimants are eligible for care, but only so long as they have valid Interim Federal Health documents. Those with working holiday visas are not eligible for coverage as residents. Immigration and MSP documents are required upon

21 Policy sheet “AN 0500 - Non Canadian Residents as Patients” provided by email dated April 18, 2012, from Jackie Tang, Vancouver Coastal Health in response to a written request made under the Freedom of Information and Protection of Privacy Act, RSBC 1996, c 165 at 1.
22 Ibid at 2.
request prior to obtaining health or hospital services. For those who are unable to provide the required immigration documents, they must pay for health services.23

5.2.2.2 Fraser Health

Fraser Health defines non-residents of Canada as those who are:

From outside of Canada either with or without a visitor visa
Unable to provide proof of valid residency status (i.e. Landed immigration papers or permanent residency cards or student or work visa issued for 6 or more months)
Refugee claimants without valid Interim Federal Health Coverage on the date of the service
Returning Canadians who are not permanent residents of Canada (not physically present in Canada at least 6 months in a calendar year)24

While all of the status categories used in this policy exist in the vocabulary of federal immigration law, this policy also activates those definitions to assess the validity of residency in ways which diverge from status as authorized in the federal immigration regime. For example, this policy has built in a residency determination which is stricter than that required under federal law: while the Immigration and Refugee Protection Act requires permanent residents to maintain physical presence in Canada for two out of five years (and citizens have no such requirement at all), this policy seems to require residence for 6 months out of every year.25

23 Vancouver Coastal Health also provided examples of medical services rates which could be billed to nonresident patients: an emergency room visit costs $545, for example, and a standard bed day rate is $3235 per day for hospital stays, and 1,750 for an MRI. For those who are residents, but uninsured, there are costs but the costs are listed at considerably lower rates than those for nonresidents. Policy sheet “VGH-UBCH-GFS Patient Daily Rate Sheet” provided by email dated April 18, 2012, from Jackie Tang, Vancouver Coastal Health in response to a written request made under the Freedom of Information and Protection of Privacy Act, RSBC 1996, c 165 at 1.

24 Policy sheet “Admission of Non-Residents of Canada and Uninsured Residents of Canada” provided by email dated May 10, 2012, from Darcey Kelner, Fraser Health in response to a written request made under the Freedom of Information and Protection of Privacy Act, RSBC 1996, c 165 at 1.

Like Vancouver Coastal Health, Fraser Health uses a definition of “uninsured” patients to exclude both residents without insurance and those who are waiting for provincial medical care. In order to have access to emergency services, these patients are required to provide a deposit on admission. Furthermore, Vancouver Coastal Health records migrants’ immigration status expiry dates, and work or school information upon admission. Physicians are directed to discuss with nonresidents and uninsured persons “their earliest possible discharge or transfer back to their home country or province as soon as possible after their admission.” The treatment costs given by this district are similar to those of Vancouver Coastal Health.

Several study participants mentioned debts and costs associated with accessing health care services when they did not qualify for the Medical Services Plan. Such costs occurred primarily in the case of workers without authorization, but health care fees also accrued in the case of one worker who had a work permit but had not yet met the requirements of “residency” for the purposes of obtaining medical coverage. Health care costs for uninsured persons ranged from about $10-12,000 for a routine hospital childbirth to $50,000 for care for kidney failure.

While not explicitly identified by participants as an issue, it is also likely that barriers to health care access are associated with fear of status removal on the basis of possible

26 Supra note 24 at 1.
27 The following data is recorded for nonresident persons: citizenship, passport, permanent resident card data, refugee claimant document, work or study visa number and dates of issue and expiry as well as work or school name and phone number. Policy sheet “Admission of Non-Residents of Canada and Uninsured Residents of Canada” provided by email dated May 10, 2012, from Darcey Kelner, Fraser Health in response to a written request made under the Freedom of Information and Protection of Privacy Act, RSBC 1996, c 165 at 6.
28 Supra note 24 at 6.
29 Policy sheet “Hospital Rates Table” provided by email dated May 10, 2012, from Darcey Kelner, Fraser Health in response to a written request made under the Freedom of Information and Protection of Privacy Act, RSBC 1996, c 165 at 6.
medical inadmissibility.\textsuperscript{30} For live-in caregivers, the requirement for a second medical examination prior to become a permanent resident was removed in 2010.\textsuperscript{31} However, the delay and uncertainty with regard to obtaining permanent status fosters a perception among applicants that they should not ask for assistance from the state while they are waiting for permanent residence. As I have documented below with regard to Employment Insurance, it is likely that precarious status reduces access to health care for precarious migrants with and without status authorization on the basis of this fear.

Through both migrant perspectives and government information about the policies and practices through which health care is governed, it is clear that precarious status operates as a mediating factor in accessing health care in multiple ways. The federal taxonomy of migration status is used in provincial healthcare legislation to create a category of “deemed residents,” under which migrants are excluded if they do not fall within one of the listed categories. Hospitals and health districts also have their own policies which govern specific institutional practices, and which vary, but tend to be more restrictive in their application of status requirements than the healthcare legislation itself. Specific iterations of this occur through local institutional interactions in which immigration law and healthcare law interact, such as delay in receiving permits or shifting patients back and forth between federal and provincial coverage. Institutional practices governing the allocation of healthcare to precarious migrants emerge as locally specific, and somewhat unpredictable in their integration of migration status requirements. Migration status functions as a barrier both through formal exclusion in legislation, but also through particular institutional practices which function to exclude even those who are legally entitled to coverage.

\textsuperscript{30} Pursuant to the \textit{Immigration and Refugee Protection Act}, foreign nationals may be medically inadmissible to Canada if they are “likely to be a danger to public health,” “likely to be a danger to public safety,” or “might reasonably be expected to cause excessive demand on health or social services.” \textit{Immigration and Refugee Protection Act}, supra note 25, s 38.

\textsuperscript{31} \textit{Immigration and Refugee Protection Regulations}, supra note 18, s 30(1)(g).
5.3 Education

Alongside health, basic public education\(^{32}\) for children has a longstanding association with membership in Canadian society. While only a minority of migrant participants (\(N=5\)) had children with them in Canada, access to public education for their children was conditioned by their migration status. Access to education has moved toward inclusion in Canadian urban areas. The Toronto District School Board has adopted a “don’t ask, don’t tell” policy which enables schools to enrol and teach students independently of their migration status, as well as committing to the non-disclosure of immigration status information to Canadian immigration authorities.\(^{33}\) Activism toward a similar goal is also underway in Montreal.\(^{34}\)

An exploration of British Columbia’s provincial laws and school board policies and practices reveals status-specific requirements which, like those concerning healthcare, are formally associated with the definition of a “resident” but which turn on migration status either directly or through their effect. In 2011, the British Columbia Ministry of Education issued a policy guideline which gave instructions on how to determine residency with regard to immigration status. In theory, this policy would be applied in a uniform way throughout the province. In reality, however, school districts disclosed a wide variety of practices concerning the screening of students and their families on the basis of migration status, usually in association with residency determinations. Similarly to health care, migration status tended to be used to justify restriction and exclusion, and increasingly so from the level of statute to that of policies and practices. In this section I explore the legal structures governing entitlement to publicly funded education. Drawing on the

\(^{32}\) Although some postsecondary education is funded in large part by governmental sources, this section is limited to consideration of primary and secondary education as provided by the state.


perspectives shared by study participants, I trace the impact of migration status through policies and practices in which the law is applied.

a. Legislation

Although education is a matter of provincial jurisdiction, it is mentioned specifically in s. 30(2) of the federal *Immigration and Refugee Protection Act*, which states:

30.
(2) Every minor child in Canada, other than a child of a temporary resident not authorized to work or study, is authorized to study at the pre-, primary or secondary level.\(^{35}\)

This section does not guarantee enrolment of students, which is a provincial responsibility, but it does confirm that all minor children except those whose parents are not allowed to study or work under the *Immigration and Refugee Protection Act* are not breaking immigration law by attending school. This section has not been defined in the case law, so it is unclear whether a “temporary resident not authorized to work or study” refers only to a visitor, or whether it also excludes temporary resident permit holders, or persons with no status. Read in conjunction with s. 22 of the same Act, which defines temporary residents as those who have obtained a document after meeting requirements, this section can be construed narrowly to exclude only those who have a document other than a work or study permit. This interpretation would put children without status, and those of parents without status, within the sphere of authorization to study. While this provision is of interest, because its application is limited to immigration law, it has little practical potential in terms of the application of provincial laws governing education, on which the remainder of this section will focus.

\(^{35}\) *Immigration and Refugee Protection Act*, supra note 25, s 30(2).
The British Columbia School Act requires children residing in British Columbia to enrol in school by age 5 and until age 16, and a corresponding responsibility of the provincial government to provide education for “residents” in British Columbia free of charge. The Act does not define “ordinarily resident,” nor is this term interpreted in case law in the specific context of the Act. The provincial Ministry of Education has, however, set out specific indicators that it will consider as aspects of “ordinary residence” based on case law more generally, as discussed in detail below. If a student is found to be part of a family “ordinarily resident,” the student will be able to enrol without fees. If not, they may be required to pay fees to attend school.

In some cases, children’s precarious immigration status did not result in automatic intervention or differential treatment by schools upon attendance, but this could change once students came to the attention of the school for a specific reason. One agency participant reported that lack of status sometimes came to the attention of schools when a student became ill and required medical attention, at which point, the lack of medical plan care and other Canadian identification became clear. In one case, a school refused to enrol students without sufficient proof of status, and in another, parents were afraid to enrol their children in school because they wished to avoid having their immigration situation made more visible.

For migrant participants who had made refugee claims, the initiation of the refugee claim process was identified with increased access to the education system for their children.

In one case, an authorized foreign worker parent of a Canadian citizen child described what he called an “interrogation” by a school on the basis of his status:

A: The school interrogated me about my status; if I lose my status my child won’t be able to continue studying.
Q: So you said interrogated you, can you tell me a bit more about how that happened or what they asked you for?
A: The school itself they weren’t, they didn’t ask very directly, but the board of education, the school board they interrogated me about that.

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36 School Act, RSBC 1996, c 412, s 3.
37 Ibid, s 82(1).
Q: Your child is a Canadian citizen, how did they come to know that your status is something they want to talk to you about?
A: I am not sure exactly how they were able to identify me but I guess it was because when enrolling my child into school I submitted information about my personal status.
Q: So was there a form where you had fill in something about what your immigration status was when you were enrolling him, your status or just your child’s status or both?
A: There was a form that I had to comply with.
Q: So when did they, did they ask you for a meeting, or did they talk to you when you dropped your son off, how did they talk to you?
A: They had a meeting with me in the school board.
Q: In the school board offices not in the school?
A: School board office.
Q: Was that for yourself and your wife?
A: Together yes.
Q: So what sort of things did they ask you?
A: So they basically let me know that had my visa expired, if it wasn’t granted extension that my child would have to leave or pay over $10,000 as an international student.
Q: So when did this happen, what school did this happen at?
A: When my child was 5 and half years old they made this meeting. When the initial entry into school, the initial enrolment.
Q: Are they aware that your child is a Canadian citizen?
A: They knew because we had his passport and his identification.
Q: So since that time have you had any interactions with the school board about that same issue?
A: Every just a little bit prior to when my visa expires, they contact me every year.
Q: Do they phone you or do they send you a letter?
A: The school board gives a letter to the principal of the child’s school, the principal gives it to my son’s teacher, my kid brings it home to me.
Q: Is this in Richmond or Vancouver?
A: Vancouver. (M25)

This situation provides one example of a school board tracking immigration status of the parents in order to determine whether to provide state-funded education; the school and board kept track of their status as an aspect of their own records. The threat of exclusion on the basis of parental status is consistent with the British Columbia Ministry of Education policy on fee assessment for foreign students and the policies of some schools, which bases
the availability of education on the status of the parents, regardless of the status of the children, as discussed in detail below.

b. Policy

On May 25, 2011, British Columbia’s provincial Ministry of Education issued a policy statement to be applied by all school districts with regard to which students are provincially funded and which are not. The policy describes its purpose as follows:

Boards of education are entitled to scrutinize the purpose for which the person or family has established its residence in the community to prevent an abuse of the system under which higher fees may lawfully be charged for out of province/international students.38

This policy gives a list of indicia of “ordinarily resident” which does not refer directly to immigration status:

- Ownership of dwelling or long-term lease or rental of dwelling,
- Residence of spouse, children and other dependent family members in the dwelling,
- Legal documents indicating British Columbia residence,
- Provincial driver’s licence,
- Employment within the community,
- Parent or guardian filing income tax returns as a BC resident,
- Provincial registration of automobile,
- Canadian bank accounts or credit cards,
- Links to community through religious organizations, recreational and social clubs, unions and professional organizations,
- Subscriptions for life or health insurance, such as MSP coverage, and
- Business relationships within the community.39


39 Ibid.
The policy refers specifically to immigration status in a later section:

Immigration status is relevant but not determinative of ordinary residence. The determination of whether a person is ordinarily resident should never be based solely on the person’s immigration status. A person need not be a Canadian citizen or permanent resident to be ‘ordinarily resident’ in BC for the purposes of s. 82. For example, persons who have applied for convention refugee status but not yet received a determination, and persons who have applied for permanent resident status from within Canada, are ordinarily resident in BC if there are other indicators of continuity with the community and residence for a settled purpose other than receiving free public education. On the other hand, a person who comes to Canada on a time-limited basis and has not taken steps to obtain permanent residence in Canada usually will not be ordinarily resident because he or she has no legitimate expectation of remaining in Canada. 40[emphasis mine]

Although the above excerpt states that immigration status is not determinative of residence, the policy also includes a list of types of immigration status which indicate residency. The very creation of such a list may invite exclusion for those who are not listed. These categories are described in the policy as being additive to those who meet the residency requirements of section 82. According to this policy, then, a person who is not a citizen or permanent resident could still meet the requirements of section 82, but even where she didn’t, funding is allotted for the following categories:

A student who resides in British Columbia and:
who has made a claim for refugee status in Canada and whose claim has not yet been determined, or
who is detained in custody in a youth custody centre.

A student who is in British Columbia with his/her guardian if the guardian meets one of the criteria set out below. Guardians must be able to provide documentation to substantiate that they meet these criteria:

has been lawfully admitted to Canada for temporary residence and is authorised to work for a period of one year or more, and is or will be employed for at least 20 hours per week;

40 Ibid.
The children of temporary residents who have a valid study or work permit are clearly covered within the above policy while the parents have sufficient documentation. It is less clear whether students would be covered if their parents fall within a variety of other status situations, including those who hold a temporary resident permit, who are nationals of countries to which they cannot be removed, pre-removal risk assessment applicants, humanitarian and compassionate applicants, and those who are undocumented. Furthermore, this policy clearly bases children’s access to education solely on the status of their parents, which means that Canadian citizen and permanent resident children can be denied access to funded education on the basis of their parents’ status. Families in the above situations may well fit the indicators of ordinary residence as described in the law, but would have a more difficult time enrolling without fees as they are not specifically mentioned in the policy document.

Specific school boards report a variety of operational policies, many of which specifically exclude children on the basis of their immigration status, or that of their parents, even where the child in question is a permanent resident or citizen of Canada. In order to determine the specific manner in which the residency requirement was deployed with regard to immigration status, I made Freedom of Information requests for all procedures used for interviewing and determining fee status of students on the basis of status, and other documents implementing the Ministry’s policy to both the Ministry and specific school boards.

The Ministry itself advised that it did not have any documents which met the request, but referred to an online document entitled “Decision Aid that Could Be Used in Determining Provincial Education Funding.” It is a chart listing a variety of immigration statuses,

\[41 \text{Ibid.}\]
location of the child, whether they are provincially funded, and what type of documentation should be required. It is clear from this document that the child’s immigration status is not considered separately from the parent/guardian’s status. Put another way, migration status is determinative of funding, but where the child “entered Canada with parent or legal guardian,” only the parent/guardian’s status is considered when determining funding eligibility. This document lists the following categories of status as being eligible for funding:

- Canadian citizen
- Landed Immigrant
- Convention Refugee
- Refugee Claimant
- Protected Person or PRRA
- applied for landed status from within Canada
- Minister’s Permit, and
- study and work permits issued for a year or longer.\(^{42}\)

It lists the following migration statuses as rendering a person’s child ineligible for funding: Visitor visa/stamped passport and Temporary Resident Permit.\(^{43}\) While these categories capture some status situations in reference to the language used in the *Immigration and Refugee Protection Act*, there are many which are not mentioned, including those in which a person is on implied status, whose status is expired, or who has entered Canada without authorization. Because decisions to admit or refuse a student are made at the level of local schools, policies and practices used by specific districts are the most relevant to access to education for precarious migrants.

While I received responses from school districts outside the lower mainland of British Columbia, I have included here only the school boards most likely to overlap with the urban

\(^{42}\) British Columbia Ministry of Education, “Decision Aid that could be used in Determining Provincial Education Funding,” British Columbia Ministry of Education, online: www.bced.gov.bc.ca/policy/policies/international.pdf [British Columbia Ministry of Education, “Decision Aid.”].

\(^{43}\) *Ibid.* The inclusion of Temporary Resident Permit here is contradictory, as the latter is simply a new nomenclature for the older “Minister’s Permit.”
locations of the participant cohort. The remainder are reproduced in the Law and Policy Appendix. School districts provided a variety of written policies, documents and information about practices, which can be loosely organized into initial screening and status determination procedures, and ongoing status confirmation measures.

i. Screening and Status Determination by School Districts

Some school boards referred specifically to the Ministry policy, indicating that they had adopted it and applied it directly. Chilliwack School District indicated that it had adopted Ministry policy, but confirmed by email that in their interpretation of the policy, migration status was necessary: “If the family has no official status in Canada (illegal), we would not register the children.”

More often, though, school boards disclosed written policies of their own, which diverge to a greater or lesser degree from Ministry policy. The Surrey school district, for example, classifies certain “international” students as being exempt from yearly tuition fees of $12,000, including:

A student who:
A) is a refugee claimant with an acknowledgement letter from the Immigration and Refugee Board
B) is a Convention Refugee and can present a letter of permission or permit issued by Citizenship and Immigration Canada confirming this;
C) has been admitted to Canada under a letter of permission or permit issued by Citizenship and Immigration Canada
...

A student whose parent/guardian(s):
A) has been admitted to Canada for permanent residence or has applied for permanent residence from within Canada and can substantiate this with documentation from Citizenship and Immigration Canada
B) Has been admitted for temporary residence in Canada for a term of one year or more and holds a work permit from Citizenship and Immigration

44 Response provided by email dated June 22, 2011, from Kathy Miki, Executive Assistant, Chilliwack School Board.
Canada
C) has been admitted for temporary residence in Canada for a term of one year or more, holds a study permit and is attending a degree granting institution at a public post-secondary institution. This policy also allows discretion to admit those “whose parents or custodians satisfy, through an administrative review...that there are special circumstances which warrant a tuition free education." Vancouver School District disclosed a very similar list for exemption from payment.

These policies are fairly similar in content to the list in the Ministry policy described above, with an important exception. Unlike the Ministry policy, there is nothing to indicate to frontline decisionmakers that those who are not on the list of included students may meet the definition of “residents” under the School Act. Furthermore, the use of this list in an exclusionary way is underscored by the indication of discretion for “special circumstances.”

Coquitlam School District disclosed a checklist for registration which includes separate requirements for “Status in Canada” and “Residency.” To demonstrate “Status in Canada,” parents/guardians are required to provide one of the following documents:

- Canadian birth certificate, passport or citizenship card,
- Confirmation of Landing documents plus passport,
- Permanent Resident Card or Status Indian documentation, or
- work/study permits valid for one year plus proof of work of 20 hours or more per week or postsecondary enrolment.

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46 Ibid.
48 Policy sheet “Documentation Required for Registration of All School-Age Students Funding Eligibility Checklist” provided by email dated June 22, 2012, from Cheryl Quinton, Coquitlam School District, in response to a written request made under the Freedom of Information and Protection of Privacy Act, RSBC 1996, c 165.
As a part of registration, both citizenship status and ordinarily resident documentation are verified and recorded in school computer systems.49

The requirement for parents/guardians to have status, regardless of the status of the children, was universal in the policies I reviewed. For example, the Vancouver School “Entitlement to a Publically [sic] Funded Education in the Vancouver School System,” referring to section 82(2) of the School Act in particular with regard to the dual requirement of both student and parent/guardian being “ordinarily resident.” This policy explicitly confirms that “if a student is ordinarily resident in British Columbia, but their guardian is not, the student is not entitled to a publicly-funded educational program.”50

Because the majority of study participants were residents of Vancouver, I asked follow-up questions of this district by email to find out more about how this policy might apply in a variety of status situations, and received the following responses by email:

Q: Refugee claimants?
A: As explained in our VBE policy, all refugee claimants are eligible for a publicly funded education.

Q: PRRA claimants?
A: Although the VBE has no specific language addressing Pre-Removal Risk Assessment (PRRA), we will look at each claimant on a case by case basis and if the family can prove their “settled purpose for taking up residence in the community and have shown sufficient continuity of residence” then their children will be permitted to enrol in our schools (e.g. children of unsuccessful refugee claimants will be able to stay in school while students of parents who were caught overstaying their temporary work permit of less than one year may not be allowed to receive a free public education).

49 Policy sheet “Administrative Procedure 300-Student Registration” provided by email dated June 22, 2012, from Cheryl Quinton, Communications Manager, Coquitlam School District, in response to a written request made under the Freedom of Information and Protection of Privacy Act, RSBC 1996, c 165.
50 Supra note 47.
Q: Children of foreign workers?
A: Eligibility depends on the parent providing documentation of a work permit greater than one year and employment for at least 20 hours per week.

Q: Children of visitors or who have visitor status?
A: Not eligible for a publicly funded education unless they apply for permanent residence, a work permit greater than one year or a study permit greater than one year at an EQA school or a public post secondary school leading to a diploma or degree or a degree programme at a private post-secondary institution in BC.”

Q: Children of temporary resident permit holders or who hold temporary resident permits?
A: Not eligible for a publicly funded education unless they provide documentation that they have applied for permanent residence or a work or study greater than one year as stated above.

Q: Children without status or whose parents do not have status?
A: Would need to be looked at on a case by case basis; e.g. students under care of MCFD would be enrolled in our public schools.

Q: When do families have to pay fees to enrol?
A: If both the student or the parent/legal guardian are not “ordinary resident” in Vancouver and do not maintain their principal residence in Vancouver.

Q: Are there any circumstances in which students cannot be enrolled at all (with or without fees) on the basis of migration status?
A: Funding for a free public education is not based on immigration status but on residency requirements as stated earlier.51

Although both the wording of this policy and subsequent communications emphasize that it is a residency requirement, not an immigration requirement, which excludes students from a funded education, it is clear that in the case of the Vancouver School Board that immigration status can result in exclusion from state-funded education, regardless of other indicia of attachment. The application of this policy also distinguishes between different

51 Responses provided by email dated June 28, 2011, from William Wong, District Principal, Student Placement and ESL Services, Vancouver School Board.
categories of people, all of whom could be without status, apparently on behavioural grounds: the “unsuccessful refugee claimant” is entitled to enrol their children, whereas children of “parents caught overstaying” would be excluded, regardless of other evidence of residency. Furthermore, the child’s status seems to be irrelevant in screening measures, which confirms that it could be used to exclude Canadian citizen and permanent resident children on the basis of their parents’ status.

North Vancouver disclosed the policy the most divergent from the Ministry guidelines. This district has a specific policy for non-Canadian students, also separate from its residency requirements concerning Canadian non-residents (i.e. out of province students). For temporary residents, this policy only allows funded admission for children of parents who hold a Study Permit for two years or longer, and on a discretionary temporary basis for visitors. There appears to be no allowance made for the other categories listed in the Ministry policy, including work permit holders, refugee claimants, and protected persons without permanent residence. This policy also reaches further than others in its interaction with immigration law, as it actively prohibits the board from issuing documentation to support a study permit. The seeming absence of categories of temporary migrants included in other jurisdictions might be explained by this policy’s error in understanding the scope of federal jurisdiction. It states that the federal government is responsible both “the admission of non-Canadian students to Canada” and “the specification of privileges associated with such admission.” This interpretation is unique among school policies; the rest appear to be based on the understanding that the provinces have jurisdiction over education, which is consistent with the constitutional division of powers.

52 North Vancouver School Board, “Policy 605 - Admission of Students to School,” North Vancouver School Board, online: <http://www.nvsd44.bc.ca/Home/Administration/PoliciesAndProcedures/Series600/Policy%20605.aspx>.

53 Ibid.
ii. Ongoing Status Confirmation by School Boards

In making Freedom of Information requests to school boards, I specifically asked for any documents or procedures concerning reporting of immigration status to CIC and CBSA. There were no responding schools which disclosed such a policy, and many confirmed that they had no such policy. However, multiple school boards provided information on their practices pertaining to the ongoing verification of status and residence for families which they had identified as having migration status problems.

One practice common to both Vancouver and Surrey was the use of formal written declarations by parents concerning their status. Vancouver, for example, disclosed a “Parent Declaration” in which parents/guardians must swear that they belong to one of the following categories:

- Canadian citizen
- Landed Immigration/Permanent Resident
- refugee status
- refugee claimant
- study permit for one or more years,
- work permit for one or more years,
- diplomatic, or
- other (which must be cleared with Citizenship and Immigration Canada).

As part of their declaration, parents must also confirm that they will be residing with their child, will not take extended trips, and will be liable for expenses if a false statement is made.

Surrey School District provided a “Parent Declaration” form for landed immigrants in which parents are required to declare that they are not residing in their country of origin and “will not be taking extended vacations during the school year.”

The policies of the Vancouver School District include recommendations for monitoring the residency of students, as follows:

Monitoring ordinary residence and address (actions taken by previous administrators)
have the parent/legal guardian report to the main office regularly (e.g. 4-6 weeks) to let the front office staff know they are residing in BC
call student’s home and have the student go to the window to wave at you as you drive past.56

The practice of monitoring residence status by observing the student at home or requiring parents to report to the school is purely a creation of this Board’s policy - there is no regulatory or legal basis for this practice, and it may raise privacy concerns. Again, while it is “residency” that is the determining factor in access to funded health care, because lists are published describing migration statuses for which students are included as a prerequisite, it is very likely that such practices would be applied in association with status for families headed by adults with precarious migration status.

In follow up discussions, Coquitlam School District explained the following:

In response to your emailed questions regarding “checking in with the family at the end of the permit”, in the 2011-2012 school year, there were 103 parents with work permits and 10 parents with study permits in the current database. Reminder letters are sent to parents when their work or study permit is about to expire, requesting that a copy of the new permit (or copy of the application for a new permit) be sent in.57

56 Supra note 47.
57 Responses provided by email dated Jul 9, 2012, from Cheryl Quinton, Communications Manager, Coquitlam School District.
However, it was clear from their policy that they considered status in Canada to be a necessary additive to the determination of residency. In a somewhat less intrusive way than that described by the Vancouver School Board above, this Board also exercised its discretion through tracking the status of parents, and requiring updated work and study permits.

Information provided by school boards illustrates several themes in the policies and practices relevant to access to education for precarious migrants. First, although by law it is residency in British Columbia which forms the basis for admission to publicly funded education, school districts often treat migration status as an additional requirement. Second, as policies devolve from law and regulation to frontline practices, they tend to become more restrictive rather than more inclusive. Third, school districts may diverge significantly from each other in their formulation and application of policies, even where such policies draw specifically on legal constructs from the federal immigration regime. Finally, children's access to education is determined not by their own status and residency, but that of their parents/guardians.

5.4 Employment Insurance

Employment Insurance is a federally-administered program of financial support which is available to eligible persons who have an involuntary break in work, such as layoffs, maternity leave, care of family members, or illness. All employees who are formally employed, including temporary migrant workers, contribute to the Employment Insurance fund through contributions withheld at the point of pay.

Although they often contributed to Employment Insurance through payroll deductions, study participants identified several different types of barriers to the receipt of Employment Insurance payments. Many migrant participants described situations of unemployment in which they would qualify for benefits, and many had paid into the Employment Insurance fund through payroll deductions. Of these, however, only two had
applied for and obtained benefits, but both experienced barriers. One worker reported that her migration status was closely and repeatedly scrutinized by Service Canada during the process of her application, and another said that she had to justify quitting a live-in caregiver position in which she did not receive sufficient food in order to obtain benefits. (M27, M17) This first part of this section will describe the legal regime governing Employment Insurance as it applies to precarious migrants, drawing on the text of the law, policy documents, and the information provided by study participants. In the second part, I review case law form both courts and tribunals in which the migration status of unauthorized workers was determinative in assessing entitlement to benefits.

5.4.1 Legislation and Policy

Employment Insurance is governed by the federal Employment Insurance Act and associated Regulations. Benefit eligibility does not explicitly require a specific migration status. There are, however, eligibility requirements which may have a disproportionate impact on temporary workers, the sections concerning the qualifying period of work, and availability for work. Qualification for benefits requires a certain period of labour force attachment, measured by the hours of work in the year prior to the application for Employment Insurance. The hours of work required vary from 420-910 hours total, depending on the rate of unemployment in the worker’s region and the worker’s labour attachment history. Depending on the level of regional unemployment in the worker’s community, the Act requires varying levels of demonstrated workforce attachment as an initial condition of eligibility. Workers who are considered “new entrants” to the Canadian workforce must meet the requirement of 910 hours in the 12 months leading up to the discontinuation of earnings. This is possible for some temporary workers, but for those who suffer layoffs earlier in their contract, it may be a barrier. This requirement is likely to affect foreign workers differentially simply because the lack of a Canadian work

60 Employment Insurance Act, supra note 58, s 7.
history may render them a “new entrant” or otherwise make it more difficult to accrue the required hours to qualify for EI.

In order to be eligible for EI, applicants also need to be available for work pursuant to section 18 of the Employment Insurance Act, which has a differential impact on migrant workers with closed work permits.61 Because many temporary foreign workers have employer-specific work permits, this may limit the extent to which they are considered “available for work.” This issue has been considered in the case law specifically with regard to foreign workers, and there is ambivalence among appeal decisions as to whether person with an employer-specific work permit is not “available for work.”62 As noted by Nakache and Kinoshita in their analysis, there are exceptional cases in which the opposite conclusion has been reached, namely, that a temporary foreign worker cannot be said to be “unavailable for work” when the circumstances rendering a person unavailable for work are beyond the workers’ control, which is the case with restricted work permits.63 A 1993 Umpire’s decision on this issue found that the differential effect did not amount to a breach of equality rights under the Charter.64 The EI policy manual is similarly unclear: it leaves open the possibility that such workers could be considered available in certain circumstances, but does not provide concrete guidance as to how this decision would be made.65 This possibility would likely rely heavily on the employment relationship, particularly as most work permits can be renewed only with the support of an employer.

An agency participant reported that many migrants without status thought they would be unable to qualify for benefits because they were working informally for the entire period of

61 Ibid, s 18.
employment (i.e. had never had status). (A4) In such cases, there would be no record of them as workers, no deductions, and no possibility of obtaining the formal Record of Employment required by Service Canada to obtain Employment Insurance, so eligibility for Employment Insurance would be impossible on a practical level, because they could not prove they had worked. Furthermore, such workers do not have the opportunity to contribute to the Employment Insurance fund and the associated entitlement to claim from it. When workers were lacking immigration status entirely, they were unable to become formal participants in the workforce, and as such, no matter how long their service or what the circumstances of the termination of their employment, they would effectively be barred from Employment Insurance. Although the legal structures governing Employment Insurance do not explicitly require immigration status, without any immigration status it is functionally impossible to obtain proof of labour market attachment sufficient to provide eligibility.

As described in Chapter 3, the Immigration and Refugee Protection Act allows for what is called “implied” status, in which a person is legally authorized to remain in Canada but does not yet have a status document. This often occurs when a person is waiting for a renewed or changed document but has not yet received it, and has complied with immigration regulations pertaining to renewal or change. Study participants identified situations they had status pursuant to the “implied” provisions, but they were refused access to Employment Insurance because they hadn’t yet obtained their new documents:

It’s a bit challenging for them to get it if they are on implied status because EI ask for a valid SIN number and a valid work permit so they often get refused. And I’ve always thought, next time we have a client who comes because they got refused EI because they were on implied status, I’d want us to appeal it because they should have status. It’s just that they don’t have the paper proving it. (A5)

The same agency participant identified the issue of availability for work. (A5) If an applicant cannot prove that she is “available for work,” she may be disentitled from receiving Employment Insurance even where her work force attachment was sufficiently
established and she was terminated through no fault of her own. Workers who have a closed work permit, attached to one specific employer, may therefore be ineligible for Employment Insurance due to the lack of labour mobility associated specifically with their migration status. Again, although the requirement to be available for work does not refer specifically to migration status, the interaction of this law with federal immigration law results in a categorical exclusion for temporary migrants with closed work permits, despite their capacity and intention to work.

Another situation in which precarious migrants encounter barriers to Employment Insurance coverage is when they are authorized to work for one employer, but are working for another employer without authorization. As described in Chapter 3, this often occurs due to employer termination of worker contracts prior to the expiry of the work permit, and the delay and effort implicit in obtaining authorization to work for a new employer:

Q: Did you think about applying for Unemployment Insurance?

A: No.

Q: Why not?

A: I didn’t know that was possible and because I didn’t want to have in my records that they fired. And it was important that I was still working with them for immigration. Because I was lying for the immigration, government agencies, saying I was working for that person when it wasn’t true. (M18)

Although this worker may have been disentitled from obtaining Employment Insurance by virtue of the fact that she had been fired, if she applied, she would be able to provide information about why her job ended, and is entitled to have her evidence considered in her application for benefits. However, due to the necessity of maintaining the fiction of her employment in order to obtain permanent status, her precarious status created a barrier which precluded even making the application.
Another worker described a similar situation, in which maintaining employment on paper was paramount to maintaining status:

I can’t apply for EI because my employer did not release me. The situation was I was still under the name, so because I was able to apply for permanent residence after the 24 months, so I was supposed to be 24 months by June 2011 but since I went home for a holiday for 2 months, I need to make up for that 2 months. Since my employer is so nice they want my papers to be moving…(M24)

One of the most prevalent concerns articulated by migrant participants was the potential for applying for Employment Insurance to affect immigration status. The majority of those who spoke about this were workers with authorization, primarily live-in caregivers. Although they were aware that they could apply for Employment Insurance when they were without work, they were unwilling to do so on the basis of perceived risk. In one case, a worker did not apply for EI even after she had met the requirements for permanent residence by working for two years as a caregiver, because she was concerned that simply being unemployed would negative consequences for her permanent residence application:

I’ve been here for 2 years and once your employer doesn’t need you anymore, I would be unemployed without work. And I have a concern that if I applied for Employment Insurance or social benefits, the immigration services would know and they wouldn’t support my application for immigration because I would be without work. (M7)

For some workers, this risk was associated with the idea that they would be perceived as a burden to Canadian society, and thus deemed ineligible or unsuitable for permanent residence, as described by these three caregivers:

...when applying for immigration, the government may believe that you are coming here and you are already taking without providing for society. (M8)

This time when I move out by myself, I have to pay rent and food. I do also, I ask for the ROE from my employer and I got that but people say it might affect your application and because you get the social welfare from the government, some people say that it is a burden to society and it might not be good for your application. I think don’t try that. (M9)
But if you don't have PR status and you only have a work permit, I feel that applying for EI assistance isn’t that easy. Because I’m young and I don’t have a PR status and with this situation of me receiving money from the government, would that affect my PR application?(M10)

Participants indicated that they were aware of the potential to obtain Employment Insurance, but weighed this against the perceived potential to put their eventual permanent status at risk:

Q: But were there times when you were unemployed?  
A: There were times when I had no income.  
Q: During those times, why didn’t you want to apply for Employment Insurance?  
A: There was no instruction, I didn’t understand.  
Q: You didn’t understand that that might be available to you?  
A: I knew that EI existed but I heard it would be unfavourable for my application had I tried to apply and I didn’t understand about the actual application procedure either. (M14)

Thus, although migrant workers with formalized labour force attachment are paying into Employment Insurance and aware of it, they are reluctant to avail themselves of it at any point prior to obtaining permanent residence. There is nothing in immigration law or policy which requires a worker to avoid relying Employment Insurance, or considering this as a factor in assessing permanent residence applications. However, the immense fear of doing anything to endanger their eventual permanent status prevented workers from applying from this entitlement, even though they, like other workers, had paid into it. Migrant participants described an acute awareness of the need to present themselves as only giving, and never taking, from Canada, and thus saw themselves as being different from permanent resident or citizen workers. The perception of Canada as a unified whole is at play here as well, and particularly, that potential consequences in one area (immigration enforcement) would flow from specific kinds of action in another (Employment Insurance).

66 While section 39 of the Immigration and Refugee Protection Act does create a category of inadmissibility on the basis that a person is not able to support themselves financially, this section refers to the receipt of social assistance, and not Employment Insurance. Immigration and Refugee Protection Act, supra note 25, s 39.
One worker who did apply for Employment Insurance after a layoff described being required to provide additional paperwork and information after she became medically unable to work:

I went there and filled up the forms and sent them, gave them my prescription and what happened. After 15 days they called me and I don’t know if that’s normal, it never happened to me before, but they were like I need your work permit because I have to see your status…. then he was like “why are you applying for this” “because I have this happen” he was really rude, he was like “why are you applying for this?” “because I have this happen” “yeah, but you’re not Canadian.” I said “yeah I’m not Canadian but I still pay for it, so it’s my money” “yeah but usually it’s for Canadians” “I don’t think so because every paycheque they take off money and I didn’t use this since I started, I should get something.”

Q: Did they ask for your passport or birth certificate?
A: Just the work permit…oh, and the passport copy.
Q: Was it just that one guy?
A: It was the same guy all the time. If that’s just for Canadians, why do they take money from me? Imagine if I go back to Mexico now, I’m not gonna get that money back. (M17)

While there is no legal requirement for applicants for Employment Insurance to have permanent status or citizenship, the Employment Insurance Commission is empowered to speak to both workers and employers to determine eligibility for Employment Insurance. In this instance, even though the worker did not fear losing status on the basis of making her claim, and felt entitled to be treated similarly to any other worker who had paid into the system, the distinction between Canadian and non-Canadian workers defined the officer’s approach to her file. The officer’s scrutiny of the fact of three work permits rather than one was based directly on the worker’s non-permanent status. Multiple work permits are not uncommon, as workers are often required by immigration law to obtain new work permits to change jobs or employers. The association of her status as a “non-Canadian” with a lack of entitlement to Employment Insurance evokes a notion of precarious migrants.
as somehow morally disentitled from taking, much like that described by the caregiver workers quoted above.

5.4.2 Case Law and the Doctrine of Illegality

The availability of Employment Insurance has been considered in the case law with regard to workers working without authorization. This question arises primarily in cases in which applicants had status at some point but it was discontinued, while employment continued. Entitlement to Employment Insurance is determined according to whether or not employment is “insurable.” Whether work undertaken by a foreign worker without immigration status renders work non-insurable for the purposes of Employment Insurance has been the occasional subject of judicial consideration. In the case of Still v M.N.R., the Federal Court of Appeal considered the application of the traditional doctrine of illegality to the situation of a foreign worker working without a permit. The lower level Tax Court had upheld the denial of Employment Insurance Benefits to a housekeeper who was working without status while she waited for her permanent residence application to be processed. The Tax Court decision turned on the fact that the worker had contravened immigration laws in working without status, and while it recognized exceptions to the strict application of the doctrine of illegality, it found social utility in the denial of benefits, to protect the Employment Insurance fund.

This decision was overturned on appeal to the Federal Court of Appeal, which applied a modern approach to the doctrine of illegality. It found that simply because a contract is found to be illegal does not mean that relief is not available, furthermore that the particular objects of the statute giving rise to the illegality should be considered. In this case, the Court of Appeal found that the consequences of declaring such a contract illegal would be too far reaching, as this would result in disentitlement to other protections, such as workers’ compensation. The Court of Appeal instead applied the principle that “where a

contract is expressly or impliedly prohibited by statute, a court may refuse to grant relief to a party when, in all of the circumstances of the case, including regard to the objects and purposes of the statutory prohibition, it would be contrary to public policy, reflected in the relief claimed, to do so.”\(^\text{68}\)

In STILL the Court of Appeal articulated the public policy considerations as being twofold, finding that: “while on the one hand we have to consider the policy behind the legislation being violated, the Immigration Act, we must also consider the policy behind the legislation which gives rise to the benefits that have been denied, the Unemployment Insurance Act.”\(^\text{69}\) The Court of Appeal found that a liberal interpretation of Employment Insurance provisions was justified, and that they should be understood inclusively. In considering the policy factors with regard to immigration, the Court considered the legitimate interest of the state in requiring work by foreign workers to be legally authorized, noting that in the immigration regime:

> Consideration must also be given to: ‘whether the wages and working conditions offered [by the prospective employer] are sufficient to attract and retain in employment Canadian citizens or permanent residents.’ The latter consideration may be said to be a politically correct way of stating that if Canadians are unwilling to accept poorly paid employment, it can be made available to lawful immigrants.\(^\text{70}\)

In this case, the court distinguished between those acting in good faith, like Ms. Still, and “those cases where a person gains entry to this country through stealth or deception,”\(^\text{71}\) but also held that “moral disapproval of employment obtained in flagrant disregard of Canadian laws is not an unreasonable policy consideration, this sentiment should not be permitted to degenerate into the belief that everyone who gains employment in Canada without a work permit should be so judged.”\(^\text{72}\) The Court found that Ms. Still was in good

\(^{68}\) Ibid at para 48.  
\(^{69}\) Ibid at para 49.  
\(^{70}\) Ibid at para 51.  
\(^{71}\) Ibid at para 53.  
\(^{72}\) Ibid at para 53.
faith, not “an illegal immigrant,” and that the denial of Employment Insurance benefits would constitute a de facto penalty for non-compliance with immigration law, disproportionate to the statutory breach.73

The Court in Still distinguished the facts before it from situations in which benefits were rightly denied to a person who sought out an employer other than that for whom he had been authorized to work,74 in which the worker had started work prior to the issuance of a work permit due to delay,75 and in which a worker had continued to work despite being rejected for a work permit.76 This approach to the doctrine of illegality has also been applied in the context of workers’ compensation to the worker’s benefit.77 In the latter case, the tribunal found that to do so would not undermine the objective of the Immigration Act, and such protection could not be seen as a benefit or windfall amounting from one’s wrongdoing in being noncompliant with the immigration regime. In the Quebec case of Mia v M.N.R.,78 however, a refugee claimant who had failed to renew his work permit was disentitled from obtaining Employment Insurance benefits on the basis that he knew or should have know he was required to obtain a new work permit; the Court found that the contract of employment was null under both the common law doctrine of illegality and the Civil Code of Quebec.

The law governing entitlement to Employment Insurance does not require of applicants that they prove any specific migration status. Through the perspectives shared by study participants, and through a detailed examination of specific polices and practices in the administration of Employment Insurance, however, there are several ways in which precarious migrants face status-based barriers. In terms of practical access to benefits, precarious migrants may be subject to differential requirements as “new entrants” to the labour force, or may be unable to demonstrate sufficient formal work, if they have been

73 Ibid at para 55.
78 Mia v M.N.R., 2001 CanLII 785.
working informally or beyond the authorization of their permits. Furthermore, even when precarious migrants are entitled to Employment Insurance, they may be deterred from applying because of the fear of not obtaining permanent status. Migrant participants tied this fear to the idea of being perceived as a “burden” or taking something they did not deserve from Canadian society. While case law does not mirror this sentiment, it does include an element of moral sanction and division of migrants. While the case law confirms that being out of status itself is not sufficient to render a contract illegal for the purposes of EI determination, the individual migrant’s behaviour vis-à-vis their own migration status is considered as a factor in determining entitlement. The impact of migration status is thus visible through specific institutional application of the law. As in other aspects of the social state, concepts from federal immigration law are used in making Employment Insurance determination, but these concepts are modified through specific institutional practices.

5.5 Employment Assistance (“Welfare”)  

Employment assistance, or “welfare” as it is more colloquially known, is a system of basic social benefits which, like health care, falls within the legal jurisdiction of the provinces. Entitlement is assessed on the basis of residency as well as explicitly requiring certain types of immigration status. While perhaps not as deeply entrenched as an automatic benefit of membership as education and health care, welfare is nonetheless present across Canadian jurisdictions as a basic source of income support for those with no other source of income. Like health care and education, welfare is funded through taxpayer revenue, but it is more far deeply associated with stigma and moral scrutiny than other aspects of the social state, for Canadians as well as non-citizens.79 With regard to migrants specifically, welfare has been recently deployed by the federal Minister of Immigration to construct migrants as undesirable takers from Canada, although a quantifiable basis for this

conclusion was not provided by the Minister.\textsuperscript{80} In this section, I explore the manner in which migration status interacts with entitlement to welfare benefits through provincial legislation, policy, and tribunal-level decisions as well as perspectives given by study participants.

\subsection*{5.5.1 Legislation and Policy}

Eligibility for employment assistance (comprised of both “welfare” and disability assistance) in British Columbia is defined in the Employment and Assistance Act,\textsuperscript{81} the Employment and Assistance for Persons with Disabilities Act,\textsuperscript{82} and associated Regulations. In the Employment and Assistance Regulation,\textsuperscript{83} immigration status is specifically mentioned as a requirement for benefit entitlement. In order to receive benefits, a person must fit one of the following categories:

- permanent residence,
- citizenship,
- confirmed refugee status,
- applicant for refugee status,
- temporary resident permit, or
- subject to an unenforceable removal order.\textsuperscript{84}

If a family is eligible in one of the above categories, they will receive benefits for all family members who fit the above requirements, plus any dependent children, even if the children themselves do not meet the requirements above.\textsuperscript{85} If the family includes an adult who does not fit in the above categories, that person’s assets and income will still be counted when

\footnotesize
\begin{itemize}
\item \textsuperscript{81} Employment Assistance Act, SBC 2002, c 40.
\item \textsuperscript{82} Employment Assistance for Persons With Disabilities Act SBC 2002, c 41.
\item \textsuperscript{83} Employment Assistance Regulation, BC Reg 263/2002. While similar status-based restrictions exist in the corresponding regulation under the Employment and Assistance for Persons with Disabilities Act, for the purposes of this dissertation I limit my discussion to the regular employment assistance structure.
\item \textsuperscript{84} Ibid, s 7(1).
\item \textsuperscript{85} Ibid s 7(2).
\end{itemize}
eligibility is determined, but the family will not receive any benefits for that person.\textsuperscript{86} Policy documents specify that children “take their parents’ status” with regard to assessment for benefit eligibility.\textsuperscript{87} With regard to ineligibility, Ministry policy states:

The entire family unit is ineligible for income assistance or disability assistance where all adults in a family unit are:
- visitors, foreign students, and temporary workers who do not have a Temporary Resident Permit
- persons in Canada illegally
- persons whose immigration status has not been confirmed by CIC
- persons who are subject to removal order that is enforceable. (This can be verified by the immigration liaison). [see Contacts]

... In a family unit where only one applicant meets the citizenship requirements for income assistance, hardship assistance, or disability assistance, and the other applicant does not, \textbf{assistance may only be issued for the family member who meets the citizenship requirements}. However, the excluded members’ income and assets must be included in the income and assets of the family unit for the purposes of determining whether the family unit is eligible for assistance.\textsuperscript{88}

Thus, for mixed status families, while one person’s lack of status or documentation would not disqualify the entire family, the family would receive a lower amount based on the subtraction of any adults from the determination of the rate payable to the family. In an interesting bifurcation, adults without sufficient status are included as family members for the purpose of income contribution (which would reduce eligibility and rate of benefits), but they are excluded for the purpose of determining family need (which would increase the level of benefits).

Based on the requirements articulated in the regulations and associated policy, the following categories of migrants would be excluded from eligibility for benefits

\textsuperscript{86} \textit{Ibid} s 7(3).
\textsuperscript{87} British Columbia Ministry of Social Development, “Citizenship Requirements,” Ministry of Social Development, online: <http://www.gov.bc.ca/meia/online_resource/verification_and_eligibility/citreq/policy.html#2>.
\textsuperscript{88} \textit{Ibid}.
work permit holders
study permit holders
humanitarian and compassionate applicants who have not yet received approval
visitors
people without status or who cannot sufficiently document their status
family and spousal sponsorship applicants who have not yet received approval (although arguably, such persons would be eligible under section 7(1)(b) as they are entitled to permanent residence)
Canadian citizen children where all of the adults in their family unit are excluded under one of the above categories, depending on the circumstances.\(^{89}\)

In a response to a Freedom of Information request, the provincial Ministry of Social Development confirmed that it denied benefits to applicants on the basis of not meeting citizenship requirements. Furthermore, they explained that their policy is to deny benefits to migrants on the basis even where they met citizenship requirements if they were within an immigration sponsorship period. In the latter situation, the Ministry considered the sponsor(s) to be financially responsible for the applicant in such a manner as to preempt benefit entitlement, even where the applicant otherwise met eligibility criteria. The number of such refusals was usually under 100 per year from 2005 to 2011.\(^{90}\)

\section*{5.5.2 Tribunal Level Decisions}

While the status requirements associated with welfare entitlement in British Columbia have not been judicially considered, there are several decisions in which this issue has been considered by the quasi-judicial tribunal responsible for welfare appeals. The Employment

\(^{89}\) A 2012 policy change made an exception to this rule, in which mothers without legal status were able to obtain employment assistance in specific circumstances, see: British Columbia Ministry of Social Development, "Exemption from Citizenship Requirements," Ministry of Social Development, online: http://www.gov.bc.ca/meia/online_resource/verification_and_eligibility/citreq/policy.html#3>.

\(^{90}\) Excel spreadsheets containing applicant numbers provided by email dated September 15, 2011, from Raymond Fieltsch, Ministry of Social Development, in response to a written request made under the Freedom of Information and Protection of Privacy Act, RSBC 1996, c 165.
and Assistance Appeal Tribunal has heard several appeals concerning eligibility under section 7(1) of the Regulations. Although the decisions of the Tribunal do not set precedent, and are thus not binding on other decisionmakers, they provide examples of the way in which eligibility is determined at the appeal level.

In decision 10-427, the Tribunal refused the eligibility appeal of a person who had made a refugee claim. The refugee claim had been declared abandoned by the Immigration and Refugee Board, and then the person had sought legal counsel and was in the process of making an application to re-open the claim. The Tribunal noted that the Ministry of Social Development had confirmed that the refugee claim was not re-opened and also that it had “confirmed with Immigration the appellant had no status in Canada.” In this case the Ministry's use of information sharing with Citizenship and Immigration Canada was essential in refusing the case. Similarly, in a 2007 decision, an appellant claimed to have temporary migration status. The Tribunal, however, preferred the Ministry's evidence, including a computer search provided by the Canada Border Services Agency showing the applicant’s lack of status. Another Tribunal case considered the situation of a US citizen who had a previous failed refugee claim and who had a Canadian citizen child who was in the care of the Ministry of Child and Family Development at the time of decision. In that case, the Board found that neither the mother nor the child qualified under the citizenship requirements of section 7 and they were both declared ineligible for income assistance.

With regard to a break in continuity of documents, the Tribunal considered the case of a person on disability benefits whose temporary resident permit had expired. The person had made an application to extend his status with Citizenship and Immigration Canada, but had not yet received a decision. The Tribunal reviewed s. 183(5) of the Immigration and Refugee Protection Regulation, which gives “implied status” to a person once they have

applied to extend temporary status (and until a decision is made). The Tribunal found that this person was eligible for benefits because he had status under immigration law, and found that he was in fact “authorized to take up permanent residence in Canada” under section 7(1)(b) of the *Employment and Assistance Regulation* because he held a temporary residence permit. In this example, the interpretation of migration status is similar to that in the federal immigration regime.

In some cases, the Tribunal adopted peculiar interpretations of immigration status. In case 09-310, the Tribunal refused eligibility to a person who had received a negative refugee decision but stated he was subject to an unenforceable removal order. The applicant had an expired work permit and Interim Federal Health Certificate. The Tribunal found that the applicant’s statement that he was subject to an unenforceable removal order to be insufficient evidence, and also relied on the fact that his work permit and Interim Federal Health Certificate stated “this document does not confer status” and “this document does not authorize re-entry.” At the time, a person with a failed refugee claim but who had not yet been given the opportunity to file a pre-removal risk assessment was considered to have a non-enforceable removal order within the federal immigration regime. According to the Ministry of Social Development’s own policy, this person should have been eligible for benefits. Furthermore, every work permit issued by Citizenship and Immigration Canada states “this document does not authorize re-entry,” even when they are associated with the conferral of status. This statement does not denote anything about status under federal immigration law. This case thus provides an example of the ways in which provincial services can also be withheld on the basis of a tribunal’s misinterpretation of federal law. While the federal language of status is used in decisionmaking, it can be applied in institutionally specific ways which diverge from federal laws governing status.

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94 EAAT 09-310 (undated), online: <http://www.gov.bc.ca/eaat/popt/decisions.htm>.
Although many participants were aware of the existence of welfare benefits, very few applied for or received benefits. Of the migrant participants, only two referred to having been on welfare while they had precarious migration status, and both of these were refugee claimants at the time they applied for benefits. One participant noted that the only reason she needed to apply for welfare was because the family was waiting for a work permit. (M21) Where applicants did receive benefits, they described welfare as inadequate to provide for the basics of life. (M4, M15, M21) Participants also identified several barriers to applying for benefits, most of which referred in some way to migration status. An agency participant reported that for his clients, lack of status was seen as precluding the ability to obtain benefits:

They are not going to apply to welfare. They know they are not allowed to apply, they are illegal workers. (A4)

For others, the desire to be seen as “working” people made applying for welfare undesirable. (A2) When precarious migrants needed welfare, concern about the potential loss of status prevented them from applying, in a manner similar to the reluctance to apply for Employment Insurance:

Our clients typically don’t apply for welfare, not because they don’t need it but because they are very afraid it’s going to affect their immigration status. (A5)

Some workers associated income assistance and Employment Insurance as barriers to permanent residence:

And I have a concern that if I applied for Employment Insurance or social benefits, the immigration services would know and they wouldn’t support my application for immigration because I would be without work (M7)

One participant who had applied to income assistance after obtaining her permanent residence reported a welfare officer making comments to her during the welfare
application process, which she attributed to the “refugee” designation on the back of her permanent resident card:

...just two months while I find another job, and then they refused me at the beginning, they were saying like no you’re only trying to...take advantage, you just want to take advantage of the system.
Q: Do you think it was because of your status?
A: Because of my status, yes because all they seen the back of card, it’s like your mark you know, your mark like forever ...(M20)

One agency participant described a case in which the federal immigration system interacted with provincial welfare law to deprive a disabled woman of her benefits. The woman had applied for permanent residence on humanitarian and compassionate grounds, but when she obtained approval, the provincial government removed her benefits:

She had applied for an H&C five years ago. I think at some point it was approved in principle, and once it was AIP [approved in principle: a first stage of approval by CIC prior to granting permanent residence], the provincial social assistance program cut her off because it said she was then eligible for a work permit. It had something to do with even though the H&C was still being processed, because one part of it was approved in principle they didn't think they were financially responsible for her anymore. She has a child that was born in Canada, she has serious health costs and health issues and she is not someone who was able to have a job, and she was suddenly cut off her disability. (A1)

As such, even for those migrants who were legally eligible for benefits, the interaction of federal and provincial policies can create a situation in which even while they have status, they can be refused welfare benefits.

Unlike the other elements of the social state discussed in this chapter, the legal regime governing welfare benefits specifically lists migration status acts as a necessary component of eligibility. If a family unit does not meet migration status requirements, the entire family can be rendered ineligible for welfare, even if there are permanent residents or citizens within the family unit. This was not the only way in which migration status mediated
access to welfare: as was the case with Employment Insurance, study participants were reluctant to apply for welfare on the basis that it could interfere with their eventual permanent residence. Unlike EI, however, use of welfare benefits could result in a determination of financial inadmissibility under federal immigration law, which would be a barrier to permanent and temporary residence. Specific institutional practices also make use of federal concepts of migration status. In both the determination of initial eligibility and in welfare appeals, migration status and information gathering from immigration authorities were used to allocate benefits, with varying degrees of adherence to federal interpretations of immigration law.

5.6 Conclusion

Drawing on the perspectives and experiences of study participants, this chapter has traced the role of migration status through various aspects of the social state. Status emerges as a factor in interactions between migrants and the state, and even migrants with current status face barriers to obtaining social state entitlements. Similarly to the regulation of workplaces, the laws governing the distribution of the benefits of membership rarely use migration status explicitly as a determining factor in assessing entitlement. While laws and policies do not appear designed with intentional prejudice toward migrants, migration status nonetheless has the effect of shaping social state entitlements in health care, education, Employment Insurance, and welfare.

Social state entitlements are governed and administered primarily under provincial law, with the exception of Employment Insurance, which is federal. Each of these four social state elements is administered through its own set of institutions, policies, and practices. Even for the three that have provincial jurisdiction in common, there does not appear to be any purposeful harmonization of status and residency requirements throughout, either in

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95 Section 39 states that a foreign national may be inadmissible “if they are or will be unable or unwilling to support themselves or any other person who is dependent on them, and have not satisfied an officer that adequate arrangements for care and support, other than those that involve social assistance, have been made.” *Immigration and Refugee Protection Act, SC 2001, c 27, s 39.*
law or in practice. While there are themes and patterns of exclusion and legitimation, they are visible through particular institutional practices and applications of the law.\footnote{96 The effect of such potential harmonization depends completely on the manner and purpose of institutional implementation; purposefully making status requirements uniform across the social state in multiple jurisdictions as a matter of policy could lend potency to either exclusion or inclusion.}

Within the intersection between state funded health care benefits and precarious migration status, status is a complex mediating factor in the provision of health care. While it is not explicitly mentioned in the statutes that govern the distribution of health care in British Columbia, it is incorporated as an aspect of residency in regulations, and takes specific effect through policies used by health authorities. These policies reveal the further effects of migration status in determining access to health care, but also variety of ways in which it may be interpreted at the frontline service level. These documents reveal that the construct of migration status flows through procedures for determining who gets access to health care, and on what terms. The result of this include a troublingly broad notion of who is a “nonresident” (i.e. those “from outside of Canada”), immediate financial consequences for those who are ineligible, as well as a heightened level of documentation and data collection applied to those without permanent status. Through the devolution of legal power to the details of regulations, policies, and practices, the barriers to obtaining care increase, and are imbued with a moral flavour in which the “free” nature of health care is emphasized. Health care is distributed on a restrictive basis, on the assumption that health care belongs not to everyone, but only to permanent migrants, citizens, and authorized temporary migrants who are able to demonstrate the sufficiency of their status in time to receive care.

For those study participants who had children with them in Canada, access to public education arose as a site of interaction with migration status; through a detailed exploration of the laws, regulations, and policies governing access to public education, migration status is also associated with exclusion from this aspect of the social state. While the \textit{School Act} itself does not mention immigration status, it requires both the parent and
the child to be “ordinarily resident.” Policy at the provincial level states that migration status is non-determinative of whether a parent is “resident,” but also provides a list of statuses for which students of those parents should be included, which may have the effect of filtering on the basis of status. Through the policies provided by school boards, which illustrate a wide variation in application of this policy, it is clear that migration status of the parents does function as a filter. In practice, school boards require immigration documentation in addition to residency documentation. The documents and practices described here bar families regardless of whether they met the other indicia of residency. In conjunction with this, two school boards listed policies which actively monitored the status of parents on a regular basis, including in-person reporting requirements in the case of Vancouver. Taken together with the School Act, the status requirements of school boards have the effect of making distinctions on the basis of status for Canadian citizen and permanent resident children. Similarly to health care, the idea of “free” services and “entitlement” feature in the policy materials disclosed by education providers. This aspect of the social state is not only mediated by status, but also seems to become more restrictive and punitive on the basis of status through the devolution of law to applied policies.

Migration status also played a mediating role in precarious migrants’ interaction with the Employment Insurance system in several ways: combining the text of the law with the policies used to apply it, both the requirement of insurable hours and that of “availability for work” create a differential effect which is likely to reduce availability of benefits, including situations in which workers had legal status and had paid into the Employment Insurance system. Furthermore, even when they would have been likely to meet the eligibility and availability requirements, migrant participants expressed a strong reluctance to apply for Employment Insurance when they were unemployed due to the perception that it would have an impact on their eligibility for permanent residence, regardless of the fact of legal entitlement. Migrant participants were concerned about

97 School Act, RSBC 1996, c 412, s 82. This section has been considered once, briefly by the BCHRT in A obo B v School District No. C. 2009 BCHRT 256, which found that “residency” was not an enumerated ground under the Code, and that the policy applied equally regardless of place of origin.
being seen as “taking” from Canadian society; the receipt of benefits was understood as a kind of moral disqualification from membership.

Unlike other aspects of the social state, Employment Insurance includes a presumption of inclusivity developed through case law. The cases in this section identify as a matter of public policy the desirability of including workers regardless of status, which stands in stark contrast to the complete rejection of an analogous policy aim with regard to health. This is not the entire basis for determination of entitlement, though: the decisions in this section also describe an end to entitlement, determined, like in the health care case law, on the basis of the migrant's compliance with immigration law and on the level of culpability associated with it. For workers without status, while Employment Insurance benefits may be available, they are subject to a standard of “good faith” behaviour with regard to their status, and the potential for an assessment of whether a restrictive interpretation is appropriate given the moral content of their conduct, with specific reference to immigration law and status. This creates a dimension of assessment and a prerequisite associated with migration status which would not apply to permanent resident or citizen workers. The purpose of the Immigration Act (as it was then called) is explicitly considered in some of these cases, and the construct of status imported from that Act seems to function in a manner paramount to, rather than alongside, the federal power to regulate Employment Insurance for all workers. Migration status and associated concepts of membership and the assessment of deservingness thus act to create categorical barriers for precarious migrants who would otherwise be entitled to benefits through their work.

The role of migration status in relation to provincial welfare benefits was evident on several levels. Compared to other aspects of the social state, such as education and health, which incorporated status indirectly as an aspect of “residence,” employment assistance laws and policies in British Columbia are more explicit in their use of migration status as a qualifying requirement, borrowing the construct of status originating in federal law and regulation. Like other aspects of the social state, however, the devolution of law through to policy and application grew more restrictive in terms of benefit eligibility, in which the effect of precarious migration status was generally disentitlement. In terms of migrant
perspectives, most participants indicated that they had not applied for benefits, as they were aware that they would be ineligible, and many elided welfare with Employment Insurance as an aspect of “taking” from the state which would potentially endanger their status. Unlike Employment Insurance, however, most precarious migrants would not be eligible for welfare benefits at law. Of the categories of migrants considered in this study, work permit holders, nonstatus workers, and those waiting for status would be completely ineligible for benefits on the basis of status, as would children of nonstatus parents in many circumstances, regardless of the children’s own status; only refugee claimants would be eligible. This aspect of the social state is the most restrictive of those considered in this chapter: while for permanent members of the state welfare is available as a basic entitlement when no other source of income is available, those deemed temporary are for the most part completely excluded.

In terms of health care and education, migration status was not explicitly used as a requirement to obtain benefits. It was incorporated instead as an indicator of residency, which is explicitly a requirement. Employment Insurance does not mention migration status at all, but through other requirements it becomes relevant. The provincial welfare regime is unique among those canvassed as it specifically acknowledges migration status as a requirement in the assessment of entitlement. Whether or not it was explicitly mentioned, migration status was deployed in the application of all of the regulations discussed in this chapter through effects, policies and practices, tended to become more restrictive as they devolved from law to practice. Furthermore, migration status played a role in access to benefits through migrants’ adoption of a discourse which associated benefits the risk of loss of status, despite the feelings of expectation and entitlement to basic equality articulated in Chapter 3. Similar themes emerge in case law, which is most robust in terms of Employment Insurance; jurisprudence tied the receipt of benefits to “good” behaviour and adherence to migration laws. This reasoning incorporates the discourse of deserving and undeserving migrants as an additive aspect of the law - although there is nothing in statute to indicate that benefits should be denied on a punitive basis or as an aspect of enforcement and deterrence vis-à-vis immigration law, this logic was applied as a primary basis of decision making at the judicial and quasi-judicial level.
Through policy, as well, the notions of disentitlement are enforced through framing the social state as a provider of “free” benefits, a treasure chest of generosity to be carefully allotted and guarded.

Relative to the laws governing workplaces, migration status tends to be deployed in a more restrictive and exclusive manner with regard to the social state; while economic participation and work protection suffer some disjuncture on the axis of status, economic participation and the benefits of the social state suffer a more total disjuncture. This is effected through the incorporation of a notion of membership in which moral scrutiny is applied to those determined to be outsiders, even while they are within the state physically, socially, and economically. Such an analysis is used to justify not only the exclusion of migrants from equal participation in the social state, but also, in the case of Employment Insurance, the deprivation of benefits as a punitive measure ancillary to immigration law. There is thus a conceptual link forged between those laws intended to create closure and restrict entry to the state, and those intended to apply to those who reside within its territory. This contributes to the entrenchment of a hierarchical membership regime in which equality is endorsed as a social and legal value, but migration status has the effect of a filter by which some become more equal than others. In the case of the social state, however, the interaction of migration status with the laws governing benefits takes on more active features: beyond deprivation, the framing of status justifies moral scrutiny and monitoring of status continuity. The latter is undertaken by various provincial authorities, and in the case of education, taken to the point of exclusion of Canadian citizens born to those without sufficient proof of status. Moral scrutiny informs judicial and quasi-judicial reasoning to augment the legal relationship between immigration laws and those which govern social benefits. Exclusion on the basis of status is thus consonant with particular constructions of precarious migrants as “illegal,” greedy, undeserving, or at the very least, whose potential for malfeasance is ubiquitous as an aspect of their very presence within the state.

While the legal regulation of workplaces shows law’s recognition of precarious migrants as workers, the laws and policies of social state show a failure to include the same migrants
with regard to basic social entitlements. When precarious migrants are commodified as labour through participation in paid work, the differential access they encounter is less an institutional feature of legal systems protecting workers and more an interaction of precarious migration status with otherwise nondiscriminatory regulations. In the case of the social state, however, in which the connection between the person and their labour is less evident, both direct exclusion and moral surveillance emerge as features of institutional relations. While migrants provide paid work, their exclusion from the social state represents a failure not only to recognize unpaid forms of work but also a failure to include precarious migrants on par with permanent residents and citizens. In one sense, the state is fragmented and separate: the law creates demarcations which function differently in different locations. The state institutions described here operate separately from each other in terms of jurisdiction, and have specific functions and concerns which are unrelated in the text of the law. Local institutions act as agents of sovereign power, but their activities are “far more suggestive of a highly fragmented system of governance than a coherent and systematic sovereign logic.”98 Alongside this disparate arrangement, is the effect of these fragmented parts, which coalesce in the lives and experiences of migrants to govern even in the absence of intentional cohesion on the part of state institutions. This invites both a closer examination of the role of state institutions in maintaining inequality, as well as the potential of human rights to respond to exclusion. I turn to both of these in the concluding chapter.

Chapter 6. Enforcement and Rights

6.1 Introduction

Migration status is a dominant organizing feature of life for precarious migrants, and it functions as a mediating factor in both working life and interactions with the social state. In both of these spheres, migration status operates to exclude precarious migrants in a variety of ways ranging from differential effect to refusal of services and surveillance concerning status. I have argued that migration status functions analogously to race, class, and gender to condition social relations. Unlike the laws governing employment standards, in which migrants are readily accepted as workers at least in theory, laws and institutions which determine allocation of benefits through the social state often explicitly excludes precarious migrants on the basis of status. While barriers and deleterious impacts appear in both spheres, there is also a disjuncture which arises between the recognition of people in terms of their labour alongside the restriction of their access to the social state. Precarious migrants are accepted as labour, but excluded with regard to needs beyond the working environment. Beyond documenting the impact of migration status, though, it is essential to understand the processes by which exclusion and stratification are maintained, and to assess potential responses to both human rights shortfalls and the question of membership.

Legal migration status is delimited by enforcement provisions in the Immigration and Refugee Protection Act and Regulations which provide penalties for unauthorized presence or activities in Canada, as well as provisions which allow for the forcible removal of foreign nationals who are unauthorized or otherwise in breach of the Act and Regulations. However, based on participants’ narratives, the way enforcement plays out is much more complex than written dictates and policies. Only a small minority of migrant participants had experienced direct interaction with the Canada Border Services Agency, which is the institution primarily responsible for immigration enforcement. Almost all participants,
however, described an acute awareness of the potential for enforcement. This potential was enacted through multiple sites and relationships within working life, in relation to the social state, and in social and community life more generally.

In this chapter, I propose a more expansive understanding of the notion of enforcement and argue that this is an appropriate way to understand the mechanisms of exclusion which function through multiple institutions. Immigration enforcement is defined in discrete terms as part of the federal immigration power and pertains primarily to the removal of status, the removal of persons, and other punitive measures for those who contravene the conditions of their status or who otherwise fail to meet the requirements of the legislation. Based on the information provided by study participants, however, status seems to catalyze coercive power within state and non-state relations across a variety of sites, most of which were not based on direct interactions with immigration authorities. Rather than using the definitions of enforcement power given in the federal immigration regime, then, I elaborate a definition of enforcement in which interactions are included on the basis of their coercive power, and explore the role of status in legitimizing this coercive function through multiple institutional sites.

Federal immigration authorities enforce closure of the state by territorial means: through the physical removal of individuals and by revoking status. What is enforced through the practices described in the above chapters is also a form of closure, but it is effected non-territorially. Individuals are not ejected from Canada’s territory through local practices, but are effectively excluded from social state benefits and from protections of adequate working conditions. Like territorial closure, this social and economic exclusion relies on the construct of status, but it acts through boundaries apparent in daily life and in multiple local sites, impairing participation even while migrants live and work in Canada.

Moving from the premise that the exclusionary impact of status is maintained through multiple state sites by way of enforcement, I explore the potential of human rights mechanisms to respond to the exclusionary impacts of precarious status. It is appropriate to do so for several reasons. First, rights mattered to the people I interviewed in this study.
Both migrant and agency participants framed their expectations and understandings of the state’s obligations in terms of human rights. Second, in a democratic state, human rights are understood to enshrine norms with which other laws and practices must comply. They are a state’s way of measuring its own conformity with the values it purports to uphold. An analysis which implicates state institutions in promulgating inequality would be incomplete without exploring the potential of rights mechanisms as a built-in corrective. Finally, migration status operates similarly to race, gender, and class, and is likely to benefit from the development of a rights analysis, which has been an important, if incomplete, part of the ongoing struggle to overcome unequal relations through those categories. As I will argue in further detail below, human rights strategies are limited primarily because of the failure to include precarious migrants as rights-bearing members of a particular national community. As such, I conclude with a critical exploration of the manner in which theorizing membership within a state has the potential to respond to the complex of authority organized by migration status.

6.2 Redefining Enforcement

In thinking of immigration enforcement, dramatic scenes of immigration police, workplace raids, and physical coercion fill the popular imagination, but enforcement also occurs through much more subtle pathways and by less direct means in a variety of state and non-state sites. Through the interviews in this study, enforcement was invoked through state agencies, employers, and community members. The disciplining effects of enforcement were linked not only to the capacity to reside in Canada, but also to toleration of inadequate or exploitative working conditions, reluctance to claim rights and entitlements, and circumscription of social life. As described in detail in Chapter 5, migrant relationships to various institutions were often affected by the perception of the power of the state to enforce negative consequences, refuse service, or "report" migrants to immigration. Similarly, status functioned as a catalyst for discipline and self-discipline in employment relationships, and social and community life. These specific interactions occurred within the larger frame of the perceptions and expectations concerning state power and the
envisioning of its corollaries in daily life. Furthermore, participants described the impact of precarious migration status as being multifaceted: effects on health, economic position, and family relationships were of urgent concern to migrants across cultural and worker groups. In this context, decisionmaking processes in which self-identified "legal" or "illegal" ways of living were also deeply conditioned by migrants’ perceptions of state power as a connected whole. Migrant participants described intricate relationships between conceptions of enforcement and status and various aspects of life which could be determinative of social inclusion or marginalization, providing insight into the ways in which direct enforcement might be unnecessary where a migrant is excluded within the state through other means.

Enforcement is engaged in both policy and practice to limit the capacity of migrants to reside, work, or study legally in Canada. Insofar as precarious or temporary migration is constructed as a problem from the perspective of the federal state, the idea of enforcement or exclusion is readily enlisted as the solution. In the Canadian context, however, direct immigration enforcement appears to function primarily on a symbolic level. The number of prosecutions and deportations of unauthorized migrants is small in comparison to the likely number of migrants without status or with improper documentation, and enforcement against employers of precarious migrants has also been ineffective at best.1

Talk of the dangers of large-scale incursions of migrants, both workers and refugees, persists in policy discourse.2 In practice, large-scale enforcement has not been actively pursued by the state, but the idea of enforcement is entrenched in the context of precarious migration through the conflation of two quite different issues: border control and migrant control. The former refers to controlling the entry of persons into a state, often cited as a


2 For example, the following quote is reproduced from an intelligence manual aimed at educating Canada Border Services Agency officers in carrying out their duties: “In a prolonged recession and difficult labour market, Canada, which has been identified as being better positioned to weather the recession, and with its comprehensive social safety nets, will continue to be an attractive destination for displaced migrant workers and irregular migrants leaving behind social and political conflicts” Canada Border Services Agency, The Impact of the Global Recession on Migration (Ottawa, Canada Border Services Agency, Intelligence Risk Assessment and Analysis Division, Intelligence Directorate, 2009, released as part of Access to Information Request A-2009-08262), at 1.
foundational aspect of sovereignty, and the latter refers to the regulation of persons who are already within the state’s territory, and whose presence gives rise to specific normative claims to membership that do not exist for those outside the state’s borders. In other words, precarious migrants are socially and politically excluded while living in Canada on the basis of sovereignty even while they participate in economic and social communities. Marginalization of precarious migrants within a territory is justified by logic which appeals to sovereignty, borders, and national integrity, but in actuality the borders are constructed within, rather than outside, the state in what Catherine Dauvergne has called “the reciprocity of sovereignty and illegality.”

Enforcement as described in this study took place through interactions with state agencies not legally responsible for immigration enforcement (such as school boards), non-immigration specific state authorities (such as transit police), and non-state actors such as employers and community members. These interactions ranged from surveillance and document scrutiny, questioning, threats of deportation, and informing on non-status migrants. Migrants also experienced enforcement in terms of indirect effect: often, even when they had no direct interaction with the various actors listed above, they modified their actions and behaviours based on the potential of enforcement. Migrants often reported weighing the perceived potential for enforcement action against accessing services, demanding basic employment rights, or being active in social life. This was to be the case for many participants even when there were social membership entitlements at stake, such as Employment Insurance benefits or medical assistance.

The fact of legal entitlement did not appear to mitigate the perceived danger of enforcement or the disciplining effect of enforcement/illegality dialogues for migrants, which resulted in lack of access to membership benefits even where entitlements were clear in the text of the law. This effect was evident both for those who had no status and

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those who had temporary legal status of some kind. Although these disciplining features were distinct from law’s written dictates and direct enforcement policies, the enforcement discourse present for migrants is intimately a part of the law in a broader sense. It flows from status distinctions which originate in the law; these distinctions are integrated on a profound level in the way migrants view themselves in relation to the state and non-state actors through which enforcement flows. In a sense, the law is lived in these relationships in tandem with direct enforcement; the effects of potential enforcement in the absence or direct interactions with immigration authorities are pervasive, and should be understood as part of the phenomenon of enforcement. Through examples and themes which emerged in migrant and agency interviews, this section will offer an expanded picture of enforcement as defined by its coercive or disciplining effects in multiple sites.

6.2.1 Enforcement and Immigration Authorities

Federal immigration law empowers the state to enforce status-based distinctions in a direct and physical manner, by way of removal orders. Within the federal immigration legal regime, there are different types of removal, depending on the nature of the person’s situation. There are three types of order that a peace officer (although these almost always enforced by Canada Border Services Agency) is empowered to issue. A departure order is the least serious of the three. It is an order requiring the person to leave Canada, but is not immediately enforceable, and may be issued on a conditional basis. An exclusion order is an order prohibiting a person to re-enter Canada for a specified period of time (one or two years, depending on the basis for issuing the order). A deportation order is a complete bar to re-entry to Canada without specific authorization, and is more likely to result in actual

5 Immigration and Refugee Protection Regulations, SOR/2002-227, s 223.
6 For example, departure orders are always issued to refugee claimants upon making their claim, but they cannot become enforceable until after the determination of the claim. Immigration and Refugee Protection Act, SC 2001, c 27, s 49(2).
7 Immigration and Refugee Protection Regulations, supra note 5, s 225.
expulsion from Canada.\textsuperscript{8} For the latter two categories, persons who wish to return to Canada during their exclusion must make an application for authorization to return to Canada on the basis of "compelling reasons" to re-enter; this is a discretionary decision on the part of the Minister of Immigration.\textsuperscript{9} Deportation orders represent the greatest likelihood of actual enforcement action, as well as the most serious consequences in terms of re-entry prohibition.

In response to an Access to Information Request, the Canada Border Services Agency provided data on removal orders issued in British Columbia from 2003-2012. In issuing removal orders, the Canada Border Services Agency tracks the status of the person to whom it is issued on the basis of entry (entered without authorization, entered with authorization, or Permanent Resident).\textsuperscript{10} Among these categories, those who are not permanent residents consistently comprise a large majority of removal orders (78-93%). The basis for removal is also tracked, (Criminality-Lesser, Criminality-Serious, Financial, Health, Human Rights Violations, Misrepresentation, Non Compliance with IRPA, Organized Crime, and Security Grounds). Of these, “Non Compliance” is by far the most frequent basis for removal orders, comprising at least 80% of tracked cases in each year for which there are data.

The Canada Border Services Agency reported that it had issued between 249 and 449 deportation orders annually in British Columbia between 2003 and 2012, with no noticeable pattern of increase or decrease over that time period. Deportation orders

\textsuperscript{8} \textit{Ibid, s 226}(1).
\textsuperscript{9} \textit{Ibid, s 226}(1).
\textsuperscript{10} Chart A-2011-07552 provided by email dated March 2, 2012, from Daniel Kipin, Canada Border Services Agency in response to a written request made under the \textit{Access to Information Act}, RSC 1985, c A-1.

The Canada Border Services Agency response included the following notes:

- Not all removal orders come into force, for example a removal order against a refugee claimant will not come into force if the individual is granted Protected Person status as the result of the refugee claim.
- All removal orders against an individual become void if the person becomes a permanent resident.
- Some individuals have a right to appeal their removal orders to the IRB, if their appeal is allowed the order against them may be set aside.

Removal of an individual from Canada enforces all in force removal orders made against that individual.
represent a small share of total removal orders issued; they regularly comprise about 10-20% of all removal orders issued in British Columbia. The majority of removal orders are departure orders, which represent 50-70% of all removal orders. Pursuant to the Immigration and Refugee Protection Act, departure orders become deportation orders if a person does not leave Canada, but on the basis of the above numbers, it is reasonable to assume that most departure orders do not result in deportation orders.

Another measure of direct enforcement is through the number of offences investigated under the Immigration and Refugee Protection Act. Through a further Access to Information request, the Canada Border Services Agency provided data on the processing of offences under the Immigration and Refugee Protection Act. I requested data on investigations resulting in a charge since 2006 for all of Canada for which the initial investigation was commenced under sections of the Act which would be most relevant to the question of enforcement against persons without status or with irregular status, namely: contravention of a section of the Act or failing to comply with a requirement of the Act, with specific reference to staying, working, or studying in Canada without authorization; employing a person without authorization; aiding entry of persons without authorization; and organizing entry through fraud or deception. The results of this request showed several charges pursuant to aiding entry (N=14, of which 2 were in Vancouver), and for employing a foreign national without authorization (N=33, of which 4 were in Vancouver). The Canada Border Services Agency does not record charges with regard to staying, working, or studying in Canada without authorization specifically, but did disclose more than 800 investigations for failing to comply with the Act (which would

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12 Immigration and Refugee Protection Regulations, supra note 5, s 224(2).
13 Table A-2011-07740 provided by email dated October 3, 2012, from Daniel Kipin, Canada Border Services Agency in response to a written request made under the Access to Information Act, RSC 1985, c A-1.
14 Immigration and Refugee Protection Act, SC 2001, c 27, s 124(1)(a).
15 Immigration and Refugee Protection Regulations, supra note 5, s 183(1).
16 Immigration and Refugee Protection Act, SC 2001, supra note 14, s 124(1)(c).
17 Ibid, ss 117(1), 119.
18 Ibid, s 118(1).
encompass a wide variety of potential reasons for investigation), of which at least 90 took place in Vancouver.\textsuperscript{19} Most of these resulted in a guilty verdict and subsequent incarceration. Annually, the numbers of investigations toward criminal charges under the Act in Vancouver ranged from 16 to 44, with no clear pattern of increase or decrease over the years for which data were available.\textsuperscript{20}

Based on this brief sketch of data on removal orders, several tentative observations can be made. First, although there are no firm data on the number of people lacking status or with irregular status, the number of deportations is very small compared to even the most conservative estimates of the number of irregular or undocumented people. Secondly, non-permanent residents comprise a large majority of those for whom removal orders are issued and the number of actual deportation orders issued for all groups is much smaller than the number of removal orders. Non-permanent residents are clearly an object of initial enforcement action, but because most removal orders do not appear to result in deportation orders, we can assume that the most of the enforcement situations of non-permanent residents do not result in actual deportation. While the reasons for this are difficult to surmise in the absence of exit data, possibilities include the persistence of removal orders which are not enforceable legally or practically, voluntary departure, individuals “going underground” or otherwise losing contact with immigration authorities, and lack of enforcement activity on the part of the Canada Border Services Agency. The data on offences indicate that proceeding by way of offence investigation is relatively common, although it is not possible to determine the frequency of a foreign national being charged with an offence on the basis of overstaying or working or studying without authorization.

It is the policy of the Canada Border Services Agency to prioritize enforcement cases; the agency uses five priority levels to determine the urgency of enforcement action, as follows: 1. Security Threat; 2. Organized Crime or Crimes Against Humanity; 3. Serious Criminality

\textsuperscript{19} Table A-2011-07740 provided by email dated October 3, 2012, from Daniel Kipin, Canada Border Services Agency in response to a written request made under the Access to Information Act, RSC 1985, c A-1. 
\textsuperscript{20} Ibid.
or Health (serious risk to their own or others’ health)’ 4. Criminality; and 5. Non-Criminal.\textsuperscript{21} As such, immigration offences and irregular status are categorized separately from criminality, and identified as the lowest order of priority for enforcement action. This does not indicate a lack of actual enforcement, but it does support an assumption that for those with irregular status who are not seen as posing a risk on criminal or health grounds, enforcement is not as vigorously pursued as it is for higher-priority categories.

Fear of enforcement was described as an aspect of community information sharing and the potential for enforcement had a disciplining effect: for those without documents, in particular, the feeling of scrutiny was pervasive: “…you feel worried, like oh the police, like you have to do everything perfect, or just worried about immigration, all the time….I never had it happen, but some of my friends got deported like that.” (M17) This shows the internalization of the conceptualization of irregular migrants as “lawbreakers” despite the minor nature of immigration infractions themselves.\textsuperscript{22}

Although only a small minority of migrant participants had experienced enforcement action directly, one case merits description as an example of workplace enforcement. The participant in question entered Canada as a live-in caregiver, and her initial employer decided she no longer needed the caregiver’s services part way through the initial two-year contract. This particular employer advised the caregiver that she wished to “help,” and agreed to keep her as an employee “on paper” in order to facilitate her permanent residence application, but did not continue to pay her. Instead, the employer offered to connect the caregiver with other employers (for whom she was not authorized to work), to do cleaning work in their homes for cash on an informal basis. After some months of this work, the worker was approached in her employer’s home by Canada Border Services Agency officers:

\textsuperscript{21} Operational Manual ENF 7 - Investigations and Arrests provided by email dated March 15, 2012, from Daniel Kipin, Canada Border Services Agency in response to a written request made under the Access to Information Act, RSC 1985, c A-1.
So around 10 o’clock someone rang the bell, because in my part time home there’s a monitor that you can see who is outside the gate, and you just press the button open and then the gate open. So I did it twice, I saw two lady outside the gate...I went out and open the gate and it’s the people from CBSA...I did ask them what’s going on, and they say no you don’t need to ask, like show me your ID, they were asking for my ID so I gave them my ID. They interrogating already, and I did ask them oh can you just tell me what’s going on, and the lady said maybe now you can think what’s going on and then they ask me what are you doing here...they did search the whole house like okay it’s positive she is alone...at first I was just trying to collect all my thoughts, and she said have you ever been handcuffed before....I was so scared...like there was no way out... (M 31)

This participant was quite distressed while recounting this experience with the Canada Border Services Agency. It was clear that part of the force of this encounter was associated with the threat of deportation. She mentioned that “they have a plane ticket” to send her back to the Philippines as an aspect of the initial enforcement encounter, although it was unclear in the interview whether the officers actually threatened deportation. The officers advised her that they had received a tip, but did not identify their source. She suspected it had been a family member with whom she had had a disagreement, and who learned of her situation via Facebook. This situation echoes a case documented in Geraldine Pratt’s work with live-in caregivers, in which the employer practice of “sharing” or subcontracting a caregiver led to the caregiver’s deportation.23

Many migrants referred directly to actual or potential interactions with the immigration enforcement authorities as an influential factor in governing their own lives. In their descriptions of immigration authorities, migrants spoke first of the negative exercise of discretion and of the manner in which they live with the thought of deportation whether or not it is actually imminent. (e.g. M21, A1) In the words of one agency representative: “whenever they get something that’s uncertain or that doesn’t look too positive, the first question is “am I going to get deported?” (A5) Thus, although direct enforcement by the

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Canada Border Services Agency is infrequent relative to the number of people with irregular status, enforcement was influential not just in terms of both face-to-face interactions but also its potential, the “specter of deportation.” The risk of actual enforcement action by immigration authorities for precarious migrants is real, but alongside direct enforcement action is the pervasive force of the potential for deportation, often invoked through reference to enforcement. For many people for whom the only basis for enforcement is irregularity of status or lack of status, the spectre of deportation may never be actualized, but it is potent nonetheless.

In some cases, participants in social life acted as connectors or informers to immigration authorities. Direct contact with immigration officials that resulted in enforcement action was reported by agencies and migrants in various sites outside of those discussed above: on the street and upon re-entry to Canada, (A5) and social parties. (M17) Migrants reported that various people in their personal lives played the role of informant or potential informant: friends, co-workers, (M18, M20) classmates, and family members. (M31) Migrant participants described curtailing their social lives accordingly, through limiting social activities generally not going out, or hiding their status when interacting with others. (M17, M18) One agency representative also commented on the high frequency of enforcement action following “anonymous tips” or “poison pen letters” from community members concerning unauthorized employment. (A5)

Many of these examples were distant from physical state authority, yet evoked the tone of surveillance. For example, one migrant participant recounted the manner in which a roommate took on an authoritative, scrutinizing role:

I used to have a roommate, Canadian, and he was like...like a cop. He always asked me “your friends are legal, your friends are not” or “what are you doing, why you came here, show me your work permit” like that. He was like crazy. When I say I’m legal, and I have this-he changed his mind about me, you know what I mean? It was more friendly, but when I say my

friend doesn’t have...he didn’t want to talk to them, or he was rude. (M17)

In the following sections, I draw on examples given in participant interviews to argue for a redefinition of immigration enforcement which includes the various ways in which the potential for removal or deportation arises as a disciplining force in day-to-day life beyond direct interactions with immigration authorities.

6.2.2 Enforcement and Work

Work sites were a major site of enforcement as articulated by both agency workers and migrants. Work sites may serve as an interface for direct contact with Canada Border Service Agency officers and regular police, but the spectre of enforcement also arose as a primary feature of the relationship between employers and employees, even where direct enforcement had not occurred. Furthermore, although not a part of the actual work site, many participants relied on public transportation in order to work, and I have included here a discussion of the role of transit authorities as part of the matrix of enforcement encountered by precarious migrants.

With regard to direct contact with authorities, “immigration police” (as the Canada Border Services Agency were sometimes called in interviews) or regular police, direct enforcement activities and “checking papers” were reported at construction sites, farms (A2), restaurants (M18), private households where domestic workers were employed (A5, M31) massage parlours (M14) and “cash corners” where workers in informal sectors wait to meet potential employers. (M 23) Participants did not always make the distinction between regular police and immigration police, but certainly identified the presence of any type of police at work sites as a risk of losing status, deportation, or criminal sanction. Even the possibility of police presence, in conjunction with uncertain migration status, led to a heightened awareness of risk. As described in detail in Chapter 4, migrants were often reluctant to complain about workplace abuses, unpaid work, and health and safety concerns, and experienced an exaggerated power disparity within employment relationships in
association with their status. Although employment relationships are governed by laws unrelated to the federal employment regime which determines status, and those laws are in principle inclusive of all workers, status functions as a barrier to equal treatment through those regimes. Framing the workplace as one site in a matrix of enforcement allows us to understand the manner in which this exclusion is maintained and reproduced.

The most poignant instance of status-based enforcement as invoked directly in an employment situation was described by a worker who had received a performance complaint from her employer. The worker disputed the facts alleged by the employer, but felt she could not speak up because of the link with her migration status. The employer’s disciplinary letter to the worker cited the alleged failure by the employee and threatened immediate termination for further infractions, as many disciplinary letters do. However, this letter also stated that the employer would inform immigration authorities that the worker was not authorized to work, and that this would remove her ability to work legally, as well as pointing out that it might be difficult for her to obtain another work permit.25 (M18)

In this letter, the use of legalistic language such as “offences” and “infraction,” reference to inside legal expertise, are combined with a direct threat to contact immigration enforcement. The employer thus displays power not only through its willingness to activate immigration enforcement if the worker does not comply with demands, but also by substituting itself directly as the arbiter of legal migration status for that worker. This is possible because the legal structure surrounding status places the employment relationship in a pivotal role in obtaining status and maintaining status.

Another work-related site of enforcement reported by migrants and agency representatives was the Skytrain public transit system, through interactions with transit police. This was of concern specifically where migrants did not have legal documents

25 This letter was read into to study transcript but has been redacted here in order to protect the identity of the participant.
establishing status, as transit police were reported to have turned over such migrants to the Canada Border Services Agency for enforcement and deportation. Two agencies reported Skytrain ticket checks as a regular site of enforcement and counseled their clients to “be careful” ensure they rode with a ticket, (A2 and A4) and one Mexican migrant reported community knowledge of “immigration on the Skytrain.” (M17) One agency worker gave the following example:

“Lately, most of the illegal workers from Latin America, they get caught on the Skytrain. A guy who was living in the country for two years...he was caught a few weeks later when the security was re-enforcing the transportation especially on Skytrain. One of the police officers got him and told him, “you know, you’re getting checked.” But he was so nervous and they see something is wrong about this guy...they said, “can we have an ID?” He didn’t have any ID. That’s when they call the police or after, immigration. Sometimes, they call straight to immigration. They show up to pick the guys. I think that has been really successful for immigration, catching the illegal ones.” (A4)

In British Columbia, the public transit service has a distinct police force formally known as the South Coast British Columbia Transportation Authority Police Service. As police, its members are “peace officers” within the meaning given by the Criminal Code of Canada, and thus legally empowered to take enforcement action with regard to Acts of Parliament, including the offence provisions of the Immigration and Refugee Protection Act and Regulations described above, in relation to migration status in Canada. Transit police are guided by their own “Policies and Procedures Manual,” which contains a specific section concerning “Immigration Arrests” and includes an interpretation of the offence provisions of the Act. Rather than directly importing categories articulated by the Act, the policies cast a broader net, including the suspicion on “reasonable grounds” that a person is “in Canada by fraudulent or improper means,” “no longer a visitor,” or for “not leaving Canada as

26 Criminal Code RSC C-34, s 2.
specified in a departure order.”

Each of these categories could include individuals who could be in Canada with authorization. For example, the broad language of “improper means” may capture a refugee claimant who used inauthentic documents to travel to Canada, but this is specifically considered under immigration law as non-punishable. A person may be “no longer a visitor” because they have obtained a study permit, or applied for permanent residence, or have implied status. Similarly, as described above, a departure order is often stayed or otherwise considered to be non-enforceable under the Immigration and Refugee Protection Act.

Pursuant to a Freedom of Information request, the Greater Vancouver South Coast Transportation Authority (“transit police”) provided information about actions taken by their members relating to immigration status or the Immigration and Refugee Protection Act and Regulations. The data they provided showed between 27 and 103 recorded enforcement interactions annually which were pursuant to immigration offences. Many of these interactions are coded as an “assist,” likely to the Canada Border Services Agency. Some also represent interactions initiated by transit police to directly enforce their interpretation of the Act. In an email, a representative from the transit police noted that

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28 Excerpt from SCBCTA Policies and Procedures Manual, Ibid:

ARRESTS-IMMIGRATION ACT

31. Every peace officer in Canada may arrest and detain without a warrant for an inquiry or removal from Canada any person who on reasonable grounds is suspected of:

1. being a visitor who takes or continues employment without authorization
2. being no longer a visitor,
3. eluding examination or inquiry,
4. escaping custody,
5. being in Canada by fraudulent or improper means
6. returning to Canada after removal without Ministerial consent
7. not leaving Canada as specified in a departure order
8. being a deserting crew member

if, in the opinion of the arresting officer, the person poses a danger to the public or is unlikely to appear for inquiry or removal.

29 Immigration and Refugee Protection Act, supra note 14, s 133.

30 Excel Spreadsheet “immigration” provided by email June 18, 2012 by Ruth Boyd, South Coast Transportation Authority, in response to a written request made under the Freedom of Information and Protection of Privacy Act, RSBC 1996, c 165.
“the majority of our contacts made is as a result of fare checks on the sky train system. Our members place themselves in the Fare Paid Zone at the stations, check for fares and if a fare cannot be produced a check of identification is done which results in the incidents that are listed here.”31 The act of boarding a transit vehicle without the requisite proof of payment is normally a minor offence attracting only a fine. For precarious migrants, it serves as a venue for enforcement of immigration laws, either through transit assistance to the immigration authorities or through the transit police’s particular policy derivative of the terms contained in the federal immigration regime.

Through the data provided by participants in this study, places of employment and activities peripheral to employment arise as sites of enforcement in which status provides a catalyst for the enactment of power in several ways. Direct enforcement and surveillance by immigration authorities at work sites is straightforward as an example of the way in which status may interact with state authority to create situations of control or coercion. One step removed, the introduction of status-based arrests through transit policy creates further site of enforcement in a space of daily living often ancillary to work. In the workplace itself, even in the absence of a federal removal order or investigation, the possibility of losing status can be invoked by employers to control the activities of employees and provide a strong disincentive to dissent in the workplace.

6.2.3 Enforcement and the Social State

Through the detailed description of precarious migrants’ interactions and understandings of the social state, fields such as health care, education, and income security may act as sites of enforcement. Within the social state, migration status is deployed through policies and practices to exclude precarious migrants, as described in detail in Chapter 5. The persistence and potency of this exclusion flows not from the mere exercise of bureaucratic discretion, but from the coercive function of the potential for punitive measures on the

31 Email June 18, 2012 from Ruth Boyd, Transportation Authority, in response to a written request made under the Freedom of Information and Protection of Privacy Act, RSBC 1996, c 165.
basis of status. When discretion is imbued with the actual or perceived potential for punitive measures such as status removal, it creates both disciplining and self-disciplining features through which power disparity is maintained and reproduced. Thus, although they are legally distinct from the enforcement apparatus under federal immigration law, institutions within the social state emerge as sites of enforcement. For precarious migrants, interactions with the social state are never only about the benefit or service in question, because while status is uncertain, it is constantly at stake. The construct of status both imbues social state interactions with the actual capacity to enforce differential access and colours their relationships with the potential for enforcement from the perspective of migrants, who adjust their behaviour accordingly.

Both agency representatives and migrant participants reported that seeking medical assistance was associated with the fear of having irregular status discovered and immigration enforcement, whether directly enacted or not. One agency worker related the following situation of a worker without status:

There was a lady who worked in washing dishes. She fell on the kitchen floor and she spent one night before coming to the office with a broken open wound. The bone had broken and got out of the skin. She was in pain and with a towel covering that and the only thing I told her was, “ok, we’re going to the hospital.” And she told me, “I have no papers. They are going to deport me.” ... And I took her to the hospital and they treated her in the hospital. She spent quite a long time in the hospital probably 2 or 3 weeks. After they left her to go home, immigration showed up and told her her status. She was more worried the way she was going to pay the hospital than the deportation.” (A4)

This example shows not only the initial reluctance of the migrant to obtain what was clearly essential emergency care because of fear of deportation, also that the power of the hospital to collect on a debt seemed to persist in its effects even once the course of immigration enforcement was already decided. A migrant participant mentioned health care as a site of enforcement in association with status distinction explaining that once you had a work permit, “any problem, you can go to the doctor, you’re not like ‘oh, they’re going to catch me at the doctor.’” (M17)
Interactions with health services can also lead to police involvement: one agency noted that this was not usually the case, but described a situation wherein a migrant worker (with migration status, but not covered by provincial health care) was treated at a hospital, and asked to pay $700 when he left, for lab work and a physician's time. The migrant had not anticipated the cost, and when he said that he didn't have the money, the administrative staff at the hospital called the police, who attended the scene but did not detain the migrant. (A2) In this case, there was no further police action, but the hospital’s readiness to ask for police assistance to settle a debt could have profound consequences for status and non-status temporary migrants greater than those which would likely accrue to a permanent resident or citizen in a similar situation. The message that hospital interactions may result in direct enforcement is confirmed by this example, and such incidents are likely to further entrench the enforcement effect, even if they are only occasional. This case shows the multiple levels of enforcement and exclusion are at work: the migrant is excluded from state-funded medical care despite his legal status and economic participation, and the interaction arising from the demand for payment in conjunction with lack of status created a situation in which the police were involved, although the police would not under normal circumstances attend to enforce payment of a debt.32

Migrants, particularly those without any legal status, faced barriers to medical care due to lack of coverage, but also for fear of being discovered without status through the health care system. While one migrant was described as having “slipped through the cracks,” (A1) others specifically cited status as a reason for avoiding necessary medical care. As described in chapter 5, one agency worker described having contact with a number of women who required prenatal medical care and medical care during childbirth, but did not seek this care from doctors or hospitals due to fear associated with their immigration status.

32 Historically, (1900-1920), doctors played a major role in the deportation of foreign nationals from Canada. Barbara Roberts "Doctors and deports: the role of the medical profession in Canadian deportation, 1900-20" (1986) 18:3 Canadian Ethnic Studies 17.
As in health care, both disciplining and self-disciplining functions are evident through public education. In Chapter 5, I described a situation in which the parents held work permits and were required by school administrators to report regularly to provide updates on migration status, though the child in question was a Canadian citizen. (M 25) Furthermore, policy documents disclosed by the Vancouver school board encouraged physical surveillance of children's homes to determine residency, which may be a proxy for status, also as described in Chapter 5. Status may deter participation in education, even in the absence of direct exclusion on the part of the educational institution or school board: one family reported choosing not to enroll their child in school when they understood that it would not be possible because of their status. (M4) Keeping children out of school could also draw enforcement attention by way of neighbours: one agency reported cases where neighbours had noticed migrant children not in school, and then contacted the Ministry of Child and Family Services, who then investigated the family. (A4) In some other cases, children were enrolled in school without status for years, and were only identified as non-status children when health care needs arose. (A4)

In terms of income security, as described in Chapter 5, migrants regularly reported that they would never apply for welfare because they knew they were ineligible. This is consonant with provincial law, which categorically excludes those with less than permanent residence from obtaining welfare benefits. However, as described in later sections of the same chapter, participants also avoided applying for Employment Insurance, even though for the most part they would have been eligible for it. This was a very consistent response across the interviews. When participants described non-voluntary work stoppage, I asked if they had applied for Employment Insurance, and none had applied for it. Many gave the reason that they were afraid it would affect their potential to obtain permanent resident status in some way. In the absence of legal exclusion, participants changed their own behaviour on the basis of possible threat to their status, even in cases where they were clearly entitled to receive a benefit on discontinuation of work. The bare text of the law is thus insufficient to determine the
degree to which migrants may be excluded, and the mechanisms through which such exclusion would be maintained.

The data gathered in this study establish exclusion and differential access to the social state on the basis of migration status, but also invite an examination of the role of social state interactions in contributing to marginalization in greater social relations. Although legally governed by statutes and regulations which stand apart from the federal immigration regime, and which often exist outside federal jurisdiction entirely, these data cast social state interactions not only as sites of exclusion, but as sites of enforcement which help to maintain social stratification. The way exclusion is carried out goes beyond simple denial at points of access, isolated from the context of migrants’ lives. Rather, practices within the social state of surveillance, mandatory reporting, and police involvement, often pivoting on migration status, function to enforce exclusion. Furthermore, even in the absence of actual enforcement action, it is clear that there is also disciplining effect on migrants: the potential presence of any level of observation and control within the social state in conjunction with the potential to lose status or be deported also functions to entrench exclusion. The fact of enforceability is integral to the nature of law and its corollaries, whether direct or indirect, as described by Derrida:

...there is no such thing as law that doesn’t imply in itself, a priori, in the analytic structure of its concept, the possibility of being “enforced,” applied by force. There are to be sure, laws that are not enforced, but there is no law without enforceability, and no applicability or enforceability of the law without force, whether this fore be direct or indirect, physical or symbolic, exterior or interior, brutal or subtly discursive and hermeneutic, coercive or regulative...”

While there is no single, unified, national state through which governance occurs, the sites described here are unified through the enforcement of exclusion through diverse laws, policies, and practices. In organizing all of these interactions under the rubric of enforcement, their function in enforcing borders inside Canada’s physical territory, and as

against those who are already present within it, becomes clear. This highlights the problematic of migrants’ simultaneous presence in, and exclusion from Canada, and invites examination of potential rights responses as well as the basis on which membership within the Canadian state and society can be determined and contested.

6.3 Human Rights

Through the study data in this research, I have added to the body of work which clearly establishes lack of parity for precarious migrants in working relationships and barriers to accessing the social state. I have shown that, in this sense, migration status itself can be seen analogously to race, gender, and class in terms of its social function. I have also concluded that local sites of enforcement serve to reproduce unequal relations. These conclusions illustrate human rights problems in terms of both formal and substantive inequality for precarious migrants, and invite analysis of the potential of rights processes to provide effective remedies.34

One stream of scholarship concerning migrants and human rights is focused on the potential of international rights regimes to protect migrants or promote universalized norms in global and local settings.35 These scholars argue that rights and national citizenship are becoming increasingly disjoined under conditions of globalization. International human rights are thus framed as an increasingly viable basis for noncitizens to contest inequality within states. For example, David Jacobsen argues that international human rights norms are contested through states and that “aliens turn to such

34 My discussion of human rights here is limited to potential remedies available at law pursuant to human rights codes and the Charter. An alternative conception of rights includes those counter-hegemonic practices in which general human rights principles are used to perpetuate grassroots movements for greater inclusion of precarious migrants. See, eg Tanya Basok, “Counter-hegemonic human rights discourses and migrant rights activism in the US and Canada” (2009) 50:2 International Journal of Comparative Sociology 183. For the purposes of this dissertation, “human rights” will refer to the available legal remedies and other advocacy options, such as those Basok describes, will be discussed separately in the concluding chapter.

international codes in making claims on the state,” and entitlements can thus be established on the basis of residency, rather than state-allocated membership.\(^\text{36}\)

This research supports the conclusion that rights claims may be made in the absence of formal membership in the national state. Furthermore, the principles of universal human rights, and the identification of all individuals as rights-bearing regardless of migration status, would certainly not be contrary to the struggles and needs articulated by precarious migrants in this study. However, actual international human rights remedies are not a viable option in the Canadian example. In the Canadian context, the potential for international law to respond directly to migrants’ concerns is limited by practical considerations: Canada, along with a vast majority of migrant-receiving nations, has not signed the main international treaty aiming to protect the rights of migrant workers, and even if it had, in the absence of explicit incorporation into domestic law, the application of international treaties is limited to persuasive value, at best, in domestic decisions. Fudge has also argued that even were Canada to ratify this treaty, there are institutional features of the foreign worker program, such as the bonding of work permits to specific employers, which would create barriers to the effective use of this treaty.\(^\text{37}\)

While I agree with Jacobsen that rights can be used to constraining states, in the Canadian case, the issue of membership remains embedded as a precursor to consideration of rights claims, and particularly those in which social and economic entitlements are at stake, in which state institutions retain “very substantial latitude.”\(^\text{38}\) In this sense, international norms do not trump sovereignty, particularly as it is expressed through ongoing membership divisions which occur on the basis of migration status.\(^\text{39}\)

\(^{36}\) *Ibid* at 10.


In this section I limit my discussion to the potential of domestic human rights mechanisms to address the rights shortfalls observed in this study, with a specific focus on equal treatment/non-discrimination provisions in both constitutional and regional human rights provisions.

### 6.3.1 Canadian Charter of Rights and Freedoms

The Canadian Charter of Rights and Freedoms forms part of Canada’s constitution, and facilitates judicial review of legislative provisions on the basis of the rights it guarantees. Courts of competent jurisdiction are enabled by the Charter to give such remedies as they find “appropriate and just in the circumstances.” Judicial remedies for Charter breaches include “striking down” offending provisions and “reading down” to modify the explicit content of a provision. Provincial, territorial, and federal governments are subject to the provisions of the Charter. As such, the Charter plays a unique and dynamic role in Canadian law in terms of its empowerment of the judiciary to refigure legislation on the basis of specific challenges. In terms of the equality provisions of section 15 of the Charter, such challenges often flow from situations of individuals or groups who wish to contest a distinction made in law. Section 15 jurisprudence addresses distinctions and exclusions pertaining to individuals on the basis of group membership. In terms of exclusion from benefits, many such distinctions are similar to those I have demonstrated with regard to precarious migrants. It thus offers the potential to effect legal changes as a response to unequal treatment which occurs through the law.

My review of this aspect of the Charter is very brief, and by necessity oversimplifies judicial and academic conversations concerning the development of equality jurisprudence under

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42 Charter, supra note 40 ss 30, 32(1).
section 15. I include it here, however, because the *Charter* is a central source of domestic human rights law in Canada, potent both in terms of its capacity to shape legislative power and in its potential to integrate international human rights standards. In this section, I focus primarily on the decisions of the Federal Court and Federal Court of Appeal in *Toussaint v Attorney General of Canada*.43 Ms. Toussaint argued that the federal government’s decision to exclude her from the Interim Federal Health program on the basis that her immigration status had expired constituted a breach of her *Charter* rights. In the foundational *Charter* case of *Andrews*, the Supreme Court held that non-citizenship was an analogous ground, but in *Toussaint*, twenty-four years later, the Federal Court of Appeal rejected immigration status as an analogous ground. The Federal Court of Appeal’s analysis started with the definition of discrimination from *Andrews*, but also drew on subsequent section 15 jurisprudence, relying specifically on the determination of analogous grounds as articulated in *Corbiere*, and the concept of legislative purpose as articulated in *Auton*. The decision in *Toussaint* thus invites examination of the manner in which the Court framed its equality analysis such as to refuse a ground of discrimination which is, on its face, relatively similar to that which was accepted by the Supreme Court in *Andrews* in the *Charter*’s infancy.

Noncitizen residents of Canada do not have the right to enter and remain *per se*, but while they are present in Canada they are entitled to *Charter* protection.44 The Supreme Court of Canada has made it clear that “[t]he most fundamental principle of immigration law is that noncitizens do not have an unqualified right to enter or remain in Canada.”45 However, such individuals are also subject to *Charter* protection once they are inside Canada,


44 A complete analysis of the application of the *Charter* to non-citizens is beyond the scope of this project; for a fuller treatment of this issue with regard to Supreme Court of Canada jurisprudence, see Catherine Dauvergne, “How the *Charter* Has Failed Non-citizens in Canada: Reviewing Thirty Years of Supreme Court Jurisprudence” (2013) 58:3 McGill Law J 1. For a discussion of the development of collective bargaining rights for migrant workers, see Basok & Carasco, *supra* note 37.

including section 15. The Supreme Court of Canada has considered the claims of noncitizens under the Charter, but a majority of those cases dealt with situations of deportation or deprivation of status itself, rather than access to state-based entitlements for noncitizens within Canada. The most notable exception to this is the case of Andrews, which I discuss in detail below.

Section 15 of the Charter provides the following guarantee:

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

This section of the Charter is most commonly used to challenge provisions in statutes and regulations on the basis of their discriminatory effect. Depending on the proximity to government of the institution in question, policies can also be considered part of the law for the purposes of this analysis. Protection from discrimination is not limited to the grounds enumerated in this section: grounds determined to be “analogous” to those listed in section 15(1) are also subject to protection. Identification of an enumerated or analogous ground as the basis for distinctions in treatment is a necessary component of a

46 In the case of section 7, “everyone” includes noncitizens physically present in Canada, Singh v Minister of Employment and Immigration, [1985] 1 SCR 177; in the case of section 15, this and other courts have used this section to determine the rights of noncitizens present in Canada: Andrews v Law Society of British Columbia, 1989 CanLII 2 (SCC), Lavoie v Canada [2002] 1 SCR 769.
47 Dauvergne, supra note 44 at 39.
48 Andrews, supra note 46.
50 If a court determines that a provision is contrary to section 15 of the Charter, it may still be upheld by virtue of section 1 of the Charter, which stipulates that the rights guaranteed in the Charter are “subject only to reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society,” which forms the second stage of judicial analysis. The application of section 1 is the subject of considerable scholarship (see, eg, Martha Jackman, “Protecting Rights and Promoting Democracy: Judicial Review Under Section 1 of the Charter” (1996) 34 Osgoode Hall LJ 661; Fay Faraday, Margaret Denike, & M Kate Stephenson, eds, Making Equality Rights Real: Securing Substantive Equality under the Charter (Toronto: Irwin Law, 2009) but for the purposes of this dissertation, I limit my discussion to the first stage of the analysis, namely, the inclusion of migration status or similar grounds within the ambit of section 15.
51 See, eg, McKinney v University of Guelph, 1990 CanLII 60 (SCC) [McKinney], Stoffman v Vancouver General Hospital, 1990 CanLII 62 (SCC).
successful section 15 claim, but not all distinctions made on the basis of enumerated or analogous grounds will offend section 15. In determining whether a basis for distinction constitutes an analogous ground, courts consider whether the characteristic is immutable\textsuperscript{52} (race is a common example), or constructively immutable (changeable only at unacceptable personal cost, religion is a common example), as well as the historical disadvantage faced by a group and its status as a “discrete and insular minority.”\textsuperscript{53} Analogous grounds identified thus far in Charter jurisprudence include sexual orientation,\textsuperscript{54} off-reserve Aboriginality,\textsuperscript{55} marital status,\textsuperscript{56} and non-citizenship.\textsuperscript{57}

In Andrews v The Law Society of British Columbia,\textsuperscript{58} the Supreme Court of Canada considered the situation of a man of British nationality, a permanent resident of Canada who was precluded from applying for admission to the Bar of British Columbia on the basis that he was not a citizen. Andrews successfully challenged the regulation in question, and the Supreme Court found that citizenship constituted an analogous ground which could attract the protection of section 15. In so doing, the Court stated:

Relative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They are among "those groups in society to whose needs and wishes elected officials have no apparent interest in attending": see J. H. Ely, Democracy and Distrust (1980), at p. 151. Non-citizens, to take only the most obvious example, do not have the right to vote. Their vulnerability to becoming a disadvantaged group in our society is captured by John Stuart Mill’s observation in Book III of Considerations on Representative Government that "in the absence of its natural defenders, the interests of the excluded is always in danger of being overlooked ...." I would conclude therefore that non-citizens fall into an analogous category to those specifically enumerated in section 15. I emphasize, moreover, that this is a determination which is not to be made

\textsuperscript{52} Corbiere v Canada (Minister of Indian and Northern Affairs) 1999 CanLII 687 (SCC) at para 13 [Corbiere].
\textsuperscript{53} Law v Canada (M.E.I.), [1999] 1 SCR 497 at para 67.
\textsuperscript{54} Egan v Canada [1995] 2 SCR 513.
\textsuperscript{55} Corbiere, supra note 52.
\textsuperscript{56} Miron v Trudel 2 SCR 418.
\textsuperscript{57} Andrews, supra note 46.
\textsuperscript{58} Andrews, supra note 46.
only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society. While legislatures must inevitably draw distinctions among the governed, such distinctions should not bring about or reinforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others.\(^{59}\)

Andrews has also been subsequently applied in terms of its articulation of the appropriate test for discrimination, which it describes as follows:

...[D]iscrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual’s merits and capacities will rarely be so classed.\(^{60}\)

This dissertation deals with a specific subset of non-citizens: those whose migration status in Canada is less than permanent. The decision in Andrews referred to non-citizens generally as compared to citizens, and the applicant in that case was a permanent resident. While the Supreme Court has not specifically considered “migration status” itself as a potential analogous ground, the Federal Court of Appeal did so in 2011, in an appeal of the Federal Court’s decision in Toussaint. By way of context, I will briefly introduce to the trial level decision before turning to an examination of the equality analysis of the Federal Court of Appeal, in which I will identify several assumptions built into the reasoning of the Courts, and particularly the Court of Appeal, in which judicial interpretation of the law

\(^{59}\) Andrews supra note 46 at 32.

\(^{60}\) Andrews v Law Society of British Columbia, [1989] 1 S.C.R. 143 at pp. 174-175 as cited in McKinney v University of Guelph, 1990 CanLII 60 (SCC). In Lavoie, supra note 46, the Supreme Court of Canada considered the application of section 15 of the Charter to a federal law requiring citizenship status for certain categories of employment with the federal public service. While the majority found that the law was discriminatory within the meaning of section 15, it held that the discriminatory effect was of such a nature as to be justifiable under section 1.
imports particular discursive features concerning non-status migrants, membership, and the role of the state.

In the case of *Toussaint v The Attorney General of Canada*, the Federal Court considered the situation of a woman who had entered Canada as a visitor from Granada in 1999, and who stayed in Canada without regular immigration status for more than 10 years. Ms. Toussaint worked for the first seven of those years, but in 2006, became ill and was unable to work. She obtained sporadic free health care but the provincial health authority refused access to publicly funded health care in Ontario on the basis of her lack of immigration status in Canada. She was billed for emergency medical services, and subsequently was refused medical services and medication. In her request for medical services, Ms. Toussaint provided medical reports to indicate that there had been a deleterious effect on her health on the basis of refusal and delay of treatment, and that she “would be at extremely high risk of suffering severe health consequences if she does not receive health care in a timely fashion.”

Ms. Toussaint attempted to regularize her status by applying for permanent and temporary residence in Canada in 2009, but could not afford to pay the processing fees of $550 and $200, respectively. She requested a waiver of the processing fees for these applications, but her request was denied and thus neither application was ever considered. As her medical situation became more serious, she applied to Citizenship and Immigration Canada to be covered under the Interim Federal Health plan (IFH), was refused, and sought judicial review of that decision. She argued that her exclusion from the ambit of the Interim Federal Health plan violated sections 7 and 15 of the *Charter* and international law.

The basis for IFH at the time was Order-in-Council P.C. 157-11/848, which applied to “immigrants” as described therein. Ms. Toussaint argued that she was an “immigrant”

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61 *Toussaint, supra* note 43.
63 Order in Council P.C. 157-11/848 of June 20, 1957 provided as follows:
within the meaning of that word under the *Immigration Act* in force at the time the Order in Council was drafted, namely: “a person who seeks admission to Canada for permanent residence.”\(^{64}\) She argued that she fit within this definition as soon as she applied for permanent residence. The Court noted that no application had actually been filed, as Citizenship and Immigration Canada had refused to process the application without the requisite fees. She had also applied to have the decision to refuse to process her application judicially reviewed, and the Federal Court denied that application.\(^{65}\)

With regard to part (b) of the IFH requirements, the Court rejected Ms. Toussaint’s submission that anyone who could be subject to the exercise of powers under the *Immigration and Refugee Protection Act* is a person “subject to immigration jurisdiction.” It found that a person is subject to immigration jurisdiction “if there is some action or proceeding being taken with respect to that person under the legislative regime or powers by the Immigration authorities”\(^{66}\) and would include:

- those persons who are passing through a port of entry and thus subject to the jurisdiction of the Immigration authorities,
- those persons whose status in Canada is being processed by the Immigration authorities, and
- those persons under detention and in the custody of the Immigration authorities.

Persons temporarily under the jurisdiction of the Immigration authorities would also include refugee claimants since refugee claimants are subject to

\[^{64}\] *The Immigration Act*, SC 1952, c. 42, s. 2(i), at para 37.

\[^{65}\] *Toussaint v The Attorney General of Canada*, 2009 FC 873.

\[^{66}\] *Toussaint*, *supra* note 43 at para 43.
a removal order that is unenforceable pending determination of their eligibility to make a claim, adjudication of that claim, and any subsequent application for judicial review of a negative decision by the Immigration and Refugee Board.

Paragraph (b) of the Order-in-Council includes these two groups of persons; however, it also says that it includes a person “for whom the Immigration authorities feel responsible and who has been referred for examination and/or treatment by an authorized Immigration officer.” This further extension of the payment of medical expenses is consistent with the statement made in the fourth recital above that the department pays for medical expenses “when circumstances render it the best course of action in the public interest, and only when humane interests more or less obligate the Departments to accept the responsibility.” 67

With regard to the Canadian Charter of Rights and Freedoms,68 Ms. Toussaint argued that section 15 was infringed by her exclusion from the Interim Federal Health program on the basis of disability and citizenship. The Court rejected this argument, stating:

Similarly, the applicant was not excluded from IFHP coverage on the basis of her lack of Canadian citizenship. The applicant was excluded from coverage because of her illegal status in Canada. Only if “immigration status” is an analogous ground could the applicant’s exclusion from IFHP coverage be said to violate section 15(1) of the Charter.

The applicant did not argue that “immigration status” was such an analogous ground. It is not for the Court in Charter cases to construct arguments for the parties or advance them on their behalf. Given the applicant’s failure to argue that “immigration status” was an analogous ground, the applicant’s section 15(1) argument must fail.69

Although it identified the potential basis of the applicant’s section 15 claim as “migration status” the Court did not assess the merits of an argument that migration status could constitute an analogous ground, because that the applicant did not make this argument.

67 Toussaint, supra note 43 at para 49.
68 Charter, supra note 49.
69 Toussaint, supra note 43 at para 81.
While it is not the focus of this section, Ms. Toussaint’s section 7 argument bears mentioning here in order to illustrate the Court’s approach to her lack of status. While the Court confirmed that the IFH was “government action,” and that non-citizens in Canada, including “illegal immigrants” benefit from the protection of section 7, which guarantees the right to “life, liberty, and security of the person.” The Court noted that “this does not mean that non-citizens, and in particular illegal migrants, are entitled to remain in Canada.” The Court found that Ms. Toussaint had established a deprivation of section 7 rights on the facts of her case, but distinguished between those migrants for whom Canada “feels responsible” because they are unwittingly illegal migrants, and those migrants who have “chosen” to remain illegally in Canada. With regard to Ms. Toussaint specifically, the Court stated:

Ms. Toussaint is neither a legal migrant nor is she unwittingly an illegal migrant. Although she entered this country legally, she chose to remain here illegally; there is nothing stopping her from returning to her country of origin. She has chosen her illegal status and, moreover, she has chosen to maintain it.71

Hanging its analysis on the construct of migration status as a “chosen” state, the Federal Court found that the denial of health care coverage in this case was not arbitrary in such a manner as to render it inconsistent with the principles of fundamental justice. Ms. Toussaint appealed to the Federal Court of Appeal, which, in applying an equality analysis, also relied heavily on the idea of individual choice. Reviewing the Court of Appeal’s logic, it is possible to discern the ways in which the Court returns to the concept of individual choice in its application of existing section 15 jurisprudence as a basis to reject the applicant’s claim.

At the outset of its section 15 analysis, the Court adopted the two-part modification of the Law test recently confirmed by the Supreme Court in Kapp and Withler, namely:

70 Charter, supra note 49 s 7.
71 Toussaint, supra note 43 at para 93.
72 Ibid at para 94.
(1) whether the law creates a distinction that is based on an enumerated or analogous ground and
(2) whether the distinction creates a disadvantage by perpetuating prejudice or stereotyping

The Court accepted the definition of discrimination given in Andrews, which is quoted in its entirety above, but found that, unlike citizenship status, migration status was not an analogous ground under section 15. The Court based its reasoning on several different aspects of equality jurisprudence, but through each, it returned to the finding that Ms. Toussaint had willfully maintained her status as an illegal resident of Canada.

Ms. Toussaint is introduced in the first paragraph of the Court of Appeal judgment as having “stayed in Canada, contrary to Canada’s immigration laws.” Three paragraphs later, the Court of Appeal reminds us that she was “still in Canada contrary to Canada’s immigration laws” at the time she tried to regularize her status by submitting both temporary and permanent residence applications.

After summarizing the trial court’s decision, the Court of Appeal returns to the issue of Ms. Toussaint’s lack of adherence to immigration laws:

If the Federal Court accepted the appellant’s request, the curiosity of some might be piqued: even though the appellant has disregarded Canada’s immigration laws for the better part of a decade, she would be able to take one of Canada’s immigration laws (the Order in Council), get a court to include her by extending the scope of that law, and then benefit from that extension while remaining in Canada contrary to Canada’s immigration laws.

The Court of Appeal interpreted the definition of “immigrant” in part (a) of the Order in Council to be limited to “those who seek admission to Canada for permanent residence on

73 Toussaint-FCA, supra note 43 at para 89.
74 Ibid at para 1.
75 Ibid at para 4.
76 Ibid at para 8.
or before entry to Canada” and that Ms. Toussaint did not fit within this definition, but was “simply a visitor who decided to remain in Canada, contrary to Canada’s immigration law.”\(^{77}\)

The Court describes Ms. Toussaint’s poor judgment again in paragraph 45 in which the Court explains that the Immigration authorities could not have felt responsible for her, as she “was just a visitor who decided to remain in Canada, contrary to Canada’s immigration law.”\(^{78}\) With regard to part (b) of the Order in Council, the Court of Appeal thus gave a restricted interpretation, again relying on the idea of choice:

…”those persons whose status is being processed by the Immigration authorities” must mean a person who sought that status before or upon entry to Canada. The Program could not have been intended to pay the medical expenses of those who arrive as visitors but remain illegally in Canada and who, after the better part of a decade of living illegally in Canada, suddenly choose to try to regularize their immigration status.\(^{79}\)

In its reasoning on section 15, the Court of Appeal found that the Order in Council does not necessarily make a distinction on the basis of status, and that it is available to all persons “regardless of immigration status.”\(^{80}\) To support this reasoning, the Court notes that the applicant may have had access to the health program while she was a legal visitor in Canada. The Court does not explicitly mention “choice” here, but it is implied by the logic. The finding that the Order in Council applies regardless of status, so long as one has some kind of legal status, relies on the assumption that the range of possible legal statuses which are not within one’s control are limited to authorized status, and do not include situations where status is lacking.

\(^{77}\) Ibid at para 34.  
\(^{78}\) Ibid at para 45.  
\(^{79}\) Ibid at para 40.  
\(^{80}\) Ibid at para 98.
The Court of Appeal also uses a comparator group in explaining why migration status is not the basis for discrimination; in choosing a comparator group, however, the Court does not use “migrants with status” in comparison to “migrants without status.” Instead, it refers to a group to which the Order would not actually apply at all, namely Canadian citizens, noting that: “[t]he Order in Council treats the appellant, a non-citizen who has remained in Canada contrary to Canadian immigration law in the same way as all Canadian citizens, rich or poor, healthy or sick.” 81 The use of comparator groups in equality jurisprudence has been subject to scholarly critique, and is commonly associated with a formal, rather than substantive, equality analysis. 82 In addition to reiterating the finding that Ms. Toussaint chose her migration status, this portion of the reasoning underscores the way in which the act of framing comparator groups can shape judicial decisionmaking pursuant to section 15. If a law is worded to apply only to a particular group, equality concerns could arise both as a function of the law’s treatment of that group relative to others and as a function of distinctions which arise between groups to which the law applies.

The Court referred specifically to choice again in its application of the test for analogous grounds. Drawing on the Supreme Court of Canada’s decision in Corbiere, 83 the Court found that migration status is not immutable or unchangeable, and in any case is a characteristic that the government has a justified interest in expecting people to change. The Court of Appeal went beyond the trial court’s decision to specifically consider the issue of whether “immigration status” could be understood as an analogous ground. In this regard, the Court of Appeal stated:

Further, I do not accept that immigration status qualifies as an analogous ground under section 15 of the Charter, for many of the reasons set out in Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203 at paragraph 13, recently approved by the Supreme Court in Withler.

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81 Ibid at para 104.
83 Corbiere, supra note 52.
supra at paragraph 33. Immigration status is not a “characteristic” that we cannot change. It is not “immutable or changeable only at unacceptable cost\textsuperscript{84} to personal identity”. Finally immigration status or in this case, presence in Canada illegally, is a characteristic that the government has a legitimate interest in expecting [the person] to change. Indeed, the government has a real, valid and justified interest in expecting those present in Canada to have a legal right to be in Canada. See also Forrest v. Canada (A.G.), 2006 FCA 400 at paragraph 16; Irshad (Litigation Guardian of) v. Ontario (Minister of Health) (2001), 55 O.R. (3d) 43 (C.A.) at paragraphs 133-136.

This reasoning draws on the Supreme Court of Canada’s finding in Corbiere that a characteristic is more likely to be an analogous ground where it is a “characteristic that we cannot change, or that the government has no legitimate interest in changing.”\textsuperscript{85} The purpose of the Court’s reasoning in Corbiere was to make room for “constructively immutable” traits, like religion, or, in the case of Andrews, citizenship. Such traits may have a significant impact on equal treatment but are not physically immutable in the sense of gender, or race. In the case of Ms. Toussaint, there was evidence before the Court that she had attempted to regularize her status, but was refused on the basis that she did not pay the fees. In contrast with some Supreme Court rulings on analogous grounds, for example in the case of social condition or poverty,\textsuperscript{86} the Court of Appeal makes no reference to social science or other supporting data to indicate whether “immigration status” is in fact a choice or whether it is associated with features that are difficult to change. Ms Toussaint tried to obtain immigration status, and on the basis of discretionary decisionmaking under the Immigration and Refugee Protection Act and Regulations, her application was rejected for processing. Furthermore, the complex features of precarious status and its mediating function in the application of law and policy, as discussed throughout this dissertation, support the conclusion that status is associated with social disadvantages in ways which closely resemble other axes of discrimination.

\textsuperscript{84} Toussaint-FCA, supra note 43 at para 99.
\textsuperscript{85} Corbiere, supra note 52 at para 13.
\textsuperscript{86} See, eg, Gosselin v Quebec (Attorney General), 2002 SCC 84, McKinney, supra note 60.
Had the Court considered social science evidence it may have had the opportunity to more fully consider the argument that the applicant did not choose her status. Perhaps more importantly, though, is the Court’s use of the concept of choice in applying the reasoning in *Corbiere*. By immediately formulating immigration status as a matter of choice, the Court was able to move directly to the disjunctive second trait of analogous grounds: characteristics which the government has a legitimate interest in changing. This move allowed the Court to use the notion of individual choice to bring the government’s prerogative in determining membership into the initial discrimination analysis. This is a powerful use of the construction of choice, because it could be applied to any ground of distinction rooted in social, rather than physical, traits: as soon something is categorized as having been “chosen,” the government’s prerogative is at the forefront of analysis. This approach has the potential not only to ignore the context in which ostensible “choices” are made, which is relevant to precisely those traits which are social, rather than physical, but also to circumvent the purpose of the *Charter* in limiting government action where it infringes section 15 equality guarantees.

Having foregrounded the government prerogative in determining immigration status, the Court of Appeal proceeded to connect the potential to enforce membership boundaries with the provision or refusal of health care. The Court of Appeal framed the relationship between immigration misconduct and health care as part of “our law,” implying that refusal of medical care is an appropriate measure to discourage non-compliance with immigration laws:

The appellant submits at paragraph 34 of her memorandum of fact and law that governments ought never to deny access to healthcare necessary to life as a means of discouraging unwanted or illegal activity, including to those who have entered or remained in a country without legal or documented status. The appellant submits that this principle is fundamental to judicial and legislative practice in Canada...

At the root of the appellant’s submission are assertions that the principles of fundamental justice under section 7 of the Charter require our governments to provide access to health care to everyone inside our borders, and that access cannot be denied, even to those defying our
immigration laws, even if we wish to discourage defiance of our immigration laws. I reject these assertions. They are not part of our law or practice, and they never have been. 87

The Court refers again to the relationship between compliance with immigration laws and health care at the conclusion of its decision. It reasons that if an applicant such as Ms. Toussaint were successful in establishing the right to medical care “without complying with Canada’s immigration laws,” others might do the same, making Canada a “health care safe haven” and undermining its immigration laws, and possibly causing the potential others to fall into the hands of smugglers, which may result in scrapping the IFH program entirely. 88

In terms of government prerogative, the Court of Appeal also considered the issue of the government’s capacity to limit benefits to particular groups. In so doing, it relied on the reasoning in the Supreme Court of Canada’s decision in Auton. 89 After finding that the Order in Council, like the impugned provision in Auton, does not “single out a disadvantaged group for inferior treatment,” 90 the Court finds that the exclusion of Ms. Toussaint from the Order in Council does not “undercut its overall purpose” and is in fact “an anticipated feature” of the Order in Council. 91 The Court interpreted the purpose of the Order in Council as being “to provide emergency care to legal entrants.” 92 The “legal” status of applicants for health care is not a requirement of the Order in Council, but a product of the Court’s interpretation of the Order. Similarly to the Court’s findings with regard to analogous grounds and the use of comparator grounds, the manner in which the “legislative purpose” is interpreted is pivotal in shaping the decision, and provides space in which the content of legislative purpose, and thus the meaning of equality under section 15, may fluctuate widely.

87 Toussaint-FCA, supra note 43 at para 75.
88 Ibid at para 113.
89 Auton (Guardian ad litem of) v British Columbia (A.G.), 2004 SCC 78.
90 Toussaint-FCA, supra note 43 at para 106.
91 Ibid at para 108.
92 Ibid.
The Supreme Court of Canada’s decision in Andrews twenty-four years ago was seen as a commitment to substantive equality. In the intervening time, jurisprudence considering substantive rights under section 15 of the Charter has taken a complicated path, and attracted considerable academic commentary on the potential of the Court’s approaches to substantial equality. While more decisions dealing with section 15, and notably the decisions in Kapp, Withler, and Quebec v A have also proclaimed a continuing commitment to substantive equality in interpreting section 15, scholars have critiqued the Court both for its lack of clarity and consistency in the legal constructs with which it defines equality, and for its failure to adequately capture the basis of substantive inequality in deciding claims under this section. The Federal Court of Appeal’s interpretation of section 15 in Toussaint not only echoes what Dauvergne has observed in the Supreme Court as a “fail[ure] to deliver on the early promise that it held for non-citizens,” but also an example of the ways in which more recent equality jurisprudence may be impaired in its potential to address shortfalls in substantive equality.

Perhaps the most obvious of these is the Court of Appeal’s reliance in its application of existing jurisprudence on Ms. Toussaint’s purported wrongdoing in being “illegal.” The Court could have limited its finding to the wording of the law and the Order in Council, finding that Ms. Toussaint was not within the ambit of the Interim Federal Health program, and reached the same conclusion as it did. In addition to this, throughout the decision there are continual references to Ms. Toussaint or her presence in Canada as “illegal,” or otherwise blameworthy with regard to her lack of status. The logic here seems to be that if

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93 Margot E Young, “Unequal to the Task: Kapp’ing the Substantive Potential of Section 15.” (2010) 50 Supreme Court Law Review 183.
95 R v Kapp, 2008 SCC 41 (CanLII), [2008] 2 SCR 483.
99 Dauvergne, supra note 44 at 5.
she, by her own choice, did not leave Canada or regularize her status here, she has committed an immoral or illegal act and this is part of what disentitles her from the availability of health care. However, such a requirement is not evident within the provision in question. The Order in Council itself contains no requirement that a person entitled to benefit from it be free of having ever contravened Canada’s immigration laws. Furthermore, the Immigration and Refugee Protection Act contains numerous enforcement provisions, none of which require the withholding of health care from migrants on the basis of noncompliance with immigration laws. The Court has thus imputed the function of membership determination to the provision of healthcare for those who are not recognized as legally present in Canada.

Similarly, in speculating on the potential future waves of migrants who might come seeking health care, the Court imputes a systemic deterrent function to the denial of health care, failing not only to cite evidence in support of this proposition, but also to make a distinction between those who already live and work in Canada, and theoretical future migrants who are outside of Canada (but waiting to get in). Thus, the economic and social participation of Ms. Toussaint is completely disregarded as a potential claim to membership or inclusion - although she is inside Canada territorially, economically, and socially, her situation is elided with those who are outside Canada. The Court thus underscores the notion of an enforceable border within Canada for those deemed nonmembers, regardless of whether they have some degree of belonging here on the basis of actual participation. The fact that this distinction could be seen as a function of the accident of birth within one territory and not another, between the winners and losers of the birthright lottery, and thus rest on a distinction which could be described as actually or constructively immutable, is not addressed by the Court.

One way of explaining the availability of such arguments within existing equality jurisprudence is that the foundational jurisprudence in insufficiently clear on the definition

\footnote{Ayelet Shachar, \textit{The Birthright Lottery, Citizenship and Global Inequality}. (Cambridge, MA: Harvard University Press, 2009) at 7.}
of equality. Sophia Moreau, for example, argues that the test in Law fails to distinguish different conceptions of the “wrong” of inequality which renders equality analysis “less able to recognize as discriminatory certain instances in which the claimant has indeed suffered one or more of the wrongs [she has] discussed.”101 Moreau identifies four possible substantive conceptions of what is at the heart of the objection to inequality, namely 1) stereotyping and prejudice, which result the reduction of autonomy and public proclamation of inferiority, 2) the perpetuation of oppressive power relations, 3) the deprivation of some individuals of access to basic goods, and 4) the diminishment of self worth.102 Of particular relevance to the question of rights for precarious migrants are 2) and 3). Moreau notes that “oppressive power relations are often the indirect effect of institutional structures”103 but critiques the necessity of using as a comparator group those that have been given a benefit versus those who have been deprived of it. Instead, she argues “the relevant comparator group is not the group that has been given the benefit in question but the group or groups who exercise oppressive amounts of power over those who have been denied the benefits.”104 In a similar vein, if equality is determined on the basis of access to basic goods, such as those distributed through the social state, Moreau argues that a comparator group analysis is not sufficient to canvass this basis of inequality, as it is possible to reduce services to the lowest common denominator (which would achieve “equality” as between the groups) without ameliorating the inequality or its substantive effects.105

The Federal Court of Appeal’s decision in Toussaint is an example of problem Moreau identifies in Law and section 15 jurisprudence generally: a failure to adequately articulate the basis for determining that a distinction constitutes unequal treatment and to connect a reduction of autonomy, oppressive power relations or deprivation of certain basic goods as an aspect of inequality, although all of these were present in association with Ms.

101 Moreau, supra note 82 at 33.
102 Ibid at 34.
103 Ibid at 41.
104 Ibid at 42.
105 Ibid at 46.
Toussaint’s lack of migration status. In *Toussaint*, rather than conduct such an analysis, the Court elided the basis for inequality almost completely with Ms. Toussaint’s individual choices, with the effect of excluding her situation from meaningful consideration under section 15. The Court did not deny the applicability of section 15 of the *Charter* to a person within the territory of Canada. However, if the very fact of irregular status is sufficient to outweigh the substantive consideration of the claims of nonpermanent migrants (many of whom experience some form of irregular status during their migration trajectory) as a potential protected group, then the membership claims of such persons are defeated *a priori* despite the fact that the *Charter* formally applies to them.

It is impossible to say whether the Federal Court of Appeal’s decision in *Toussaint* is the last word on the distinction between permanent and nonpermanent migrants as a potential analogous ground under section 15 of the *Charter*. The Supreme Court of Canada denied leave to appeal the decision in *Toussaint,* but the issue of entitlement to state benefits for precarious migrants may well arise in a different factual situation. A court may have the opportunity to consider not only the growing body of social science concerning the nature of migration status on a social level, but also interpretations of equality in which institutional relations can be considered within a section 15 analysis. As Dauvergne has observed, however, since the decision in *Andrews,* “none of the subsequent non-citizens cases feature a successful equality analysis.” Based on the present trajectory and through the example of *Toussaint,* it is difficult to imagine that the *Charter* could be a viable strategic tool for inclusion of precarious migrants.

### 6.3.2 Provincial Human Rights Mechanisms

In addition to the *Charter*, there exist provincial statutory human rights regimes in all Canadian provinces as well as the *Canadian Human Rights Code*, which applies to federal

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107 Dauvergne, *supra* note 44 at 40.
matters and entities. While they do not possess the overarching legal power accorded to the *Charter*, as part of the Constitution, they usually contain a clause in which any inconsistency between laws of that jurisdiction and the human rights law are to be resolved in favour of the human rights law.\(^{108}\) Furthermore, their nondiscrimination provisions provide a much broader scope of protection insofar as they are not limited to equality in the application of the law, but apply to other areas of life, such as housing, employment, and the provision of services generally. However, unlike the *Charter*, provincial human rights codes are applied for the most part by statutory tribunals and thus are not subject to judicial expansion through such concepts as “analogous grounds.” Such protections thus tend to be restricted to the grounds of protection actually enumerated in the legislation. Provincial human rights legislation in all jurisdictions of Canada includes protection on the basis of grounds which may overlap with precarious migration status, including, for example, race, colour, ancestry, and place of origin in British Columbia’s *Human Rights Code*.\(^ {109}\) All Canadian jurisdictions contain similar grounds of protection, but none include protection on the basis of immigration status or nonpermanent residence.\(^ {110}\)

In this section, I will use British Columbia’s *Human Rights Code* as an example of provincial human rights protections and their potential application to the exclusion of precarious migrants as discussed in the above chapters. Although immigration status is not a protected ground, the data provided in this dissertation could be used to support an argument that it should be included as such, and my purpose here is to provide an assessment of the utility of adding a new ground for protection to existing human rights regimes.

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\(^{109}\) *Human Rights Code*, RSBC 1996 c. 210, s 8(1).

\(^{110}\) Other jurisdictions are similar. The *Ontario Human Rights Code*, RSO 1990 c H19, includes citizenship as a protected ground, but s. 16(1) of that Code limits it: “A right under Part I to non-discrimination because of citizenship is not infringed where Canadian citizenship is a requirement, qualification or consideration imposed or authorized by law.”
There are two main provisions in the Code which could potentially address the barriers described by precarious migrants if “immigration status” were to be added to the list of protected grounds. Section 13 of the Code deals with employment. It prohibits the refusal to employ a person on the basis of protected grounds, and also includes a general prohibition on discrimination in “employment or any term or condition of employment” unless such discrimination is demonstrably a “bona fide occupational requirement.”

Workers regularly use this section to dispute differential pay and hours, biased hiring practices, and discriminatory comments. If precarious migrants as a group were subject to protection under the Code, many of the difficulties encountered in the sphere of work would likely fall within the ambit of this section. The type of problems they describe are well within the normal operation of the Code in terms of its scope, but without the recognition of immigration status or nonpermanent status as a protected ground, the Code is not available unless the workers are able to make out a case on one of the existing grounds of discrimination. While it impossible to determine whether precarious migrants have made claims under the Code on other grounds unless they are specifically identified as such in the text of the decision, it is possible to view those cases in which workers were specifically identified in terms of temporary migration status.

A search of the British Columbia Human Rights Tribunal decision database for “foreign worker” reveals only two decisions,112 one of which is a preliminary dismissal of a case in which a foreign worker challenged racialized statements in her workplace, but her complaint was submitted out of time and not accepted by the Tribunal.113 The other is SELI,114 a case in which an employer on a construction site provided differential wages and

111 Human Rights Code, supra note 109, s 13(4).
112 Searches conducted on February 17, 2013 on Canlii under section 13 of the British Columbia Human Rights Code for the following terms returned zero results: “temporary foreign worker”, “illegal migrant”, “out of status”, “irregular migrant”, and “undocumented’ AND ‘migrant.” A search for “immigration status” returned only decisions referring to permanent residence. Searches for “work permit” and “refugee claimant” returned decisions in which those terms were used incidentally within the judgment, and one case in which a foreign-trained pharmacist on a work permit made a complaint about racialized remarks, but the complaint was dismissed in early stages on the basis of no reasonable prospect of success: Saad v London Drugs and another, 2012 BCHRT 24 (CanLII).
113 Azouz v Barbier and another, 2012 BCHRT 134 (CanLII).
114 C.S.W.U. Local 1611 v SELI Canada and others (No. 8), 2008 BCHRT 436 (CanLII)
working conditions as between two different groups of foreign workers: one group of Eastern European origin, and one of Latin American origin. In that case, the Employer argued that differential wage policies constituted a “bona fide occupational requirement” on the basis that wages were offered such as to be better than local wages in a particular country of origin, which of course varied on the basis of the economic position of the country in question. Thus, it argued, higher wages were required to recruit workers from European countries in which wages were higher as compared to local wages in Latin America. The Tribunal rejected this argument, finding as follows:

In effect, the application of SELI’s actual international compensation practices to the Latin Americans employed by them on the Canada Line project was to take advantage of the existing disadvantaged position of these workers, who are from poorer countries, and to perpetuate that disadvantage, and to do so while they were living and working within the province of British Columbia. As such, the application of those practices in British Columbia perpetuated, compounded and entrenched existing patterns of inequality.115

The Latin American workers in SELI were successful in their complaint and obtained a remedy from the Tribunal which included orders for the cessation of the Employer’s practices, back wages to compensate for the wage differential, and damages for injury to dignity.116

While this case represents the only identifiable substantive consideration of a complaint under section 13 of the Code by foreign workers,117 the Tribunal’s analysis with regard to differential treatment would also fit the situations described in the above chapters with regard to the working situations of precarious migrants, and the inclusion of status as an aspect of the “disadvantaged position of workers” in such an analysis is easily imaginable. In its current configuration, however, the Human Rights Code was only available to the

115 Ibid at para 489.
116 Ibid at para 529.
117 A case has now been started on behalf of several temporary foreign workers against Tim Hortons before the Tribunal for underpayment, derogatory remarks, and substandard conditions in employer-controlled housing, see http://bcpiac.com/organizational/double-double-takes-on-new-meaning-as-temporary-foreign-workers-trapped-by-tim-hortons-boss/.
workers in *SELI* on the basis of their race and place of origin as compared to other workers. While the fact of temporary migrant status was implicitly considered in the Tribunal’s analysis, the workers would not have been able to pursue their claim on this basis alone. If, for example, an employer’s practice was to underpay all foreign workers regardless of race or place of origin, it would not be likely to fit within existing grounds of protection. As described above, study participants recounted situations in which there were mixed permanent resident, foreign workers, and non-status workers but in which the race, place of origin, and nationality was the same. In such a situation, if the non-status or temporary workers were treated differentially, they would currently have no recourse under the *Code* despite the potential for similar exploitation to that described in the decision in *SELI*.

With regard to Section 8 of the *Code*, there is nothing analogous to the decision in *SELI*, and searches using various status-based terms did not disclose any cases in which complainants were identified as precarious migrants or in which migration status was at issue.\(^\text{118}\) In terms of the scope of this section more generally, however, it appears that many of the sites in which precarious migrants encountered barriers are regularly subject to complaint and remedy through the *Code*. For example, a full-text search of decisions considering Section 8 discloses that all of the provincial sites described in Chapter 5 are subject to complaint and remedy through the Tribunal, including school boards and districts, hospitals and health authorities, and the provincial Ministry of Social Development, which is responsible for the allocation of employment assistance benefits. Furthermore, the provincial Human Rights Tribunal is used as a venue for complaint against the two primary agencies responsible for worker health and safety as described in

\(^{118}\) Searches conducted on February 17, 2013 on Canlii under section 8 of the British Columbia Human Rights Code for the following terms returned zero results: “temporary foreign worker”, “illegal migrant”, “out of status”, “irregular migrant”, and “undocumented AND ‘migrant’.” Searches for “foreign worker” and “work permit” returned decisions in which those terms were used incidentally within the judgment. A search for “immigration status” disclosed one case in which discriminatory conduct was alleged against a college once immigration status was disclosed, but the complaint was dismissed in early stages on the basis of no reasonable prospect of success: Bahena v Camosun College, 2011 BCHRT 103 (Canlii). This case also represented the only search result under the term “refugee claimant.”
Chapter 4, namely WorkSafe BC and the Employment Standards Branch.\textsuperscript{119} As such, while there are no specific decisions in which precarious migrants are identifiable as claimants, it is clear that the scope of the \textit{Code} already includes all of the provincial government sites in which barriers were identified; similarly, the federal Canadian Human Rights Tribunal is used as a venue for human rights complaints with regard to Employment Insurance.\textsuperscript{120}

\subsection*{6.3.3 Rights and Membership}

Based on the information compiled in this study and similar work documenting the impact of non-permanent or precarious status, there is a strong argument to be made that immigration status on its own functions in a manner similar to race, gender, and other protected grounds. It is worth considering the addition of immigration status as a protected ground under both types of human rights structures, because while it is sometimes associated with place of origin or racialization, it does not always overlap with these grounds. Furthermore, in this study individuals from various places of origin and who would be racialized differentially experienced similar impacts. If a measure does not distinguish on the basis of race or origin \textit{per se}, because it is equally detrimental to Chinese and to Mexican workers, for example, it would be more difficult to challenge on the basis of race or place of origin.

In terms of section 15 of the \textit{Charter}, using nonpermanent migration status as a potential analogous ground allows an analysis in which the relevant comparator group is those with permanent residence, or citizens of Canada, rather than other groups affected by a particular legal provision or policy. However, through examination of the decision in

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\textsuperscript{119} Searches conducted on February 17, 2013 on Canlii under section 8 of the British Columbia Human Rights Code discloses the following number of hits for the following terms: for “school district” 184 results, for “hospital,” 82 results, for “health authority,” 44 results, “worksafe,” 23 results, “workers compensation,” 140 results, and “social development” 15 results, “employment standards,” 12 results.

\textsuperscript{120} On a federal level, a search conducted on February 17, 2013 of the Canadian Human Rights Tribunal database on Canlii disclosed 44 results for the term “Employment Insurance” and 49 results for the term “Unemployment Insurance.”
}
*Toussaint*, it is clear that distinctions between nonpermanent and permanent residents are not judicially constructed in the same manner as the distinction between permanent residents and citizens in *Andrews*. In *Toussaint*, membership considerations and moral sanction of the applicant’s very presence in Canada as “illegal” precluded any serious consideration of immigration status as an analogous ground. Furthermore, as this was proactively addressed by the Court of Appeal, rather than argued by the applicant herself, it is unlikely that either level of court had access to social science or other data in support of the contention that the impact of status should be understood similarly to that of other enumerated and analogous grounds. It is unclear whether there will be an opportunity to have such information judicially considered in support of this argument in the future. For such an argument to be viable, however, would require more than data establishing the impact of status and its constructive immutability. It would also require a shift the construction of membership.

Based on the logic in *Toussaint* as well as previous jurisprudence, membership distinctions are framed as an a priori aspect of sovereign discretion - anything which is contingent on a membership decision, even as applied to those already within Canada, can thus be shielded from human rights scrutiny.121 Asking a court to decide that the very distinction on which people are excluded from the “everyone” is itself subject to discrimination analysis is effectively asking it to reframe the basis of membership in terms of factors such as presence, identity, and belonging through social and economic participation. Protection on the basis of status challenges the basic closure assumed by the liberal state, and the subordination of nonpermanent members within the labour force, by framing the question of exclusion as a potential source of discrimination, rather than as simply an expression of sovereign discretion. Such a conceptual shift seems unlikely on the basis of current jurisprudence. As such, *Charter* litigation to this end is worth pursuing and well supported

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in some ways by data such as those presented in this study, but is unlikely to provide a practical remedy to the marginalizing features of status documented here.

The legal role of provincial human rights regimes is distinct from that of the Charter; while they do often contain clauses by which other provincial laws need to be interpreted consistently with their provisions, they do not have the power associated with constitutional status. Furthermore, they are applied for the most part by tribunals, whose role is much more constrained as they are limited to the considerations and remedies listed in the enabling statute. There is no legal equivalent to an argument on “analogous grounds” within provincial human rights regimes - if a basis for discrimination is not listed in the enabling statute, a tribunal cannot consider it. Thus, the addition of immigration status as a specific protected ground would require legislative change. While such a change could be justified on the basis of data documenting the situation of precarious migrants, it would also likely require a conceptual shift on the part of lawmakers similar to that described above with regard to Charter jurisprudence. Even short of such a change, however, provincial human rights regimes hold some potential for the amelioration of some of the problems associated with precarious migration status for several reasons. Firstly, based on the limited information available through the example of British Columbia, human rights tribunals may be willing to consider the inequality faced by foreign workers. While in the SELI decision, the decision was based on place of origin and not status, the analysis specifically considered the lack of status and mobility of workers in a way which Charter jurisprudence has not. While this would not provide a remedy for all precarious migrants, it does show promise as a venue through which the impact of status may be considered as an aspect of “place of origin,” “nationality,” or “race.”

While it is the domestic state with which migrants interact and which still serves as the primary arbiter of membership and entitlements, the context in which migration occurs is inevitably also subject to transnational realities. The fact that the impact of foreign economic conditions as a precursor to inequality was considered in a provincial rights determination shows promise in terms of the essential work of contextualizing local rights struggles within globalizing conditions. The Tribunal did not seem to be impeded by
membership and sovereignty considerations in the same manner as the Court of Appeal in *Toussaint*, but the facts were also quite different: the workers in *SELI* had status, and were demanding parity in working conditions, rather than access to the social state. Whether membership constructs would preclude consideration of such claims is impossible to determine, but the use of human rights legislation in this manner is certainly worth exploring. Furthermore, human rights tribunals have a broad scope of application, as seen through the example of the British Columbia Human Rights Tribunal, which already functions as a venues for challenging decisions in all of the local sites in which this study has identified. The remedies are concrete, and while they may be limited by statute rather than the judicial imagination, insofar as they include such possibilities as wage compensation, cessations orders, and compensation for injury to dignity, they have the potential to be meaningful in the lives of individuals in concrete ways. Finally, in provincial human rights regimes are much more accessible to individuals both practically and legally. Unlike *Charter* litigation, applicants can make claims without legal counsel or the need to meet legal tests for “standing,” and can expect decisions within a reasonable period of time.

There is enough potential in formal human rights remedies to make them worth the struggle, and significant benefit would accrue should such strategies succeed, but there remain difficulties which are unaccounted for in the human rights processes themselves. Foremost among these is the reluctance on the part of precarious migrants to claim remedies in any forum, even when entitlements are clearly established. In the chapters above, I have described precarious migrants’ relationship with state institutions as being imbued with fear and reluctance. Even where entitlements are not curtailed by law, policy, or practice, precarious status invokes self-disciplining in which migrants will purposefully avoid state interactions of various kinds. Although they identified themselves as participants in some ways, they also acted on the assumption that the state would treat them as non-members for the purposes of benefits and protections, which was also often reflected in their interactions in the sphere of work and with regard to the social state.

The issue of membership thus arises as a necessary prelude not only in the analytical framing of rights, but also in the lived realities of migrants. While it is beneficial and
feasible to expand human rights protections for precarious migrants, that this are not the primary forum in which to contest the inequalities faced by migrants. It is the question of membership, rather than rights, is the necessary starting point to address the marginalization faced by precarious migrants. It is “outsider status,” rather than any particular race, religion, or culture that tend to result in marginalization, although “outsider status” is often assigned on the basis of particular social and political contexts. In the final chapter below, I argue that the data in this study support the conclusion that membership can be contested and redefined through local sites of governance and enforcement to work toward an alternative to the structure of migration status currently governed by federal migration law.

Chapter 7. Conclusion: Membership and Sites of Contestation

The research I present in this dissertation was shaped not only by the information shared by research participants, but also by my experience of conducting it. While I had previous experience with the subject matter to a certain extent from legal practice, the perspectives of people are inevitably relegated in the practice of law, in which both the law and people's stories are approached instrumentally. At times during this study, I felt my hands were tied and wished to advocate for people, a yearning toward the role of lawyer. More often, though, I felt a sense of freedom from the constraints of that role, which has led me to question the ways in which advocacy is carried out on behalf of migrants and the possibility of alliance. Law is implicated in exclusive and oppressive practices, and it is an ongoing struggle to find the ways in which it can be useful, or whether it can ever be emancipatory. In this research, this question required me to attempt to articulate migrant-based perspectives as part of an analytical frame for law, while trying to both apply my own legal knowledge and critically recognize my own position. As a legal scholar, stepping outside of the “doctrinal” methodological approach required a heavy reliance on methods and research from social science, bringing them to bear on law, which is never disconnected from the social relations in which it is constituted. I hope this research provide an example of the utility and necessity, of deep engagement between law and social science, not only in terms of using social science to understand law, but also in using technical legal knowledge to enrich sociological approaches. While I cannot claim to have balanced these things perfectly, I hope I have contributed to the scholarly and public dialogue about the social relations in which precarious migrants interact with legal and state institutions. I also hope that this study could be used both to signal further research needs in terms of access to particular institutional structures, and to support local initiatives for change.

The opportunity to consider these questions gained lasting meaning for my practice as researcher and advocate because they arose through lived relationships and interactions,
which was a definite advantage of using institutional ethnography. Similar work would likely benefit from more longitudinal and follow up work with participants than was possible within the time frame of this study. I would also consider talking to decisionmakers and other people who work within institutions to provide further detail about institutional practices, but in the case of governing institutions, I would always strive to orient the study with the perspective of governed individuals in mind, insofar as possible. While the latter commitment formed an important part of this methodology, it is not simple to maintain. Balancing the desire to include legal knowledge gained from my own position while adopting a stance of alliance and privileging of a participant perspectives in which the experience and knowledge of law was quite different is a struggle that cannot be resolved here, but bears brief exploration here as a signpost for future work.

The attempt to balance disparate perspectives adds complexity to questions for this and similar work, including the precise location and boundaries of law. In approaching law as a subject of study, trying to name the law is complicated but necessary. For example, many people I spoke with knew they were not entitled by law to receive Employment Insurance, because of its interaction with immigration law and impact on their status. In contrast, I knew that they were entitled to those benefits, and that it was legally unrelated to immigration law. In this situation, it was necessary to privilege my own perspective as a “legal expert” or “lawyer” in order to render visible the very effect I wanted to describe, which is precisely what happens in the gap between the law’s word and the perceptions and responses through which people are governed. However, I also wanted to frame the latter as intimately a part of law. Similarly, in this dissertation, the view of the state as a unified whole was deeply felt by participants, but I saw it instead as a constellation of different sites. In trying to support the claim that state institutions are cohesively linked by governing functions visible through perspectives other than my own, it was a continual struggle to maintain clarity in the separation and role of the various viewpoints at play. The act of giving necessary epistemological privilege to my own expertise while maintaining a political commitment to alliance is intellectually and emotionally complex. Using an institutional ethnographic approach in the field of law requires acceptance on the part of researchers of the impossibility of clear resolution of some of these fundamental
questions, particularly where the research involves outsider researcher perspectives. This approach troubles understandings of law as much as it resolves them. In the context of the present study, I found this is engaging, appropriate, and useful, this may not be so for others.

Perhaps the most useful aspect of the use of institutional ethnography in this study was the way in which starting with migrant perspectives caused me to uncover policies and practices which may otherwise not have been evident from my perspective. While I had some anecdotal information about institutional practices with regard to migrants when I started, it is very difficult to craft specific queries in the abstract, based on speculation flowing from these anecdotes. In the more organized context of a study, I was able to have similar conversations with participants, and being able to obtain specific examples often led directly to institutional information that otherwise I would not have sought. Furthermore, pursuing this information systematically performed the important work of linking single cases (which could be anomalous on their own) to regular practices. For example, a participant specifically related that a Vancouver school had asked him to attend interviews to confirm his status, even though his child was a Canadian citizen. This situation, on its own, could easily be dismissed as insignificant: it may be just one bad example. However, when I asked school boards specifically for their policies on tracking and interviewing families, I discovered that the practice of basing admission on parents’ status as well as checking in with parents when their status expires are specifically articulated in school board policy for non-resident families. Had I started with a general question to school boards with regard to their policies, I may not have obtained this information.

In future work, I would suggest that institutional ethnography is practical where study goals require the consideration of perspectives outside the researcher’s normal purview, or where institutional functioning is relevant to the subject under investigation. I think that it can be usefully combined with other methods, and but is extremely helpful at the early stages of study design and investigation. In the present case, the data may be most useful in terms of their indication of possible avenues for longitudinal or larger–cohort work.
Because of the energy required in design and integration of multiple perspectives, institutional ethnography can make no claim to completeness: in the present case, there may be, for example, many areas of governance in which migration status is relevant which did not arise from the particular instances described by participants or from my own problematization of migration status. As such, institutional ethnography might best be seen as an initial component of a multi-method approach, in which it expands and reframes research questions but in which other methods can be usefully applied to obtain larger or more diverse sets of data.

The study is formally closed, but it is an incomplete closure, because the lives that are so central to it continue: some of the people whose stories are presented in this work have no doubt been deported, or have left Canada with some degree of voluntariness, while some have stayed. Some have obtained permanent residence, and some have disappeared into a completely underground existence. During the course of writing this dissertation, immigration policy has been prevalent in media and public discourse, including much attention to the growing temporary foreign worker program in Canada as well as a sharp turn right in refugee, migrant worker, and sponsorship policy under Stephen Harper’s Conservative government. At the same time, movement toward local recognition of entitlements for irregular migrants have gained ground in both Toronto and Montreal, as discussed in more detail below, and I hope that this work can contribute to similar movements in Vancouver.

Precarious migrants face barriers to protection in the workplace and exclusion from the social state on the basis of migration status, as deployed in law, policy, and institutional practice. I have also argued that the construct of status operates in multiple sites to maintain inequality in ways best understood as forms of enforcement which occur through both working life and interactions with the social state at local levels. This returns us to the main problematic underlying this work, namely, the tension between the presence of precarious migrants within the Canadian state and their concurrent subjection to particular forms of exclusion and enforcement on the basis of status. Liberal arguments provide a strong argument in support of formal membership allocation to precarious
migrants, but they do not provide a practical venue for contestsing membership. I will argue instead that local sites of policy and practice are places in which membership can be contested and which provide the potential for redefining status apart from the federal structure of immigration law.

As articulated by Linda Bosniak, the tension between egalitarianism and exclusion is easier for liberal states to navigate when closure is activated at the border of a state’s territory, and equal rights assumed to apply to all of those “inside.” But territory and national community are not so neatly paired in practice: through both authorized and unauthorized channels, workers enter the national territory to live and work, often to the benefit and at the behest of both employers and the state. This enmeshment of territory and precariousness represents a greater challenge to equality: at what point should the federal determination of closure cease to effect those who are physically present within a society? At what point do such individuals become part of the “everyone?” At what point does their presence, work, or connection to Canada justify treatment on par with permanent residents and citizens?

For many scholars who have considered this question, the answer hinges on the degree of connection and participation. Social connections, length of residence in Canada, and participation in paid and unpaid labour have all been suggested as the basis for assignment of membership on a moral basis, consistent with the principles of liberalism. Another set of scholars answer this question from a different angle. Rather than premising their work on the eventual goal of liberal egalitarianism, they explore the particular function of having separate classes of workers, and challenge the assumption of liberal values as guiding forces in the organization of capitalist states. Robin Cohen, for example, points out that capitalist economic systems consistently rely on a mix of free and unfree labour.

Precarious migrants may thus be treated as necessary on an economic basis, but framed as outsiders for the purposes of distribution of membership entitlements.

Migration theorists and activists focus on the potential allocation of permanent membership status at the federal level through the provision of legal immigration status, for example, through amnesty and regularization programs. The capacity to obtain formal permanent residence was articulated as a major concern of migrant participants in this study, and there is little doubt that obtaining permanent residence status would be beneficial. With permanent resident status would come a degree of security in which the threat of deportation would be greatly reduced, and so would its corollaries in terms of fear of reprisal from employers and through access to the social state. As described above, there are strong moral arguments on the basis of liberal equality to include precarious migrants as full members of the state on the basis of their presence, family connections, work, and identification with communities within Canada. Arguments to exclude migrants mistakenly elide the question of border control with the question of migrant control, attempting to create analogies to the territorial border within Canada, but without a territorial basis, which often result in the direct or indirect promotion of social and economic hierarchies. On the premises of equality on the basis of territorial presence, it is straightforward to argue that liberal values demand formal inclusion of those who are already present and have a connection to Canada.

Territorial logic is only one force operating within migration policy, however, and the liberal paradigm is an incomplete manner in which to frame the Canadian state. The operation of the logic of capital as a force in migration policy also helps to explain the difficulty in obtaining formal equality, but also the persistence of barriers even where formal equality is present in law, such as with regard to employment standards.4 Temporary residence through labour migration, whether through legal channels or otherwise, becomes an integral part of the economic system on the basis of the demand for

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cheap, flexible labour. In the case of temporary work permits, federal law often mandates a closed work permit and the concomitant loss of labour mobility and bargaining power on the part of workers. The production and maintenance of precarious status helps to maintain a supply of workers who are available on request for low or no pay, in dangerous or deleterious conditions, and who face barriers to both employment protection and in meeting basic needs through interactions with the state in areas such as education, health, and income security. Thus, while liberal theory provides a strong argument to justify the formal inclusion of precarious migrants, it is limited in terms of its capacity to actually unsettle the socio-economic structures of which precarious migration status is an integral part. Furthermore, while both desirable and justified from equality-based perspective, allotment of permanent resident status through federal structures is unlikely: the maintenance of a population of non-permanent residents serves both political and economic ends in Canada.

In this dissertation, I have demonstrated that migration status operates as an organizing social force in the lives of migrants. Through a spectrum of precarious migration status situations including various degrees of authorization, people described the destabilizing and marginalizing nature of status. While legal authorization of migration status is granted and enforced by federal state institutions, the experience of the lack of status or fear of its removal gains potency through exclusion of precarious migrants in multiple sites beyond the federal state. Within employment contexts, precarious migration status served to exacerbate the power differential between employer and employee, and to reduce labour security and mobility. Study participants described shortfalls in basic employment rights, as well as the impact of physical and mental health concerns and the impact on their family relationships. Provincial laws governing standards and work and worker health and safety do not exclude workers on the basis of migration status, but migration status nonetheless played a major role in determining access to the protection afforded by these laws. With regard to the social state, migration status was often integrated into the allocation of entitlements both explicitly and through institutional practices. Formal decisionmaking in judicial and quasi-judicial venues related to the social state often relied on moral regulation of migrants’ migration status situations in determining allocation of benefits.
In order to formulate membership in a way that is meaningful to precarious migrants such as those who participated in this study, it is necessary not only to consider the basis on which membership should be allotted, but also the ways in which it can be effectively pursued in such a way as to actually challenge the underlying divisions and barriers. Enforcement occurs directly through the federal state by way of Canada Border Services Agency, which is empowered by federal immigration legislation, but much of the power of status is in the way it colours everyday life for precarious migrants. I have shown that the effect of status pervades people’s lives through surveillance and control on the part of other state and non-state entities through law, policy and practice, generating interactions which serve to discipline. Thus, while migrants identify their own belonging and connection to Canada, the risk of having their status reported or otherwise attracting negative state attention is sufficient to discourage participation in many aspects of life, including those entitlements to which they already have formal access.

Membership is most likely to be effectively formulated if it addresses the complex of authority organized by status. I would argue that the best way to do this is to challenge the framing of status itself. This study has shown that status is much more than the formal labelling undertaken by the federal state, and that marginalization is maintained through a multiplicity of sites, most of which are unrelated to the federal immigration authorities. It is those sites in which status is lived everyday, rather than the federal structure itself, which are the most appropriate sites for contestation of status; it is those sites through which status can be redefined. Rather than starting with the assumption that status is fixed within the structure of federal law, membership strategies should seek first to contest and establish status throughout the diverse local sites in which it is enacted.

By establishing membership through such contestations at the local level, status can become grounded in the reality of residence and presence in a place, rather than “bounded” by the federal government’s consent to enter and remain in a territory on the basis of an
assumed political community.\textsuperscript{5} Such an approach serves to challenge the elision between border control and migrant control described above as well as the “boundaries around what is still the hegemonic container of citizenry: the nation-state.”\textsuperscript{6} While the national state is clearly still relevant to migration law in Canada, this does not mean it needs to be taken as the \textit{a priori} arbiter of membership. As described in Varsanyi’s work on postnational citizenship, it is possible instead to proceed by examining “a variety of different social practices and experiences, and then asking whether the practices and experiences named by citizenship are, in fact, confined to the national sphere.”\textsuperscript{7} In the cases described in this study, it is clear that while the construct of status may originate in distinctions produced in federal legislation, it takes on multiple meanings and functions at local levels through specific practices and relationships, many of which could be contested without the necessity of satisfying federal requirements. Nor is the federal immigration regime the only site in which law is engaged: on the contrary, the data presented here show that the force of law is invoked through local practices. If, from the perspective of migrants, status and enforcement are already constituted through various interactions with local institutions, it is in relation to these institutions that status should be contested and established.

One example of such contestation in the Canadian context with regard to precarious migrants is the struggle toward recognition of undocumented migrants in the greater Toronto area. At the time of writing, there is a set of recommendations before Toronto city council with regard to undocumented migrants. The recommendations and associated report were prepared by City Hall’s Community Development and Recreation Committee, and the primary recommendations are as follows:

\begin{quote}
City Council request the Executive Director, Social Development, Finance and Administration to conduct an internal review, with community consultation, of City Divisions, Agencies and Corporations, and to report to
\end{quote}

\textsuperscript{5} Monica Varsanyi, “Interrogating "Urban Citizenship" vis-à-vis Undocumented Migration” (2006) 19:2 Citizenship Studies 229 at 239.
\textsuperscript{6} \textit{Ibid} at 244.
\textsuperscript{7} Linda Bosniak, “Citizenship Denationalized” (1999) 7 Ind. J. Global Legal Stud. 447 at 488.
the Community Development and Recreation Committee in the 3rd quarter of 2013 on the following:

a. a review of opportunities to improve access without fear;
b. opportunities for City-funded agencies to improve access without fear;
c. providing training for front line staff and managers to ensure that undocumented residents can access services without fear;
d. a complaints protocol and a public education strategy to inform Torontonians of our policy.

2. City Council request the federal government to establish a regularization program for undocumented residents, and that a letter be sent to the Government and Opposition parties to this end.

3. City Council request the provincial government to review its policies for provincially-funded services for undocumented residents with a view to ensuring access to health care, emergency services, community housing and supports for such residents within a social determinants of the health framework.8

The motion includes a report detailing the difficulties of undocumented workers both in obtaining services and in negotiating employment situations. The motion has been supported through an alliance network of researchers, legal service providers, community centres and groups, city councillors, and labour organizers. If it is passed, this motion will represent recognition and the need to provide access to services “without fear” for those who would otherwise face barriers on the basis of their status. While it remains to be seen whether such actions as requests to the federal and provincial governments to change their policies would be effective, the passing of this motion has immediate ameliorative potential. Even the municipal recognition of the desirability of access without fear without reference to status provides a counterpoint to the potential for localized enforcement. Both providing access to municipal services and public dissemination of this policy also provide a potent message which may serve to reshape local interactions.

8 City of Toronto, Motion CD 18.5 “Undocumented Workers in Toronto” adopted February 20, 2013, City of Toronto, online: <http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2013.CD18.5>.
While a similar proposal does not yet exist in Vancouver, the present research supports the view that municipal action and other localized policy changes could be used to strengthen entitlements and decrease barriers, building status and forms of membership starting from the experience of people. In this study, there was evidence of some tolerance as well as formal equality for precarious migrants, ranging through to policies of active exclusion, surveillance and control, often beyond or apart from the text of the law. Much of the law’s force is carried out through sites which may be more easily contestable than the federal landscape. This is so for several reasons. First, localized action means that multiple sites are available in which to contest exclusive policies and practices. For example, school boards could be asked to consider completely removing immigration status from their consideration of residence, while hospitals could be requested to confirm in writing that they will not provide information to the immigration authorities or use police to enforce medical debts. The response to exclusion could thus be multifaceted, building status in a variety of different sites rather than relying on a decision from a centralized federal authority. Connecting multiple sites under the rubric of “access without fear” also serves to resist the compartmentalization of migrants’ lives in a disjunctive fashion in which they are accepted as labour but rejected as members. Furthermore, organizing on the basis of access provides a common venue for solidarity between groups with different status situations and cultural backgrounds, as well as solidarity with nonprofit organizations, researchers, activists, and potentially members of the particular institutions subject to action, as is the case in Toronto. If it is likely that the number of precarious migrants will continue to increase, political momentum also becomes also increasingly likely through organized responses.

Understanding local institutions as sites of transformation could be generative and cumulative: once an institution is willing to modify policies, it becomes easier for others to do the same. Working toward access in multiple local sites would culminate in a form of status apart from that dictated by the federal state; in this way, articulations of membership by precarious migrants go beyond the moral argument, becoming “generative
of a political subjectivity” through declaration of non-citizen membership.⁹ By providing access to the social state and reducing barriers to parity in employment even in the absence of federal recognition of individuals with precarious status, the potency of federal status is thereby decreased. Redefining membership on the basis of de facto connection allows us to put migration policy questions in a broader social context to include the reproduction of power relations and enduring inequalities, rather than simply applying a strict legal definition as a test for membership.¹⁰ Finally, if localized enforcement can be unsettled though policies of active acceptance, the ability to mobilize is also strengthened. Through these “democratic iterations,”¹¹ this may have the potential to strengthen the role of migrants’ voices in federal immigration policy as well, rendering membership dialogues between local policy, public dialogue, and legislation more meaningful in the struggle toward inclusion.

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Appendices

Appendix A: Law and Policy

A.1 Materials referred to in Chapter 4

1. Statutes and Regulations

Employment Standards Act, RSBC 1996, c 113 (Excerpts)

1(1) ...

"employee" includes
(a) a person, including a deceased person, receiving or entitled to wages for work performed for another,
(b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,
(c) a person being trained by an employer for the employer's business,
...

"employer" includes a person
(a) who has or had control or direction of an employee, or
(b) who is or was responsible, directly or indirectly, for the employment of an employee;
...

14 (1) On employing a domestic, the employer must provide the domestic with a copy of the employment contract.
(2) The copy of the employment contract provided to the domestic must clearly state the conditions of employment, including
(a) the duties the domestic is to perform,
(b) the hours of work,
(c) the wages, and
(d) the charges for room and board.

(3) If an employer requires a domestic to work during any pay period any hours other than those stated in the employment contract, the employer must add those hours to the hours worked during that pay period under the employment contract.

17 (1) At least semimonthly and within 8 days after the end of the pay period, an employer must pay to an employee all wages earned by the employee in a pay period.

20 An employer must pay all wages
(a) in Canadian currency,
(b) by cheque, draft or money order, payable on demand, drawn on a savings institution, or
(c) by deposit to the credit of an employee’s account in a savings institution, if authorized by the employee in writing or by a collective agreement.

35 (1) An employer must pay an employee overtime wages in accordance with section 40 if the employer requires, or directly or indirectly allows, the employee to work more than 8 hours a day or 40 hours a week.

40 (1) An employer must pay an employee who works over 8 hours a day, and is not working under an averaging agreement under section 37,
(a) 1 1/2 times the employee’s regular wage for the time over 8 hours, and
(b) double the employee’s regular wage for any time over 12 hours.

(2) An employer must pay an employee who works over 40 hours a week, and is not working under an averaging agreement under section 37, 1 1/2 times the employee's
regular wage for the time over 40 hours.
(3) For the purpose of calculating weekly overtime under subsection (2), only the first 8 hours worked by an employee in each day are counted, no matter how long the employee works on any day of the week.

Workers Compensation Act, RSBC 1996, c 492 (Excerpts)

1 ...

"employer" includes every person having in their service under a contract of hiring or apprenticeship, written or oral, express or implied, a person engaged in work in or about an industry;

...

"worker" includes
(a) a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise;

...

5 (1) Where, in an industry within the scope of this Part, arising out of and in the course of the employment is caused to a worker, compensation as provided by this Part must be paid by the Board out of the accident fund.

...

5.1 (1) Subject to subsection (2), a worker is entitled to compensation for a mental
disorder that does not result from an injury for which the worker is otherwise entitled to compensation, only if the mental disorder
(a) either
(i) is a reaction to one or more traumatic events arising out of and in the course of the worker’s employment, or
(ii) is predominantly caused by a significant work-related stressor, including bullying or harassment, or a cumulative series of significant work-related stressors, arising out of and in the course of the worker’s employment,
(b) is diagnosed by a psychiatrist or psychologist as a mental or physical condition that is described in the most recent American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders at the time of the diagnosis, and
(c) is not caused by a decision of the worker’s employer relating to the worker’s employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the worker’s employment.

53 (1) In every case of an injury or disabling occupational disease to a worker in an industry within the scope of this Part, the worker, or in case of death the dependant, must as soon as practicable after the occurrence inform the employer by giving information of the disease or injury to the superintendant, first aid attendant, supervisor, agent in charge of the work where the injury occurred or other appropriate representative of the employer, and the information must include the name of the worker, the time and place of the occurrence, and, in ordinary language, the nature and cause of the disease or injury.
(2) In the case of an occupational disease, the employer to be informed of the death or disablement is the employer who last employed the worker in the employment to the nature of which the disease was due.
(3) The worker must, if he or she is fit to do so and on request of the employer, provide to the employer particulars of the injury or occupational disease on a form prescribed by the Board and supplied to the worker by the employer.
(4) Failure to provide the information required by this section is a bar to a claim for
compensation under this Part, unless the Board is satisfied that
(a) the information, although imperfect in some respects, is sufficient to describe the
disease or injury suffered, and the occasion of it;
(b) the employer or the employer’s representative had knowledge of it; or
(c) the employer has not been prejudiced, and the Board considers that the interests of
justice require that the claim be allowed.

Employer’s notification of injury

54 (1) Subject to subsection (6), an employer must report to the Board within 3 days of its
occurrence every injury to a worker that is or is claimed to be one arising out of and in the
course of employment.
(2) Subject to subsection (6), an employer must report to the Board, within 3 days of
receiving information under section 53, every disabling occupational disease, or claim for
or allegation of an occupational disease.
(3) An employer must report immediately to the Board and to its local representative the
death of a worker where the death is or is claimed to be one arising out of and in the course
of employment.
(4) The report must be on the form prescribed by the Board and must state
(a) the name and address of the worker;
(b) the time and place of the disease, injury or death;
(c) the nature of the injury or alleged injury;
(d) the name and address of any physician or qualified practitioner who attended the
worker; and
(e) any other particulars required by the Board or by the regulations,
and may be made by mailing copies of the form addressed to the Board at the address the
Board prescribes.
(5) The failure to make a report required by virtue of this section, unless excused by the
Board on the ground that the report for some sufficient reason could not have been made,
constitutes an offence against this Part.
2. Policy

_WorkSafe BC Assessment Manual (Excerpts)_

Full text available online:

...

(a) General

Workers include individuals not employing other individuals and who fall into the following categories:

- individuals paid on an hourly, salaried or commission basis;
- individuals paid on commission or piecework where the work is performed in the employer’s shop, plant or premises;
- individuals paid commission, piecework or profit sharing where they are using equipment supplied by the employer;
- individuals operating under circumstances where the “lease” or “rental” of equipment or “purchase” of material from their employer is merely a device to arrive at a wage or commission amount; and
- labour contractors who elect not to be registered as independent operators.
A.2 Materials referred to in Chapter 5

1. Statutes and Regulations

a. Health

*Medicare Protection Act*, RSBC 1996, c 286 (Excerpts)

... “resident”

(a) is a citizen of Canada or is lawfully admitted to Canada for permanent residence,
(b) makes his or her home in British Columbia, and
(c) is physically present in British Columbia at least 6 months in a calendar year,

and includes a person who is deemed under the regulations to be a resident but does not include a tourist or visitor to British Columbia;

...

*Medical and Health Services Regulation, BC Reg 426/97 (Excerpts)*

... 2

The following persons are deemed to be residents for the purposes of the definition:

(a) a person admitted to Canada as a student who,
(i) possesses a valid student authorization issued under the Immigration Act (Canada) before its repeal or a study permit issued under the Immigration and Refugee Protection Act (Canada), for a period of 6 or more months,
(ii) continues to retain such valid authorization, and
(iii) meets the criteria under paragraphs (b) and (c) of the definition;
(b) a person admitted to Canada to work who,
(i) possesses a valid employment authorization issued under the Immigration Act (Canada) before its repeal or a work permit issued under the Immigration and Refugee Protection Act (Canada), for a period of 6 or more months,
(ii) continues to retain such valid authorization, and
(iii) meets the criteria under paragraphs (b) and (c) of the definition;
...
(d) a person who
(i) is a spouse or child of a resident if the person has applied for permanent resident status and as long as the application remains active, and
(ii) meets the criteria under paragraphs (b) and (c) of the definition;
(e) a person who is a spouse or child of a resident if the person meets the criteria under paragraphs (b) and (c) of the definition and
(i) the resident has filed with Citizenship and Immigration Canada an undertaking to assist the person and paid the fee required by Citizenship and Immigration Canada, and
(ii) the application of the person for permanent resident status remains active;
...
(g) a person who has applied for permanent resident status and as a result has been issued a permit by the federal minister responsible for immigration if
(i) issuance of the permit has been recommended by the committee established by the minister responsible for the Medicare Protection Act to review the admissibility of persons on medical grounds, and
(ii) the person meets the criteria under paragraphs (b) and (c) of the definition;
b. Education

*School Act*, RSBC 1996, c 412 (Excerpts)

...  

**Entry to educational program**

3 (1) Subject to subsections (2) and (3), a person who is resident in British Columbia must

(a) enroll in an educational program

...  

on the first school day of a school year if, on or before December 31 of that school year, the person will have reached the age of 5 years, and

(b) participate in an educational program provided by a board or, in the case of an eligible child or an immigrant child, by a board or a francophone education authority until he or she reaches the age of 16 years.

...

82

(1) a board must provide free of charge to every student of school age resident in British Columbia and enrolled in an educational program in a school operated by the board, instruction in an educational program

(a) instruction in an educational program sufficient to meet the general requirements for graduation,

(b) instruction in an educational program after the student has met the general requirements for graduation, and

(c) educational resource materials necessary to participate in the educational program.

(2) for the purposes of subsection (1), a student is resident in British Columbia if the student and the guardian of the person of the student are ordinarily resident in British Columbia.
c. Employment Insurance

Employment Insurance Act, SC 1996, c 23 (Excerpts)

...  

18. A claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that on that day the claimant was

(a) capable of and available for work and unable to obtain suitable employment;


d. Employment Assistance (Welfare)

Employment Assistance Act, SBC 2002, c 40 (Excerpts)

...  

Citizenship requirements

7 (1) For a family unit to be eligible for income assistance at least one applicant or recipient in the family unit must be

(a) a Canadian citizen,

(b) authorized under an enactment of Canada to take up permanent residence in Canada,

(c) determined under the Immigration and Refugee Protection Act (Canada) or the Immigration Act (Canada) to be a Convention refugee,

(d) in Canada under a temporary resident permit issued under the Immigration and Refugee Protection Act (Canada) or on a minister’s permit issued under the Immigration Act (Canada),

(e) in the process of having his or her claim for refugee protection, or application for protection, determined or decided under the Immigration and Refugee Protection Act
(Canada), or

(f) subject to a removal order under the *Immigration and Refugee Protection Act* (Canada) that cannot be executed.

2. Policy

a. Health

*MSP Enrolment Account Maintenance Manual v. 2 (Excerpts)*

(Policy manual provided by email dated July 7, 2011, from Anne Stearn, British Columbia Ministry of Health, in response to a written request made under the Freedom of Information and Protection of Privacy Act, RSBC 1996, c 165)

...

23. Eligibility Determination Tables

In the following tables, a status of “Eligible” indicates eligibility for MSP coverage after the waiting period has been completed (i.e. in most cases, balance of the month of arrival plus 2 months).

<table>
<thead>
<tr>
<th>Visitor Record Case Type</th>
<th>Meaning of Case Type</th>
<th>Eligibility for Applicant</th>
<th>Eligibility for spouse/dependent of Canadian or Permanent Resident Status Holder</th>
<th>Eligibility for spouse/dependent of eligible Temporary Immigration Document Holder</th>
<th>Visa Type Code</th>
</tr>
</thead>
<tbody>
<tr>
<td>10, 11, 15</td>
<td>Visitor</td>
<td>Not Eligible unless case type 10 religious worker coded R19(1)(C)</td>
<td>Eligible if proof of sponsored spouse/dependent received</td>
<td>Eligible</td>
<td>V</td>
</tr>
<tr>
<td>13</td>
<td>Religious Worker – may be case type 10 R19(1)(C) in remarks</td>
<td>Eligible</td>
<td>Eligible</td>
<td>Eligible</td>
<td>V</td>
</tr>
<tr>
<td>Visitor Record Case Type</td>
<td>Meaning of Case Type</td>
<td>Eligibility for Applicant</td>
<td>Eligibility for spouse/dependent of Canadian or Permanent Resident Status Holder</td>
<td>Eligibility for spouse/dependent of eligible Temporary Immigration Document Holder</td>
<td>Visa Type Code</td>
</tr>
<tr>
<td>--------------------------</td>
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<td>---------------------------</td>
<td>------------------------------------------------------------------</td>
<td>------------------------------------------------------------------</td>
<td>----------------</td>
</tr>
<tr>
<td>16</td>
<td>National Communist Country</td>
<td>Not Eligible</td>
<td>Eligible if proof of sponsored spouse/dependent received</td>
<td>Eligible</td>
<td>V</td>
</tr>
<tr>
<td>17</td>
<td>Favourable applicant for permanent resident status</td>
<td>Not Eligible</td>
<td>Eligible</td>
<td>Eligible</td>
<td>V</td>
</tr>
<tr>
<td>18</td>
<td>Poss. refugee claimant or in violation of immigration act</td>
<td>Not Eligible unless has work or study permit</td>
<td>Not Eligible unless proof of sponsored spouse/dependent received</td>
<td>Eligible</td>
<td>V</td>
</tr>
<tr>
<td>20</td>
<td>Visitor permitted to work</td>
<td>Eligible Employment contract or letter from employer confirming employment if Working Holiday Program (CCDO:9999999) or Student Working Abroad Program (E05) needed</td>
<td>Eligible</td>
<td>Eligible</td>
<td>W</td>
</tr>
<tr>
<td>22</td>
<td>Diplomat</td>
<td>Eligible</td>
<td>Eligible</td>
<td>Eligible</td>
<td>D</td>
</tr>
<tr>
<td>23</td>
<td>Entertainer</td>
<td>Eligible</td>
<td>Eligible</td>
<td>Eligible</td>
<td>W</td>
</tr>
<tr>
<td>24</td>
<td>Student Permitted to work</td>
<td>Eligible</td>
<td>Eligible</td>
<td>Eligible</td>
<td>W</td>
</tr>
<tr>
<td>26</td>
<td>National Communist Country</td>
<td>Eligible</td>
<td>Eligible</td>
<td>Eligible</td>
<td>W</td>
</tr>
<tr>
<td>27</td>
<td>Favourable applicant for permanent resident status</td>
<td>Eligible</td>
<td>Eligible</td>
<td>Eligible</td>
<td>W</td>
</tr>
<tr>
<td>28</td>
<td>Possible refugee claimant or in violation of immigration act</td>
<td>Eligible</td>
<td>Eligible</td>
<td>Eligible</td>
<td>W</td>
</tr>
<tr>
<td>29</td>
<td>Inadmissible – medical or criminal</td>
<td>Eligible</td>
<td>Eligible</td>
<td>Eligible</td>
<td>W</td>
</tr>
<tr>
<td>98</td>
<td>Seasonal worker</td>
<td>Eligible</td>
<td>Eligible</td>
<td>Eligible</td>
<td>W</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Study Permit (Student Authorization) Case Type</th>
<th>Meaning of Case Type</th>
<th>Eligibility for Applicant</th>
<th>Eligibility for spouse/dependent of Canadian or Permanent Resident Status Holder</th>
<th>Eligibility for spouse/dependent of eligible Temporary Immigration Document Holder</th>
<th>Visa Type Code</th>
</tr>
</thead>
<tbody>
<tr>
<td>30</td>
<td>Visitor permitted to attend school</td>
<td>Eligible</td>
<td>Eligible</td>
<td>Eligible</td>
<td>S</td>
</tr>
<tr>
<td>32</td>
<td>Diplomat</td>
<td>Eligible</td>
<td>Eligible</td>
<td>Eligible</td>
<td>D</td>
</tr>
</tbody>
</table>
### Study Permit (Student Authorization) Case Type

<table>
<thead>
<tr>
<th>Study Permit (Student Authorization) Case Type</th>
<th>Meaning of Case Type</th>
<th>Eligibility for Applicant</th>
<th>Eligibility for spouse/dependent of Canadian or Permanent Resident Status Holder</th>
<th>Eligibility for spouse/dependent of eligible Temporary Immigration Document Holder</th>
<th>Visa Type Code</th>
</tr>
</thead>
<tbody>
<tr>
<td>34</td>
<td>Worker permitted to study</td>
<td>Eligible</td>
<td>Eligible</td>
<td>Eligible</td>
<td>S</td>
</tr>
<tr>
<td>36</td>
<td>National Communist Country</td>
<td>Eligible</td>
<td>Eligible</td>
<td>Eligible</td>
<td>S</td>
</tr>
<tr>
<td>37</td>
<td>Favourable applicant for permanent resident status</td>
<td>Eligible</td>
<td>Eligible</td>
<td>Eligible</td>
<td>S</td>
</tr>
<tr>
<td>38</td>
<td>Possible refugee claimant or in violation of immigration act</td>
<td>Eligible</td>
<td>Eligible</td>
<td>Eligible</td>
<td>S</td>
</tr>
</tbody>
</table>

### b. Education

*Policy Document:* “Funding Policy - Eligibility of students for operating grant funding” British Columbia Ministry of Education (Excerpts)

Available online:


...  

The courts have interpreted the term ‘ordinarily resident’ in this context by assessing whether the applicant has:

- a ‘settled purpose’ for taking up residence in the community; and
- sufficient continuity of residence, despite temporary absences.

To meet these requirements the applicant must show, on the basis of objective evidence, that they have established a regular, habitual mode of life in the community with a sufficient degree of continuity which has persisted despite temporary absences. It is not
enough to qualify for free public education that the applicant has taken up residence for the ‘settled purpose’ that the children of the family receive public education.

Boards of education are entitled to scrutinize the purpose for which the person or family has established its residence in the community to prevent an abuse of the system under which higher fees may lawfully be charged for out of province/international students.

Consideration of the following indicia of ‘ordinary residence’ may assist boards in making the determination of whether a person is ordinarily resident in BC. While each of these indicators alone is not enough to establish residency for the purposes of s. 82, the larger the number of positive indicators as set out in the first list below, the more likely it is that the person will qualify as a resident of the province for the purpose of receiving free public education.

Ownership of dwelling or long-term lease or rental of dwelling,

- Residence of spouse, children and other dependent family members in the dwelling,
- Legal documents indicating British Columbia residence
- Provincial driver’s licence,
- Employment within the community,
- Parent or guardian filing income tax returns as a BC resident,
- Provincial registration of automobile,
- Canadian bank accounts or credit cards,
- Links to community through religious organizations, recreational and social clubs, unions and professional organizations,
- Subscriptions for life or health insurance, such as MSP coverage, and
- Business relationships within the community.

Again, while none of the factors alone are sufficient, the larger the number of negative indicators as set out below, the more likely it is that a person will not qualify for free public education:

- For the school-aged child, residence of the parents and/or family home in another jurisdiction, even if the student has a BC guardian,
- Existence of another dwelling outside of BC where the person and/or their family regularly resides,
- Foreign bank accounts or credit cards,
- Parent or guardian’s employment in another jurisdiction,
- Parent or guardian filing income tax return in another jurisdiction,
• Identification documents from another jurisdiction, and
• Substantial ties with former country or place of residence.

... Other classes of persons for whom the ministry will provide operating grant funding – In addition to those who have a clear entitlement to public education under Section 82 of the School Act, the minister will provide operating grant funding for school age students in the categories listed below if the board of education requests funding via Form 1701. Boards are encouraged to seek their own legal advice should circumstances warrant.

A student who resides in British Columbia and:
- who has made a claim for refugee status in Canada and whose claim has not yet been determined, or
- who is detained in custody in a youth custody centre.

• A student who is in British Columbia with his/her guardian if the guardian meets one of the criteria set out below. Guardians must be able to provide documentation to substantiate that they meet these criteria:

  - has been lawfully admitted to Canada for temporary residence and is authorised to work for a period of one year or more, and is or will be employed for at least 20 hours per week;

  - has been lawfully admitted to Canada and is authorised to study for a period of one year or more, and is enrolled in a degree or diploma programme at a public post-secondary institution in British Columbia or in a degree programme at a private post-secondary institution in British Columbia

  - has been lawfully admitted to Canada and is authorised to study for a period of one year or more and all of the following conditions apply
-is enrolled in an English as a Second Language (ESL) program of up to a year in duration at an institution that has an Education Quality Assurance Designation (EQA). The ESL student will be deemed resident for up to one year only; beyond one year, children of an ESL student will be considered international students and districts may charge international student fees;

-has been accepted to a degree or diploma programme at a public post-secondary institution in British Columbia, or a degree program at a private post-secondary institution; and

-the acceptance is contingent upon the completion of an ESL program.

-has been lawfully admitted to and is authorized to study in Canada, and has been awarded a multi-year scholarship that covers the cost of both tuition and living expenses for a post-secondary program that includes both an ESL component and a degree program component. The ESL component must be completed at an institution that has an Education Quality Assurance (EQA) designation.

-has been lawfully admitted to Canada and is participating in an educator exchange program with a public school in British Columbia

-is carrying out official duties under the authority of the Visiting Forces Act or as an accredited diplomatic agent, preclearance officer, consular officer or official representative in Canada of a foreign government with a consular post in British Columbia.

... 

School District 43 – Coquitlam
Policy sheet “Documentation Required for Registration of All School-Age Students Funding Eligibility Checklist” (Excerpts)


...

For “Status in Canada”, parents/guardians must provide one of the following documents:

- Canadian birth certificate, passport or citizenship card,
- Confirmation of Landing documents plus passport,
- Permanent Resident Card or Status Indian documentation, or
- work/study permits valid for one year plus proof of work of 20 hours or more per week or postsecondary enrolment.

...

For “Residency”, the parent or guardian must provide one of:

a long term tenancy agreement, property purchase agreement, income tax statement, property tax statement, or proof of employment for 20 hours plus per week, as well as two of the following: utility bill, care card, drivers’ license, BCID, vehicle registration, Canadian SIN card, Canadian bank account statement or credit card statement, or proof of membership in a local community organization.

School District 44 – North Vancouver

Policy 605: Admission of Non-Canadian Students (Excerpts)

Available online:
<http://www.nvsd44.bc.ca/Home/Administration/PoliciesAndProcedures/Series600/Policy%20605.aspx>
As non-Canadian students do not qualify for funding from the Ministry of Education, fees may be charged.

The admission of non-Canadian students to Canada, and the specification of privileges associated with such admission, is essentially a Federal responsibility. Admission into a District school of non-Canadian students who are resident in the School District shall, therefore, be governed by the following provisions:

- Landed immigrants shall be granted the same educational privileges as Canadians
- The Superintendent or designate may grant permission to attend school for a limited period of time to students who are non-Canadian school age children of persons holding work permits. Permission shall be granted only if the Superintendent or designate determines that the attendance of such a student will not unduly strain the resources of the school
- The Superintendent or designate may grant permission to non-Canadian students who are visiting a close relative or friend to attend school as a visitor for a limited period of time. The school is not expected to assume the usual responsibility for instruction, evaluation, or reporting of progress
- Admission shall be granted to students of parents who are enrolled full time in a recognized, degree-granting program at a provincial community college or university (independent language schools do not qualify) and who hold a Study Permit for two years or greater
- Admission shall not be granted to other categories of students except in exceptional circumstances. As an example of exceptional circumstances, principals of schools may grant permission to non-Canadian students participating in a recognized international student exchange program to attend for a specified period of time. The Superintendent may also provide for temporary admission to non-Canadian students pending a legal determination of the guardianship of a student
- No written permission shall be provided which would enable a student to obtain a study permit except as required for the exceptional circumstances determined by the Superintendent or for fee-paying offshore international students described in the section below.

1. Employment Insurance

*Digest of Benefit Entitlement Principles (Excerpts)*

Available online:
10.2.4 Expiry of work permit

All foreign workers authorized to enter Canada do so as temporary residents, visitors, students or workers. When they enter Canada they are given temporary resident status for a limited period of time.

In the majority of cases, if they wish to work in Canada, they are required to obtain a work permit issued by Citizenship and Immigration Canada (CIC) before they begin working, or continue working in Canada. This work permit is also referred to as an Employment Authorization.

Generally, foreign workers can only demonstrate availability to accept work if they possess a work permit which allows them to work in Canada. Temporary foreign workers who are not eligible to extend their stay in Canada, beyond the expiry of their work permit cannot demonstrate availability for work.

However, a claimant who does not currently possess a work permit is not necessarily unavailable for work. The claimant may be able to obtain a work permit as soon as employment is secured, because of the type of work they perform, or because of the individual’s skills. Consequently, the lack of a work permit is not the only factor to be considered when determining availability. The Commission must take into account all factors normally considered when determining a claimant’s availability.

10.2.4.1 Open work permit

Temporary foreign workers who have an open work permit are allowed to accept employment and to work for any employer during the period specified on the work permit. An open work permit can only be granted once the individual has received first stage approval (approval in principal) of their application for permanent residence in Canada. For example, under the Post-Graduation Work Permit Program international students can
obtain an open work permit with no restrictions on the type of employment and no requirement for a job offer. The duration of the work permit can be up to three years.

A claimant whose work permit has expired must apply to have it renewed before continuing to work in Canada. It is the claimant’s responsibility to apply for an extension before their current work permit expires. In cases where a claimant’s work permit has expired, and they provide proof that, before the expiry date, they applied to have it extended, the availability of that claimant will be assessed in the normal manner. A claimant cannot prove that they are available for work if their work permit has expired and they did not apply for an extension, prior to the expiry date. These claimants will be subject to a disentitlement until such time as a new work permit has been issued.

10.2.4.2 Non-renewable work permit
Foreign workers with non-renewable work permits are not entitled to extend the duration of their stay in Canada. These types of permits are issued to workers in the Seasonal Agricultural Program. These workers are issued a work permit that is valid for a specific period of time (usually eight months) which normally corresponds with the agricultural season. This type of permit is non-renewable, therefore, once the permit expires, the worker must leave Canada. They cannot be considered available for work regardless of whether or not they state they are willing to seek work, and that they would not refuse any employment opportunities that arise.

10.2.4.3 Restricted to one employer
A person whose work permit includes a restriction that only allows them to work for a specific employer, is not normally considered to be available to accept work, and may be disentitled from collecting benefits. However, the simple fact that the work permit restricts the worker to one employer is not the only factor to be considered when determining the claimant’s availability.

It is important to fact find and take all factors into consideration before determining that a foreign worker is unavailable because their work permit restricts their employment to one
employer. Before making a determination, it is necessary to obtain a declaration from the claimant regarding their availability. In addition, the claimant must show that once they receive an offer of employment from a new employer, CIC will remove the restriction on their work permit.

10.2.4.4 Expired work permit

The availability of a claimant who holds a valid work permit, must be assessed based on their individual circumstances, taking into consideration all the terms of their work permit. When a claimant indicates they are available for work, and there is no issue with the work permit, or any contradictory evidence on file concerning the claimant’s availability, entitlement to benefits must be considered the same as for any other claimant.

Once the work permit has expired, if the claimant cannot show that they applied for an extension prior to the expiry date, the claimant no longer has any status in Canada. In these situations, the claimant cannot prove they are available for work and a disentitlement is warranted. If the claimant proves they applied for a new work permit prior to the expiry of the previous one, availability would be considered the same as for any other claimant.

2. Employment Assistance

*British Columbia Ministry of Social Development, “Citizenship Requirements.”* (Excerpts)

Available online:
<http://www.gov.bc.ca/meia/online_resource/verification_and_eligibility/citreq/policy.html>

For a family unit to be eligible for income assistance or disability assistance, one of the following requirements must be met:

each applicant in the family unit is one of the following:
• a Canadian citizen
• a permanent resident
• a protected person (Convention refugee or person in need of protection)
• in Canada on a Temporary Resident Permit (Minister’s Permit prior to June 28, 2002)
• a refugee claimant [see Policy – Refugee Claimants]
• under a removal order that cannot be executed (for example, there might be humanitarian concerns if a person is returning to a country where there are reasons to believe they might face persecution and mistreatment, or the person’s home country no longer exists making it impossible for the person to return.)
• a dependent child

Dependent children do not affect eligibility due to their citizenship. For the purposes of eligibility, they take their parents’ status. For example, a dependent child of a parent who has refugee status assumes the same status.

... Refugees claimants include persons who:
• have made a claim for refugee protection with the Refugee Protection Division of the Immigration and Refugee Board (IRB)
• have been denied protected person status by the IRB (Convention refugee and person in need of protection) and are appealing.
• are requesting a Pre-Removal Risk Assessment (PRRA) by CIC or are applying for judicial review by the Federal Court of Canada. This includes:
  o PRRA applicants who have exhausted appeals for refugee protection through IRB
  o Refugee claimants whose claim was refused, withdrawn, or abandoned, and
  o Refugee claimants who are inadmissible for referral to the IRB but may still qualify for protection through PRRA or the judicial review by the Federal Court of Canada
• are subject to a removal order issued by CIC when the order cannot or is not being executed.

... Applicants who are refugee claimants, Temporary Resident Permit holders, and persons under a removal order that cannot be executed must provide immigration document IMM 1442 that specifies they are in Canada under these categories when applying for regular assistance and disability assistance. The ministry recognizes the IMM 1442 document as
primary identification and as the sole piece of identification required from this client group while waiting to receive secondary identification. [see Identification Requirements-Proof of Identity]

Refugee claimants, Temporary Resident Permit holders, and those with permanent resident status waiting to receive a Social Insurance Number (SIN) are exempt from meeting the SIN requirement when determining eligibility for income assistance or disability assistance.

...  

**Case Example**

A two-parent family with two children applies for income assistance. The father is a permanent resident. The mother and children do not have status in Canada.

If all eligibility criteria are met, except the mother does not meet the citizenship requirements, the family unit is eligible for income assistance. The dependent children would be considered to have their father's permanent residence status.

Issue income assistance based on a family unit size of three. Both adults are required to complete and sign the Monthly Report (HSD0081) each month.
Appendix B: Sample Interview Script

Sample Interview Script (April 2011)

1. Have you/your clients experienced times where you/they had uncertain status or lack of status?

2. What were the factors that contributed to the uncertain status or lack of status?

3. Do you/your clients have family members in Canada, and if so, was their status uncertain or lacking as well?

4. What were the impacts of uncertain status or lack of status?

5. Did you/your client change anything in your/their life because of uncertain status or lack of status?

6. Did you/your client have any interactions with the law when you/they had uncertain status or lack of status?

7. Did you/your client have any health care needs when you/they had uncertain status or lack of status? If so, did you/they seek treatment, and was this affected by lack of status/uncertain status?

8. Did you/your client have any interaction with the education system when you/they had uncertain status or lack of status? If so, how was this affected by lack of status/uncertain status?

9. Did you/your client have any need of welfare or other social benefits when you/they had uncertain status or lack of status? If so, was this affected by lack of status/uncertain status?

10. Did you/your client seek employment or work while they had uncertain status or lack of status? If so, was working life affected by lack of status/uncertain status?

11. Did you/your client have interactions with immigration authorities while they had uncertain or lack of status?
12. Did you/your client have interactions with other authorities while they had uncertain or lack of status?

13. Did you/your client attempt to regularize status? If so, what were the factors that affected this decision and the process of trying to obtain status?

14. Are there any other ways you/your client and family have been affected by uncertain status or lack of status?
### Appendix C: Migrant Participant Profiles

<table>
<thead>
<tr>
<th>No.</th>
<th>Nationality</th>
<th>Sex</th>
<th>Family Status</th>
<th>Migration Status (past and present)</th>
<th>Type of work</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Mexican</td>
<td>M</td>
<td>Married with children, family in Mexico</td>
<td>Work permit</td>
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<tr>
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<td>Common law, spouse in Canada</td>
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<td>Children in China</td>
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<tr>
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<td>Work permit, but unauthorized employer</td>
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</tr>
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<td>Children in China</td>
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<td>Work permit, but unauthorized employer</td>
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<tr>
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<td>Spouse and 2 kids</td>
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<tr>
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<tr>
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<td>Visitor visa, undocumented, work permit</td>
<td>Food service, live-out domestic</td>
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<tr>
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<td>Married with children, family in Canada</td>
<td>Work permit</td>
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<tr>
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<td>Married, spouse in Canada</td>
<td>Work permit, refugee claimant</td>
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<tr>
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<td>Undocumented, refugee claimant, post-claim overstay</td>
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<td>Undocumented</td>
<td>Construction</td>
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<tr>
<td>No.</td>
<td>Nationality</td>
<td>Sex</td>
<td>Family Status</td>
<td>Migration Status (past and present)</td>
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<tr>
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<td>Work permit, but unauthorized employment</td>
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<tr>
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<td>Work permit</td>
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<tr>
<td>27</td>
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<td>Work permit, unauthorized employment, permanent resident</td>
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<tr>
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<td>Married with children, family in Canada</td>
<td>Undocumented, permanent resident</td>
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<tr>
<td>31</td>
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<td>Unknown/not identified</td>
<td>Work permit, unauthorized employment</td>
<td>Housecleaning, domestic</td>
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</table>