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Rules of Disengagement: "Low Skill" Migrant Workers, Law and the Social Dimensions of Exclusionary Inclusion

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**RULES OF DISENGAGEMENT: “LOW SKILL” MIGRANT
WORKERS, LAW, AND THE SOCIAL DIMENSIONS OF
EXCLUSIONARY INCLUSION**

BRENDAN JOWETT

A THESIS SUBMITTED TO
THE FACULTY OF GRADUATE STUDIES
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ABSTRACT

This thesis interrogates social exclusion among migrant workers under the NOC C & D (“low skill”) occupational stream of Canada’s Temporary Foreign Worker Program, a relatively new, fast-growing, and highly diverse stream which brings migrant workers into industry sectors and social settings where they were never seen before. The author develops a framework for understanding law’s role in producing social exclusion, and applies it to ethnographic data collected through interviews with migrant justice advocates and migrant workers in Brandon, Manitoba. This thesis ultimately establishes that migrant workers need not face spatial separation, discrimination from the community, or a historically gendered and racialized labour context in order to experience social exclusion; the author argues that social exclusion is legally constructed and that the legal framework of this program itself presents barriers to migrants’ full participation in the life of the communities in which they live and work.

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Glossary of Acronyms

CBSA – Canada Border Services Agency

CEC – Canadian Experience Class

CIC – Citizenship and Immigration Canada

FSW – Federal Skilled Worker Class

H & C – Humanitarian and Compassionate grounds

HRSDC – Human Resources and Skills Development Canada

IELTS – International English Language Testing System

IRPA – Immigration and Refugee Protection Act

IRPP – Institute for Research on Public Policy

J4MW – Justicia for Migrant Workers

LMO – Labour Market Opinion

NIEAP – Non-Immigrant Employment Authorization Program

NOC 0, A & B – National Occupational Classification streams 0, A & B – occupations classified as “high skill” or requiring higher levels of formal training.

NOC C & D – National Occupational Classification streams C & D – occupations classified as “low skill” or requiring low levels of formal training.

PIPEDA – Personal Information and Protection of Electronic Documents Act

PNP – Provincial Nominee Program

SAWP – Seasonal Agricultural Workers Program

TFW – Temporary Foreign Worker

TFWP – Temporary Foreign Worker Program

UFCW – United Food and Commercial Workers Union

WAC – Workers’ Action Centre

Rules of Disengagement: “Low Skill” Migrant Workers, Law, and the Social Dimensions of Exclusionary Inclusion

"Wir riefen Arbeitskräfte und es kamen Menschen."
(We asked for manpower and we got human beings.)
- Max Frisch¹

Introduction: Towards an Immigration Model of Exclusionary Inclusion

Ten kilometres east of the main street in Brandon, Manitoba, a giant, red maple leaf dominates the prairie skyline. The grey, vinyl-sided complex on which it is displayed is easily visible from several kilometres down the road, towering over the flat and endless fields otherwise punctuated only by the occasional shrub, drooping power lines and passing trains. It is not so much the building's height as its expanse that creates a sense of immensity; at 475 000 square feet sitting on 330 acres of land, this is a large-scale industrial operation which has been a significant economic force in Manitoba's second-largest city.² The presence of the plant can be felt driving along the Trans-Canada Highway well before one arrives in Brandon, with 18-wheel hog trucks conspicuously full of pink flesh bursting through side grates on their way to town, conspicuously empty on their way back. In total, approximately 2300 people work at the facility to process the 85 000 hogs that pass through Canada's largest pork processing plant each week, making it the largest private employer in this city of approximately 45 000 residents. The maple leaf which looms over the vast prairie landscape is the logo of Maple Leaf Foods Inc. – a clear allusion to the corporation's Canadian heritage (the corporation being an amalgam of Canada Packers Inc. and Maple Leaf Mills Ltd.) and an appeal to Canadian consumers' sense of national identity. For approximately 75% of the people who enter the plant each day to slaughter hogs, slice meat, package products and ship them to be sold in markets across Canada, however, legal recognition as members of that same “Canadian” community has been withheld for periods lasting several years, and in some cases is never

¹ International Migration and Multicultural Policies Section, “United Nations Convention on Migrants' Rights” online: UNESCO <http://oppenheimer.mcgill.ca/IMG/pdf/un_convention_on_migrants_rights_eng-2.pdf>.

² Economic Development Brandon, “Maple Leaf Overview” online: City of Brandon, <<http://www.economicdevelopmentbrandon.com/maple-leaf>>.

realized. These 1800 people arrived in Canada from Latin America, China, and Ukraine with temporary visas stamped in their passports and work permits authorizing them to work for Maple Leaf – and exclusively for Maple Leaf – for a specified period of time, not as Canadian citizens or permanent residents, but as temporary foreign workers [‘TFWs’]³ under the National Occupational Classification C and D stream [‘NOC C & D’]⁴ of the Government of Canada’s Temporary Foreign Worker Program [‘TFWP’].

Seven kilometres along the same road, back towards town, the United Food & Commercial Workers [‘UFCW’] Local 832 Union Office and Training Centre sits across the road from the garages and back fences of a residential neighbourhood. Purchased by the UFCW in 2008 and significantly renovated, the single-story Training Centre has fresh stucco exterior walls and a spotless, peaked sheet metal roof in the same blue as the union brand. Bus stops and bike racks have been placed directly in front of the union office, as they have at the Maple Leaf plant further up the road, and a special public transit schedule operates to assist workers in getting to shifts outside of ordinary transit hours.⁵ Within the building, off of the main hallway, a door leads to the offices of Local 832, the local union which has organized and is certified to act as the bargaining agent for workers, migrant and non-migrant alike, in the Maple Leaf plant. The other doors in this hallway, however, lead to rooms which are far less typical than the standard local union headquarters. These doorways with labels such as the “Neepawa Room,” “Carberry Room” or “Virden Room,” in reference to smaller towns in southern Manitoba, lead to rooms with a rectangular desk at the front facing large circular tables surrounded by chairs,

³ While the terminology of temporary *foreign* worker is the language used by governments in official policy documents (and thus often used by the media and other public and private discourse), I prefer to use the terminology of *migrant* workers. Kerry Preibisch writes that “...labelling migrants as foreign is part of a nationalist discourse that contributes ideologically to their legal and social disenfranchisement within labour market and society,” characterizing foreignness as an inherent quality. The terminology of “migrant” shifts focus from that otherness to the individual person and their position as being in process of migration, which is what more accurately characterizes this group of people. See Kerry Preibisch, “Development as Remittances or Development as Freedom? Exploring Canada’s Temporary Migration Programs from a Rights-Based Approach” in Fay Faraday, Judy Fudge & Eric Tucker, eds, *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Toronto: Irwin Law, 2012) at 86, from Fay Faraday, *Made in Canada: How the Law Constructs Migrant Workers’ Insecurity* (Toronto: The Metcalf Foundation, 2012) at 16.

⁴ Known also as the Pilot Project for Workers with Lower Levels of Formal Training, what I will less formally refer to as the Low-Skill Pilot Project.

⁵ Canadian Urban Transit Association, “Public Transit and Small Communities” online: Canadian Urban Transit Association <http://www.cutaactu.ca/en/publicationsAndresearch/resources/IssuePaperNo.11_PublicTransitandSmallCommunities.pdf>.

and clean whiteboards on the front walls. The rooms are lined with glossy posters reading “Canadian Language Benchmarks,” bordered in blue and gold with a red maple leaf in the upper right corner of each poster; the bottom of the poster also has the logos of the Centre for Canadian Language Benchmarks and the Province of Manitoba. The Level 3 speaking benchmarks include “I can ask for help or permission” and “I know a few words about health and feelings”; Level 2 reading includes “I can read a simple form”; Level 4 writers can “write a paragraph about a personal experience.” Another poster in the classroom offers a high school upgrade at the local Assiniboine Community College, free to UFCW members. In a smaller kitchen and eating area off the main hallway, posters for community events such as the local “Super Run” car show are tacked onto a bulletin board, and some of the signs taped to the wall, especially those concerning personal safety, are also posted in Spanish and Mandarin as well as English alongside framed images of labour movement figures such as Rosie the Riveter and Jack Layton. A box sitting on a table by the door holds several bags of day-old bread, free for the taking for those who need it, and on the other side of the door is a wire stand holding flyers with the headline “Rights & Responsibilities,” outlining the safety-related responsibilities of employers, workers and supervisors and the rights of workers regarding safety in the workplace. The flyers, produced by SAFE Work Manitoba and the Manitoba Immigrants’ Safety Initiative, are available in English, French, Spanish, Ukrainian and Mandarin, among other languages. Along with an office across the hall from the main union headquarters, and a large banquet hall down the hallway, these rooms comprise the UFCW Training Centre.

Over the last several years, the TFWP and the NOC C & D stream under which these 1800 Maple Leaf workers came to Canada has garnered increasing attention from media, grassroots social justice organizers, labour unions, lawyers and academics, based largely on the revelation that since 2006 the number of (im)migrants admitted into Canada as temporary migrant workers has exceeded, and increasingly exceeds, the number of people admitted into

Canada as permanent residents and future Canadian citizens.⁶ NOC C & D, which specifically applies to migrant workers classified as “low skill,” has attracted particular public attention as the fastest growing of the multiple streams which comprise the TFWP, and yet it remains largely under-researched.⁷ This is not to say that the number of people crossing the border to live and work in Canada has decreased, but rather that a significant shift has taken place in the way in which people traverse the country’s political boundaries over the last forty years.⁸ Prior to 1973 and the introduction of the Non-Immigrant Employment Authorization Program [‘NIEAP’], the majority of people admitted to work in the Canadian labour market entered the country as immigrants, that is, permanent residents who were eligible to bring their families with them, circulate the labour market freely, access services to assist with their integration into Canada, and eventually attain status as Canadian citizens with the full set of legal rights that accompanies that status.⁹ The NIEAP, which provided the original legal framework for today’s TFWP, facilitated the incorporation of non-Canadian-born workers into the Canadian labour market as *migrant* workers, permitted to work in Canada but under markedly different conditions than those who were incorporated as permanent residents; this included (and continues to include) limitations on labour mobility, citizenship rights and settlement services, accompaniment by family and the length of migrants’ stay in Canada.¹⁰ Denying the creation of a permanent economic and political relationship between the foreign-born person and Canadian society and its institutions, the NIEAP (and the TFWP) rendered migrant workers

⁶ Citizenship and Immigration Canada, “Canada – Temporary Residents by Yearly Status, 1987 to 2011” online: Government of Canada <<http://www.cic.gc.ca/english/resources/statistics/facts2011/temporary/01.asp>> and Citizenship and Immigration Canada, “Canada – Permanent Residents by Gender and Category, 1987 to 2011” online: Government of Canada <<http://www.cic.gc.ca/english/resources/statistics/facts2011/permanent/01.asp>>. It should be noted that many groups were raising concerns about the TFWP well before 2006.

⁷ Delphine Nakache & Paula Kinoshita, “The Canadian Temporary Foreign Worker Program: Do Short-Term Economic Needs Prevail over Human Rights Concerns?” (2010) IRPP Study, No. 5 at 5. I continue to place the term “low skill” in quotation marks throughout this thesis to call attention to the ideology surrounding the way that “skill” is understood. Many of the migrants who are classified to work in “low skill” occupations are actually highly skilled, as will be seen further on. It is also important to recognize that skills are simply *different*; the physically difficult, dangerous and often monotonous work performed by these workers is socially necessary, and requires physical and mental abilities that many “highly skilled” people could never muster.

⁸ Nandita Sharma, “On Being *Not* Canadian: The Social Organization of ‘Migrant Workers’ in Canada” (2001) 38:4 Canadian Review of Sociology 415 at 417.

⁹ Judy Fudge & Fiona MacPhail. “The Temporary Foreign Worker Program in Canada: Low-Skilled Workers as an Extreme Form of Flexible Labor” (2009) 30 Immigr. & Nat'lity L. Rev. 843 at 846.

¹⁰ Vic Satzewich, *Racism and the Incorporation of Foreign Labour: Farm Labour Migration to Canada since 1945* (New York: Routledge, 1991) at 39.

“strangers” in the places where they lived and worked, often for years at a time or for significant periods on an annual basis.¹¹ In short, Canada has shifted towards an immigration regime of what Nandita Sharma calls “exclusionary inclusion.”¹²

The legal framework of NOC C & D (and other streams of the TFWP related to “low-skilled” workers) not only belies a legislative desire to incorporate migrant workers into Canadian production relations without permanently incorporating them into Canadian society, but it *relies* on such legal exclusion in order to control the way in which migrant workers are, temporarily, incorporated into Canadian production relations. By legally constructing migrant workers as non-citizen, non-permanent resident, non-member, *foreigners*, the Government of Canada invokes nationalist ideologies to carve out a normative and legal space within which it can, with a veneer of legitimacy, differentiate between the rights and entitlements of those who are legally recognized as citizens, formal members of the political community, and those who are not.¹³ Sharma writes that “...within the global system of national states, it is an oxymoron to insist that foreigners be *at home* in the nation”¹⁴ (emphasis mine) and indeed she argues that this notion of “home” coupled with ideas of nation, space and race operates both to exclude people from national territory, as well as to enact processes of “differential inclusion” which “...[work] to facilitate how people are seen – and see themselves – as being at home or not in the spaces in which they find themselves.”¹⁵ Guiding Sharma’s inquiry is the question of “...how borders make many people *homeless* in the very places where their lives are lived.”¹⁶ Michael Burawoy observed that guest worker programs (such as Canada’s TFWP) enact a coercive separation between the processes of labour force maintenance and labour force renewal, a legislative attempt to extract as much economic power from the worker as

¹¹ *Ibid* at 39.

¹² Nandita Sharma, *Home Economics* (Toronto: University of Toronto Press, 2006) at 29.

¹³ Sharma, *supra* note 8 at 418.

¹⁴ Sharma, *supra* note 12 at 137.

¹⁵ *Ibid* at 18. It is important to note, from the outset, that while the idea of “home” has been central to the process of differential inclusion of migrant workers, it has also been crucial to the colonial process on Turtle Island. The assertion of “home” by colonial settlers in a place that had been home to indigenous peoples and nations since time immemorial has resulted in the displacement and compromised sovereignty of many First Nations. The experiences of migrant workers, often facing displacement and loss of national sovereignty in an era of globalization, are closely related to those of indigenous peoples and their struggles must be understood as connected rather than in opposition to one another.

¹⁶ *Ibid* at 4.

possible while relegating as much of their social existence as possible (most notably their reproductive family lives) to their country of origin.¹⁷ Catherine Dauvergne points out that in legally constituting its pool of eligible future citizens, the state must answer a number of social questions, such as “[w]ho do we value and why? Who can contribute to vital social sectors: the economy and the family? Who is deserving of our protection and our humanity?”¹⁸ In the case of migrant workers, specifically those in occupations classified as “low-skill,” the Government of Canada’s answer to these questions takes legal form in the framework of the TFWP; Canada does not value “low-skill” migrant workers as future members of the national community, it owes them only minimal protection and a limited display of “humanity,” and it will accept migrants’ contribution to the economic sector without encouraging or accepting their contribution to the family and Canadian society generally. The social dimension of exclusionary inclusion is also illuminated in the *Immigration and Refugee Protection Act*¹⁹ which states, as one of its objectives, “...to promote the successful integration of permanent residents into Canada, while recognizing that integration involves mutual obligations for new immigrants and Canadian society.”²⁰ NOC C & D migrant workers are definitively *not* permanent residents, and no federal program assists to help them transition into this category.

While the legal framework of NOC C & D is designed so as to limit (or actively prevent) the integration of migrant workers into Canadian civil society, temporarily if not permanently, Max Frisch’s quote which prefaces this thesis points to the impossibility (and perhaps the absurdity) of rendering a human being a pure economic unit, free of the social and political complexities which are also vital aspects of human life. People bring with them the need for social interaction, for a sense of belonging to a community, and the agency to resist processes which seek to deprive them of these needs. In her highly influential piece “Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study,” Sally Falk Moore wrote that “[l]egislation consists of conscious attempts at social direction. But clearly

¹⁷ Michael Burawoy, “The Functions and Reproduction of Migrant Labour: Comparative Material from Southern Africa and the United States” (1976) 81:5 *American Journal of Sociology* 1050 at 1051.

¹⁸ Catherine Dauvergne, “Citizenship with a Vengeance” (2007) 8:1 *Theoretical Inq. L.* 489 at 495.

¹⁹ SC 2001, c 27 [‘IRPA’].

²⁰ *Ibid* at s 3(1)(e).

societies are in the grip of processes of change quite outside this kind of control.”²¹ In a sense, the growing body of academic literature which examines the processes by which migrant workers assert belonging and strengthen ties to social formations in which they are otherwise legally categorized as foreigners, captured in phrases such as “negotiated citizenship”²² and the “citizenship of non-citizens,”²³ implicitly acknowledges and documents such a state of affairs.

As political and legal mechanisms are deployed in the federal government’s shift towards an immigration model of exclusionary inclusion which predominantly constitutes newcomers as labour power rather than future citizens, these structural processes are felt and confronted in the lived experiences of those complex and autonomous individuals. This thesis examines the social dimension of exclusionary inclusion from the perspective of migrant workers at the Maple Leaf plant in Brandon, Manitoba, unionized under the UFCW. Through the analytical lens of social exclusion, I argue that while migrants in Brandon have individually and collectively fostered processes of social inclusion within the community, the legal framework of the NOC C & D stream *itself* continues to present barriers to individual migrants’ full participation in the social life of the community. Experiences of social exclusion directly attributable to this legal framework are unique to each individual, in relation to his or her ambitions, concerns, passions and priorities. Understanding these experiences as legally constructed offers insight into how law operates to detach people from the communities in which they live and work, as well as revealing areas in which migrant workers, advocates, organizers and academics can push for legislative reform to mitigate the socially exclusionary effects of the NOC C & D stream and the TFWPs more generally.

A. Chapter Overview

This project contributes to a burgeoning body of scholarship concerning the social experiences, and in particular the social exclusion, of migrant workers in the context of an immigration program whose *modus operandi* is to facilitate their inclusion in the Canadian

²¹ Sally Falk Moore, “Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study” (1973) 7:4 Law & Soc’y Rev 719 at 725.

²² Abigail Bakan & Daiva Stasiulis, “Negotiating Citizenship: The Case of Foreign Domestic Workers in Canada” (1997) 57 Feminist Review 112.

²³ Linda Bosniak, *The Citizen and the Alien* (Princeton: Princeton University Press, 2006) at 5.

labour market without permanent incorporation into the larger Canadian social formation.²⁴ For the purposes of framing my discussion and clarifying my use of terms, in Chapter One I examine the concept of social exclusion as it has been employed in the literature concerning the social experiences of migrant workers in Canada as well as in broader sociological literature in order to develop a working definition and analytical framework for this terminology. I arrive at a framework within which an individual or group can be said to be socially excluded when they face barriers to their full participation in the economic, political and social life of the community. There are three dimensions to social exclusion, namely that it is a relational concept which examines connections between and among individuals, groups and social institutions, it occurs in a local socio-spatial context which is embedded in local, territorial, national and global socio-spatial structures (including law), and it is a process which is governed by these structures rather than a static, unchangeable condition. In this chapter I also discuss the methodology of institutional ethnography, and how a modified approach to institutional ethnography can be imported into the context of a social exclusion analysis.

In Chapter Two, I identify the legal framework of the NOC C & D stream as a socio-spatial structure which, in its implementation and operation, may serve to erect barriers to the full participation of migrant workers in community life. I consider NOC C & D alongside other TFWPs which apply to “low skill” workers, including the Seasonal Agricultural Workers Program and the Live-in Caregiver Program. Situating NOC C & D in the context of ongoing neoliberal globalization, I rely on interviews conducted with migrant worker advocates to narrate an overview of the NOC C & D stream which gives legal form to exclusionary inclusion, as well as provincial legal frameworks which, in combination with one another, comprise the socio-spatial legal context that migrant workers enter when they cross the Canadian border and begin working in a specific Canadian locality. I also provide a more specific examination of Manitoba’s provincial nominee program which offers “low skill” migrant workers in that province an opportunity to establish permanent residency.

In Chapter Three, I share my own story of struggling to make contact with NOC C & D migrant workers in the City of Toronto, and eventually making contact with the UFCW Local 832

²⁴ Satzewich, *supra* note 10 at 38.

in Brandon, Manitoba. I describe the physical spatial setting that migrant workers enter into in Brandon, and go on to narrate the stories of three NOC C & D migrant workers, supplemented with the insight of three former migrant workers who have since become permanent residents. While these migrants have individually and collectively found ways of participating, to a certain extent, in community life in the city, in the context of each individual story of migration the legal framework of NOC C & D continues to directly perpetuate experiences of social exclusion which are unique to each individual's circumstances and the things that are important to them. I conclude by suggesting legislative demands that may be made by migrant workers and migrant justice advocates, arising out of these interviews which would mitigate the socially exclusionary effects of the law on the experiences of these individuals, reiterating the importance of continued research on this program, part of the new face of migration to Canada.

CHAPTER ONE: ANALYTICAL AND METHODOLOGICAL FRAMEWORKS

In examining the social dimensions of a legal framework which gives form to the exclusionary inclusion of migrant workers, it is necessary to identify, firstly, what *type* of phenomena we seek to understand, and secondly, what analytical framework can help us to best understand those phenomena (as observable in the available data) and their relationship to law. “Exclusionary inclusion” denotes a relationship between a person or group of people and a society, although it is not self-evident what aspects of social life are invoked by the term. In its political dimension, the terminology of exclusionary inclusion conjures images of Agamben’s *homo sacer*,²⁵ describing political states of exception (increasingly) drawn around certain groups which normalize their differential inclusion; Janet McLaughlin notes that non-citizens, in her case agricultural migrant workers, are one such group who is frequently accorded partial or differential rights.²⁶ Inquiries into the process by which the sovereign creates and normalizes states of exclusionary inclusion, of which Sharma’s is one, necessarily examine state practice and its role in social organization.²⁷ In its social dimension, the terminology of exclusionary inclusion calls attention to the fact that those who are politically excluded (to varying degrees and in varying ways) necessarily live within a society, and have relationships with civil society, with employers, within the market, and with social and political institutions – whether those relationships are defined by exclusion or inclusion. It is the relationship between political exclusion and these broader social relationships which is the central focus of this thesis.

²⁵ *Homo sacer* is described by Agamben as biologically human life “...included in the juridical order solely in the form of its exclusion (that is, of its capacity to be killed).” With its political personhood severed and discarded, as determined through the exercise of sovereign power, *homo sacer* exists as “bare life,” simultaneously present within the sovereign territory and yet abandoned by law and excluded from “qualified life,” incorporation into the political community. Importantly, according to Agamben, law has always been able to draw this distinction, and it is the sovereign’s power to abandon a person from the juridical order (to decide on the state of exception) from which law derives its force. *Homo sacer* can thus be killed with impunity, but not sacrificed. See Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford University Press, 1998) at 29.

²⁶ Janet McLaughlin, “Selecting, Competing, and Performing as ‘Ideal Migrants’: Mexican and Jamaican Farmworkers in Canada” in Pauline Gardiner Barber & Winnie Lem, eds, *Migration in the 21st Century: Political Economy and Ethnography* (New York: Routledge, 2012) at 109. For Agamben’s investigation into the proliferation of states of exception, see generally Giorgio Agamben, *State of Exception* (Chicago: University of Chicago Press, 2005).

²⁷ Sharma, *supra* note 8 at 420.

The terminology employed in the existing literature on the social experiences of migrant workers in Canada has, up to this point, been relatively imprecise in its efforts to describe and understand these social relationships. In the first part of this chapter I set out the analytical framework of “social exclusion and inclusion,” which I will employ in my investigation of the social dimension of exclusionary inclusion. I begin by identifying two terminological threads that have been used in the existing literature – one which uses the language of “social integration,” the other of which uses the language of “social exclusion and inclusion.” Finding the terminology of social exclusion to be preferable, I examine how it has been used in the literature, and strengthen it with discussions on social exclusion in the wider sociological context. I emerge with an analytical framework which defines social exclusion as barriers which prevent an individual or group’s full participation in the social, political or economic life of the community, with three additional dimensions: social exclusion focuses on relationships between and among people and institutions within society, it is concerned with the social structures extant in a given social space (“socio-spatial structures”), and the processes by which those structures erect barriers to full participation. This makes it particularly helpful for examining the relationship between law and social exclusion or inclusion.

In the second part of this chapter, I discuss the development of my research problematic and identify the methodology of institutional ethnography as particularly applicable to understanding that problematic, slightly modifying the methodological framework so as to allow for the application of the lens of social exclusion. In-depth, open interviews serve as my primary means of research, and I discuss the selection of participants, my interview format and other considerations which informed my field research. I then argue for the importance of such experience-based research in understanding the localized effects of the law, describing such research in Mari Matsuda’s terminology of “outsider jurisprudence”

A. Analytical Framework and Defining Social Exclusion and Inclusion

i. Foregoing the Language of “Social Integration”: Three Observations

Within the academic literature concerning the social experiences of migrant workers, which is predominantly sociological, it is surprising that there has not been more discussion as

to what various authors mean when they refer to concepts such as “social exclusion” or “social inclusion.” Perhaps the clearest step towards developing a working definition of a comparable concept within this literature is taken by Jenna Hennebry in her report “Permanently Temporary? Agricultural Migrant Workers and their Integration in Canada.”²⁸ In defining “social integration” in the context of agricultural migrant workers in rural Canadian communities, Hennebry synthesizes various sociological literature on the concept, eventually defining social integration as “...a process whereby these newcomers (like permanent migrants) participate in the economic, social, cultural and political aspects of Canadian society, yet with some important distinctions due to their ‘temporary’ status.” Those distinctions arise out of the structural limitations imposed on migrant agricultural workers, including the limited prospects of achieving permanent residency and citizenship, the annual movement of workers under the Seasonal Agricultural Workers Program [‘SAWP’] between Canada and their originating countries, and limitations on access to social services.²⁹ Hennebry builds upon rubrics developed among sociologists to quantitatively measure the social integration of immigrants,³⁰ adapting those rubrics into the specific context of temporary agricultural labour migration in rural settings and proposing a Labour Migrant Integration Scale that would translate the qualitative experiences of migrant agricultural workers and rural communities into a numerical score.³¹

While the literature on migrant workers’ social experiences in Canada tends to be somewhat flexible with regard to terminology, several observations regarding the language of “social integration” have prompted me to generally position myself away from the use of that term for the purposes of this thesis (despite its similarities to the language that I will be using). The first is that, as mentioned above, the term “social integration” has generally been used to

²⁸ Jenna Hennebry, *Permanently Temporary? Agricultural Migrant Workers and Their Integration in Canada* (2012) IRPP Study, No. 26.

²⁹ *Ibid* at 11.

³⁰ Most influential to her work is a framework developed by James Frideres which focuses on three forms of integration of newcomers: social integration (immigrants’ participation in the social institutions of the host country), cultural integration (the process of learning the values and beliefs of the host country) and identity integration (immigrants’ subjective feelings of belonging to a group). See James Frideres, “Creating an Inclusive Society: Promoting Social Integration in Canada” in John Biles, Meyer Burstein & James Frideres, eds, *Immigration and Integration in Canada in the Twenty-First Century* (Montreal: McGill-Queen’s University Press, 2008) at 81.

³¹ See Hennebry, *supra* note 28 at 31.

denote the quantitative measurement of a phenomenon. For this reason, debates in this academic context often arise around appropriate research methods for measuring integration, the selection of optimum indicators of social integration, and the process of translating qualitative data into a quantitative measurement.³² In light of my research objective, which is concerned with how the legal framework of NOC C & D is felt in the experiences of individual migrant workers, this is not an ideal approach. Far from attempting to convert qualitative narrative accounts of social experience into a quantitative numerical form, this particular study provides an examination of the *way* in which participants make sense of their experiences in Canada and within Canadian society. It is a study not so much concerned with analysis arising out of measurement, but rather analysis arising out of documentary accounts and description. I will discuss my own methodology in further detail below, but for now it will suffice to say that this approach is not appropriate in light of my research objectives.

My second observation is that studies which have sought to measure “social integration” and specifically the social integration of newcomers to Canada is that these studies are generally conducted at a broad societal level rather than at the level of the individual or among relatively small social groups. Sociologist James Frideres, whose work on social integration of immigrants provides much of the foundation of Hennebry’s analytical framework, further explicates the meaning of “social integration” when he defines it as “...the process by which newcomers become a part of the social, cultural, and institutional *fabric* of the host community or society while at the same time retaining their own cultural identity” (emphasis mine).³³ Such a definition clearly necessitates multiple sites and types of investigation, relying not only on the experiences of the group whose integration is the subject of study, but also on an examination of that “fabric” constituted by “mainstream society.”³⁴ In the context of research on the social integration of migrant workers into Ontario communities, although Hennebry’s report acknowledges the individual experiences of migrant agricultural workers in her report and bolsters its findings with quotations from interviews conducted with migrant

³² See for example Frideres, *supra* note 30 at 89. As one of the editors of this compendium, Frideres notes that “...one of the purposes of this volume is to identify key indicators that could be used to measure social integration.”

³³ *Ibid* at 80.

³⁴ *Ibid* at 82.

workers, her report seeks to draw broad conclusions about the operation of the SAWP and the agricultural stream of NOC C & D in Ontario farming communities.³⁵ The broad nature of her study is reflected in her research methodology; her findings are drawn from approximately 600 standardized questionnaires with agricultural migrant workers across Ontario, qualitative interviews with migrants, service providers and community groups, as well as twenty-five interviews with employers, government officials and industry representatives.³⁶ Further studies on the social integration of newcomers (albeit permanent residents and immigrants rather than temporary migrant workers) also provide general investigations of the effects of federal and provincial legislation and policy as they relate to immigration and settlement, and although researchers may also narrow their focus to a particular aspect of integration (for instance economic integration of newcomers) they still seek to proffer an observation generally applicable within a particular social setting.³⁷

This thesis does not seek to offer an expansive observation on a general societal trend, but is rather much more particularistic in its scope. This is primarily for reasons arising from the nature of the social contexts in which the NOC C & D stream operates (although I also have neither the time nor funding for such an extensive project). Migrant agricultural workers constitute a distinct social group in the rural communities that they inhabit, and agriculture is by a significant margin the largest industry sector for migrant workers destined to enter the Canadian labour market.³⁸ Non-agricultural migrant workers under the NOC C & D stream, however, are fragmented across a wide variety of industry sectors, from cooks and dishwashers in restaurants to longshoremen on the docks of major shipping ports, and are found in a wide

³⁵ I will argue below that this mixture of societal and individualized

³⁶ Hennebry, *supra* note 28 at 12.

³⁷ For a collection of studies on social integration of newcomers across Canadian jurisdictions, see generally: John Biles et al, eds, *Integration and Inclusion of Newcomers and Minorities Across Canada* (Montreal and Kingston: McGill-Queen's University Press, 2011).

³⁸ For instance, the NOC C & D agricultural stream alone (not including the SAWP) saw 24 200 confirmed entries of migrant workers in the agricultural sector in Canada out of a total 36 185 NOC C & D migrant workers, meaning that the remaining 33% of NOC C & D migrants were spread across every other "low-skill" industry sector: Citizenship and Immigration Canada, Unpublished Data, *Data Request, Number of Confirmed Temporary Foreign Worker Positions (Entries and Present on December 1st) Under NOC C and D, by Specific Industry Sectors and Province/Territory*. Received 13 December 2012.

variety of social contexts, from the counter of a Tim Hortons in rural British Columbia³⁹ to the heart of downtown Toronto.⁴⁰ While I will further discuss the implications of this vastly different social setting below, this configuration of social, economic, cultural and spatial factors suggests that the social experiences of NOC C & D migrants cannot be subject to the same type of generalizing analysis as has been seen in the agricultural sector. For the purposes of the immediate discussion, it will suffice to say that the language of “social integration” as it has been applied in previous scholarship concerning the broad social trends observed among migrant agricultural is not as readily applied in this particular field. With that in mind, the sites of investigation which inform the findings of this study are limited to the legal structure of the TFWP, the experiences of lawyers and advocates who have frequent and direct contact with migrant workers, and the experiences of migrant workers and former migrant workers themselves. To characterize this as a study of social integration would be to overstate my claim.

Finally, there is a connotative quality about the term “integration,” both in its ordinary use and its use in academic literature, which makes its application uncomfortable (although not incorrect) in the context of the TFWP, particularly TFWP streams which apply to “low skill” workers. Although there are ongoing debates as to whether “integration” requires full assimilation into the mainstream of society or whether it will permit expressions of cultural difference by individuals or groups, there is an aspect of unity, of individual elements blending into a cohesive structure, that attaches to the use of a term whose etymology arises out of the verb “to make whole.”⁴¹ Consistent with this understanding of the term, the definition of “integration” preferred by policy-makers, according to Frideres, is “...adding single elements to an existing structure and joining these to an interconnected ‘whole’.”⁴² It is important to note that the texts which form the theoretical foundation for Hennebry’s discussion of “social integration” are concerned with the integration of *immigrants*, people permanently admitted

³⁹ Fabiola Carletti & Janet Davison, “Who’s looking out for Tim Hortons’ temporary foreign workers?” online: CBC News <<http://www.cbc.ca/news/canada/story/2012/12/11/f-temporary-foreign-worker-program-tim-hortons-canada.html>>.

⁴⁰ This is a finding which emerged from my own field research and which will be discussed in Chapter Three.

⁴¹ See for example: Peter S. Li, “Deconstructing Canada’s Discourse of Immigrant Integration” (2003) 4:3 *Journal of International Migration and Integration* 315 and Frideres, *supra* note 30 at 80-81.

⁴² *Ibid* at 81.

to Canada⁴³ for the specific purpose of becoming members of the national community.⁴⁴ In the case of migrant workers however, particularly those categorized as “low skill” with limited prospects for establishing permanent residency (especially for those under the SAWP), the entire operation of the TFWP is predicated upon keeping migrant workers *separate* from the whole, or in Hennebry’s language, “permanently temporary.” It is migrant workers’ exclusion from the permanent community of Canadian citizens, both legally and normatively, that allows the federal government to impose conditions on them that could not be imposed on citizens, including restrictions on employment (and mobility, in turn) and temporal limitations on the period for which the migrant is authorized to be in Canada, preventing migrants’ families from joining them in Canada, and foreclosing migrants’ access to basic settlement services. Migrant workers are those who are “...not defined as members, or future members, of the imagined community which constitutes the nation. In theory, if not in practice, they are subject to repatriation to their country of origin.”⁴⁵ In other words, from the perspective of those migrant workers who are unable to establish permanent residency (or, in the case of two-step immigration, in the period during which permanent residency is withheld) the language of “integration” or being “part of the whole” of Canadian society will predictably ring hollow when they are told to leave the country after they have been here for eight months, or for four years (a relatively recent time limitation imposed on NOC C & D migrant workers),⁴⁶ or if they are terminated from their employment. It therefore generally only makes sense to speak of migrant workers in the language of “social integration” if they are imagined as a monolithic entity, a group which constitutes a permanent element of a particular social landscape but whose

⁴³ An exception being that permanent residents are subject to the provisions for loss of permanent residency status outlined in s. 46 of the *IRPA*, which include committing a serious offence and failing to meet residency requirements.

⁴⁴ See Biles et al., *supra* note 30, Biles et al., *supra* note 37, and Li, *supra* note 41 generally. Her source which is concerned with integration of *migrant* workers specifically examines the limited context of labour relations regimes in Europe and compares the application of these regimes between citizen/permanent resident workers and migrant workers. See: Heinz Werner, “Integration of Foreign Workers into the Labour Market: France, Germany, the Netherlands and Sweden” (1994) World Employment Programme, Migration and Population, International Labour Office Working Paper, No. 74. Hennebry clearly acknowledges that this literature concerns immigrants rather than migrant workers, and again, part of her objective is to develop a social integration framework which accounts for the specific circumstances of migrant workers. See Hennebry, *supra* note 28 at 3.

⁴⁵ Satzewich, *supra* note 10 at 38.

⁴⁶ *Immigration and Refugee Protection Regulations*, SOR/2002-227 [‘the Regulations’] at s 200(3)(g).

individual members cycle (unevenly) in and out of that group.⁴⁷ Such is the way that James Frideres proposes conceptualizing global labour mobility and its impact on Canadian society, writing that in this setting “...social integration should be conceptualized not as constituting a ‘permanent’ condition, but rather as a ‘circulation’ process.”⁴⁸ The significance of migrant workers’ existence as individuals and their individual experience declines in the analysis of their integration.⁴⁹ On the contrary, this thesis emphasizes the individuality of the migrant workers who participated in the research process, relying on their personal stories to develop a clear picture of how the legal structure of the TFWP and the intervention of non-state institutions (the union in particular) has shaped their experiences in Canadian society. The terminology of “social integration” is not appropriate for the purposes of this thesis.

ii. Electing to use the Language of “Social Exclusion and Inclusion”

As mentioned above, within the literature on the social experiences of migrant workers in Canada, terminology that describes migrant workers’ experiences and relationships within various aspects of Canadian society (in its broadest sense) has been used relatively loosely with little attention paid to what is precisely meant when these various terms are invoked. I have argued above that the best-defined terminology, the language of “social integration,” is not appropriate in this context, or at least not for the purposes of this thesis. The terminology often used in the literature on the social experiences of migrant workers in Canada and which best speaks to the argument that I wish to advance is the language of “social exclusion and inclusion,” however that language has been used differentially within this body of literature and often in a way that is inconsistent with wider sociological understandings of those terms. Here I will review the ways in which these terms have been used in the literature on migrant workers in Canada, the way in which they have been defined in other bodies of literature, and survey the reasons why these terms are optimum for my investigation. Through this overview, I arrive

⁴⁷ Some may be able to integrate permanently while others will move in and out of that group at different rates.

⁴⁸ Frideres, *supra* note 30 at 79.

⁴⁹ I do not intend to cast into doubt Professor Hennebry’s recognition of the individuality of migrant agricultural workers or her concern about their social experiences. To the contrary, her report relies heavily on the voices of migrant workers and in her long career working with migrants in rural Ontario she has worked tirelessly to improve working and social conditions for migrant workers. My criticism merely strives toward conceptual clarity and an explanation of my own use of these terms.

at a definition of “social exclusion and inclusion” that will clarify and guide my analysis of my research findings and their relationship to the legal framework of the NOC C & D stream of the TFWP.⁵⁰

a. Use of Terminology in the Literature

Although studies on the social experiences of migrant workers in Canada had been conducted as early as 1991, the explicit terminology of social exclusion/inclusion was introduced into the literature concerning the social experiences of migrant workers in Canada in Tanya Basok’s 2002 book *Tortillas and Tomatoes*, within which Basok provides an ethnographic account of the structural necessity of migrant agricultural workers in the Canadian horticultural industry.⁵¹ Based on extensive fieldwork in Leamington, Ontario, Basok describes the political, economic, legal and social forces which structure the lives of migrant workers and allocate them into undesirable positions of unfreedom in the Canadian labour market. Part of Basok’s study examines the interactions between Mexican migrants and the permanent Canadian community. Asserting that migrants generally “...do not have a social life outside of work,” Basok describes Friday evening visits to a local No Frills and the emergence of some churches offering services in Spanish as the high points in migrant/host community social interaction. This leaves migrants with few social commitments to take them away from their work, and those migrants who develop social relations in their free time (particularly with women) often face disapproval from employers concerned that this will detract from the quality of their work.⁵² Basok writes that “[b]ecause of the isolation of the work environment and housing arrangements, Mexican workers are excluded from the social world of the Leamington community.”⁵³ While there are numerous references to underenforcement of legal rights throughout the book, including occupational health and safety standards and housing requirements, these are not referred to in the language of social exclusion/inclusion. It appears that Basok’s use of this language was largely incidental, used to describe a state of affairs

⁵⁰ My goal here is not to redefine the terminology of “social exclusion” or “inclusion,” but rather to identify more precisely how other scholars in various disciplines (particularly sociologists) have employed the terms so that the substance of my field research can speak more clearly to their work.

⁵¹ Tanya Basok, *Tortillas and Tomatoes* (Montreal: McGill-Queen’s University Press, 2002) [*Tortillas*] at 143.

⁵² *Ibid* at 123

⁵³ *Ibid* at 145.

through the ordinary meaning of the word but not intended to invoke the web of meanings and interpretations that accompany a term which has taken on a technical usage.

In 2004, two separate articles were published which both placed the terminology of social exclusion/inclusion at the centre of their analysis. Despite their heavy reliance on these terms, neither of the authors articulates a clear definition of social exclusion/inclusion, and the articles evince competing understandings of this terminology. In the article “Post-National Citizenship, Social Exclusion and Migrants Rights: Mexican Seasonal Workers in Canada” (*sic*) Tanya Basok retains the same conception of “social exclusion” that she employed in *Tortillas* two years earlier. Importantly, Basok characterizes social inclusion/exclusion as taking place at the level of informal social relations developed among individuals within the community and within larger civil society institutions.⁵⁴ Using Mexican migrant workers in Leamington, Ontario, as a case study, Basok’s ultimate argument is that while states have extended legal rights to territorially-present non-citizens (a condition which she describes as a form of post-national citizenship), social exclusion from local permanent communities often deprives migrant workers the ability to claim those rights.⁵⁵ Based on qualitative interviews including interviews with approximately 250 migrant agricultural workers, consular officials and policy makers, Basok observes that while migrants participate in the economic life of the community as workers and consumers, they are socially insulated from the community and broader Canadian society which views them as “...sojourners whose temporary stay in the country did not necessitate investment in their language training and/or cultural orientation.” Basok points to initiatives by civil organizations like Justicia for Migrant Workers [‘J4MW’], Frontier College, and various unions (including the UFCW, United Steel Workers of America and Canadian Auto Workers) aimed at strengthening migrant workers’ rights at the public policy level, as well as educating and supporting migrant workers in enforcing their rights in the workplace. In the case of Frontier College, steps towards community inclusion have been made by placing English

⁵⁴ For the purposes of this thesis, I will refer to this level of social interaction as the level of “civil society,” wherein private individuals develop personal, familial and institutional relationships and form communities independent of direct state action (although among the central concerns of this thesis is the question of the state’s role in structuring these seemingly private relationships).

⁵⁵ Tanya Basok, “Post-national Citizenship, Social Exclusion and Migrants Rights: Mexican Seasonal Workers in Canada” (2004) 8:1 Citizenship Studies 47 [‘Post-National Citizenship’] at 50 and 51.

teachers in Ontario farms to work alongside migrant workers and break down the language barriers that exist between migrant workers and the host community.⁵⁶ Despite these initiatives, however, Basok writes that in social and cultural terms, migrant workers are still generally not viewed as part of the local communities in which they reside, having negative implications for the realization of their legal rights.⁵⁷

In Kerry Preibisch's 2004 article "Migrant Agricultural Workers and Processes of Social Inclusion in Rural Canada: *Encuentros* and *Desencuentros*," the terminology of social exclusion/inclusion takes on a new dimension not previously contemplated by Basok or within the other literature on the subject of the social experiences of migrant workers in Canada. Preibisch's literature review, which she classifies as documenting a consistent pattern of social exclusion of migrant workers in Ontario communities,⁵⁸ cites a variety of studies which have focused on interactions between migrants and rural communities at the level that I have referred to as "civil society." For instance, a 1991 article conducted by Robert Cecil and Edward Ebanks⁵⁹ documents social activity at the level of civil society, within both the community and the workplace. Accounts of social interaction within the community, derived from 300 interviews with migrants and 25 interviews with employers,⁶⁰ include migrants' perceptions of the "friendliness of the receiving culture,"⁶¹ their "patterns of contact with Canadians"⁶², and farmers' perceptions of migrants' social lives in Canada.⁶³ Within the workplace, the authors examined migrants' "work terms and conditions," "living accommodations and arrangements" and "working in a foreign cultural environment." The long hours and isolated working and living environments of migrant agricultural workers were found to have a tremendous impact on

⁵⁶ *Ibid* at 59.

⁵⁷ *Ibid* at 57.

⁵⁸ My review of these articles confirms that none of them explicitly use the terminology of social exclusion/inclusion, which points to one of the strengths of this language, namely that as descriptive terminology it can be applied to a variety of processes even when authors themselves do not employ the terms.

⁵⁹ The first research study investigating questions of social exclusion and relationships between migrant agricultural workers and rural Canadian communities under the SAWP: see Kerry Preibisch. "Migrant agricultural workers and processes of social inclusion in rural Canada: *Encuentros* and *desencuentros*" (2004) 29:57 *Canadian Journal of Latin American and Caribbean Studies* 203 [*Encuentros*] at 208.

⁶⁰ Robert Cecil & G. Edward Ebanks, "The Human Condition of West Indian Migrant Farm Labour in Southwestern Ontario" (1991) 29:3 *International Migration* 389 at 389.

⁶¹ *Ibid* at 393.

⁶² *Ibid* at 395.

⁶³ *Ibid* at 397.

migrants' ability to forge connections with the local community.⁶⁴ Preibisch cites the article as documenting a state of general social exclusion, perhaps best summarized in its closing sentence: "Ontario offers a peaceful, reasonably decent working environment with economic opportunities but, even after more than twenty years, the workers are collectively strangers in a land where many spend a good part of their lives."⁶⁵ A similar (but less influential) study conducted by Josephine Smart and reported in a 1997 article also documented interaction between the small Mexican migrant agricultural worker population in Alberta and host communities at the level of civil society,⁶⁶ which Preibisch counts among the literature supporting the "social exclusion thesis."⁶⁷ Basok's own *Tortillas* is also grouped in that camp, and had Hennebry's 2012 study been available in 2004, it would also be categorized as such.

Preibisch's central argument in *Encuentros* is that while

...the *integration* of migrant workers as a social group into the broader Canadian community continues to be characterized by *social exclusion*... the nature of the relationships between migrant and permanent communities is undergoing small but perceptible transformations towards *social inclusion*. This is occurring through the development of personal ties to the community as well as the emergence of non-state actors who have become increasingly relevant in ensuring TMAW rights are respected and who pressure the state to extend those rights.⁶⁸ (emphasis mine)

⁶⁴ *Ibid* at 393.

⁶⁵ *Ibid* at 401.

⁶⁶ Josephine Smart, "Borrowed Men on Borrowed Time: Globalization, Labour Migration, and Local Economies in Alberta" (1997) 20:1-2 *Canadian Journal of Regional Science* 141.

⁶⁷ Preibisch, *supra* note 59 at 210.

⁶⁸ *Ibid* at 205. Preibisch's brief reference to integration is relatively consistent with that discussed by Hennebry, Frideres, Li, and Biles et. al, above, although some minor distinctions may be drawn between Preibisch and Hennebry's use of the term. Like these other scholars (and Hennebry, most importantly), Preibisch characterizes the integration of migrants into Canadian communities as a phenomenon to be studied at a broad societal level, with isolated community initiatives aimed towards a fuller, more permanent social connection between migrant workers and rural communities: see *ibid* at 223 and 225. Furthermore, for both Preibisch and Hennebry, social exclusion and inclusion are processes which occur at a sub-societal level which inform (in part) the analysis of migrants' broader social integration; Hennebry writes that:

[i]mportant to the examination of integration for migrant farm workers specifically is an approach that considers both the everyday experiences of inclusion and exclusion, and the structural factors that so significantly affect the integration of this group. See Hennebry, *supra* note 28 at 12.

The subtle difference which separates Preibisch and Hennebry's conceptualizations of the relationship between social integration, social exclusion and social inclusion is that while Preibisch describes social exclusion/inclusion as "characteristics" of social integration, Hennebry describes social exclusion/inclusion as *constituent* of social integration. Hennebry's Labour Migrant Integration Scale issues "points" based on eight indicators that emerge from her review of the unique social and structural situation of migrant workers in rural Ontario. Many of those indicators are closely linked to the concepts of social exclusion/inclusion, including "Full access to health care, social services and benefits comparable to those of residents," "Social/community engagement and belonging,"

It is clear that Preibisch conceptualizes processes of social exclusion and inclusion as occurring at the level of civil society, in the informal relationships and interactions that develop among individuals living their lives among one another within a shared geographical space. Her account of processes of social inclusion begins by discussing reports of friendships and intimate relationships developed between individual migrant workers and Canadian community residents, and moves on to discuss the work of local churches which have served as sites for migrant workers to mingle with members of the local community and build ties of fellowship with like-minded people.⁶⁹ Like Basok, Preibisch discusses initiatives by civil society organizations like Justicia for Migrant Workers [‘J4MW’], Frontier College, and various unions not only aimed at enhancing and realizing legal rights, but also aimed at bringing migrant workers into direct contact with local residents outside of superficial commercial interactions, planning social activities, and providing services to eliminate social barriers between migrant workers and the host community.⁷⁰ In Preibisch’s account, a process at the civil society level is classified as socially inclusionary if it has the effect of increasing and improving relationships between migrant workers and the permanent community, and enhancing their participation in community life.

Through the course of the article, however, the concept of social exclusion/inclusion appears to take on new dimensions that had not previously been addressed in the literature, pulling a wider variety of social relations into its ambit. Preibisch describes the development of an organizational infrastructure which has developed that not only fosters interactions between migrant workers and the communities, but serves other social needs as well. Preibisch discusses the emergence of faith-based groups who have begun to act as advocates for migrant workers in relations with employers and even at the government level, helping to enforce and

and “Political participation and enfranchisement”: see Hennebry, *supra* at 31. More points are awarded for practices considered to promote integration; these are identical to practices considered to be “inclusionary.” In Preibisch’s limited treatment of the term “integration,” however, social exclusion/inclusion are described as offering qualitative insight into a state of affairs which may also be discussed quite separately. While it is not my intention here to resolve this apparent discrepancy (which may be the product more of definitional imprecision than real conceptual differences), I wish firstly to bring attention to the differential uses in terminology, secondly to demonstrate the potential applications of research on social exclusion/inclusion, and thirdly to identify what I *do not* mean when I refer to “social exclusion” or “social inclusion.”

⁶⁹ Preibisch, *supra* note 59 at 223.

⁷⁰ *Ibid* at 225.

strengthen the legal rights of migrants.⁷¹ She highlights the role of organized labour, most notably the UFCW, Canadian Auto Workers, and United Steel Workers of America in distributing information and other resources to migrant communities not to facilitate contact with the community, but rather to make migrants aware of their legal rights and how to exercise them, including not only housing and occupational health and safety rights, but social programs such as Canada Pension Plan, workers' compensation, provincial health care and taxation matters as well. Offices established by these unions across Ontario and have also provided legal advice to migrant workers who face repatriation.⁷² Moreover, the aforementioned civil organizations, especially J4MW, have also played a critical role not only in helping migrants to enforce their rights, but to raise awareness and politicize migrants themselves to advocate for stronger protections at the provincial and federal levels.⁷³ These developments, characterized by Preibisch as processes of social inclusion, "...have made progress in extending what has been historically denied to migrant agricultural workers: social membership in Canadian society."⁷⁴ The new dimension added to the processes cited by Preibisch as socially exclusionary (beyond the realm of civil society) is confirmed when Preibisch writes that these processes are the product of legislative steps to "...limit the rights of migrant agricultural workers and deny them social membership in Canadian society."⁷⁵

The important point here is that the effect of Preibisch's article is to transform the discussion of social exclusion/inclusion of migrants from one focused solely on the personal relations between migrant workers and Canadians to one which also examines relations between migrants and the civil organizational infrastructure that has emerged to meet the social needs of this group (including unions, faith groups and other non-state actors), whereby social inclusion is enhanced through better realization of legal rights and increased political participation. Basok, on the other hand, characterizes the development of this organizational infrastructure as a process of social inclusion in and of itself, with the concomitant realization of legal rights following as a result of increased social inclusion (but not to be *equated* with social

⁷¹ *Ibid* at 224.

⁷² *Ibid* at 227.

⁷³ *Ibid* at 231.

⁷⁴ *Ibid* at 232.

⁷⁵ *Ibid* at 235.

inclusion). Unlike Preibisch, Basok does not discuss lack of rights enforcement or lack of political power in the language of social exclusion, but rather in the language of citizenship rights unrealized. Intentionally or unintentionally, Preibisch thereby redefines the parameters of the discussion on the social exclusion/inclusion of migrant workers to include the relationship between migrants and the legal channels through which their legal rights can be enforced, as well as between migrants and the Canadian political arena where those rights are created (or limited). Common to every level of social interaction is the criteria by which Preibisch classifies a process as exclusionary or inclusionary, namely whether the process has the effect of detracting from or promoting migrant workers' participation in the institution under examination.

b. Use of Terminology in Broader Sociological Literature

We are left, then, with two competing understandings of the terminology of social exclusion/inclusion, one which defines the term narrowly to apply only to relationships at the civil society level, and one which offers a broader definition of the term which encompasses relations at the level of civil society but also people's relationships with civil society organizations, legal institutions as well as state actors. While this discrepancy in terminology has gone, up to this point, unacknowledged, important conceptual consequences flow from these differential definitions. Within the narrow understanding of social exclusion/inclusion, enforcement of legal rights and access to the state is portrayed as its own process which is separate, but susceptible to influence from, processes of social exclusion/inclusion at the level of civil society. Within the broader understanding, processes occurring at varying levels of social relations are brought within the same conceptual framework, such that social exclusion at one level may be said to promote social exclusion at other levels; the interrelation between these processes is made much more explicit. Although the narrow definition of social inclusion/exclusion has been the one more commonly applied in the literature on the social experiences of migrant workers in Canada, a brief review of the wider sociological literature on the language of social exclusion/inclusion demonstrates that the broader definition more closely resembles that which is commonly used in the literature. Moreover, the conception

arising out of this literature offers a much more robust framework for understanding the connection between political exclusion in the form of the legal framework of NOC C & D, and exclusion/inclusion which takes place in a broader social context, in the lived experiences of individuals.

The terminology of social exclusion was first brought into use by French policymakers in the 1970s, to describe the many groups who appeared to be marginalized and unable to access the benefits of the French welfare state, such as the homeless and drug addicts, however it has come to assume a much wider variety of meanings as it has been pulled into the sociological mainstream.⁷⁶ As social exclusion has traditionally been invoked to problematize a state of affairs, the language of social *inclusion* has generally arisen to describe remedial measures which have been taken in response social exclusion, although it also figures prominently in discussions concerning social citizenship.⁷⁷ Indeed it is this element of marginalization that remains constant throughout the various formulations of this contested term that have emerged since its introduction, although social exclusion goes beyond identifying disadvantage to *identify* societal factors that create, perpetuate, and aggravate it. While some definitions of social exclusion narrowly equate the term with poverty,⁷⁸ most tend to espouse a broader definition which focuses on the barriers that prevent people's full participation in the mainstream economic, political and social life of the society in which they live.⁷⁹ For instance, the Commission of the European Communities defined social exclusion as "...the multiple and changing factors resulting in people being excluded from the normal exchanges, practices and rights of modern society."⁸⁰ Burchardt et al. hold that "[a]n individual is socially excluded if (a)

⁷⁶ Tania Burchardt, Julian Le Grand & David Piachaud, "Social Exclusion in Britain 1991-1995" (1999) 33:3 *Social Policy & Administration* 227 at 230.

⁷⁷ See for example Will Kymlicka & Wayne Norman, "Return of the Citizen: A Survey of Recent Work on Citizenship Theory" (1994) 104 *Ethics* 352 at 355.

⁷⁸ See for example Ruth Levitas, "The Concept of Social Exclusion and the New Durkheimian Hegemony" (1996) 46 *Critical Social Policy* 5 and Carey Oppenheim, *The Inclusive Society: Strategies for Tackling Poverty* (London: Institute for Public Policy Research, 1998).

⁷⁹ See for example Anthony Giddens, *Sociology*, 5th ed (Cambridge: Polity Press, 2007) and Ali Madanipour, Goran Cars & Judith Allen, *Social Exclusion in European Cities: Processes, Experiences and Responses* (London: Jessica Kingsley, 1998) at 17.

⁸⁰ Commission of the European Communities, *Background Report: Social Exclusion – Poverty and Other Social Problems in the European Community: ISEC/B11/93* (Luxembourg: Office for Official Publications of the European Communities, 1993) from Janie Percy-Smith, *Policy Responses to Social Exclusion: Towards Inclusion?* (Philadelphia: Open University Press, 2000).

he or she is geographically resident in a society and (b) he or she does not participate in the normal activities of citizens in that society.”⁸¹ In light of these varied (but not mutually exclusive) understandings of the terminology, for the purposes of my own analysis I rely primarily on the standard definition of social exclusion advanced by Giddens and others, which focuses on the barriers to participation in the economic, political and social life in which an individual or group lives. Burchardt et al. inform this framework by stressing the importance of territorial presence rather than legal citizenship status, while their reference (and that of the Commission of the European Communities) to “normal activities” is elaborated upon through the (non-strict) categories of economic, political and social life.⁸²

Clearly the concept of social exclusion as defined in the sociological literature, namely as those barriers which prevent a person or group’s full participation in the mainstream economic, political and social life of a society, goes beyond the realm of civil society. These dominant accounts of the dimensions of social exclusion are much more in keeping with the broad account of Preibisch than the narrow account of Basok. The terminology of social exclusion has been used to capture *all* of the social relationships encompassed in Preibisch’s conceptualization of the term, but inversely it has at no point been used to describe *only* the civil society relationships that Basok identifies with social exclusion. If the body of literature concerning the social experiences of migrant workers in Canada is to attach to broader academic conversations concerning social exclusion (which is beyond the scope of this thesis), and in turn linked to wider social patterns of disadvantage, social exclusion cannot be understood as occurring only at the level of civil society.

1. Additional Dimensions of Social Exclusion and Inclusion

⁸¹ Burchardt et al, *supra* note 76 at 230. Note that this account emphasizes that social exclusion is experienced by *individuals* (who may form a group) and that it concerns people who are territorially present regardless of citizenship status.

⁸² Burchardt et al break the “normal activities” of citizens into five categories, those being consumption activity, savings activity, production activity, political activity and social activity; while their account of social activity roughly corresponds to what I have been calling relations at the “civil society” level, consumption, savings and production activity all relate to economic relations, while political activity clearly applies at the political level. See *ibid* at 231.

The above discussion has thus far centred around one of the features of this concept which must be taken into account in an analytical framework of social exclusion, namely that it is a *relational* concept. Social exclusion is experienced by individuals or groups in their relationships with other individuals or groups, as well as with the social, economic and state institutions which comprise a social formation.⁸³ Madanipour clarifies that not all boundaries drawn between people will be socially exclusionary, the household being a prime example in which “...exclusionary processes work in close relationship with inclusionary activities to maintain a social fabric.”⁸⁴ It is not the existence of relational boundaries in and of themselves which are to be regarded as negative then, but rather when groups or individuals are negatively affected by an imbalance between exclusion and inclusion.

There are two additional dimensions of social exclusion, however, that must be also be accounted for in such an analytical framework, which have not been raised in the literature on the social experiences of migrant workers in Canada but which are crucial to an analysis of social exclusion.⁸⁵ The second element (in addition to its relational character) is a socio-spatial structural dimension.⁸⁶ Social exclusion occurs in a context which is globalized, nationalized, localized and individualized, although this thesis focuses in particular on the national, local and individual level. Accounts of social exclusion must consider the arrangement of contextual and, in particular, structural factors present in each site where social exclusion is investigated, taking into account the role of globalization, international legal and trade regimes, national social and economic policy and nationalist ideologies, the particularities of national and territorial legal regimes, factors such as ethnicity and race, and local cultural and kinship networks as factors which structure experiences of social exclusion and inclusion in a particular setting.⁸⁷ Anthony Giddens conceived of social structure as constituted by “rules and resources,” with “the rules of social life... as techniques or generalizable procedures applied in the enactment/reproduction of social practices.”⁸⁸ These rules, however, provide only a virtual order; they are reproduced,

⁸³ Percy-Smith, *supra* note 80 at 7.

⁸⁴ Ali Madanipour, “Social Exclusion and Space” in Madanipour et al, *supra* note 79 at 76

⁸⁵ I will review the findings reported in the literature below.

⁸⁶ Percy-Smith, *supra* note 80 at 6.

⁸⁷ Madanipour et al, *supra* note 79 at 9.

⁸⁸ Anthony Giddens, *The Constitution of Society* (Berkeley: University of California Press, 1984) at 21.

imperfectly, in social practice, and thus the term “structure” (as Giddens used it and as I will follow) really describes the structuring *properties* of particular social systems.⁸⁹ As for law, Giddens writes that “[l]aws, of course, are among the most strongly sanctioned types of social rules,” although they do not exemplify rules; codified laws are simply a specific type of rule.⁹⁰ When I refer to socio-spatial structures, then, I refer to those techniques by which social practices are reproduced and enacted within a particular socio-spatial context (for instance, a national or territorial legal jurisdiction), of which law is one. Importantly, analyses of social exclusion look to these socio-spatial structures, including law and other sets of rules which give a pattern to social activity (such as politics, economics, religion or class structures) to explain and to remedy social exclusion.⁹¹ This is where the concept is of particular utility to policymakers.

The third dimension that must be accounted for in the development of an analytical framework of social exclusion, and closely related to the socio-spatial structural dimension, is that the concept is *processual*. Stressing that social exclusion examines not only the negative outcomes experienced by individuals and groups but also the structural processes that lead to such disadvantage, Giddens wrote that “[e]xclusion is not about gradations of inequality, but about mechanisms that act to detach groups of people from the social mainstream.”⁹² Berghman notes the utility of social exclusion as a concept to policy makers, as it refers “...more to the dynamic aspect of process that is at the basis of poverty and... [bears] a less unidimensional connotation with the income dimension of poverty.”⁹³ Such a processual understanding recognizes social exclusion as a set of changing (and changeable) societal circumstances rather than an inherent characteristic of a particular individual or group (barring, again, voluntary decisions made by individuals). This has important implications at both the analytical and policy level; a comprehensive analysis of social exclusion examines not only the state of social exclusion, but the way in which social practice guided by socio-spatial structures

⁸⁹ *Ibid* at 17.

⁹⁰ *Ibid* at 23.

⁹¹ Patsy Healy, “Institutionalist Theory, Social Exclusion and Governance” in Madanipour et al, *supra* note 79 at 56.

⁹² Anthony Giddens, *The Third Way* (Cambridge: Polity Press, 1998) at 104.

⁹³ Jos Berghman, “Social Exclusion in Europe: Policy Context and Analytical Framework” in Graham Room, ed, *Beyond the Threshold: The Measurement and Analysis of Social Exclusion* (Bristol: The Policy Press, 1995) at 12.

(by governments, communities, individuals, corporations and others, all in a global context) leads to such a state. Again, by identifying social exclusion as processual, policy recommendations are the natural by-product of investigations into social inclusion.

c. Positioning Law within the Framework of Social Exclusion/Inclusion

“[S]tate law at most provides the framework or constitution of a normative regime whose substantive content is then contextually determined.”

- Harry Arthurs⁹⁴

The latter two dimensions of the social exclusion/inclusion framework that I have identified, namely that social exclusion occurs within a context of overlapping socio-spatial structures and is dynamic and processual rather than a static condition, raises the fundamental question (in the context of a thesis in law) of where law fits into this analytical framework. This is a complicated question and roughly mirrors disagreements among legal anthropologists who have engaged in protracted debate over whether rules or processes should be analytically prioritized in the study of law and social life. Proponents of the “rule-centred paradigm,” whose origin is generally considered to lie in Radcliffe-Brown’s 1952 book *Structure and Function in Primitive Society*, conceptualize social life as primarily rule-governed, where determinations of what constitutes “normal” behaviour are heavily structured by the normative order established through rules and enforcement mechanisms. Departure from these established rules is equated with deviance, a dysfunction in those controlling institutions which must be corrected within those institutions.⁹⁵ Such a focus on rules is captured in Radcliffe-Brown’s definition of law as “...social control through the systematic application of the force of politically organised society.”⁹⁶ The “processual paradigm,” on the other hand, commonly identified as arising out of Malinowski’s *Crime and Custom in Savage Society*, holds that order arises out of the social process itself, more the product of the interaction between social individuals than overarching

⁹⁴ Harry W. Arthurs, “‘Landscape and Memory’: Labour Law, Legal Pluralism and Globalization” in A.C.J.M. Wilthagen, ed, *Advancing Theory in Labour Law and Industrial Relations in a Global Context* (Amsterdam: North Holland Press, 1998) at 26.

⁹⁵ Jane F. Collier, Bill Maurer, & Liliana Suarez-Navaz, "Sanctioned Identities: Legal Constructions of Modern Personhood" (1996) 2:1-2 *Identities: Global Studies in Culture and Power* 1 at 3.

⁹⁶ John Comaroff & Simon Roberts, *Rules and Processes: The Cultural Logic of Disputes in an African Context* (Chicago: University of Chicago Press, 1981) at 6.

institutional attempts of social orchestration. The standard critique of this position is that it is so broad that the lines between law and social control generally become so blurred that law loses its distinctiveness as a subject of study.⁹⁷ Within the social exclusion framework that I have articulated, the militant adherent to the rule-centred paradigm would characterize law as the dominant socio-spatial structure which imposes significant constraints on the activities of social actors. Processes leading to social exclusion are thereby the direct products or malfunctions of such institutionalized social ordering.⁹⁸ On the other hand, the extreme proponent of the processual paradigm would view social exclusion within a social order as arising almost entirely out of social processes and interactions. The institutionalized legal system such as that seen in Canada would also be conceived of as a product arising out of these social processes, rather than a force with its own inherent structural power.⁹⁹ For Radcliffe-Brown, law monopolizes the social order; for Malinowski, the social order monopolizes law.

In their 1981 book *Rules and Processes: The Cultural Logic of Disputes in an African Context*, Comaroff and Roberts attempted to merge these two paradigms.¹⁰⁰ In their legal-anthropological study of Tswana dispute processes, Comaroff and Roberts found that the rigid application of either the rule-centred or processual paradigms would do violence to their ethnographic data. While "...Tswana dispute processes simply cannot be reduced to, or explained by, formalistic models or derivative legal logic," it was also inaccurate to say that there is not a normative framework which governed social interaction and dispute processes. "[I]t is simply untrue that, among the Tswana, behavior is never rule-governed."¹⁰¹ They conceptualized rules and processes as mutually constructive of the social order, and in doing so ultimately proposed that legal anthropology as a discrete field of study be absorbed into broader socio-cultural systemic analysis.¹⁰² Giddens echoes this account of the interaction of rules and processes in his concept of the "duality of structure," which refers to "[s]tructure as

⁹⁷ Sally Falk Moore wrote that "...the conception of law that Malinowski propounded was so broad that it was virtually indistinguishable from a study of the obligatory aspect of all social relationships... Law was not distinguished from social control in general": see Sally Falk Moore, "Law and Anthropology" in Bernard Siegel, ed, *Biennial Review of Anthropology* (Stanford: Stanford University Press, 1969) at 258.

⁹⁸ Comaroff & Roberts, *supra* note 96 at 5.

⁹⁹ *Ibid* at 12.

¹⁰⁰ *Ibid* at 3.

¹⁰¹ *Ibid* at 19.

¹⁰² *Ibid* at 20.

the medium and outcome of the conduct it recursively organizes; the structural properties of social systems do not exist outside of action but are chronically implicated in its production and reproduction.”¹⁰³

The object of my analysis is a formally codified body of rules derived from statutes, regulations and policy prescriptions created and enforced by the state and its institutions. These rules comprise the legal framework of the TFWP, and are unquestionably the state’s “conscious attempt at social direction,” within Falk Moore’s understanding.¹⁰⁴ It is, in other words, created with structural intent, a technique (and a powerful one) by which the state intends to enact and reproduces social practices such as Canada Border Services Agency [‘CBSA’] personnel allowing people to cross over borders, the work that people engage in within the country, and the act of leaving (or remaining in) the country when a temporary visa expires. Embedded in this conception of state-based law as a social structure is the assumption that if the law as it is written were to change, the behaviour of social actors (particularly state actors) would change as well; law has processual characteristics simply in its neutral application. While the focus of this thesis is the structural role of legal rules in the experiences of social exclusion and inclusion of migrant workers, however, it must be recognized that within the social field law is only a structure among structures. Particularly at the local level, within “semi-autonomous social fields,”¹⁰⁵ “...the cumulative effect of legislative tinkering is a compound of preconditions in the regulated social field itself,” which include both socio-spatial structures and processes that were not “legislated into being.”¹⁰⁶ Within the account of “structure” that I will be employing throughout my analysis (derived heavily from Giddens), referring to techniques by which social practices are reproduced and enacted, my use of the term “process” then refers to the *action* of enacting and reproducing social practices. State law thus has processual characteristics in the sense that laws may be created and changed at the level of

¹⁰³ Giddens, *supra* note 88 at 374.

¹⁰⁴ Sally Falk Moore, *Law as Process: An Anthropological Approach* (Oxford: Oxford University Press, 1978) at 17.

¹⁰⁵ *Ibid* at 57. Falk Moore characterized the semi-autonomous social field as a social field capable of producing and enforcing its own internal rules. See also Brian Tamanaha, “Understanding Legal Pluralism: Past to Present, Local to Global” 30 *Sydney Law Review* 375 at 392.

¹⁰⁶ *Ibid* at 8. With most of the literature in legal anthropology focusing on those settings where such “legislative tinkering” is largely muted by the preconditions of the semi-autonomous social field (such as Falk Moore’s Better Dress Line or, better still, the Chagga of Mount Kilimanjaro), it is easy to overlook the (perhaps mundane) fact that in many settings the social field strongly conforms to legislated rules.

government, but at the local level may also be followed and not followed, enforced and not enforced, and felt by different people to greater or lesser degrees as it articulates with other social structures and processes. As an example, the police officers, court officials and lawyers who respond to an allegation of “theft” under a state’s criminal law are all active in reproducing the social practice that a person’s privately-owned property not be taken away from them (or some other formulation of a social practice). On the other hand, the decision of a person to remain in a country without documentation upon expiration of a temporary resident visa is a process by which the virtual order which the law seeks to reproduce (ie. that temporary residents will leave the country when their status expires) is not reproduced in social practice.

The phenomena that social exclusion helps us to understand are different from most of the work in legal anthropology. Social exclusion focuses on the exclusionary or inclusionary social relationships (characterized in terms of participation) attributable to social structures which enact and reproduce social practices, rather than processes of social control themselves, although processes of social control may *lead* to social exclusion. Unlike the legal anthropological work of Malinowski, Falk Moore, or Radcliffe-Brown, all of which ultimately examines the way in which rules are made, this thesis accepts a certain type of rule – formal, written, state-made law – as a socio-spatial structure which may also play an active role in the social processes which push people to the societal margins and prevent them from fully participating in the social, political and economic life of the community. The question here is not how rules are made and followed, but rather how categorization and subjection to a certain set of rules has impacted people’s relational experiences in the particular social contexts in which they live. Within the framework of social exclusion, rules and processes are mutually constructing, in keeping with the definition advanced by Comaroff and Roberts. For the purposes of this thesis, then, I conceptualize law and the legal frameworks which constitute the TFWP and NOC C & D stream as socio-spatial structural elements of the social context into which migrant workers enter when they cross the Canadian border, whose operation and articulation with other social structures is processual. These processes (governed more or less strongly by the structure of state-based law) may lead to experiences of social exclusion or inclusion.

d. Agency and Problematic Social Exclusion

One question that arises in this conversation is the role of individual agency in social exclusion. If there are no socio-spatial structural barriers which prevent the full participation of an individual or group in the life of a society, can an individual or group be said to be socially excluded? Burchardt et al confront this question in "Social Exclusion in Britain," positing in an initial working definition that involuntariness is an integral aspect of social exclusion, but eventually disembedding it from that definition. They justify its removal for two reasons. First, many cases present questions as to the truly voluntary nature of an individual or group's withdrawal from mainstream society. For instance, while a group may apparently "choose" to forego ordinary social activity and recede into its own counter-culture, they may also have experienced continuing hostility in a wider social context. An individual raised in a setting that presents a narrow set of employment opportunities offered by the society may "choose" to enter an alternative market and social group and join a gang, the product of a perception of limited social choice.¹⁰⁷ Second, and less convincing, the authors argue that even if individuals wish to remove themselves from the mainstream of society, it may be preferable for wider society for all residents to be a part of it, and thus society has an interest in addressing any form of social exclusion regardless of whether it is voluntary or not. While this may be socially preferable in cases where the voluntary choices of individuals have negative impacts on other members of society (returning again to the example of a violent gang), the perspective assumes that inclusion in society is in all cases an ultimate good, denying the reasons that a person might have for turning away from society.¹⁰⁸ Burchardt et al solve the question by transferring considerations of voluntariness into a second analysis which allows for greater influence of the views of the observer, namely whether social exclusion is "total" and whether it is "problematic." For one who holds that social exclusion may be voluntary and that the freely-made decisions of individuals may take primacy over a societal interest in full social inclusion, then a finding of total exclusion will be coupled with a consideration of whether exclusion is problematic. For one who believes that individuals would never rationally choose to be excluded, or that society and individuals benefit from fuller inclusion, the analysis of total and

¹⁰⁷ Burchardt et al., *supra* note 76 at 229.

¹⁰⁸ *Ibid* at 230.

problematic exclusion will be the same.¹⁰⁹ For the purpose of my analysis, I adopt this proposed method of handling agency by distinguishing between total and problematic exclusion.

The question may arise for some, then, as to what exactly makes social exclusion “problematic”; why is social exclusion a “bad thing,” particularly in the context of a program whose participants make a decision to enter a country where they (generally) understand that they are not citizens or full members of that society, at least for the first few years they are here (for those who have the opportunity to establish permanent residency)? We must answer this question in relation to the social and political context in which the concept of social exclusion has developed. The framework of social exclusion presupposes the existence of the liberal democratic welfare state, and is therefore limited in its ability to support broad criticism of the overarching structures (such as the configuration of the economic system or the state) which, from various critical perspectives, may be said to reinforce systems of domination, exploitation and oppression. From a Marxist perspective, for instance, social exclusion analysis does not go far enough in examining barriers which prevent participation in community life; if the dominant mode of community life is inherently oppressive (which Marx argued is inherent to capitalism)¹¹⁰ then it is not a *lack* of participation, but rather society’s *continued* participation in these institutions and its reproduction of social practices that must be the target of criticism. In my concluding section I consider the implications of my own social exclusion analysis in the context of the TFWP, asking whether my finding that the TFWP has inherently socially exclusionary effects should be directed towards the standard goal of policy reform, or whether my findings point to a larger system of exploitation which cannot be remediated through “tweaks” to the extant legal framework. While I ultimately argue for the latter, in this section my objective is to provide a liberal argument for why social exclusion in the context of the TFWP is problematic.

¹⁰⁹ *Ibid.*

¹¹⁰ This is Marx’s central argument in *Capital*, where he wrote that “[t]he rate of surplus value is therefore an exact expression for the degree of exploitation of labour-power by capital, or of the labourer by the capitalist”: see Karl Marx, *Capital: A Critique of Political Economy* (New York: International Publishers, 1967) at 218.

To begin with, social exclusion has effects which may include social isolation and emotional distress,¹¹¹ health problems,¹¹² lack of access to necessities of life and lack of access to basic social rights.¹¹³ Shepley Orr sets out to provide a normative underpinning to Burchardt et al's account of social exclusion, conceptualizing social exclusion (as I have done) as barriers to full participation in the activities important to a society (which Orr and Burchardt et al describe as social, political and economic activities). Orr's treatise deals primarily with liberal political theories of social justice, highlighting the shortcomings of welfare-based theories (as opposed to fairness or equality-based) to justify redistributive social policies; alleviating social exclusion in the name of increasing welfare risks people making unjust demands on communal resources, or requires undue paternalism and limitations on people's choices.¹¹⁴ Instead, Orr argues that social exclusion is bad because it deprives people of primary social goods (in the Rawlsian sense) which are necessary to their feelings of equal dignity and respect within a society. His proposed solution follows Amartya Sen's "capabilities" approach which demands that people be provided with the goods essential to their functioning in society, in relation to their personal capabilities.¹¹⁵ Orr broadly describes the "problem" with social exclusion, then, as a lack of social justice.¹¹⁶ At a broader social level, Orr holds that social exclusion poses serious societal risks when it prevents excluded people from political participation. With the interests of socially excluded groups often being opposed to those of dominant included groups, an unfair and undesirable form of politics arises wherein the interests of certain groups may be ignored and their social exclusion exacerbated.¹¹⁷

Orr's argument must be slightly reconfigured in order to be understood in the context of the TFWP, however it nevertheless provides one normative basis for understanding social

¹¹¹ Geoff MacDonald, "Social Pain and Hurt Feelings" in Philip Corr & Gerald Matthews, eds, *The Cambridge Handbook of Personality Psychology* (Cambridge: Cambridge University Press, 2009).

¹¹² Grace-Edward Galabuzi et al, "The Social Determinants of Health: Social Inclusion as a Determinant of Health" online: Public Health Agency of Canada <http://www.phac-aspc.gc.ca/ph-sp/oi-ar/03_inclusion-eng.php>.

¹¹³ See generally Madanipour et al, *supra* note 79.

¹¹⁴ Shepley Orr, "The Normative Theory of Social Exclusion: Perspectives from Political Philosophy" online: Shepley Orr <<https://www.google.ca/#q=normative+theory+of+social+exclusion>> at 13.

¹¹⁵ *Ibid* at 4.

¹¹⁶ *Ibid* at 11.

¹¹⁷ Orr criticizes this perspective as a reiteration of the first concern, that social exclusion is bad because it is a failure of justice: see *ibid* at 11. I include this second argument simply to demonstrate that social exclusion at the local level may also have broader negative societal impacts.

exclusion as negative in the context of temporary labour migration. One of the standard criticisms of distributive arguments which follow a Rawlsian line of reasoning, particularly from those concerned with treatment of newcomers, is that these arguments treat “society” as a closed system operating in isolation, generally confined to the nation-state. The provision of an equal level of basic goods is problematized when it is empirically recognized that both people and goods traverse the boundaries of that “closed” society; social “boundaries” are permeable. Rejecting Rawls’ account of “simple” equality (an equal distribution of basic goods), Michael Walzer argues for a vision of “complex equality” which recognizes a plurality of social goods whose just distribution may be governed by different criteria. He divides various social goods into different “spheres,” each with its own distributive criteria (derived from the shared meanings of those goods within that society), with the overarching principle that domination (or disadvantage) in one sphere must not lead to domination (or disadvantage) in others. Importantly, Walzer overcomes criticisms of Rawls’ closed system approach by demarcating membership itself as the primary social good which a society distributes.¹¹⁸ As will be discussed in Chapter Two, Walzer’s theory still envisions a nation-state-centred society, but the distribution of membership acts as a mechanism by which people may enter that society and make claims for just treatment. He leaves broad discretion to societies to determine their own membership, guided by the internal principles of the shared meanings of membership within the society, and the external principle of mutual aid in the case of refugees.¹¹⁹ The normative underpinning which Walzer uses to support the right of nation-states to determine their membership and exclude people from their sovereign territory is the society’s interest in maintaining a “community of character,” in determining what the society will look like in the future.¹²⁰

Grafting Walzer’s arguments concerning membership to Orr’s normative argument against social exclusion, three major reasons arise for why the social exclusion of migrant workers should be understood as negative. First, to the extent that exclusion from social membership results in the emotional distress, health concerns and lack of access to social

¹¹⁸ Michael Walzer, *Spheres of Justice* (New York: Basic Books, Inc., 1983) at 31.

¹¹⁹ *Ibid* at 62.

¹²⁰ *Ibid* at 34.

entitlements and rights which may accompany various forms of social exclusion – the various disadvantages which threaten a person’s feelings of equal dignity and respect in a society – then disadvantages in Walzer’s membership sphere can be said to be dominant in other social spheres, including the sphere of security and welfare, honour, and even kinship and love.¹²¹ Disadvantages which translate across spheres without justification are unacceptable in a regime of complex equality. This can help us to adapt Orr’s theory to better understand the harm of social exclusion in the context of the TFWP; reading Walzer and Orr together, migrant workers’ exclusion from social membership does not provide automatic justification for the harmful impacts of social exclusion that they may experience. People who are not formally recognized as members of society are thus not outside the concerns of justice.¹²² Keeping in mind that migrant workers are invited to come to Canada, cross the border legally, perform socially necessary labour for low wages which benefits Canadians, pay taxes, participate in the Canadian market, are not considered to be criminal or security threats, and do not generally place significant demands on Canada’s social security or healthcare systems (unless they develop a need for some kind of treatment while in Canada, which raises questions about societal obligations to these so-called “outsiders”), social exclusion which arises as a result of exclusion from the membership sphere (exclusionary inclusion) will be particularly difficult to justify when a migrant’s sense of equal dignity and respect is violated.

Building upon this argument, the second reason that social exclusion of migrant workers is negative and which is particularly egregious is that, in light of Orr’s reliance on Amartya Sen’s capabilities approach, social exclusion which flows from a person’s exclusion from social membership is the product not of the state’s failure to provide for the person in accordance with their capabilities such that they may functionally participate in the activities important to a society, but rather of the state placing limitations on people’s capabilities. Orr and Sen are largely concerned with the principles governing welfare economics, with the positive obligations of a society to provide for people whose personal capacities prevent them from

¹²¹ Just as Walzer holds that domination must not be allowed to illegitimately cross between spheres, so too does he hold that disadvantages must not travel across spheres: see *ibid* at 45.

¹²² This is consistent with Burchardt et al’s definition of social exclusion which recognizes territorial presence rather than formal membership as the primary characteristic with which social exclusion is concerned.

fully participating in social life. The normative end which these obligations are intended to serve is, again, provision of individuals' feelings of equal dignity and respect. From a capabilities perspective (aided by Walzer's membership argument), the idea of a person experiencing feelings of less-than-equal dignity and respect not through the state's failure to provide for needs arising out of their personal circumstances but rather because of the state actively imposing limitations on those capabilities (of people who are invited to perform socially necessary work, not tourists who come to Canada for pleasure) violates that normative principle in a way which is particularly flagrant.

The final reason why the social exclusion of migrant workers must be understood as normatively negative in light of both Walzer and Orr's theories is a reiteration of the argument already made by Orr, that it is anti-democratic and politically undesirable. While Orr's argument concerning political participation is made in relation to citizens who have a right to vote, Walzer's theory again raises the question of how newcomers are to be integrated into the political community. Of particular relevance from Walzer's argument is his analysis of guest worker programs (similar to the TFWP) which claim on one hand to treat the nation-state as a "club" with a virtually unconstrained right to determine its own membership on one hand, while simultaneously allowing non-members to enter and imposing political and legal constraints on their movement as well as their political, social and economic activity, on the other. "Men and women are either subject to the state's authority, or they are not," Walzer writes. "[A]nd if they are subject, they must be given a say, and ultimately an equal say, in what that authority does."¹²³ The concern here is a lack of political justice. While Walzer finds that an expanding set of citizenship rights is acceptable (such as the granting of permanent residency as an intermediate step between non-citizenship and citizenship), he maintains that citizens cannot rule over people with whom they share a territory; "[i]ndeed, the rule of citizens over non-citizens, of members over strangers, is probably the most common form of tyranny in human history."¹²⁴ I should note that the migrant workers who I spoke to in Brandon expect, for the most part, to eventually establish permanent residency and then citizenship if they so choose. This is not, however, the case for many NOC C & D and SAWP migrant workers, as the

¹²³ *Ibid* at 61.

¹²⁴ *Ibid* at 62.

programs allowing “low skill” migrants to establish permanent residency are administered by the provinces; this “tyranny” persists for many “low skill” workers and is not remediated in any federal immigration policy.

This returns us to the question of agency. Migrant workers may choose not to participate in the social, political or economic life of the community, and presumably if this “choice” is fully voluntary, a person may withdraw from society without having significant impacts on their feelings of equal dignity and respect. “Social exclusion” in the context of such an exercise of agency (what Orr and others have termed “social isolation”) appears to be unproblematic, so long as it does not have negative societal impacts. In the case of migrant workers, however, a separate consideration of the relationship between agency and problematic social exclusion is also warranted. The question here is whether social exclusion can be understood as problematic and deserving of societal attention when a person appears to have exercised agency in entering the society in which they may face social exclusion, or where they have the option to exercise their agency and leave an exclusionary society. One example of an argument that would hold a degree of social exclusion to be acceptable in light of decisions made by migrant workers is that of Martin Ruhs, who argues that programs like the TFWP in fact maximize migrants’ choices, giving migrants opportunities to earn more money than they would in their originating country, and to do so legally. Restrictions on migrants’ rights are viewed as a trade-off, a condition to earning those wages, and the migrant worker him or herself accepts these conditions. Ruhs argues that a “managed liberalization” of migration policy would serve to curb illegal migration, provide migrants with better choices, and serve the labour needs of the receiving society. In any event, if the migrant decides at any point that they do not like the conditions in the receiving country, they have the option to leave at any time.¹²⁵ If migrants consent both to their initial and ongoing social exclusion, the argument follows that social exclusion of migrant workers should not be viewed as problematic. Aside from the internal contradiction within Ruhs’s argument, which treats migrants as equal parties to a contract when they enter and remain a country, and yet as disenfranchised outsiders when they are compelled by the state to leave, I argue here that on both the individual and societal

¹²⁵ Martin Ruhs, “Designing Viable and Ethical Labour Immigration Policies” in *World Migration 2005: Costs and Benefits of International Migration* (Geneva: International Organization for Migration, 2005) at 212.

level the social exclusion of migrant workers remains problematic and should still be viewed negatively despite these contractualist arguments.

My first response to the contractualist is that this approach places undue emphasis on individual agency without examining the structural factors which constrain individual choice. To begin with, as will be discussed in Chapter Two, some migrants are not even aware that they are entering into temporary positions on temporary visas. This may happen when migrants are misled by recruiting agents or employers; their consent to work with restricted rights is obtained fraudulently and thus is not consent at all. Secondly, accepting that migrant workers are autonomous agents who make their own informed choices, their decisions are also constrained by a variety of structural factors which put them in the position of having to choose between undesirable options.¹²⁶ Canada (by which I mean governments, corporations and citizens) and other countries in the Global North, particularly the United States, are (in the case of migrants from certain countries, particularly in the Global South) wilfully blind or complicit in relying on these structural factors to avail themselves of an easily disenfranchised class of workers, particularly those who are labelled “low skill.” In the cases of the migrant workers who I spoke to, violence and poverty in their home countries, to varying degrees, were significant factors motivating all of their decisions to come to Canada. Participants told me about being unemployed parents for periods of months with inadequate social security to provide for basic needs, being robbed by gangsters, being held at gunpoint, witnessing people being murdered and losing close family members to gang violence. Furthermore, many of these structural factors (such as violence and poverty in countries from the Global South) have arisen as a result of neoliberal globalization and involvement of countries from the Global North. Perhaps the best example of this can be seen in the agricultural context (which is the best researched), with the 1994 North American Free Trade Agreement opening Mexican markets to subsidized corn from the United States; millions of rural farmers were bankrupted and forced to seek work either in cities or as temporary migrant workers in wealthy northern countries such as

¹²⁶ One of the difficulties with the NOC C & D stream is that with workers coming from a wide variety of countries into a variety of industries, there is no generalizable pattern of structural factors which shape migrants’ choices or of migratory intentions. For instance, a migrant construction worker from Ireland may come from vastly different circumstances, for different reasons, with different migratory intentions, than a cook from India.

Canada.¹²⁷ The history of American interventionism in Latin America throughout the 19th and 20th centuries, particularly during the Cold War Era, also raises serious questions about responsibility for violence, inadequate social security and poverty in the South American countries that participants came from.¹²⁸ The “consent” which contractualists rely upon to justify restrictions which severely restrict the freedom and which may lead to the social exclusion of migrant workers is thus obtained under highly dubious circumstances in which the Government of Canada is complicit, fully aware of the limited choices which face migrants.

What is problematic about social exclusion which is created and perpetuated by the legal framework of NOC C & D is that, to the extent which “consent” to social exclusion is obtained, Canada relies on structural conditions such as poverty and violence to secure that consent. While migrants enter into an employment contract which they believe will provide them with the best opportunities, the contractualist position that this consent absolves the government and its people of responsibility for the dignity of migrants, or even bestows on the government a right to impose measures which negatively impact migrants’ sense of equal dignity and respect, exceeds the principle of freedom of contract and takes on an air of coercion. It is a separate debate as to whether Canada has the responsibility to address harsh structural conditions occurring wholly outside of its territory. To take advantage of these abhorrent conditions and the resultant unequal bargaining power of migrants, however, in order to justify restrictions and disentanglements that diminish the equal dignity and respect of people who are territorially present and contribute to Canadian society is deeply problematic. The social exclusion of migrant workers warrants the attention of activists, academics, and the legislators who create the laws which construct exclusionary inclusion and who have the power to change them.

Aside from the issue of the consent of the individual migrant worker and the impacts that social exclusion has on them personally, I would also argue that the social exclusion of migrant workers is negative at a broader societal level. Temporary labour migration is the now-dominant mode of migration to Canada, meaning that the country is becoming increasingly

¹²⁷ Philip McMichael, “Peasant Prospects in the Neoliberal Age” (2006) 11:3 *New Political Economy* 407.

¹²⁸ Noam Chomsky, *The Umbrella of U.S. Power: The Universal Declaration of Human Rights and the Contradictions of U.S. Policy* (New York: Seven Stories Press, 2002).

populated by a group of people who are stripped (temporarily if not permanently) of social, political and economic rights and who have no say in the rules which govern them, in order to serve the interests of capital and to uphold otherwise unsustainable relations of domination.¹²⁹ Repeatedly throughout history the law has constructed social underclasses through mythologies of personhood, telling “citizens” that the “Others” among them were not *of* them, human beings (perhaps) but not persons to whom full equality (in its various forms) is owed. From African slaves coerced into working in the fields and farmhouses of the Americas, to women denied the franchise or right to own property, to Chinese workers recruited to build Canada’s railway prior to being excluded, to Indigenous peoples in the place known as “Canada” governed under a system of segregation and disenfranchisement (such as Canada’s *Indian Act*, which provided the blueprint for apartheid in South Africa¹³⁰), societies have relied on regimes which draw seemingly-neutral, natural or justifiable differences between people in order to secure economic resources (from land to labour power) cheaply and with the general consent of the citizenry, if not the apparent “consent” of the differentiated themselves (for instance in the case of Chinese railway workers in Canada or Indigenous groups signing treaties). In the case of migrant workers, disabilities and disentanglements are normalized and justified because migrants are seen as foreign, non-members, not at “home” in the nation; their humanity is reduced to an abstract category which organizes and purports to legitimize their exploitation.¹³¹ Beyond Walzer’s liberal communitarian argument, social exclusion among this group of people is problematic because even if a person is “willing” to endure prolonged barriers to participation in community life, to acquiesce to the restrictions on rights and the disentanglements that accompany the TFWP, to take feelings of unequal respect and dignity over fears of violence and poverty, the law has constructed a growing class of permanent outsiders¹³² whose labour power is exploited and personhood ignored.

¹²⁹ Sharma, *supra* note 12 at 54.

¹³⁰ John S. Saul, “Two Fronts of Anti-Apartheid Struggle: South Africa and Canada” (2010) 74 *Transformation: Critical Perspectives on Southern Africa* 135 at 136.

¹³¹ Sharma, *supra* note 12 at 54.

¹³² Over 80 000 NOC C & D workers present in 2011, some of whom may establish permanent residency: see Citizenship and Immigration Canada, *supra* note 38.

e. Advantages of the Terminology of Social Exclusion/Inclusion

The language of social exclusion provides a remarkably versatile analytical lens to focus academic and public policy discussions on marginalization and social disadvantage. The use of this language in disability studies, gender studies, economics, criminology, poverty studies, medical sociology and sociology generally is a testament to its adaptability. Particularly for the discussion at hand, an investigation into the social aspect of Canada's recent shift towards a policy of "exclusionary inclusion" of newcomers, the language of social inclusion has understandably been attractive for academics, although as I have discussed, its improper application can lead to conceptual misunderstandings and, in the case of Preibisch and Basok's 2004 articles, academics effectively talking past each other. Nevertheless, when properly applied the use of this terminology provides major conceptual benefits beyond its power to describe processes and explain outcomes. The terminology is capacious without being vacuous, pulling a wide variety of concepts into an analytical framework that can still be discussed with a relatively high degree of precision. It also allows for the examination of processes at both the individual and the group level, and to incorporate seemingly disparate processes into the same analytical framework.

To begin with, the language of social exclusion can absorb a wide range of concepts even where the terminology is not explicitly used, revealing their interrelatedness. For instance, discussions concerning citizenship are easily adopted into the framework of social exclusion, both within the "...'thin' conception of citizenship-as-status" and the "...'thick' conception of citizenship-as-activity."¹³³ Citizenship as a formal legal status is a process of *naming*, and one of the socio-spatial structural factors that orient a person's sense of belonging within a particular community, and their relationship to place, as well as the community's views towards outsiders; this may lead to social exclusion of those outsiders. The state's creation of legal rights for migrant workers, discussed by Basok as a form of "post-national citizenship," can be characterized as a process of social inclusion (at the legislative level) as well as a change to the socio-spatial structure of law, purportedly intended to enhance migrants' participation in the legal realm. Basok ultimately argues, however, that intervening processes (structured by a

¹³³ Kymlicka & Norman, *supra* note 77 at 353.

global economy, national immigration laws, provincial labour standards and the attitudes of the host community) exclude migrant agricultural workers from accessing rights through the state apparatus. Berghman explicitly wrote that “social exclusion could then be conceived in terms of the denial—or non-realisation—of citizenship rights” in accordance with the Marshallian conception of social citizenship.¹³⁴ Several articles that I will discuss below are comfortably introduced into the conversation on social exclusion without any mention of the precise terms, but they are appropriate because the processes and outcomes that they document can easily and accurately be described in this language.

Secondly, the lens of social exclusion can be directed towards processes occurring at both the individual and group level, allowing for both particularistic observation and analysis as well as broad general conclusions. In this sense it is amenable to a variety of research objectives and conditions, from broad quantitative investigations tracing relationships between factors such as poverty and social isolation¹³⁵ to qualitative ethnographic and biographical studies examining the factors that have led to individual experiences of social exclusion.¹³⁶ In this particular case, this relatively small initial foray into the social experiences migrant workers under the NOC C & D stream can frame these experiences in the language of social exclusion/inclusion, draw connections between socio-spatial legal structures, local structural contexts, social processes and the lived social experience of these individuals, introduce them into a larger conversation about the social experiences of migrant workers in Canada, and identify areas for policy improvement and further investigation. Moreover, as discussed above, it does not require the comprehensive research project demanded of a study on social integration (although it may inform one) which would have been inappropriate given the dispersed and diverse nature of this group, and impossible due to temporal and financial restraints.

Finally, the framework of social exclusion brings together a variety of seemingly disparate social structures and processes and illuminates the interconnectedness of various

¹³⁴ Berghman, *supra* note 93 at 19

¹³⁵ Burchardt et al, *supra* note 76 at 234.

¹³⁶ Ruth Levitas et al, “The Multi-Dimensional Analysis of Social Exclusion” online: Social Exclusion Task Force <<http://www.bris.ac.uk/poverty/downloads/socialexclusion/multidimensional.pdf>>.

aspects of our social lives. While the “categories” of the economic, political and social life of the community are put forward to guide investigation, studies of social exclusion, in their nature, call attention to the fact that these categories are fluid rather than static, and that deprivations in one arena often translate quite smoothly into deprivations in another.

iii. Conclusion: What We Can Learn from the Social Exclusion Framework

The literature concerning the social experiences of migrant workers in Canada can benefit from a clearly defined analytical framework, optimally provided by the terminology of social exclusion and inclusion. In using this framework to examine the social dimension of exclusionary inclusion, the particular social phenomenon that we seek to understand is the participation of migrant workers in the social, political and economic life of the communities in which they live. This framework allows us to understand not only that social exclusion is taking place or not taking place, but to attribute experiences of social exclusion/inclusion to structural processes which erect barriers (or reduce them) to that participation. As a technique of enacting and reproducing social practices, law and the legal framework of NOC C & D has structural and processual characteristics which allow them to fit comfortably into the social exclusion framework, and to illuminate the ways in which the law acts to detach people from the societies in which they live and to give exclusionary inclusion its social dimension.

B. Methodology: Institutional Ethnography and Outsider Jurisprudence

“[T]he everyday world as the matrix of our experience is organized by relations tying it into larger processes in the world as well as by locally organized practices.”

- Dorothy Smith, *The Everyday World as Problematic*¹³⁷

This project, as with most research projects, began with a question, or rather, a series of questions. As I surveyed the literature on migrant workers in Canada, I found myself most drawn to scholarship concerning the social experiences of migrant workers in the communities where they lived and worked. Approaching the subject from a legal perspective, what struck me

¹³⁷ Dorothy E. Smith, *The Everyday World as Problematic: A Feminist Sociology* (Toronto: University of Toronto Press, 1987) at 10.

about this scholarship, which used the language of “integration” and “social inclusion,” was that this social activity took place in a context where legal instruments made the claim that these people were *not* citizens, not legally recognized as members of Canadian society; particularly in the case of agricultural workers who sometimes returned to Canada annually for ten or twenty years, they remained, legally, “foreign nationals.” This is what brought me to investigate the social dimension of exclusionary inclusion; through my own experience in the social world, I questioned whether and how the law could claim that people within communities were outsiders, how it could operate to detach people from the communities in which they live and work, and I wanted to understand what this has meant in the lives of migrant workers. As I will discuss in Chapter Two, it was easy to understand how migrant agricultural workers and live-in caregivers could experience social exclusion in the communities in (or near) which they live; space, race and gender factor heavily into these relationships, with migrant agricultural workers living great distances from the nearest rural communities, and being easily differentiated as a racialized, predominantly male group.¹³⁸ The experiences of live-in caregivers are those of racialized women living and working in predominantly white households performing chronically undervalued “women’s” work.¹³⁹

Clearly the law itself factored heavily into the experiences of agricultural and domestic migrant workers, but these other conditions were so unique and particular to these programs that they served to obfuscate the role of law in people’s social experiences, in and of itself, as it is written, enforced and not enforced, followed and not followed. As the fastest growing TFWP with highly diverse industrial, spatial and ethnic implications, the stories of migrant workers under the NOC C & D stream have not only been largely unheard within the literature on migrant workers’ social experiences in Canada,¹⁴⁰ but they are necessary to understanding the now-dominant mode of migration to Canada and its social impact on people. Moreover, NOC C & D provides a setting where the role of law itself in organizing the social experiences of migrant workers can best be illuminated. I thus arrived at the question of how the legal

¹³⁸ Preibisch, *supra* note 59 at 211.

¹³⁹ See for example Judy Fudge, “Global Care Chains, Employment Agencies, and the conundrum of Jurisdiction: Decent Work for Domestic Workers in Canada” (2011) 23 Can. J. Women & L. 235.

¹⁴⁰ Although of course these stories are most certainly heard in other non-academic circles, among workers and their families, advocates and other community members.

framework of NOC C & D has constructed the social experiences of migrant workers. In the sections that follow, I discuss the use of institutional ethnography as a method of answering this question, with some modifications for the purpose of analysis through the lens of social exclusion. I then go on to discuss the style in which my findings will be reported, which is inspired by Mari Matsuda's notion of "outsider jurisprudence."

i. Modifying Institutional Ethnography

When Dorothy Smith developed institutional ethnography as a sociological method of inquiry, she did not envision precisely this method of defining a research problematic, although it was not far removed. For Smith, "a problematic sets out a project of research and discovery that organizes the direction of investigation from the standpoint of those whose experience is its starting point."¹⁴¹ Ordinarily in institutional ethnography, the researcher would begin with the "embodied experience" of individuals, mapping out the ethnographic details of the world in which they live and allowing their investigation of the institutional forces which shape that experience to be directed by those lived experiences.¹⁴² Smith wrote that "[a] feminist mode of inquiry might then begin with women's experience from women's standpoint and explore how it is shaped in the extended relations of larger social and political relations."¹⁴³ Through experiential inquiry, institutional ethnographers seek to uncover "relations of ruling," the extralocal organized practices (particularly textual practices, including law) which attempt to make groups amenable to governance.¹⁴⁴

Similar to the work of institutional ethnographers, the present study is concerned with "textually mediated social organization," the power of extralocal texts to structure activity at the local level.¹⁴⁵ Where it departs from Smith's method is in its analysis. While Smith proposed institutional ethnography as a means of uncovering relations of ruling, the focus here is on how those extralocal texts structure the lived experiences of individuals and erect barriers to their

¹⁴¹ Dorothy Smith, *Institutional Ethnography: A Sociology for People* (Oxford: AltaMira Press, 2005) at 227.

¹⁴² Marjorie DeVault, "Introduction: What is Institutional Ethnography?" (2006) 53 Soc. Probs. 294 at 295.

¹⁴³ Smith, *supra* note 137 at 10.

¹⁴⁴ Sharma, *supra* note 8 at 422.

¹⁴⁵ DeVault, *supra* note 142 at 294.

participation in community life.¹⁴⁶ While institutional ethnographers would therefore traditionally begin by interviewing those people whose experience is of interest to them and making observations about their social world, and then move on to identify the institutional processes that shape that experience, this project called for a slightly different research path, particularly due to my disciplinary commitments which attune me to law, a particular institution which organizes social practices.¹⁴⁷ I needed first to develop a robust understanding of the institutional structures and processes that I intended to investigate (that being the legal framework of the NOC C & D stream and the TFWPs, as well as provincial legal frameworks), second to conduct interviews with a particular eye towards the phenomena that I wanted to understand (namely the participation of migrant workers in community life and the role of law in those experiences), and finally to identify those structural processes in the experiences of the people I interviewed. While my problematic was perhaps more concrete than might often be seen in institutional ethnography, the objective of connecting lived experiences to broader social and political organizational practices can still be well served by institutional ethnography, especially insofar as the main group whose experiences inform my inquiry is one which is inherently constituted by law.

a. Interviewing

Interviews in institutional ethnography recognize participants not as a population of subjects, but as informants knowledgeable about the phenomenon under investigation.¹⁴⁸

Dorothy Smith wrote that:

[t]he fulcrum of a sociology for women is the standpoint of the subject. A sociology for women preserves the presence of subjects as knowers and actors. It does not transform subjects into the objects of study or make use of conceptual devices for eliminating the

¹⁴⁶ For an institutional ethnography concerning the creation of the first TFWPs, see Sharma, *supra* note 8 at 427. Sharma examines parliamentary debates concerning the development of the first TFWPs and argues that the construction of a new, tolerant Canadian identity at the time that the NIEAP was created actually worked to secure the racist and sexist operation of the capitalist system which allowed for the creation of the category of “migrant worker.” See also Sharma, *supra* note 12 and Satzewich, *supra* note 10.

¹⁴⁷ Nancy Taber, “Institutional Ethnography, Autoethnography, and Narrative: An Argument for Incorporating Multiple Methodologies” (2010) 10:1 *Qualitative Research* 5 at 11.

¹⁴⁸ Marjorie DeVault & Liza McCoy, “Investing Ruling Relations: Dynamics of Interviewing in Institutional Ethnography” in Jaber Gubrium et al, eds, *The Sage Handbook of Interview Research: The Complexity of the Craft* 2d ed (New York: Sage Publications, 2012) at 16.

active presence of subjects. Its methods of thinking and analytic procedures must preserve the presence of the active and experiencing subject.¹⁴⁹

Smith's criticism of mainstream sociology was that it attempted to stand outside of social relations, claiming objectivity not in its capacity to provide truth, but rather because it denied the presence of particular subjectivities, particularly those of women (although the same argument has been applied to many other groups).¹⁵⁰ Viewing the social world through the lens of theory had the habit of distorting the observable, illuminating those phenomena which fit nicely into analytical boxes while erasing those which did not. Accordingly, institutional ethnography places the lived experiences of individuals at the heart of the inquiry, rather than analyzing institutional processes from a detached, disinterested, theoretical, "objective" viewpoint.

The problematic that I had developed called for a deep and robust inquiry into the particular experiences of individuals rather than the widespread collection of generalizable data. Reviewing the literature on the social experiences of migrant workers in Canada, I could see just *how* particular I would need to be. Much of the pre-existing work on the social experiences of migrant workers characterized itself as ethnographic, however these research methods were not practicable in light of my problematic and given the nature of the group I wanted to learn about. For instance, in Basok's 2004 article the author conducted a general survey of 254 migrant agricultural workers, as well as an unspecified number of interviews with officials at the Mexican consulate in Leamington, Ontario. She also engaged in participant observation.¹⁵¹ The information gathered was used to support her general claim that access to legal rights for migrant workers depends in large part on their inclusion in local communities.¹⁵² In Preibisch's article, interviews were conducted with 104 participants in total, including migrant agricultural workers, local residents, and government and industry representatives; her generalizing claim was that despite general social exclusion of migrant workers in these communities, processes of social inclusion were beginning to take place.¹⁵³ Jenna Hennebry's

¹⁴⁹ Smith, *supra* note 137 at 105.

¹⁵⁰ *Ibid* at 2.

¹⁵¹ Basok, *supra* note 55 at 52.

¹⁵² *Ibid* at 51.

¹⁵³ Preibisch, *supra* note 59 at 210.

study, a broad inquiry into the general social integration of migrant agricultural workers, consisted of 600 standardized questionnaires, as well as qualitative interviews with workers and employers.¹⁵⁴

Other studies supported more particularistic arguments based on smaller sets of data. In a 1997 article, Abigail Bakan and Daiva Stasiulis conducted structured interviews with 50 live-in caregivers which were then converted to survey data in order to argue that “citizenship” could not be confined to static categories but was rather a negotiated relationship. Their survey data was based on “generalizing collective patterns of social negotiation, rather than isolated individual experiences”; they used a small sample to identify statistical trends without making particularistic claims “based on individual life histories.”¹⁵⁵ Finally, Adrian Smith relied on an informal conversation with eight migrant agricultural workers to support his argument that it is not necessarily ignorance of the law, but perhaps a mistrust in law that prevents migrant agricultural workers from asserting their rights, in a 2005 article responding to Basok’s aforementioned article which he summarizes as asserting that “knowledge (of legal rights) is power.”¹⁵⁶ Few of these articles, aside from Hennebry’s, bring out the voices or detailed personal stories of migrant workers, and even Smith’s article, which is based in legal consciousness studies, does not put the reader in contact with the lived experiences of migrant workers.

Contrary to most of the generalizing methodologies discussed above, institutional ethnography is concerned with the way in which people talk about their lives. It is participants’ speech that transmits the expertise of living their lives and the phenomena under investigation; institutional ethnographers “want to study things that are being lived, experienced and, concurrently or subsequently, talked about.”¹⁵⁷ Standardized questionnaires or highly structured interviews would not, therefore, be an appropriate way of responding to my problematic, which asks about the role of law in the everyday lives of individuals. Large

¹⁵⁴ Hennebry, *supra* note 28 at 12.

¹⁵⁵ Bakan & Stasiulis, *supra* note 22 at 124.

¹⁵⁶ Adrian Smith, “Legal Consciousness and Resistance in Caribbean Seasonal Agricultural Workers” (2005) 20 Can. J.L. & Soc. 95 at 105.

¹⁵⁷ Marie Campbell & Frances Gregor, *Mapping Social Relations: A Primer in Institutional Ethnography* (Aurora, ON: Garamond Press, 2002) at 69.

“sample” populations would also not be appropriate, given the caveat that participants are not viewed as “populations of subjects.”¹⁵⁸ Rather, each individual story is crucial in helping the researcher to see beyond “the actualities of people’s everyday lives and experiences to discover the social as it extends beyond experience.”¹⁵⁹ Focusing on the intricacies of individual stories is necessary to understanding how the law shapes everyday experience. I therefore conducted interviews with three current NOC C & D migrant workers in Brandon, Manitoba, and three migrant justice advocates, as well as conducting a group interview with three former migrant workers (also in Brandon) who have since become permanent residents. I also investigated the physical setting in which these migrant workers live their lives, in order to provide a better sense of the world in which they are living; this also helps to distinguish this particular research context from the agricultural context. I began this thesis with some such observations, and I also use them to frame Chapter Three.

DeVault and McCoy suggest that interviewing in institutional ethnography might be better understood as “talking to people.”¹⁶⁰ This is not to say that institutional ethnographers should simply wander into an interview and start talking to a person whose experience they are interested in, but rather to structure interviews in a way that allows for people to talk in detail about their experiences, to share their stories, and to allow the interviewer to be reflexive, to adjust to the information that emerges throughout the interview process. While interviewers may enter an interview with a number of issues they intend to discuss, they will usually not decide ahead of time on the precise questions to be asked, and they may ask different questions of different participants; Hammersley and Atkinson write that “[i]n these senses... ethnographic interviews are closer in character to conversations than are survey interviews.”¹⁶¹

I began by speaking to three migrant justice advocates who had experience working with NOC C & D migrant workers, and who had a direct and explicit understanding of the legal machinations of NOC C & D. I spoke to two grassroots organizers and a lawyer who serves as general counsel to the UFCW. These conversations were intended to get an overview of the

¹⁵⁸ DeVault & McCoy, *supra* note 148 at 16.

¹⁵⁹ Dorothy Smith, *supra* note 141 at 11.

¹⁶⁰ Campbell & Gregor, *supra* note 157 at 77.

¹⁶¹ Martyn Hammersley & Paul Atkinson, *Ethnography: Principles in Practice*, 3d ed (New York: Routledge, 2007) at 117.

issues faced by NOC C & D migrant workers in Canada, particularly relating to what they had seen of the social relationships formed by migrants; questions concerned their organizations' role in providing support in obtaining legal and social rights, and their observations of migrants' social relations (including home life, employment, friendship circles, political involvement and rights advocacy, and involvement with social groups and community organizations). These interviews also helped me to understand the workings of the legal framework of NOC C & D that are not readily apparent in the text of the legislation and regulations, such as the implications of the intersection between the federal immigration regime and provincial employment relations regimes. These interviews were also intended to help me identify strategies of making contact with this difficult to find group. These interviews are relied upon in Chapter Two to provide a narrative account of the legal framework of NOC C & D.

These interviews conducted with advocates gave me a broader sense of what issues in the lives of migrant workers might be experienced as socially exclusionary, not only for the purposes of structuring interviews with migrants, but also to tell me what aspects of migrants' stories called for further investigation and more detail. I went on to conduct interviews with NOC C & D migrant workers in Brandon, Manitoba, as well as former migrant workers who had since become permanent residents; aside from one permanent resident who has since taken up employment with the City of Brandon, all participants continue to work for Maple Leaf. The process by which I recruited participants is discussed in greater detail in Chapter Three, however I will say here that representatives of the UFCW acted as gatekeepers by both recruiting participants and scheduling interview times. Interviews were documented through handwritten notes as well as an audio recorder. While each interview began with questions about the participant's decision to come to Canada, they each took their own direction, with different responses from participants triggering different questions from me and opening the door to new areas of inquiry; they were highly conversational, and designed to be so. There were, however, some important structural aspects that were consistent throughout each individual interview. To begin with, I did not ask questions about law or specifically legal status until towards the end of each interview, so as to avoid priming participants to think

legalistically.¹⁶² To prevent any priming whatsoever may have been impossible in the sense that participants were aware that this was a project for a degree in law, as stated in the informed consent form, however I was careful to limit law from entering into the conversation (from my end at least) until towards the end. Secondly, interviews were guided by several core, open-ended questions. After asking questions about migrants' decision to come here, some of the standard questions that I asked included:

- Who are the people that you like to spend your time with? What do you do together?
- What types of things have made you feel like a part of the community in Brandon?
- What types of things have made you feel like you were not part of the community?
- What will change once you establish permanent residency? What do you wish was different? (Towards the end of interviews)

I also asked several hypothetical questions, particularly surrounding the employment context, such as "What would you do if you were asked to do something you felt was dangerous at work?" and "What would you do if you became injured or lost your job?" Within the context of these various questions, other questions about family life, social life, community participation, intimate relationships, political involvement and legal rights emerged organically.

It is here that I must admit a methodological failure on my part. In addition to conducting interviews with three current migrant workers, I also conducted a group interview with three former migrant workers who have since become permanent residents. Thinking that this would offer insight into different social experiences that permanent residency status may bring, in addition to hearing about their experiences as migrant workers, I hoped that the group members would be able to share their opinions on these subjects, and to build off of each other's stories in order to provide insight into social experiences under NOC C & D. While the stories that they shared were of great interest to me, it became clear as I formulated my

¹⁶² This approach was inspired by the interview technique employed in Patricia Ewick & Susan Silbey, *The Common Place of Law: Stories from Everyday Life* (Chicago: University of Chicago Press, 1998).

argument for this thesis that I was at risk of presenting rigidly categorized information, such as “family separation” or “workplace relations”; this would ultimately make my analysis centre around these analytical categories rather than the stories of the people themselves. I was struck by Kirin Narayan’s assertion that anthropologists must be aware of the “quality of relationship with the people we seek to represent in our texts: are they viewed as mere fodder for professionally self-serving statements about a generalized Other, or are they accepted as subjects with voices, views, and dilemmas?”¹⁶³ The stories of focus group members would have been presented as *ad hoc*, isolated incidents rather than events deeply embedded within complex lives and in relation to their interests and priorities. In sharing stories as a group, I was not able to get a detailed account of the standpoints of each individual participant. A full account of a person’s story requires the listener to be able to “...see every step without having to imagine pieces;”¹⁶⁴ as I looked through the stories of group interview participants, I realized that I was left with far too many questions. I had made a fatal error which prevented me from being able to use these stories in as deep and meaningful a way as they deserve. I have therefore been able to rely on these stories only in a limited capacity.

b. Social Exclusion and Analysis

As I discussed above, while institutional ethnography offers methodological tools that are of great value to this project, I am putting them towards a different end than the uncovering of relations of ruling. While I am still “us(ing) data to discover material connections between what actually happens to participants in a research setting and what triggers those particular actions or events,”¹⁶⁵ my fieldwork was conducted with an eye towards a particular *type* of phenomena, namely experiences of social exclusion, triggered by a particular structural process, that being the operation of the NOC C & D legal framework. Following the interview process, I was struck by how different each person’s story was. Each person had their own unique experiences in Brandon, positive and negative, and it was difficult to draw connections between those seemingly disparate stories. In order to better draw out connections and

¹⁶³ Kirin Narayan, “How Native is a ‘Native’ Anthropologist?” (1993) 95:3 *American Anthropologist* 671 at 672.

¹⁶⁴ Campbell & Gregor, *supra* note 157 at 77.

¹⁶⁵ *Ibid* at 70.

similarities, I transcribed interviews from my audio recorder, annotated them using my field notes, and printed them all, with each person's story a separate document. Hammersley and Atkinson write that "[t]he identification of categories is central to the process of analysis," noting that "[i]n ethnographic coding, there is no requirement that items of data be assigned to one and only one category, or that there be explicit rules for assigning them."¹⁶⁶ With stories which seemed so disparate, I had difficulty drawing analytical categories, and ran the risk of removing people from the centre of my analysis and instead focusing on analytical categories. As a preliminary analytical measure, then, I colour coded these documents according to loose and non-mutually-exclusive categories. Where participants described an experience which could loosely be described as "inclusive" (I was generous in my interpretation of terms) I highlighted text in green. Experiences which could be described as "exclusionary" I highlighted in orange. In places where law was either discussed or implicated, I coloured the text pink, and, curious about the role of the union in participants' experiences, I coloured union-related text yellow.

Within each person's story, a distinct pattern began to emerge where orange (exclusionary) and pink (law-related) text overlapped. Each person continually returned to their own unique account of how the law and in particular the legal framework of NOC C & D prevented them from doing something important to them and, in turn, from fully participating in community life. Moreover, each person's account was in keeping with their own particular circumstances, interests and ambitions. It became clear to me that in order to understand how the legal framework of NOC C & D has constructed people's experiences of social exclusion and inclusion, it was important, above all else, to understand those people. This leads me to discuss the manner in which my findings and analysis are presented.

ii. **Storytelling and Outsider Jurisprudence**

Campbell and Gregor write that "institutional ethnographers... cannot stand apart from what they know and what they learn about the world."¹⁶⁷ Institutional ethnographers, like the people they study, inhabit a world which they have knowledge of, and they cannot simply set

¹⁶⁶ Hammersley & Atkinson, *supra* note 161 at 153.

¹⁶⁷ Campbell & Gregor, *supra* note 157 at 23.

their knowledge or ways of knowing aside. Narayan argued for an “*enactment of hybridity* in our texts; that is, writing that depicts authors as minimally bicultural in terms of belonging simultaneously to the world of engaged scholarship and the world of everyday life.”¹⁶⁸ In Clifford Geertz’ discussion of “thick description” as the presentation of densely-textured facts in order to contextualize observable behavior, Geertz wrote that in ethnography “...what we call our data are really our own constructions of other people’s constructions of what they and their compatriots are up to;”¹⁶⁹ such an approach places excessive weight on observation, and pays inadequate attention to the ethnographer’s own interpretation of data. Denzin and Lincoln likened the ethnographer to a quiltmaker, musician or filmmaker, the creator of a “pieced-together set of representations that are fitted to the specifics of a complex situation,” deeply and personally implicated in the interpretive and representative process.¹⁷⁰

All of these perspectives treat claims to objectivity and detachment in the context of ethnographic research as circumspect. Early anthropologists, conducting fieldwork in a colonial setting among groups perceived to have an “authentic culture,” made no qualms about situating themselves as scientific observer with the population under observation discussed as the native Other; the division between insider/outsider and knower/known was, at the time, unproblematically fixed.¹⁷¹ With the coming of critical texts such as Edward Said’s *Orientalism*, however, these essentializing practices were problematized. In contemporary ethnographic research, the gap between researcher and the researched has been approached by acknowledging the intersubjectivity of the research enterprise, that the researcher enters the field from a certain ideological standpoint that they cannot abandon, and that attempts to capture the subjectivity of the group whose everyday experience is of interest are inevitably coloured by that ideological standpoint. Focus must therefore be shifted from a purportedly neutral, outsider “gaze” towards the researcher, to varying extents.

¹⁶⁸ Narayan, *supra* note 163 at 671.

¹⁶⁹ Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (New York: Basic Books, 1993) at 9.

¹⁷⁰ Norman Denzin & Yvonna Lincoln, “Introduction: The Discipline and Practice of Qualitative Research” in Norman Denzin & Yvonna Lincoln, eds, *The SAGE Handbook of Qualitative Research* (Thousand Oaks: Sage Publications Ltd., 2011) at 4.

¹⁷¹ Narayan, *supra* note 163 at 672.

My research findings are presented in narrative form, attempting to preserve the stories and voices of participants as much as possible. Participants have been consulted to ensure that quotations attributed to them are accurate, that no details are included which risk revealing the identity of anonymous participants, and that my recounting of their stories is acceptable. It is not necessary for me to “speak” for participants; they speak for themselves as experts in their own lives. My role is to interpret these stories in light of my own institutional understanding of law, and to share that interpretation in another institutionalized context, that being academia. The primary subject of these narratives is, therefore, me. I make clear throughout that these are stories that were told to me in a particular setting by unique and complex individuals, and that the interpretation of these stories is my own; there is no attempt to mask my subjectivity. While my interpretation and analysis of these stories is sometimes overt, it is also embodied in the information I have selected to share, as well as the way in which it is presented. The narrative that I have cobbled together, which includes detailed description of the physical setting in which participants live, the setting where interviews were conducted, the way in which participants appear to present themselves, and the stories they shared, have their own analytical and argumentative effect, sometimes allowing the reader to draw their own conclusions, other times methodically guiding the reader to established conclusions about the place of law in the social and emotional lives of the subjects.

In a world where “knowledge” about the experiences of a particular individual or group is said to be subjective, how does a study of individual stories contribute to an understanding of law? I provide two answers to that question. First, Dorothy Smith would hold that the power of institutional ethnography lies in its position as a “point of entry” into an examination of the more generalizable social relations which structure everyday experience. From the perspective of everyday life, extralocal structures and processes which have generalizable effects across many such local settings,¹⁷² including law, can be illuminated as organizing the experiences that participants talk about.¹⁷³ Understanding these lived experiences through the lens of social exclusion puts a particular type of lived experience at the centre of the inquiry, where one faces

¹⁷² Which may differ across social and spatial settings, hence the use of the term socio-spatial structures in the language of social exclusion.

¹⁷³ Campbell & Gregor, *supra* note 157 at 89.

barriers to participation in community life, and allows us to identify what structural processes organize those experiences. In other words, examining lived experience reveals how the political form of exclusionary inclusion is socially enacted.

Secondly, and in keeping with Smith's desire for a feminist sociology, is that traditional methods of generating legal "knowledge" in Western society have historically excluded the voices of those people who are adversely affected by law's purported neutrality and universality from conversations about law. The suppression of these "outsider" voices by those who construct, observe and operate a society's legal machinery, including academics, lawyers, politicians, and judges, allows them to continue in their hegemonic positions of domination, obfuscating extant relations of ruling by masking oppositional speech as "illegitimate," "subjective" and unscientific. Sherene Razack argues that "a radical or critical pedagogy is one that resists the reproduction of the status quo by uncovering relations of domination and opening up spaces for voices suppressed in traditional education."¹⁷⁴ I find that the aims of this project of bringing humanity and experience to our understanding of law are best summarized in Mari Matsuda's terminology of "outsider jurisprudence," and I rely on Matsuda to conclude this section:

This methodology, which rejects presentist, androcentric, Eurocentric, and false-universalist descriptions of social phenomena, offers a unique description of law... The prescriptive message of outsider jurisprudence offers signposts to guide our way there: the focus on effects. ... The need to attack the effects of racism and patriarchy in order to attack the deep, hidden, tangled roots characterizes outsider thinking about law.¹⁷⁵

C. Conclusion

Social exclusion is concerned with the barriers which inhibit a person or group's participation in the social, political or economic life of the community in which they live. This phenomenon, which focuses on relationships among individuals, groups and social institutions

¹⁷⁴ Sherene Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press, 1998) at 37. See also Linda Tuhiwai-Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (London: Zed Books, 1999).

¹⁷⁵ Mari Matsuda, "Public Response to Racist Speech: Considering the Victim's Story" (1988-89) 87 Mich. L. Rev. 2320 at 2324.

must be understood in the context of the socio-spatial structures which guide the reproduction and enactment of certain social practices, as well as the processes of reproduction and enactment themselves. Law is both structural in the sense that it provides a set of rules intended to guide social activity, and processual in the sense that those rules are followed and not followed, enforced and not enforced, and experienced by different people to varying degrees. In order to understand how the legal framework of NOC C & D constructs experiences of social exclusion or inclusion in the lives of individuals, a modified institutional ethnographic methodology has been employed, relying on interviews with advocates and NOC C & D migrant workers, experts in their own lives, to uncover how the lived experiences of individuals are shaped by external, institutional structural processes. Such an approach offers insight into the workings of socio-spatial structures which have generalizable effects across many local settings, and brings traditionally marginalized voices into conversations about the operation of law, a form of outsider jurisprudence.

CHAPTER TWO: THE SOCIO-SPATIAL LEGAL STRUCTURES OF NOC C & D

“[W]hile the constitution of society as national is currently the dominant way of organizing space, one that is ‘a source of catastrophic exclusion’, there is nonetheless also an experience of the social that is materially constructed through our physical and virtual movements across and through both contextual and created space.”

- Nandita Sharma, *Home Economics*¹⁷⁶

The act of migration, as Sharma points out, is defined in terms of movement across spaces, and while movement from one physical geographical local context to another may mean little more than a change in scenery (for instance in the case of most tourists), it may also profoundly alter the material social reality that a person experiences in a particular location. For the migrant worker, a person who is admitted into Canada legally but whose presence in the country is legally defined in terms of their non-citizen, non-member, foreign Otherness, it is not the physical movement across the Canadian border but rather entry into the national socio-spatial legal context that constructs this status and the social relations that flow from it. This is supported by additional nationalized socio-spatial structures, namely (in Sharma’s view) nationalism, racism, sexism and class relations.¹⁷⁷ Once they have arrived in Canada, a migrant worker will also arrive into a provincial spatial context which also consists of legal and ideological social structures particular to that space, as well as a local context which may include physical geography, familial or ethnic ties, and the attitudes and beliefs of local populations.

As I explored the body of pre-existing literature on the social experiences of migrant workers in Canada, I noticed that space, particularly the immediate local contexts in which the social life of an individual is lived and most vividly experienced, was a subject which figured prominently into accounts of the social exclusion (and inclusion) of migrant workers. This literature focuses almost exclusively on migrant workers coming to Canada under the LCP or as agricultural workers under the SAWP or the agricultural stream of NOC C & D. While there are many commonalities between the legal frameworks of these programs which help to construct the social contexts into which live-in caregivers and agricultural workers enter when they come

¹⁷⁶ Sharma, *supra* note 12 at 162.

¹⁷⁷ *Ibid* at 4.

to Canada,¹⁷⁸ most importantly facilitating the employment of a foreign national for a temporary period with a specific employer, there are also socio-spatial structural features, legal and otherwise, that are unique to each of these programs. Allocating migrant workers into necessarily rural environments where they live in employer-provided housing,¹⁷⁹ the legal frameworks of the agricultural TFWPs and the resultant employment relationship are only part of the socio-spatial context in which migrant workers experience social exclusion; the physical isolation, demographics (particularly race) and social attitudes of rural communities also factor significantly into this state of affairs.¹⁸⁰ The history of organizing farm labour in Canada (or rather, lack thereof) also forms part of this context.¹⁸¹

In the context of domestic workers, the legal framework of the LCP requires domestic workers to live and work in the homes of their employers for a total of twenty-four months over a four-year period, after which they become eligible to apply for permanent residency.¹⁸² While this employment scenario often means that live-in caregivers will not be physically *distant* from host communities, live-in caregivers are nevertheless in many cases *isolated* from the community; the spatial overlap between the home and the workplace has been found to extend the power imbalance between employer and employee in such a way that access to legal rights and social contact is significantly limited.¹⁸³ As a gendered and racialized profession, these socio-structural elements (constructed by local attitudes, national immigration ideology and a globalized labour market) must also be taken into account in an investigation into the

¹⁷⁸ Legal mechanisms vary between programs. While the LCP and NOC C & D programs operate through the *IRPA* and its regulations, the SAWP operates through a series of bilateral agreements between Canada and specific sending countries, such as Jamaica and Mexico: see Faraday, *supra* note 3 at 37.

¹⁷⁹ This is both the product of the standardized SAWP contract which requires employers to provide housing to migrant workers, and the impracticability of migrants living off-site and trying to commute to work each day. See Human Resources and Skills Development Canada, “Agreement for the Employment in Canada of Seasonal Agricultural Workers from Mexico – 2013” online: Government of Canada <http://www.hrsdc.gc.ca/eng/jobs/foreign_workers/agriculture/seasonal/sawpmc2013.shtml>.

¹⁸⁰ See Basok, *supra* note 55 at 125.

¹⁸¹ See Faraday, *supra* note 3 generally.

¹⁸² The *Regulations*, *supra* note 46 at s 113(1)(d).

¹⁸³ Jarrah Hodge, “‘Unskilled Labour’: Canada’s Live-In Caregiver Program” (2006) 3:2 Undercurrent 60 at 64. See also International Labour Organization, *Decent Work for Domestic Workers*, International Labour Conference, 99th Session, Report No IV(1), (2010) generally.

social exclusion of live-in caregivers.¹⁸⁴ Again, this also presents a historical context of difficulty in organizing these isolated workers.¹⁸⁵

The NOC C & D stream of the TFWP arises in different socio-spatial contexts than those that have been explored in the literature on the social experiences of migrant workers up to this point, where the role of law in structuring migrants' social experience cannot be expected to be the same, both as compared to live-in caregivers, agricultural workers, and among NOC C & D workers themselves. Based largely on the legal framework of the 1973 NIEAP, when the NOC C & D stream of the TFWP was first introduced in 2002¹⁸⁶ there was little about the program that was unfamiliar or legally innovative. Socially, however, there were important implications. Migrant workers could now be hired in industry sectors where they had never been seen before, spanning the entire "low skill" labour market. As discussed above, it followed that migrants would also be found in different social settings, including Canada's ethnically and economically diverse cities, living and working in close proximity with Canadian citizens and permanent residents. As mentioned above, another critical difference between agricultural, domestic and other "low skill" sectors is that while the over 30 000 agricultural workers and 6000 live-in caregivers constitute significant populations with a relatively shared set of interests around whom advocacy groups and researchers have coalesced,¹⁸⁷ the forty migrant workers in "Ironing, Pressing and Finishing Occupations" or ten "Water and Waste Plant Operators" who were present in Canada as of December 1, 2012, are in (economically if not socially) diverse socio-spatial contexts in which the law may play differing structural roles.¹⁸⁸ NOC C & D thus provides a novel context for investigation where the law itself may play a more or less prominent role in structuring the social experiences of migrant workers under these programs, as well as providing a new set of challenges for organizers and advocacy groups attempting to learn more about the social situation of migrant workers and to develop strategies alongside

¹⁸⁴ Arlie Russell Hochschild, "Global Care Chains and Emotional Surplus Value" in Will Hutton & Anthony Giddens, eds, *On the Edge: Living with Global Capitalism* (London: Jonathon Cape, 2000) 130 at 131 and Debra Parkes, "Employment Standards that Work for Women" (2008) 5 *Underneath the Golden Boy* 49 at 67.

¹⁸⁵ Fudge & Macphail, *supra* note 9 at 861.

¹⁸⁶ With the coming into force of the *IRPA*.

¹⁸⁷ Citizenship and Immigration Canada, "Canada – Temporary Residents by Yearly Sub-Status" online: Government of Canada < <http://www.cic.gc.ca/english/resources/statistics/facts2012/temporary/03.asp>>.

¹⁸⁸ Citizenship and Immigration Canada, *supra* note 38.

migrants to better ensure access to legal rights, political participation, and social inclusion more generally.

In this chapter I pull away from these local contexts to provide an overview of the national and provincial legal frameworks which constitute the overlapping legal structures of the TFWP and the NOC C and D stream. Grounding this overview in lived social experiences, I rely on interviews conducted with three advocates who have direct experience working within the socio-spatial structure of the NOC C & D stream to narrate an overview of the varying socio-spatial legal contexts of NOC C & D, beginning with a brief consideration of migrant labour in a global context. I examine the legal mechanisms which facilitate temporary entry into Canada and which govern the migrant worker's stay in the country (including general provincial employment standards regimes) as well as the pathways through which NOC C & D migrants may attain permanent residency. I move on to provide a general overview of the provincial legal structures which are most directly implicated by the TFWP, namely the body of legislation which has developed to structure relationships between employers and employees. Here I demonstrate how the articulation between national and provincial legal structures may result in processes of social exclusion. Finally, I frame the socio-spatial context in Brandon, Manitoba, (where my field research was performed) with an overview of the provincial legal framework of the Provincial Nominee Program, a program developed through a series of provincial and federal agreements which allows the Province of Manitoba to nominate TFWs, even those considered to be "low skill," for permanent residency.

A. Migrant Labour in a Global Context

While this thesis focuses on the localized and individualized effects of a national immigration framework, it is important to recognize the inherently global nature of transnational migration, and the global structural forces which shape national, territorial and local forms of social organization; Canadian migration policy does not exist in a vacuum, nor do those who migrate. Nina Glick Schiller argues that a methodological nationalism in the social sciences has led to a "container" approach whereby the nation state is conflated with the whole of "society", leading to the separation of studies in political economy and development

from studies of incorporation of migrants into the new country.¹⁸⁹ Advocating for scholars to take a “global power perspective”, Schiller identifies neoliberal globalization as an overarching power structure which shapes the lived experiences of individuals, from the separation of families to the erosion of labour protections.¹⁹⁰ Glick Schiller’s analysis suggests that three global structural processes must be understood as interconnected in the global power perspective, namely those which cause people to migrate, those which shape national immigration policy, and the way in which immigrants live within host communities (including the sending of remittances and cultural exchange between migrants and host communities). For my purposes, it is the latter two processes which must be considered, although factors motivating the migration of the migrant workers I spoke to will also be considered in the context of their individual stories (although the role of globalization in participants’ decisions to leave their home countries is beyond the scope of this thesis). Moreover, the central concern of this thesis is the social lives of migrants in the local communities in which they and work. In this section, then, I will place NOC C & D and the TFWP in a global context.

Arguments have taken place among political economists over the implications of neoliberal globalization for the sovereignty of states to determine domestic immigration policy. Gary Teeple defines globalization as a shift from conceptions of capital accumulation as rooted in the nation-state towards capital accumulation as a global endeavour.¹⁹¹ Teeple characterizes globalization as the “‘triumph of capitalism’, that is, the ascendancy of economics over politics, of corporate demands over public policy, of the private over the public interest, of the transnational corporation over the national state.”¹⁹² Globalization, brought about by rapid changes in technology, the intensification of production relations, reduced trade tariffs, deregulation of markets, the development of supranational organizations such as the World Bank and International Monetary Fund, and increased labour mobility, contributed to the

¹⁸⁹ Nina Glick Schiller, “Migration and Development without Methodological Nationalism: Towards Global Perspectives on Migration” in Pauline Gardiner Barber & Winnie Lem, eds, *Migration in the 21st Century: Political Economy and Ethnography* (New York: Routledge, 2012) at 42. See also Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 1991).

¹⁹⁰ *Ibid* at 55. See also Arthurs, *supra* note 94.

¹⁹¹ Gary Teeple, “What is Globalization?” in Stephen McBride & John Wiseman, eds, *Globalization and its Discontents* (New York: Palgrave, 2000) at 9.

¹⁹² *Ibid* at 10.

restructuring of markets, with the nation state brought under the discipline of these supranational organizations.¹⁹³ Within this conception of globalization, a focus on national and territorial socio-spatial structures would be to overlook the global structures that are of true significance in the lives of migrant workers.

In direct response to Teeple's argument, Nandita Sharma argues that, far from wresting control over domestic policy from national governments, globalization has prompted a reorganization of international labour migration coupled with (in fact, enabled by) a reinvigorated nationalism.¹⁹⁴ Investigating the development of the NIEAP (the early form of the TFWP) through an analysis of parliamentary debates, Sharma finds that it was through the fortification of Canadian national identity as tolerant and multicultural paired with a discourse of legitimate exclusion based on national security and employment interests that "categories of difference" were normalized.¹⁹⁵ These categories allowed for the differentiation of rights and entitlements between those who were categorized as "citizen" and those who were categorized as "migrant worker."¹⁹⁶ It is not a coincidence that these categories of difference also correspond closely to the colonial ideological constructs of race, gender, and class; these constructs are crucial to the hegemonic order which relies on such ideology to "...define[] the conditions, determine[] the mechanisms, conduct[] the procedures, situate[] the boundaries, and constitute[] the consequences of social exclusion. It provides impetus and breath for each aspect of exclusionary practices."¹⁹⁷ Sharma notes that despite immigration being framed as a security issue, this has resulted in *more* people being allowed to cross the border; what has changed, as I note in my introduction, is the *way* in which they cross. Within Sharma's conception of globalization, the nation state maintains a degree of autonomy to organize itself

¹⁹³ *Ibid* at 16.

¹⁹⁴ Nandita Sharma, "The Making of the Citizen Self and Citizen Other: Canada's Non-Immigrant Employment Authorization Program" in Stephen McBride & John Wiseman, eds, *Globalization and its Discontents* (New York: Palgrave, 2000) at 129.

¹⁹⁵ Sharma, *supra* note 8 at 436.

¹⁹⁶ *Ibid* at 418.

¹⁹⁷ Luann Good Gingrich, "Theorizing Social Exclusion: Determinants, Mechanisms, Dimensions, Forms, and Acts of Resistance" in Wes Shera, ed, *Emerging Perspectives on Anti-Oppressive Practice* (Toronto: Canadian Scholar's Press, Inc., 2003) at 7. Along similar analytical lines to Sharma, Gingrich analyzes these constructs as serving the *functional* aims (rather than being incidental side effects) of dichotomization, homogenization and valorization. See also Harsha Walia, *Undoing Border Imperialism* (Oakland: AK Press, 2013) at 61.

in response to processes of globalization; it remains the dominant model of social organization, despite being influenced by global processes.¹⁹⁸

The legal framework of NOC C & D must be understood as both the outcome and the agent of this process of neoliberal globalization. In my discussion in Chapter One concerning rules and processes, I adopted a conception of rules and processes as mutually constitutive of the social order, and a similar pattern can be observed among nation states in an increasingly globalized world. Sharma and Teeple ultimately agree that national decision-making takes place in the context of changing global structures, however their point of departure is in the agency remaining for states to organize their “domestic” affairs. Sharma holds that the creation of the NIEAP and in turn the TFWP was a response to global processes, such as the desire of the Canadian government to attract foreign investment by availing employers in the country access to a cheap labour strategy in the context of global competition.¹⁹⁹ It was also seen as a way of responding to increasing migration from the Global South, allowing migrants to enter the country without having to accept them as citizen and the obligations that follow; this is perhaps best captured by Donald Avery who cites a Parliamentary debate as the SAWP was developed, where a Member of Parliament reasoned that:

By admitting West Indian workers on a seasonal basis, it might be possible to reduce greatly the pressure on Canada to accept unskilled workers from the West Indies as immigrants. Moreover, seasonal farm workers would not have the privilege of sponsoring innumerable close relatives.²⁰⁰

Fudge and MacPhail note that the 2002 expansion of migrant labour across “low skill” industry sectors in the form of NOC C & D itself was in response to demands by the construction industry in Toronto and the Alberta oil industry, the latter of which was a competitor in the global oil market.²⁰¹

While the TFWP and subsequently NOC C & D were created in response to global structural processes which increased economic competition and south-to-north migration, Sharma holds that this was not an inevitable response. Rather, Canada responded strategically

¹⁹⁸ *Ibid* at 417.

¹⁹⁹ *Ibid* at 426.

²⁰⁰ Donald Avery, *Reluctant Host: Canada's Response to Immigrant Workers, 1896-1994* (Toronto: McClelland & Stewart Inc., 1995) at 204.

²⁰¹ Fudge & MacPhail, *supra* note 9 at 860.

and in its own way, developing national socio-spatial legal structures which gave form to the ideologically-constructed category of “migrant worker.” The legal framework of NOC C & D is situated in the context of neoliberal globalization, with all of its attendant and rapidly changing supranational structures. It is both responsive to globalization in that it was constructed and can be changed to meet the needs of global capitalism, while at the same time shaping the way in which globalization is felt in the social experiences of migrant workers. In this sense, the examination of the social experiences of migrant workers should be understood as a study in globalization at a local level.

B. The National Context: The Legal Framework of the NOC C & D Stream

The Government of Canada promotes the country’s TFWPs as a way of enabling Canadian employers to “...fill immediate skills and labour shortages, when Canadian citizens and permanent residents are not available to do the job.”²⁰² Particularly in “low-skill” industry sectors such as seasonal agricultural labour and domestic work, employers have historically had difficulty in recruiting and retaining employees, although many scholars have questioned whether these labour shortages are genuine, or whether they are a product of conditions such as low pay, dangerous working conditions, inadequate labour protections and low social prestige which deter domestic labour from performing those tasks.²⁰³

The government’s options for filling these (naturally or artificially) undesirable but socially necessary jobs with domestic labour are democratically unpalatable. Michael Walzer identifies two possible domestic solutions. The first is the politically risky destruction of worker protections such as trade unions and employment insurance schemes, increasing pressure on workers to enter into precarious (“flexible”) employment relationships and to take jobs that are available. The second is to step back and allowing wages and therefore prices to rise, which would have a ripple effect throughout the entire economy. This would pose a challenge to the existing social hierarchy, requiring significant redistributions of resources to meet the basic

²⁰² Human Resources and Skills Development Canada, “Temporary Foreign Worker Program” online: Government of Canada <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/index.shtml>.

²⁰³ See for example: Faraday, *supra* note 3 at 12; Luin Goldring, Carolina Berinstein & Judith K. Bernhard “Institutionalizing Precarious Migratory Status in Canada” (2009) 13:3 *Citizenship Studies* 239 at 250; Satezewich, *supra* note 10 at 62-63, and Sharma, *supra* note 8 at 433.

needs of the population.²⁰⁴ Faced with the question of how to recruit and retain people in these labour market positions, the government must look beyond its borders. The government must find people who will enter into these positions under the conditions offered, who do not have the same labour market mobility that Canadian citizens and permanent residents have.

Non-citizens are natural subjects for the restrictions on freedom, limitations on rights, and imposition of obligations that are necessary (given the interests of government and much of the citizenry) to recruit and retain workers in these constructively undesirable positions. Exclusionary, bounded conceptions of citizenship are standard practice in international law, rooted in the generally presumed interest of political communities in determining the composition of national membership and hence controlling which non-citizens may cross borders into their sovereign territory; this claimed interest, if legitimate, sanctions (and presumes) the sovereign's exclusion of non-citizens.²⁰⁵ In admitting non-citizens into that sovereign territory, there is also presumed to be at least some concomitant prerogative for the state to allocate different rights and entitlements to the "strangers" who are permitted to cross the territorial boundaries of the nation-state, and to draw the parameters of their relationship with the national society.²⁰⁶ These bounded conceptions of citizenship are not to be accepted as natural; they are hotly contested by many migrant justice organizations and scholars, most notably Joseph Carens, Walzer's chief critic. Carens, famously observing that "[b]orders have guards and the guards have guns," posed the question of how states can justify the use of force to exclude those who are trying to enter from a political territory. "What gives anyone the right to point guns at *them*?"²⁰⁷ he asks. Applying the three dominant liberal approaches to political

²⁰⁴ Walzer, *supra* note 118 at 56. See also Satzewich, *supra* note 10 at 68.

²⁰⁵ Such a right of nation-states has been defended by Michael Walzer, who argued that the members of a political community have a collective right to shape that community in the interests of self-determination and a shared interest in the creation and maintenance of a stable, committed "community of character." He holds that this right is only minimally subject to the "constraints of justice"; it is a political decision subject only to the internal constraints of the shared meaning of membership among all members of that community, and the external (and ill-defined) principle of mutual aid: see *ibid* at 62. Walzer's theory on the rights of the political community to set the terms of admission into (and exclusion from) its "membership sphere" has become the paradigm organizing concept for virtually all normative treatments of immigration law and policy, whether or not the substance of his views is actually embraced": see Linda Bosniak, "Membership, Equality and the Difference that Alienage Makes." (1994) 69 N.Y.U. L. Rev. 1047 at 1068.

²⁰⁶ Bosniak, *supra* note 22 at 38.

²⁰⁷ Joseph Carens, "Aliens and Citizens: The Case for Open Borders" (1987) 49 Rev. Pol. 251.

theory (the utilitarian, Rawlsian and Nozickean) Carens argues that such use of force cannot be justified within any of these systems of thought. This debate should not be considered resolved, however this thesis takes place in the context of legal authority exercised pursuant to the perceived legitimacy of a closed border system.

Vic Satzewich identifies two dimensions of the process by which foreign-born workers are incorporated into production relations in capitalist societies: a political dimension and an economic dimension. The political dimension refers to the relationship between the foreign-born person and the local political community, which may consist of either permanent (or at least probational) incorporation into the political community and the creation of reciprocal rights and obligations (“immigrant”), or the temporally constrained, qualified admission into the territory of the state, and exclusion from the political community (“migrant”).²⁰⁸ The economic dimension refers to the character of the position that the foreign-born person will occupy in production relations and the person’s ability to decide where to sell their surplus labour.²⁰⁹ Satzewich’s framework reveals the constituent elements of systems of migrant labour, which are given legal form in the TFWP and NOC C & D, and is helpful for disentangling those elements so as to understand the workings of the various parts of this legal framework.

The regulatory framework of the TFWP is the means through which the Government of Canada facilitates the entry and controls the economic activity of non-citizen, non-permanent resident migrant workers, and forms the national socio-spatial legal context into which migrant workers enter. In this section I will outline the legal contours of the NOC C & D stream of the TFWP, relying on interviews conducted with advocates and organizers who have firsthand experience working within the socio-spatial context of this program to narrate and contextualize this legal framework.²¹⁰ Consistent with Satzewich’s framework, I will begin by examining the political dimension of incorporation which takes form in the issuance of a temporary resident visa, and move on to discuss the economic dimension of incorporation, which takes the form in the issuance of a work permit. I will then go on to briefly outline the

²⁰⁸ Satzewich, *supra* note 10 at 39.

²⁰⁹ *Ibid* at 41.

²¹⁰ These interviews were conducted to provide a broad perspective on the social experiences of NOC C & D migrant workers from people with firsthand experience working with this group, and to attune me to the various issues, foreseen and unforeseen, that may have been faced by the migrant workers that I was planning to speak to.

provincial legal contexts, namely the application of employment standards regimes to migrant workers and their interaction with the federal framework. Finally, I will examine the federal pathways to permanent residency as they apply to NOC C & D migrant workers, comparing this framework to the SAWP, the LCP, and programs which apply to workers categorized as “high skill.”

i. The Temporary Visa

I first met Naveen Mehta at a symposium at Ryerson University called “Local Food, Global Labour: Food Justice Needs Migrant Justice” in October of 2012. With approximately 200 people in attendance as well as camera crews from CBC, CTV and Global News, Mehta spoke as both general counsel and Director of Human Rights, Equity and Diversity of the UFCW. The event had garnered significant media attention as the first time that Juan Ariza and Javier Medina, the two survivors of the 2012 Hampstead van accident that killed ten migrant agricultural workers and a Canadian truck driver, had spoken publicly about their experience.²¹¹ Permanently disabled and in need of ongoing medical attention, Ariza and Medina were unable to continue performing the physically demanding farm work that they were authorized to perform on their work permits. With their temporary residence visas set to expire in 2013 and 2014 (respectively), requiring them to return to their home country of Peru, the UFCW had organized a campaign called Right2Stay, and Mehta’s speech addressed one fundamental question: how is Canada, as a government and a people, accountable to a person who comes here to work on a temporary basis, but is expected to leave in a much worse situation as a result of something that happens to them here?²¹² After hearing Mehta speak in other settings where he directly addressed the idea of social exclusion in the setting of NOC C & D, I told him about this project and he agreed to be interviewed.

Naveen’s office is in the UFCW’s national headquarters in Etobicoke, which occupies a full three-storey office building in a business park adjacent to Pearson International Airport. In

²¹¹ See for example Laura Kane, “Survivors Haunted by Memories of Crash that Killed 10 Migrant Workers” online: Toronto Star <http://www.thestar.com/news/canada/2012/10/01/survivors_haunted_by_memories_of_crash_that_killed_10_migrant_workers.html> and CTV News, “Migrant Workers who Survived Deadly Crash want to Stay in Canada” online: CTV News <<http://www.ctvnews.ca/canada/migrant-workers-who-survived-deadly-crash-want-to-stay-in-canada-1.980657>>.

²¹² Naveen Mehta, “Local Food, Global Labour: Food Justice Needs Migrant Justice” (Speech, delivered at Ryerson University, 2 October 2012).

his office, he has pictures of former NDP leader Jack Layton and current leader Thomas Mulcair framed on the wall, and a framed satirical cartoon of Brian Mulroney on the floor. A small canvas painting of Ché Guevara sits on his desk, along with a Rosetta Stone box (a computer-based language training program) labelled “Spanish.” With seven to eight percent of the UFCW’s 250 000 members being migrant workers,²¹³ he has gained experience advocating for and representing NOC C & D migrants predominantly in the agricultural and meat processing industries, although the union’s visibility on issues concerning migrant workers has led migrants in the restaurant industry, domestic workers and a variety of others to seek his assistance. He explains what makes the legal representation of migrant workers distinct from other workers, and why this is legally significant:

Labour lawyers can no longer just be labour lawyers. In Canada they have to be immigration lawyers as well... They have to have a robust understanding of how immigration and migration work in Canada, and of the new Canadian workforce, and those demographic changes. And at the same time, immigration lawyers need to have a better understanding of labour and employment law.

See, if the employment or labour side goes bad, it’s an economic loss; they can typically stay for the rest of the temporary visa, although losing their job is hugely traumatic in and of itself. But if the immigration aspect goes bad, like somebody is denied an extension of their work permit or they can’t apply for permanent residency, it’s the end of the road in Canada. There’s nothing further to do. They might have a legitimate employment standards claim but you can’t do anything with it because they’re not here. The most important underlying issue is immigration before, as an access to justice issue, you can access the employment standards issue or WSIB (Workplace Safety and Insurance Board) issue or whatever the case may be.

Naveen essentially points to an intersection between labour/employment law (an area of provincial jurisdiction) and immigration law (an area of federal jurisdiction) to explain the *prima facie* differential access to employment and labour standards regimes. In his experience, the central legal barrier faced by migrant workers seeking to enforce their employment-related rights (related to both political and economic participation in community life) which is not faced by otherwise identical workers ultimately lies in the legal distinction between a permanent resident and a temporary resident. A foreign national who enters Canada under the

²¹³ Making UFCW Canada both the country’s largest private sector union as well as the union with the highest percentage of migrant worker membership.

economic,²¹⁴ family²¹⁵ or refugee classes²¹⁶ of the *IRPA* and its *Regulations* is no longer legally defined as a foreign national, and becomes a permanent resident.²¹⁷ In addition to gaining rights to most of the social benefits enjoyed by Canadian citizens, access to settlement services, and a right to apply for Canadian citizenship after spending three years in Canada, permanent residents gain the right under s. 6(2) of the *Charter of Rights and Freedoms*²¹⁸ to move within the country and to live, work or study anywhere in Canada. Politically, a permanent resident becomes a member of a group which constitutes the pool of eligible future citizens.²¹⁹ A foreign national who enters Canada as a temporary resident, however, remains a foreign national in the eyes of the law. They have neither the mobility nor political rights of citizens or permanent residents, meaning they have no right to stay in Canada, to move within the country, to work within the country, or to vote in elections.²²⁰ In determining whether a foreign national is eligible for a temporary visa, an immigration officer must find, among other things, that the foreign national will leave Canada at the end of their stay.²²¹ This temporal limitation is reiterated as a condition placed on the holder of a temporary visa,²²² as determined by an immigration officer pursuant to s. 185 of the *Regulations*. Moreover, conditions may be imposed on temporary residents which restrict them from studying in a Canadian college or university, limit their mobility within Canada and, as will be discussed further, limit their ability to work in the country.²²³ When this time period ends, the foreign national must leave the country; this poses particular difficulties for migrant workers who are in the process of

²¹⁴ The *Regulations*, *supra* note 46 at Part 6.

²¹⁵ *Ibid* at Part 7.

²¹⁶ *Ibid* at Part 8.

²¹⁷ *IRPA*, *supra* note 19 at ss 12 and 21.

²¹⁸ Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c 11 [‘the *Charter*’].

²¹⁹ Dauvergne, *supra* note 18 at 494.

²²⁰ The *Charter*, *supra* note 217 at ss 3 and 6.

²²¹ The *Regulations*, *supra* note 46 at s 179(b). One scenario which complicates the decision to issue a temporary resident visa is one in which a foreign national who shows an intention of becoming a permanent resident seeks entry into Canada on a temporary basis. This is known as “dual intent”. In such cases, dual intent does not preclude the decision-maker from issuing a temporary resident visa, so long as they are convinced that the applicant will leave Canada by the end of the period authorized for their stay: Emily Carasco et al, *Immigration and Refugee Law: Cases, Materials, and Commentary* (Toronto: Emond Montgomery Publications Ltd. 2007) at 233. See also Citizenship and Immigration Canada, “OP 11: Temporary Residents” in *Overseas Processing (OP)*, s 5.4, online: Government of Canada <<http://www.cic.gc.ca/english/resources/manuals/op/op11-eng.pdf>>. See also *De La Cruz v. Canada (Minister of Employment and Immigration)* (1989), 26 FTR 285, [1989] FCJ No 111 (QL) (TD).

²²² *Ibid* at s 183(1)

²²³ *Ibid* at ss 183 and 185.

enforcing rights such as reasonable notice or human rights complaints, or who have yet to initiate claims, with participation in these rights-enforcement processes hindered when claimants are not territorially present.²²⁴

In Naveen's experience, for many migrants who are told by recruiters and employers that the NOC C & D stream is a road to permanent immigration to Canada the temporal limitations that accompany their visas come as a shock:

Some will spend thousands of dollars, a generation's worth of savings, to pay a recruiter to bring them to Canada, thinking that they'll bring their spouses and children, and over the long term this will make sense. The opportunities are, from their perspective, endless. But I have to be the bearer of bad news, I have to tell them that they're not on the road to settlement, they're on the road home [for migrant workers in Ontario].

ii. The Work Permit

At the same symposium at Ryerson University, Chris Ramsaroop spoke about his experiences organizing with migrant agricultural workers in rural Ontario as one of the co-founders of Justicia for Migrant Workers. During his presentation he grounded his concern for the rights and well-being of migrant workers in his own personal relationships that he has developed with individual migrants, including those in the construction industry, which led me to ask him more about these experiences not only in his capacity as an organizer, but as a human being.²²⁵

"Justicia is a grassroots collective which works on society's margins," he tells me as we talk at a coffee shop in downtown Toronto; J4MW does not have designated office space.

We're made up of labour activists, students, community organizers and migrant workers, people living on the margins both spatially and socially. Margins because we are working in communities that nobody goes, where there's very little support or advocacy or services, and margins because of us being racialized, we're not in the mainstream.

He tells me that although the bulk of J4MW's work is with agricultural workers, migrants in the construction industry, live-in caregivers, service workers in the food and beverage industry and,

²²⁴ Faraday, *supra* note 3 at 88-89 and 94.

²²⁵ Chris Ramsaroop, "Local Food, Global Labour: Food Justice Needs Migrant Justice" (Speech, delivered at Ryerson University, 2 October 2012).

interestingly, worm pickers living and working in the City of Toronto form a part of their membership, as do some injured agricultural workers.

Chris consistently emphasizes that J4MW's role is not to represent migrant workers but rather to act as an advocacy group which supports migrant workers in representing themselves, with employers, through legal action, and through political mobilization. He cites a history of migrant-led political activity, including a twelve-hour "Pilgrimage to Freedom: Breaking the Chains of Indentureship" where migrants and community members marched for twelve hours from Leamington, Ontario to Windsor, bringing attention to the living and working conditions faced by migrant agricultural workers, as well as direct action in the form of wildcat strikes (largely undocumented in the media) which were possible only through the collective action of migrants:

Is there fear (arising from political action)? Absolutely. It's a contradiction. On one side, the resistance is real, and the direct action and political action is real. But the threat of reprisals is real as well, and reprisals have happened. People face isolation from fellow workers... being fired, repatriated, being sent to another province because you're considered a shit disturber... you hear the idea of slavery, and slavery is not just a symbolic representation. The idea of being tied to your employer, not having rights, there's a level of consciousness.

The terminology that Chris uses in this description of the barriers to political organizing faced by migrant workers – language such as "indentureship", "reprisal", "repatriation", "tied to your employer" and even "slavery" – are all terms which relate to the economic dimension of incorporation of migrants into Canadian production relations, which takes legal form in the issuance of a work permit.²²⁶ Under s. 30 of the *IRPA*, a foreign national, including a person holding a temporary resident visa, may not work in Canada unless authorized to do so under the *Regulations*.²²⁷ This is reiterated in s. 183(1)(b) of the *Regulations* which allows a foreign national to work only pursuant to a work permit issued under Part 11; s. 196 further reinforces

²²⁶ For migrant workers who come to Canada under the SAWP, their stay in Canada is governed by a series of bilateral agreements between Canada and sending countries, although they also work pursuant to an LMO and work permit, and are admitted into Canada on a temporary visa. The LCP is governed by ss. 110-115 of the *Regulations*. The major difference from the NOC C & D stream is provided in s. 110, which guides the process by which a live-in caregiver may attain permanent residency. Prior to that, however, live-in caregivers also work pursuant to a work permit and a temporary resident visa.

²²⁷ This is reiterated in ss. 183(1)(b) and 196 of the *Regulations*, *supra* note 46. Some exceptions are made for groups such as business people and diplomats under s. 186.

this restriction. Prior to applying for a work permit, a foreign national (or a prospective employer) must follow the process to obtain a positive “Labour Market Opinion” [‘LMO’] through Human Resources and Skills Development Canada [‘HRSDC’]. This essentially requires an employer to establish that they were unable to find a Canadian citizen or permanent resident to do the job (including job advertising requirements), that employment of the foreign national is likely to have a positive or neutral effect on the Canadian labour market, and that conditions of employment (including wage) would not be less than those offered to Canadian workers.²²⁸ With a positive LMO in hand, a work permit will then be issued by an officer if it is established, among other things, that the foreign national is capable of performing the work sought, that they have passed a medical exam (where required) and that they will leave Canada at the end of the period that they are authorized to stay.²²⁹

In the case of the NOC C & D stream, as well as the other “low skill” TFWPs, the conditions in the temporary resident visa which accompany the work permit go beyond temporal limitations.²³⁰ What is characteristic about the TFWP is that, pursuant to the

²²⁸ *Ibid* at s 203(3)(a)-(c). A signed contract of employment must be included as part of the LMO application process to ensure that these minimum conditions are met. A standard NOC C & D employment contract is provided by HRSDC which sets out the terms and conditions of employment, although the employer may also submit its own contract so long as the necessary terms are provided for. Among the terms unique to migrant workers is the requirement that employers provide adequate housing or ensure that adequate housing is available to migrant employees, a commitment that recruitment fees will not be recouped from workers, a commitment to provide health insurance in the period during which the worker is not eligible for provincial health coverage, and a commitment to enrol the worker in provincial workers’ compensation programs: see Human Resources and Skills Development Canada, “Employment Contract” online: Human Resources and Skills Development Canada <http://www.hrsdc.gc.ca/eng/jobs/foreign_workers/lower_skilled/index.shtml>. See also Faraday, *supra* note 3 at 32.

²²⁹ *Ibid* at s. 200.

²³⁰ Faraday, *supra* note 3 at 31. The work permit itself contains its own temporal limitations. Under the *Regulations*, a person cannot be issued a work permit if they have accumulated a total of four years working in Canada, unless four years has elapsed since they last held a valid permit: see the *Regulations*, *supra* note 46 at s 200(3)(g)(i). Many refer to this as the “four-in, four-out” rule. In an operational bulletin released by CIC, the “rationale” for the four-in, four out rule is explained:

To prevent FNs who are working temporarily in Canada from losing ties with their country of origin due to prolonged periods of stay in Canada, and to encourage workers and employers to explore appropriate pathways to permanent residence, [the rule] establishes a maximum duration that a TFW can work in Canada.

The major inconsistency within this explanation is that the four-in, four out rule disproportionately affects “low skill” migrants. To begin with, the rule does not apply to “high skill” (NOC 0 or A) migrant workers. As will be discussed below, “high skill” workers also become eligible for federal pathways to permanent residency well before the four-year period expires, while “low skill” workers do not. If the federal government wished for workers to “explore appropriate pathways to permanent residence,” it would offer such pathways to “low skill” workers.

Regulations, the officer issuing the temporary resident visa will impose conditions that restrict the foreign national from engaging in work that is not explicitly permitted in the work permit. Known as a “tied” work permit, these conditions limit the person to working in a specified job, for a specified period of time, in a specified location, for the employer specifically named on the work permit.²³¹ Working outside of those conditions is considered “unauthorized” work, and a migrant worker who loses their job (for any reason, such as refusing work or filing an employment standards claim) is faced with three options: they can go through the complex process of finding a new employer willing to apply for a new LMO and then apply for a new work permit, they can work outside of the authorized terms and breach the conditions of his work permit, or they can leave the country (which he will have to do regardless, once his visa expires).²³² What arises out of this legal framework is what Chris calls a “legally constructed power imbalance” which inextricably connects a person’s employment relationship to their legal status. The references to indentureship and slavery by Chris and Naveen (who refers to the TFWP as “at best modern day indentured servitude, and at worst, modern day slavery”) are echoed by Nandita Sharma who writes that “[i]ndenturing workers therefore is one of the paramount meanings attached to the classification of some people as migrant workers.”²³³ Vic Satzewich characterizes this mode of economic incorporation into the labour market as “unfree labour,” characterized by the use of direct legal and political compulsion used to acquire and exploit labour power, restricting the ability of the worker to circulate the labour market and determine to whom they will provide their surplus labour power.²³⁴ Tanya Basok has argued, to the contrary, that these references to various forms of unfreedom conspicuously overlook “the degree of choice the worker has to enter and remain in the circumstances that render him/her unfree,” meaning that workers are “free” to return to their originating country if they choose.

More research is required to uncover the true rationale behind the rule and the extent to which it is designed to prevent “low skill” migrants from establishing themselves in Canada: see Citizenship and Immigration Canada, “Operational Bulletin 523 – May 22, 2013” online: Government of Canada <<http://www.cic.gc.ca/english/resources/manuals/bulletins/2013/ob523.asp>>.

²³¹ The *Regulations*, *supra* note 46 at s. 185(b).

²³² Faraday, *supra* note 3 at 31.

²³³ Sharma, *supra* note 8 at 433.

²³⁴ Satzewich, *supra* note 10 at 42.

Martin Ruh's argument, discussed in Chapter One, follows along the same lines.²³⁵ Adrian Smith responds that, in the case of workers who find themselves in exploitive employment relationships and continue in those relationships, the conditions surrounding their ongoing "consent" must be examined, including structural forces (such as poverty in originating countries caused by uneven capital accumulation) and the acts of resistance which embody experiences of unfreedom.²³⁶ Smith relies on a line from the Bob Marley song "Concrete Jungle" to illustrate this nature of this unfreedom: "No chains around my feet, but I'm not free. I know I am bound here in captivity."²³⁷

What these advocates and academics have identified in their references to varying degrees of "unfreedom" (from slavery to indentured labour to unfree labour) can be conceptualized as forming part of the national socio-spatial context into which migrant workers enter when they cross the border into Canada. It cannot be contested that this legal framework has the effect of limiting the legal labour mobility of migrant workers within Canada, which, based on the definition of social exclusion employed here, is inherently socially exclusionary; by being codified, potentially enforced, and followed or not followed, it prevents the full participation of migrants in the economic life of the community. Furthermore, while the combination of temporary resident visa and work permit will play differing roles as various socio-spatial structures converge in particular contexts, this legal framework stands as a structure whose potential for facilitating other forms of social exclusion is substantial. Such exclusionary potential arises not only out of the employment relationship, but also out of the legal restrictions imposed on migrant workers' activities in Canada, the temporal limitations imposed by the temporary resident visa, and even the legal classification of a person as "foreign." Moreover, unlike the SAWP which is established through memoranda of understanding between Canada and sending countries, there is no consular oversight of NOC C

²³⁵ Ruhs, *supra* note 125 at 210.

²³⁶ Tanya Basok, "Free to Be Unfree: Mexican Guest Workers in Canada" (1999) 32:3 Labour Cap. Soc. 192 at 194, Adrian Smith, *supra* note 156 at 104.

²³⁷ *Ibid* at 95.

& D.²³⁸ As will be seen further below, as this federal immigration regime is superimposed over provincial legal frameworks and local contexts, the latent structural potential for socially exclusionary processes becomes increasingly apparent.

iii. Pathways to Permanent Residency

The final aspect of the federal legal framework of NOC C & D that warrants attention here is the question of how or whether a migrant worker admitted under that stream can transition from being classified as a foreign national to becoming a permanent resident. What is interesting to note is that within the *IRPA* and the *Regulations*, there is no mention of NOC C & D at any point throughout. “NOC” refers to the National Occupational Classification matrix established not by Citizenship and Immigration Canada [‘CIC’] (who administer the *IRPA* and the *Regulations*) but rather by HRSDC. The NOC matrix is essentially a classification system by which the projected economic contribution of a worker is assessed.²³⁹ The matrix includes five main skill levels, each of which is divided into multiple subcategories to codify some 40 000 occupations. Workers classified as “Skill Type 0” are those in “Management Occupations” within any industry sector. “Skill Level A” workers are found in “Occupations usually requiring a university education”, including managerial occupations. “Skill Level B” workers are those in “Occupations usually requiring college education or apprenticeship training.” Those workers in “Skill Level C” and “Skill Level D”, however, are classified as working in “Occupations usually requiring secondary school and/or occupation-specific training” and occupations where “on-the-job training is usually provided.”²⁴⁰ In other words, NOC codes 0, A and B are classified as “high skill”, whereas NOC codes C and D are classified as “low skill.” Occupations classified under NOC C & D include live-in caregiver work and agricultural work, each with their own sector-specific legal frameworks; all other NOC C & D occupations are legally governed by the

²³⁸ Although the benefits of consular oversight may be highly questionable. For an excellent documentary which highlights the inefficacy of consular oversight, see Min Sook Lee, DVD: *El Contrato* (Toronto: National Film Board of Canada, 2003).

²³⁹ Faraday, *supra* note 3 at 20.

²⁴⁰ Human Resources and Skills Development Canada, “National Occupational Classification Matrix 2011” online: Human Resources and Skills Development Canada <<http://www5.rhdcc.gc.ca/cnp/english/noc/2011/html/Matrix.html>>.

temporary resident visa and work permit. The implications of classification as “low skill” for a migrant worker are significant.

As mentioned above, the three immigration streams through which a foreign national may become a permanent resident are the economic, the family and refugee streams.²⁴¹ There are five federal pathways in the economic stream through which a foreign national may become a permanent resident.²⁴² The first is the Federal Skilled Worker [‘FSW’] class, wherein a person with an arranged offer of employment or work experience in a narrow range of occupations can become eligible for permanent residency if they meet a required threshold on the “point system”, which awards points on the basis of age, official language proficiency, education, and arranged employment.²⁴³ This class is only open to workers in NOC 0, B & A occupations.²⁴⁴ The second stream is the Canadian Experience Class [‘CEC’], a two-step immigration stream open to “skilled workers” (again, based on the NOC matrix) who have worked in Canada for a total of twelve months within the three years prior to the date of application for permanent residency.²⁴⁵ The third stream, classified as “Business Immigrants”, can become permanent residents through the “Investor”, “Entrepreneur” or “Self-employed” classes, applies to those who have funds to invest in the Canadian economy or who will own or manage a business in Canada.²⁴⁶ Finally, as mentioned above, live-in caregivers obtain the opportunity to apply for permanent residency after living and working in the private home of a Canadian employer for two years within a four-year period.²⁴⁷

It should be noted that classification as either “skilled” or “low skilled” also has significant implications for family accompaniment for migrant workers coming to Canada. If the migrant’s family members wish to join her for the duration of her temporary visa, they must

²⁴¹ *IRPA*, *supra* note 19 at ss 12 and 21.

²⁴² See Faraday, *supra* note 3 at 22 to 24 generally, although changes have been made to these streams since Faraday’s report was released in the fall of 2012.

²⁴³ The *Regulations* ss 75-83. The federal government has imposed significant restrictions on the number of FSW applications it will process each year: see Citizenship and Immigration Canada, “Apply – Federal Skilled Workers” online: Citizenship and Immigration Canada < <http://www.cic.gc.ca/english/immigrate/skilled/index.asp>>.

²⁴⁴ *Ibid* at s 75(1)-(2).

²⁴⁵ And met language proficiency requirements: see *ibid* at s 87.1

²⁴⁶ *Ibid* at ss 88-109. CIC is not currently issuing permanent residency under the investor or entrepreneurial classes: see Citizenship and Immigration Canada, “Investors, Entrepreneurs and Self-employed Persons” online: Citizenship and Immigration Canada <<http://www.cic.gc.ca/english/immigrate/business/>>.

²⁴⁷ *Ibid* at s 113(1)(d).

demonstrate that they will have adequate means of support for the duration of their stay in Canada;²⁴⁸ if the principal migrant is unable to support family members alone, spouses or children may have to obtain their own work permit. NOC C & D migrants are disadvantaged on both fronts. Nakache and Kinoshita have established that migrants classified as “skilled” are much more likely to receive a higher income than those who are “low skilled”, and thus the family members of NOC C & D migrants are found to have lesser means of support. The result is that temporary residency visas are far more frequently issued to family members of NOC O, A & B migrants.²⁴⁹ The families of “low skill” migrants are also disadvantaged by current CIC policy for issuing work permits. While spouses of “skilled” workers are eligible to apply for “open” work permits which allow them to work for anybody who will hire them, the family members of “low skill” workers (assuming that they too are “low skill”) must find an employer with a positive LMO and apply for a tied work permit.²⁵⁰ Nakache and Kinoshita argue that it is very difficult, although not inconceivable, for the family of a NOC C & D migrant to join them in Canada.²⁵¹

The significance of there being no mention of migrant workers in NOC C & D occupations in the *IRPA* or its *Regulations* is that within the federal legal framework there is no explicit pathway through which a “low skill” migrant worker can obtain permanent residency.²⁵²

²⁴⁸ *Ibid* at s 183(2)(a).

²⁴⁹ Nakache & Kinoshita, *supra* note 7 at 33.

²⁵⁰ Citizenship and Immigration Canada, “Prepare for Arrival – Work in Canada” online: Government of Canada <<http://www.cic.gc.ca/english/work/arriving.asp#a6>>.

²⁵¹ Nakache & Kinoshita, *supra* note 7 at 33.

²⁵² There may be a possibility of a migrant worker establishing permanent residency through the discretionary stream of humanitarian and compassionate grounds [‘H & C’], although successful applications are rare and the filing of an H & C application does not prevent the issuance of a removal order. H & C’s are an exception to the general rule that applications for permanent residency must be made outside of the country: *IRPA*, *supra* note 19 at s 11. Applicants must satisfy the decision-maker that their personal circumstances are such that being required to apply for permanent residency from outside of Canada would result in “unusual, undeserved or disproportionate hardship”; “unusual” is described as a hardship which is not contemplated within the *IRPA* or the *Regulations*: Citizenship and Immigration Canada, “IP5: Immigrant Applications in Canada made on Humanitarian and Compassionate Grounds”, s 5.10, online: Government of Canada <<http://www.cic.gc.ca/english/resources/manuals/ip/ip05-eng.pdf>> [‘IP5’]. Interestingly, and most relevant to this thesis, is that establishment in Canada is a factor which decision-makers may consider in assessing an H & C application. This includes the applicant’s history of stable employment, a pattern of sound financial management, the applicant remaining in one community throughout their stay, taking studies which show integration into Canadian society and a good civil record in Canada: IP5 at s 11.5. This consideration clearly implicates social inclusion/exclusion, although the complex questions surrounding strategies by which migrant workers might successfully assert H & C claims is beyond the scope of this thesis.

The fact that, at least federally, NOC C & D migrants are constituted as neither permanent residents nor future permanent residents also forms part of the national socio-spatial context (as a legal measure) into which low-skill migrants enter when they come to Canada.²⁵³ This is not, however, the end of the story. The *Regulations* also provide a stream through which a foreign national may become a permanent resident through nomination by the province in which they reside, provided that they intend to continue residing in that province.²⁵⁴ Nominations are made by way of certificate, issued by the provinces in accordance with agreements reached between the federal and provincial governments. What arises, therefore, is a patchwork of Provincial Nominee Programs [‘PNPs’] wherein authority is delegated to each province to determine its own rules by which foreign nationals (including migrant workers) may become permanent residents. The national socio-spatial legal structure of NOC C & D is defined by the temporary visa, a tied work permit, no consular oversight and no federal pathways to permanent residency. In order to illuminate socially exclusionary or inclusionary processes and the structural role that law plays in those processes, we must begin to particularize and overlay the localized socio-spatial contexts that the individual migrant worker enters when they cross the Canadian border.

C. Provincial Legal Structures: Employment Standards Legislation across Canada

While federal immigration law provides the overarching socio-spatial legal structure into which migrant workers enter when they cross the border into Canada (as does other federal law, such as the criminal law and the constitution), migrant workers also enter into a provincial legal (and social) context as well as a local social context which also play a structural role in shaping experiences of social exclusion or inclusion. Two aspects of these provincial legal structures are explicitly referred to in the *IRPA* and the *Regulations*, namely that migrant

²⁵³ It should not be assumed that every migrant worker who comes to Canada wants to settle in Canada on a permanent basis, and so the way in which this will affect each individual migrant must be considered when determining whether social exclusion (if it is found to exist) is problematic or not. Recall my discussion of agency and its relation to the social exclusion framework above: see Burchardt et al, *supra* at 229.

²⁵⁴ The *Regulations*, *supra* note 46 at s 87. For how long exactly it is not specified, and under the *Charter* cannot be specified as this would be an infringement on s. 6(2) mobility rights.

workers (and their employers) are to be legally subject to the same labour and employment standards, health and safety, housing and social insurance regimes as Canadian workers,²⁵⁵ and that authority is delegated to the provinces to nominate migrant workers (of all skill levels) for permanent residency through PNPs.²⁵⁶ There is, therefore, a patchwork of differential legislation across provinces which sets out the employment-related rights of all workers (including migrants), access to public health care, landlord-tenant relations and applicability of social insurance schemes, as well as the conditions by which a migrant may be nominated under the PNP to become eligible for permanent residency. In this section I focus on employment standards legislation, relying on the narratives of advocates to provide a rough overview of provincial employment standards regimes as they are generally found across Canada.

i. Provincial Employment Standards Legislation

After speaking to Chris Ramsaroop about his experiences organizing with migrant workers to promote their social inclusion in Canada, he directed me to Sonia Singh of the Workers' Action Centre ['WAC'] and another founding member of J4MW as a person with a particular focus on employment related rights of migrants and other workers. "We are a centre where we fight for decent wages and working conditions and to build the leadership of low-wage workers. We are a centre led by its members", Sonia tells me as we speak in the central meeting room of WAC's offices on the second floor of an office and residential building just north of downtown Toronto. A series of tables forms a rectangle in the middle of a room with a chalkboard and easel, both covered in writing and diagrams from previous planning sessions. A stand with flyers and pamphlets concerning workers' legal rights is placed along the wall, and a giant printed ten-dollar bill rests in a corner, a remnant from a demonstration demanding a higher minimum wage. Windowed French doors lead directly off the central meeting room to offices that are shared by WAC staff. "We have a broad perspective, although sometimes that can make things difficult for us. We face the challenge of focusing on broad employment standards for all low-wage workers, raising the floor in Ontario rather than focusing on one

²⁵⁵ See the *Regulations*, *supra* note 46 at ss 200-203.

²⁵⁶ *Ibid* at s 87.

specific sector or group of workers or community.” Aside from live-in caregivers, who WAC directs to the Caregivers’ Action Centre, Sonia estimates that perhaps twenty migrants in NOC C & D occupations have come to the centre, including people from the restaurant, meat packing and food processing industries. “There are some, but it’s not a huge percentage.”

Sonia tells me the story of a former migrant worker who has since been able to establish permanent residency; he came seeking WAC’s support only after getting his permanent residency, feeling that he could not speak out without permanent status.²⁵⁷ This person had not been paid the \$15.00 per hour that was promised to him in his employment contract for work in an Ontario restaurant, and after factoring in the many hours of overtime that he was expected to work (sixty to seventy hours a week, feeling that refusal of work would compromise his status) he was not even making minimum wage. He was also supplied with a cold room in a basement, and was barely able to pay for the rent charged by the employer. Another restaurant worker in Ontario, the first NOC C or D migrant to come to WAC, seriously cut his finger on the job. His employer would not allow him to leave to seek medical attention and pushed him to keep working; after two weeks on the job he quit and was faced with the choices of working illegally, not working at all and slipping into poverty, or going back to his country of origin. In the latter case, WAC has helped the person to claim unpaid wages and to file a ministry of labour complaint; in the former case, WAC has helped the person attain pro bono legal counsel to represent him for a claim of over \$25 000 in unpaid wages. The former has also become a highly active member of WAC and public advocate for the rights of migrant workers.

Sonia also points to housing-related concerns as issues which can lead to the social exclusion of migrant workers, often arising when migrant workers live in housing provided by employers. In these cases, legislation protecting employee privacy is often simply disregarded. She tells me about a migrant woman from Thailand who lived in employer-provided housing with a number of co-workers. One of those co-workers was monitoring and reporting back to the employer what was happening in the home; “[i]t allows for the extension of the workplace

²⁵⁷ His story is also told in Fay Faraday’s report. As I will discuss further, a remarkably small number of NOC C & D migrants have contacts within the legal and activist community through which they can push for the enforcement of their legal rights.

into the home... there's no space that's free from that kind of surveillance." A list of rules, translated into Thai, was posted; they included restrictions on having people sleep over. When the woman developed a relationship with a man in Canada, she was terminated from her employment. WAC has successfully supported her in claiming employment insurance.²⁵⁸ Chris echoes this concern about housing:

The intimate lives of migrants, their bodies and sexual lives, are highly regulated. I've seen workers sent home for having relationships with Canadian women, women or men not allowed to have sleepovers, curfews being set. The threat of repatriation is used to govern their sexual relations. They have no legal right to do it but the law makes it possible for employers to exert that kind of control.

Naveen is perhaps more blunt: "I've heard stories of employers, governments saying 'you can't have sex', 'you can't have alcohol', 'you can't be up past a certain time', 'lights off at a certain time', they're being treated like they're prepubescent boys, it's inhumane."

Migrant workers are not only legally entitled to these employment-related rights which protect them, as with any other worker, from unscrupulous employers. They are also, theoretically, legally entitled to social benefits including provincial health care coverage and workers' compensation. Chris tells me that these benefits are often elusive:

You're supposed to be treated equally as a Canadian as long as you're on Canadian soil, but your time is constricted, you're not allowed to be on Canadian soil because of your work permit... In so many cases where a worker is injured we try to get them to stay as long as possible, but in 99% of those cases, they go back home, they get denied benefits and they're never able to work again.

a. Provincial Employment Standards Legislation on the Books

All of these accounts of migrants' legal rights being violated and vindicated are underpinned by the fact that migrant workers *have* legal rights under provincial employment and labour acts, privacy acts, human rights codes and other social insurance legislation, but that the federal legal framework imposes barriers to accessing them.²⁵⁹ It is not necessary to provide an in-depth review of these rights here, especially across provinces, but it is necessary to

²⁵⁸ Which is a federal, not a provincial, benefit.

²⁵⁹ While I have touched on it above, employment insurance is the one major federal benefits program that implicates migrant workers.

illuminate the structural role that provincial law plays in the social experiences of migrant workers and the people living in a society.²⁶⁰ Namely, the variety of provincial legislation which is most directly relevant to this discussion provides a socio-spatial structural framework which seeks to govern the relationship between employers and employees. Barriers which prevent a person from availing himself of these structural elements conceivably risk warping this relationship in such a way that the individual is prevented from fully participating in the social, political or economic life of the community.

Harry Arthurs writes that the earliest labour standards legislation in the UK reflected “...widespread public sentiment, given force by legislation, that no employer should be allowed to impose, and no worker should be obliged to endure, working conditions that fell below the standard that a decent society would tolerate.”²⁶¹ Arthurs points to a division in the literature concerning labour standards which arises between pro-worker activists and academics (unions, worker’s advocates, workers themselves and the like) and management sympathizers (certain industrial relations scholars, pro-industry think tanks and employers, among others). The “labour” camp generally characterizes the employment relationship as an inherently imbalanced power relationship rather than one of equal contracting parties (with the balance of power in the hands of the employer), whereas the “management” camp tends to stress the importance the employment relationship’s “contractual, consensual, bilateral character.” Regulation of workplace relations emerges to offset this power imbalance, to varying degrees, while allowing the principles of free contract and market regulation to operate beyond those minimum terms.²⁶² While Arthurs doubts the ability of this legislation to fully ensure the realization of basic workplace standards, arguing elsewhere (in relation to the employment relationship) that “...state law at most provides the framework or constitution of a normative

²⁶⁰ Needless to say, migrant workers are subject to all of the laws of the province in which they are present. It is not necessary to discuss all of these varied regimes here, but rather to focus on the regimes in which migrant workers are most commonly implicated in the literature, in my discussions with migrant workers and advocates, and in common sense.

²⁶¹ Federal Labour Standards Review (Comm. Harry W. Arthurs), “Fairness at Work: Federal Labour Standards for the 21st Century” online: Human Resources and Skills Development Canada <http://www.labour.gc.ca/eng/standards_equity/st/pubs_st/fls/pdf/final_report.pdf> at 5.

²⁶² *Ibid* at 81.

regime whose substantive content is then contextually determined”,²⁶³ at its heart, employment law sets out to offset (but not to overturn) a power imbalance in the relationship between employers and employees by providing employees with a floor of theoretically enforceable legal rights.

A body of legislation has developed throughout the industrial age which collectively provides a legal structural framework that, in theory if not in practice, governs the relationship between employers and employees.²⁶⁴ Employment standards acts provide individual employees with a floor of rights, what might best be conceived of as minimum contractual duties owed from an employer to employees. Terms falling below these standards will not be enforced by courts (even if ostensibly accepted by the employee). These include terms such as minimum wage, overtime pay, vacation time, break times and termination conditions. Where an employee raises concerns about issues like unpaid wages, refusal of breaks or termination processes, employment standards legislation is implicated. Within various provincial employment standards acts, however, a number of occupations are exempted from coverage under the act; this often includes agricultural work and domestic work, as well as managerial professions. Generally, however, this legislation applies to all occupations.

In a similar vein, occupational health and safety legislation is created to secure workers from risks to their safety, health and welfare that arise in the workplace. This legislation generally sets out the duties of employers and employees to take reasonable precautions when engaging in dangerous work, and provides a right for employees to refuse to perform dangerous work. Dereliction of these duties may also lead to sanctions. In the event that a worker is injured in the course of his employment, workers’ compensation legislation provides a statutory public insurance scheme whereby an employee relinquishes his right to sue his employer for liability in tort in exchange for the assurance that he will receive adequate but limited compensation.²⁶⁵ It should also be noted that labour relations regimes, while perhaps

²⁶³ Harry W. Arthurs, *supra* note 94 at 26.

²⁶⁴ I will refer to this legislation collectively as “employment standards legislation” or “employment standards regimes”, whereas when I intend to refer specifically to legislation enforcing minimum employment terms I will refer to “employment standards acts.”

²⁶⁵ Richard A. Epstein, “The Historical Origins and Economic Structure of Workers’ Compensation Law” (1981-82) 16 Ga. L. Rev. 775 at 800.

not as directly relevant to an individual employee, provide a level of protection for workers to organize and engage in collective action, and thus an individual worker may enter a provincial context and a workplace where the effects of labour relations legislation are felt more or less strongly. While the precise legal frameworks will vary across Canadian jurisdictions, there are no radical departures from these core principles.

While employment standards acts, workplace health and safety, and workers' compensation legislation have a long history in labour and employment law, more recent developments have been made in the areas of privacy law and human rights codes. Canada's *Personal Information Protection and Electronic Documents Act*²⁶⁶ applies in all provinces except for Alberta and British Columbia.²⁶⁷ *PIPEDA* establishes a balance between the privacy rights of employees and the reasonable interests of employers in collecting and using "personal information" of employees, and includes activity such as employee surveillance, monitoring and information gathering.²⁶⁸ Subject to certain specified exceptions in its application, *PIPEDA* permits an organization to "...collect, use or disclose personal information only for purposes that a reasonable person would consider are appropriate in the circumstances," with reasonableness generally determined in relation to the purpose for which the information was sought.²⁶⁹ A complaint may result in an investigation by the federal Privacy Commissioner, the issuance of a report, and remedies through the courts.²⁷⁰ Some jurisdictions also provide recourse for privacy violations through common law or statutory torts.²⁷¹ Finally, provincial human rights codes offer protection to workers from discrimination on the basis of protected characteristics, such as age, race, sex, sexual orientation, religion and disability (although protected characteristics vary to a certain degree among jurisdictions). This applies to discrimination in the process of hiring, throughout the employment relationship, and upon termination. It requires employers not to take actions which affect employees disproportionately based on code characteristics, and to accommodate employees who are so

²⁶⁶ SC 2000, c 5 [*'PIPEDA'*].

²⁶⁷ Each of which have their own privacy legislation.

²⁶⁸ *PIPEDA*, *supra* note 265 at s 3. One may or may not agree with the balance that *PIPEDA* strikes, but at a minimum it establishes some right to privacy for employees.

²⁶⁹ *Ibid* at s 5(3).

²⁷⁰ See *ibid* at Division 2 generally.

²⁷¹ See *Jones v. Tsige*, (2012) ONCA 32 and *The Privacy Act*, CCSM c P125.

disadvantaged, up to the point of undue hardship. Discrimination in the workplace which takes the form of harassment or violence (between employers and employees, or among employees) is also often addressed in occupational health and safety legislation.

b. Employment Standards Legislation in the Literature on Social Experiences of NOC C & D Migrant Workers

The small body of literature which has considered the social experiences of NOC C & D migrant workers has focused primarily on assessing migrants' access to these provincial legal frameworks, although some has also examined migrants' access to the federal employment insurance program. This literature consistently points out that while employment standards legislation formally applies to migrant workers (across skill levels and industries), there are often practical and legal barriers preventing access to these regimes which go beyond fear of reprisals from employers. In a study conducted for the Institute for Research on Public Policy ['IRPP'], Delphine Nakache and Paula Kinoshita assess Canada's public policy stance towards the "integration" of migrant workers into Canada, seeking to determine whether Canada's migrant worker programs have the effect of integrating, preventing integration, or being indifferent towards the integration of TFWP workers. One of the "mechanisms" of integration that Nakache and Kinoshita rely upon is the realization of employment-related rights.²⁷² In the area of the employment relationship, Nakache and Kinoshita found that migrant workers (across sectors and skill levels) encountered barriers to enforcing employment contracts,²⁷³ enforcing legal employment standards rights, and receiving workers' compensation. Nakache and Kinoshita point to the "intimidating" and "bureaucratic" process of filing an employment standards claim, which affects all workers but disproportionately affects migrants; a representative from Alberta's Ministry of Immigration, Employment and Industry shared that of

²⁷² Nakache & Kinoshita, *supra* note 7 at 7. Another one of the mechanisms relied upon is opportunities for family reunification, where Nakache and Kinoshita found that TFWP policy belies a clear desire to promote the integration of "high skill" workers but to prevent the integration of "low skill" migrants: see 35.

²⁷³ For instance, while template for the NOC C & D employment contract is provided by the federal government, the government will not enforce the contract as employment rights are a matter of provincial jurisdiction. The willingness of provincial employment standards boards to adjudicate such a claim is elusive as it has been characterized as a "form" rather than a contract within provincial boards. The only option available, then, is litigation through the courts, often made impossible by the length of time required to adjudicate a case and the worker's temporary visa. See Fudge & MacPhail, *supra* note 9 at 868.

the 4000 complaints that were currently under investigation, only 18 were from migrant workers.²⁷⁴ This is exacerbated by a language barrier which arises because all of the documents required to submit a claim (in Alberta) are available only in English; often migrant workers are also unaware of their rights.²⁷⁵ These barriers arise in addition to the risk that the migrant worker will lose her job when a complaint is filed. In other words, the “complaint driven process” is found to present *its own* barriers to the enforcement of statutory employment rights for migrants.

Nakache and Kinoshita also consider the barriers faced by injured migrant workers seeking to claim workers’ compensation. Again, in addition to their finding that fear of losing employment discourages many migrants from reporting claims to workers’ compensation boards, Nakache and Kinoshita found that systemic barriers internal to the claims process also prevent migrant workers (across skill levels) from attaining compensation. While employers may be obliged to display posters telling workers how to claim workers’ compensation benefits, provincial laws do not generally require those posters to be in the first language of the employees in the work place.²⁷⁶ Certain systemic features of workers’ compensation legislation also further prevent injured migrants from claiming compensation. While workers’ compensation regimes consistently state it as part of their purpose to return injured workers to the workforce, either through their former job or a new job suited to their needs, the tied nature of a migrant’s work permit poses a barrier to securing alternative employment. Workers’ compensation regimes, however, are concerned with *physical* impediments to work, not legal impediments, and it is common practice for compensation boards to deem migrants able to work and stop payment of benefits despite these legal obstacles.²⁷⁷ Similar systemic hurdles make it difficult for migrant workers to claim federal employment insurance, requiring them to

²⁷⁴ Nakache & Kinoshita, *supra* note 7 at 24.

²⁷⁵ *Ibid* at 25. This is echoed in Faraday, *supra* note 3 at 82.

²⁷⁶ *Ibid* at 26.

²⁷⁷ Delphine Nakache, “The Canadian Temporary Foreign Worker Program: Regulations, Practices and Protection Gaps” in *Producing and Negotiating Non-Citizenship: Precarious Legal Status in Canada*, Luin Goldring & Patricia Landolt (eds) (Toronto: University of Toronto Press, 2013) (in press) at 15. Chris Ramsaroop referred to this practice as “deeming” and also shared stories of Ontario’s Workplace Safety Insurance Board finding that suitable employment was available in the region where a migrant worker had been injured – despite the fact that the worker had been repatriated.

be “available to work without restrictions”, despite paying into this scheme.²⁷⁸ The work of Nakache and Kinoshita and Fay Faraday’s 2012 report prepared for the Metcalf Foundation do not examine the civil society relations of NOC C & D migrant workers and the interconnectedness between socio-spatial legal structures, other social structures and broader processes of social exclusion.

c. Employment Rights in the Literature on Social Exclusion and Inclusion of Migrant Workers Generally

Conceptualizing provincial employment legislation as part of the socio-spatial structural context into which migrant workers enter when they cross the border to work in Canadian workplaces is helpful because it illuminates the articulation between the federal legal framework, the more particular and localized provincial legal frameworks, and the highly particular local context in which society is *experienced* and where processes of social exclusion and inclusion are felt by individuals. Reading Preibisch, Hennebry and Basok’s accounts within this social exclusion framework, the processual character of social exclusion is brought into focus; federal legal structural factors create barriers to the enforcement of provincial legal rights, which warp power relationships and create further barriers to migrants’ participation in the social, political and economic life of the community.²⁷⁹ Social exclusion from local communities, a product of local socio-spatial structures such as xenophobic attitudes and physical spatial segregation, exacerbates the difficulties that migrants face in claiming legal rights and engaging in political advocacy. The intervention of civil organizations has helped (somewhat, according to Preibisch) to alleviate these exclusionary processes and foster processes of social inclusion, whereby migrants are informed of their provincially-bestowed legal rights and supported in enforcing them; the power balance between employers and migrant workers is adjusted to something closer to what a citizen or permanent resident

²⁷⁸ *Ibid* at 8.

²⁷⁹ Adrian Smith’s diagnosis is even more dire. Contesting Basok’s assertion that knowledge of legal rights will lead to enforcement of legal rights, Smith argues that many migrant agricultural workers feel so disempowered by the legal system that they are hesitant to rely on the same system that organizes their exploitation to provide for their protection; they must find their own means of resistance: see Adrian Smith, *supra* note 156 at 105.

worker would experience, giving migrants more freedom to participate in the social life of the community.

Understanding law as a structural element of national and provincial socio-spatial contexts which interact with particular local contexts also allows connections to be drawn between the experiences of social exclusion and inclusion reported among farmworkers and those of live-in caregivers. Daiva Stasiulis and Abigail Bakan discuss processes by which live-in caregivers have “negotiated citizenship” or, it might be said, alleviated the pressures of exclusionary legal and social structural elements. Stasiulis and Bakan characterize the LCP as a “systematic reproduction of migrant domestics as non-citizens within the territories where they work and reside (which) renders them in any meaningful sense stateless as far as access to state protection of their rights is concerned”, pointing primarily to the federal legal requirement of the LCP that live-in caregivers work and reside in the homes of their employers.²⁸⁰ This legislated power imbalance has predictably led to widespread violations of contracts and provincial employment standards legislation in the form of unpaid wages, unpaid overtime and verbal harassment, as well as the intrusion of the employment relationship into the private lives of live-in caregivers. Stasiulis and Bakan report employers not providing live-in caregivers with an adequate room or with locks on their doors, forbidding them from having guests or using the phone, and Faraday tells the story of a live-in caregiver being forced to share a room with a child she cared for.²⁸¹ The live-in requirement effectively collapses any privacy rights that an employee would otherwise have against an employer. Miriam Elvir, a former live-in caregiver and now a migrant rights activist, writes about parents going on vacation, leaving her alone to care for children for up to a week at a time, and forcing her to wear a uniform and serve guests when they came over. “We will never be part of the family,” she writes, “even if we are told that we are.”²⁸²

The interplay between federal and provincial legal structures creates barriers to live-in caregivers developing ordinary (in relation to the mainstream) social or romantic ties, enforcing

²⁸⁰ Bakan & Stasiulis, *supra* note 22 at 121.

²⁸¹ *Ibid* at 129 and Faraday, *supra* note 3 at 17.

²⁸² Miriam Elvir, “‘The Work at Home is Not Recognized’: Organizing Domestic Workers in Montreal” in Abigail Bakan & Daiva Stasiulis, eds, *Not One of the Family: Foreign Domestic Workers in Canada* (Toronto: University of Toronto Press, 1997) at 151.

their legal rights, or engaging in political action to improve their situation, in keeping with the dominant understanding of social exclusion. The acts of “negotiated citizenship” reported by Stasiulis and Bakan, however, are also processes of social inclusion which emerge out of organized collective action. In particular, they report groups of live-in caregivers collectively renting an apartment where they can go to get privacy when they are not working and to reclaim a degree of autonomy, and Elvir discusses the work of L’Association pour la Défense des Droits du Personnel Domestique in Montreal, which has effectively developed its own placement agency to provide support to domestic workers who lose their jobs (for instance they may be fired or the elderly person who they care for dies) or who are facing difficulties with employers.²⁸³ This has provided domestic workers with the information and support to stand up for their legal rights and to establish social networks which combat the isolation that may arise as a result of the unique socio-spatial structural context presented by live-in domestic work. As will be discussed in the next chapter, such organization in the context of NOC C & D has been far more difficult.

ii. Concluding Remarks

Naveen Mehta describes the cases which arise under employment standards legislation as:

...straightforward, winnable cases. The problem is ensuring that individuals have some knowledge to get to these advocates. For example, look at the Workers’ Action Centre wage theft campaign. They’re not complex legal issues, you just do the math, ‘you worked this many hours, you got paid this much, this is how much you should have been paid.’

In the experience of these advocates, the articulation between federal and provincial legal structures creates significant barriers to the enforcement of employment standards legislation, which lays the foundation for processes of social exclusion to take place in addition to the

²⁸³ *Ibid* at 147. To the contrary, Felicita Villasin discusses the general exclusion of live-in caregivers from the women’s liberation movement, and the struggles of groups like the Toronto-based INTERCEDE to unite these movements: see Felicita O. Villasin & M. Ann Phillips, “Falling Through the Cracks: Domestic Workers and Progressive Movements” (1994) 14:2 *Canadian Women’s Studies* 87.

inherently exclusionary qualities of the federal legal framework. Those barriers are not absolute, however, as Sonia Singh tells me that:

Within the context of the program and the restrictions it imposes, some actions are huge acts of resistance. Like the woman who had her boyfriend coming back to her home, is that an act of resistance? Just to walk in WAC's door, remember the history behind that action and the resistance it takes just to get to that point. And as they start to fight for their rights and protections it becomes even harder.

D. Provincial Legal Structures: Manitoba's Provincial Nominee Program

While the *IRPA* does not provide any explicit pathways to permanent residency for migrant workers classified under NOC C & D occupations, it allows for the creation of federal-provincial agreements whereby individual provinces can determine selection criteria for migrants based on their own labour needs and nominate migrants for permanent residency (provided that they meet federal health and safety requirements).²⁸⁴ This has resulted in a national patchwork of PNPs, as each province has developed its own unique criteria and processes for nominating migrants within the broad authority conferred to it by the federal government.²⁸⁵ Some provinces, including Manitoba, offer certain NOC C & D migrants pathways to permanent residency through their respective PNPs after spending a period working in the province; other provinces, such as Ontario, do not.²⁸⁶ Some PNPs set targets and caps for the number of migrants that they will nominate within certain industry sectors, although no caps are set by the federal government.²⁸⁷ The time periods for which migrants must live and work in the province before becoming eligible to apply through a PNP also varies between provinces, generally from six to nine months, with processing times taking an additional sixteen to thirty-six months before permanent residency is finally granted by CIC. In

²⁸⁴ The *Regulations*, s 87. Selection of criteria is free from the requirements of the Federal Skilled Worker Program's point system.

²⁸⁵ Nakache, *supra* note 276 at 19. Nakache points out that this means that two otherwise identical migrant workers would have different opportunities for permanent settlement based on the province of their employment.

²⁸⁶ Faraday, *supra* note 3 at 102. British Columbia, Alberta, Saskatchewan, Manitoba, Nova Scotia, Newfoundland and Labrador, and Yukon offer pathways to permanent residency for certain "low skill" migrant workers in specific occupations. In Ontario, New Brunswick and PEI there are no such opportunities.

²⁸⁷ Jamie Baxter, *Precarious Pathways: Evaluating the Provincial Nominee Programs in Canada* online: Law Commission of Ontario <<http://www.lco-cdo.org/baxter.pdf>> at 20.

all cases, however, PNPs are employer driven, requiring migrants to demonstrate that they have secured full-time employment in a long-term job; the implications of losing one's job during the application process, however, will vary between provinces. Employer and industry interests also play a key role in setting provincial migration targets and caps.²⁸⁸ This pattern of foreign nationals coming to Canada and working for a period of time before becoming eligible for permanent residency, as also seen in the Canadian Experience Class and the LCP, is commonly referred to as two-step migration.²⁸⁹

The structural role of PNPs in processes of social exclusion and inclusion will vary across provinces, and even within a particular provincial context NOC C & D migrants will be affected differently where industry sector-specific arrangements offer differential access to permanent residency, and even place migrant workers in competition with one another for a limited number of nominations.²⁹⁰ Unlike employment standards legislation, which may vary across provinces in precise requirements or on technical matters but rarely departs from fundamental core principles, the character of each individual PNP has significant implications for the impact of the national socio-spatial legal structure of the TFWP on the social experiences of migrants. Namely, establishing permanent resident status lifts the national socio-spatial legal structural restraints that accompany the NOC C & D stream, and the process by which status is established through the PNP have implications for migrants' social experiences. It is therefore appropriate to engage in a more specific examination of the PNP and its structural role in the particular field under investigation. In this section I consider Manitoba's PNP in its social context and provide an overview of its essential characteristics. I then move on to consider the structural implications of PNPs (more generally) and two-step migration for experiences of social exclusion and inclusion. I focus on Manitoba's PNP because it is the province in which my field research was conducted, allowing me to better set the social and legal context in which participants from Brandon are living.

²⁸⁸ *Ibid* at 23.

²⁸⁹ Naomi Alboim, *Adjusting the Balance: Fixing Canada's Economic Immigration Policies* (Toronto: The Maytree Foundation, 2009) at 49 and Nakache & Kinoshita, *supra* note 7 at 31.

²⁹⁰ Nakache & Kinoshita, *supra* note 7 at 35.

i. The Social and Legal Context of Manitoba's Provincial Nominee Program

Prior to 1998, immigration to Manitoba had become relatively stagnant, with the province serving as the destination to only 1.9% of immigrants to Canada.²⁹¹ Of course Manitoba was initially populated by Indigenous peoples, many of whom, upon contact and intermixing with British and French fur traders in the late 18th Century, developed a distinct cultural group which is now recognized in the Canadian constitution as the Métis. European agricultural settlers began to arrive starting in 1812, and, amid backlash from the French-speaking, biracial and Roman Catholic Métis (and an eventual compromise in the form of the *Manitoba Act, 1870*) the province joined Confederation in 1870.²⁹² Seeking to develop the province's agricultural industry, the Canadian government implemented a proactive immigration policy to attract new immigrants to the province, further stimulated by the extension of the Canadian Pacific Railway into the province in 1881. Essentially giving away land on the condition that the new settlers would live on it and break it over a period of several years, Manitoba attracted many poor and unemployed people from Eastern Europe and Great Britain seeking to escape the poverty of urban slum life. Following the Second World War, however, immigration to the province began to slow to a trickle due to the province's lack of economic diversity (focused primarily on agriculture and mining) and rural-to-urban migration which filled most of the job openings in Winnipeg, the province's major urban centre. With the loss of the land incentive and fewer economic opportunities than in Ontario, British Columbia or Alberta, Manitoba struggled to attract immigrants away from Canada's largest cities. In the meantime, the need to attract immigrants increased as the population aged and as young people left for larger Canadian cities. Between 1976 and 1998, however, the origins of the newcomers changed and their diversity increased from what they had been in the early days of Confederation, with an increasing number of East Asian, South East Asian and South Asian people settling in Manitoba. This had a significant impact on the demographics of the province.²⁹³ 1998 marked a turning point in this trend.

²⁹¹ Tom Carter & Benjamin Amoyaw, "Manitoba: The Struggle to Attract and Retain Immigrants" in John Biles et al, eds, *Integration and Inclusion of Newcomers and Minorities across Canada* (Montreal: McGill-Queen's University Press, 2011) at 173.

²⁹² *Ibid* at 166.

²⁹³ *Ibid* at 170.

Manitoba was among the first provinces to sign a bilateral agreement with the federal government pursuant to the newly-introduced Provincial Nominee class of economic immigrant. Allowing the province to determine its own criteria for nominating newcomers for permanent residence, Manitoba's PNP was developed not only to fill labour shortages in specific sectors but to increase population growth generally, both in urban and rural centres. While the province could not limit the movement of immigrants once they established permanent residency due to *Charter* mobility rights, the selection criteria for provincial nomination were constructed in such a way as to favour immigrants who were more likely to build economic and community ties, and thus to stay in the province.²⁹⁴ Establishing easier selection criteria than the other federal economic immigration streams, Manitoba's PNP incentivizes immigration to smaller provinces that might otherwise be considered less attractive. The impact of the PNP on immigration to Manitoba has been significant; it now serves as the primary tool for increasing immigration to Manitoba, accounting for seventy-five percent of immigration to the province in 2009 and raising Manitoba's share of total immigration to Canada from 1.9% of immigrants to 5.4%. This has also had the effect of increasing immigration to centres outside of Winnipeg, including Brandon.²⁹⁵ Officials from Maple Leaf Foods have expressed support for providing pathways to permanent residency for low skill workers in Brandon.²⁹⁶

Importantly in this discussion, Manitoba's PNP applies to workers of all skill levels (except for live-in caregivers), and does not impose industry-sector-specific caps on the number of migrants nominated, although NOC C & D migrant workers must work in the province for at least six months before being eligible to apply, whereas "high skill" migrants may apply prior to their arrival in Canada.²⁹⁷ A NOC C & D migrant worker's application for permanent residency through Manitoba's PNP (and the "employer direct" stream) proceeds in two parts, as it does with all PNPs; they must first receive a nomination certificate from the province, at which point they can apply for permanent residency through CIC. There are three main aspects to the

²⁹⁴ *Ibid* at 173.

²⁹⁵ *Ibid* at 174.

²⁹⁶ See CBC News, "Hog Workers Approve Contract that Aids Foreign Workers" online: CBC News <<http://www.cbc.ca/news/canada/manitoba/hog-workers-approve-contract-that-aids-foreign-workers-1.945076>>.

²⁹⁷ Nakache & Kinoshita, *supra* note 7 at 36.

provincial application process.²⁹⁸ First, after living and working in the province for a period of six months, working continually for the same employer (named in her work permit) and with a formal offer of full-time permanent employment from that employer, the person becomes eligible to apply for nomination by the province. Application is through an online process.²⁹⁹ Second, during the application process the applicant must establish that they have the necessary education, training, language skills and work experience to do the job that they have been offered. While there used to be very little emphasis on language ability at the provincial level, as of July 2012 CIC now requires NOC C & D migrants to demonstrate that their language skills meet a minimum standard.³⁰⁰ Finally, applicants must establish their “adaptability”, which includes proof of minimum financial savings (\$10 000 for the principal applicant and \$2000 for accompanying dependants) and, most unique to Manitoba, the submission of a “settlement plan.” The settlement plan requires applicants to demonstrate their reason for choosing Manitoba as their immigration destination, their plan for settling in a particular Manitoba community, the strength of their community ties and connection to Manitoba, and the steps they are taking to ensure their immediate and long-term employment in the province.³⁰¹ Of principal concern to the province is not so much the objective strength of a person’s community ties, but rather that their connection to Manitoba is stronger than their connection to any other province. The criteria are constructed to maximize the likelihood that successful applicants will stay in Manitoba once permanent residency is established.³⁰² Highlighting the unique structure of Manitoba’s PNP, Nakache and Kinoshita note that “...nowhere else in Canada is it possible to refer to temporary foreign workers as ‘transitional workers’, as the Manitoba government and some researchers do.”³⁰³ Once the provincial nomination certificate is issued (usually between four to six months after the application is submitted) then two important developments arise. First, the migrant worker may apply for permanent residency

²⁹⁸ *Ibid.*

²⁹⁹ Department of Immigration and Multiculturalism, “Apply to Immigrate: TFW” online: Government of Manitoba <<http://www.immigratemanitoba.com/how-to-immigrate/apply/tfw/>>.

³⁰⁰ Citizenship and Immigration Canada, “Determine Your Eligibility – Provincial Nominees” online: Government of Canada <<http://www.cic.gc.ca/english/immigrate/provincial/apply-who.asp>>.

³⁰¹ Department of Immigration and Multiculturalism, “Apply to Immigrate: Assessment” online: Government of Manitoba <<http://www.immigratemanitoba.com/how-to-immigrate/assessment/>>.

³⁰² Carter & Amoyaw, *supra* note 290 at 172.

³⁰³ Nakache & Kinoshita, *supra* note 7 at 37.

through the federal government, which assesses health and security considerations prior to granting permanent residency (usually an additional twelve to sixteen months).³⁰⁴ Second, once a person has received a provincial nomination certificate, their accompanying dependants become eligible to apply for open work permits in the province, allowing for family reunification before permanent residency is granted.³⁰⁵

ii. Structural Implications of PNP for Experiences of Social Exclusion/Inclusion

While Manitoba's PNP has had positive implications for immigration to the province, it nevertheless relies on the legal construction of migrant workers as non-citizen, non-permanent resident foreigners to allocate NOC C & D migrant workers into specific positions and tie them to specific employers. Doubtless that the opportunity to apply for permanent residency is a significant legal structural element of the socio-spatial context into which a migrant worker enters, but whether that has positive or negative implications for the social inclusion of migrant workers (both during the time that they are migrant workers and once they have established permanent residency) will depend largely on local structural factors as well. For instance, Naomi Alboim has argued that two-step immigration programs like the PNP may actually lead to less successful integration of nominees because they do not generally have access to language or settlement services; such programs are only available in Manitoba *after* a person has received their provincial nomination.³⁰⁶ Luin Goldring and Patricia Landolt have also argued that migrants who enter Canada with various forms of less-than-full status demonstrate markedly poorer economic outcomes over time than those who enter as permanent residents.³⁰⁷ Moreover, the requirement that the migrant worker maintain continuous employment with the same employer named in their work permit before and during their application (and until permanent residency is granted, as the nomination certificate is contingent on the continued employment relationship) may exacerbate the imbalanced power relationship between employees and employers. Nakache and Kinoshita hold that losing or

³⁰⁴ *Ibid.*

³⁰⁵ *Ibid* at 33.

³⁰⁶ Alboim, *supra* note 288 at 49.

³⁰⁷ Luin Goldring & Patricia Landolt, *The Impact of Precarious Status on Immigrants' Economic Outcomes* (2012) IRPP No 35.

quitting one's employment would not only delay an application for permanent residency, but rather terminate the application entirely, since it is predicated on the existence of continued employment with a named employer.³⁰⁸ This creates the risk of migrant workers becoming exceptionally tractable as the granting of their permanent residency draws nearer; they have more to lose and, in light of the four-in, four-out rule, may lose the opportunity entirely. From a public policy standpoint, the PNP has also been criticized as a privatization of decision making power over who can become a Canadian citizenship, a devolution of selection power from the Government of Canada to private corporations.³⁰⁹ On the other hand, given the right local socio-spatial conditions, migrant workers may come to see themselves as future members of the communities in which they live, develop closer relationships with civil society, participate more in community life, learn the language and culture of the host society, gain knowledge of the legal system and other activities that would be considered highly participatory and inclusionary. The structural role that such a legal framework plays in processes of social exclusion or inclusion may be significant or insignificant, or it may vary radically across socio-spatial contexts. In any case, it must be examined contextually.

E. Conclusion

The national legal structure of the NOC C & D stream is characterized by the issuance of a temporary resident visa, an employer-tied work permit, no consular oversight, and no pathways to permanent residency for these "low skill" migrant workers. When these national structural elements are superimposed over employment standards regimes, provincial legal structures which purport to offset imbalanced power relationships between employees and employers, they have potential for articulating with each other in such a way that employment relationships can be warped and processes of social inclusion risk being initiated and/or exacerbated. Additional legal structures, such as provincial programs which provide pathways to permanent residency for NOC C & D migrant workers, may also play a role in those

³⁰⁸ Nakache & Kinoshita, *supra* note 7 at 38.

³⁰⁹ CBC News, *supra* note 39. See also C. Andrew Cragg, "Neoliberalising Immigration in Canada: The Pilot Project for Occupations Requiring Lower-Levels of Formal Training and the Expansion of Canada's Temporary Foreign Worker Program" online: Andy Cragg <<http://www.andycragg.ca/writing/neoliberalisingimmigrationincanada.pdf>> at 85.

processes. Despite similarities between the various “low skill” TFWPs, such as the SAWP and the LCP, however, different processes of social exclusion and inclusion have been reported, owed largely to the particularities of localized socio-spatial contexts. In order to illuminate the role that these overlapping legal structures play in the social experiences of individuals, then, it is necessary to go to the local level, to examine the local socio-spatial context within which processes of social exclusion or inclusion are directly felt by people and to interrogate these various structural relationships through the lived experiences of individuals.

CHAPTER THREE: LIVED EXPERIENCES OF THE NOC C & D STREAM

From the Trans-Canada Highway, the City of Brandon appears to be little more than two service roads lined with gas stations, fast food joints and chain motels which interrupt the otherwise vast and open prairie landscape. Along the highway in either direction, a patchwork of lined fields of wheat, canola, sunflowers and grazing cattle point to the importance of the agricultural industry to the city, as do large factories such as that of the Maple Leaf pork processing plant or the Koch Fertilizer facility which sits just outside the main downtown area. Turning south off the Trans-Canada and descending into the Grand Valley where Brandon is located, however, the entire city comes into view with its downtown core, its main commercial drag, its industrial areas and its suburban neighbourhoods. A line of large homes along the hillside look over the Assiniboine River and across the valley, and further down the hill people drive in and out of a box-mall complex with a Wal-Mart, Home Depot, a Safeway supermarket, and groupings of smaller chain stores and restaurants forming islands in the large parking lot. A sparse series of car dealerships (new cars), strip malls and small businesses, broken up by fields and baseball diamonds, sits between bridges over the river and then over the railway tracks (a significant factor in the city's development – the Canadian Pacific Railway reached Brandon in 1881 and the city was incorporated in 1882).³¹⁰ On the other side of the railway bridge, along the tracks, a faded sign on a boarded-up four-storey tan-coloured brick building can barely be made out to read "International Harvester Company."

On this side of the tracks the layout of the city changes considerably. Here the main street (18th Street) is lined with trees, small houses with well-kept yards and gardens, lush and green in mid-July, and fences running along the sidewalk near the corner houses. Down the side avenues, this pattern continues in both directions. Along 18th street, however, the houses stop and yield to Brandon University, its central building of tan-coloured brick and stone built at the turn of the century surrounded by a hodgepodge of new and old architectural styles that one often sees in an institution that has grown over many years. Most of the university's approximately 3000 students come from Brandon and the surrounding area, although the university's education and music programs attract students from Winnipeg and out-of-

³¹⁰ Carter & Amoyaw, *supra* note 290 at 168.

province.³¹¹ A bus bench outside the university is sponsored by the city's Conservative Member of Parliament, Merv Tweed; provincially, voters in Brandon on the west side of 18th Street have elected a Progressive Conservative Member of the Legislative Assembly, whereas voters on the east side have elected a member from the New Democratic Party (which forms the government in the province). Beyond the university and strip malls with a mixture of local and larger businesses sits the Keystone Centre and fairgrounds, an arena and field complex which is home to the Royal Manitoba Winter Fair and the Brandon Wheat Kings, the local Western Hockey League team. The LED sign outside advertises a concert by the rock band KISS, and reviews in the Brandon Sun the next day label it as the biggest concert ever to be held in the city.³¹² Slightly further down 18th Street, Shopper's Mall, the city's major shopping complex, lies on the other side of a vast parking lot. While the wide streets are filled with vehicles (particularly pick-up trucks) on this Wednesday afternoon, the only people who I see walking in this area are teenagers, out of school for the summer and still too young to drive.

There were more people to be found on the sidewalks lining the grid of streets that comprise the City's downtown area, which consists predominantly of one to three-storey buildings from various eras throughout the 20th century, containing small shops, banks, restaurants and offices. Many of the buildings are hidden behind the trees in full bloom, but the cast-iron street lamps with exposed, white spherical lights (reminiscent of *Singing in the Rain*) and flowers hanging in baskets, and the preservation of classical red and brown-brick buildings on most of the street corners, such as the Double Decker Pub (complete with Union Jack awning), emphasize the city's past. The true downtown area stretches for perhaps ten blocks east to west, and two blocks north to south, a series of two-lane one-way streets with cars parked along the street for most of the way. There are enough cars going by that the jaywalkers (myself included) have to wait for a few moments to time street crossings. One of the tallest buildings downtown, tan-brick with a clock tower resembling a grain elevator, about 10 stories, many windows broken and all blanked out with cheap brown paper, has a black and white painted sign across the top which reads "McKenzie Seeds," recalling the city's history as an

³¹¹ Brandon University, "Frequently Asked Questions" online: Brandon University <<http://www.brandonu.ca/faqs>>.

³¹² Lauren Parsons, "Superfans Show True Colours" online: Brandon Sun <<http://www.brandonsun.com/local/superfans-show-true-colours-215975181.html>>.

agricultural centre.³¹³ Still Wednesday afternoon, a trickle of people passes along the sidewalk, most of them middle aged women, and most walking alone. Those walking in groupings or with children are invariably speaking English, most presenting as white but some who present as Indigenous people. This is largely in keeping with 2006 census data which cited 77% of the city's population as "White," 11.6% as members of an Aboriginal group, and 11.5% as members of "Visible Minority Groups."³¹⁴ As two Indigenous women pass by, I am reminded that the idea of "home," central to the differential inclusion of newcomers, has also been central to the process of colonization in the place known by most as North America.

Beside the Double Decker sits a small specialty grocery store, Karla's International Foods (La Tienda Mexicana), selling imported foods from Europe, Latin America, Africa and more, with a large yellow "Support our Troops" decal filling one of the front windows. A smaller sign printed on white paper in the window reads "International Money Transfer." Further down the road, a vinyl sign for "Brandon Hispano" is draped over the fascia, not fully covering two images of eyeglasses that indicate the previous tenant was (perhaps recently) an optician or optometrist. Western Union signs adorn the windows and door, although it is not until I walk in and see (and smell) the shelves of freshly baked breads, pastries, and tortilla shells that I realize this is a Latin bakery. The vinyl sign includes pictures of flags of all of the countries in Central and South America, with a larger Canadian flag in the middle. The Spanish flag is not included; the Chinese and Ukrainian flags, however, are. Moving away from the downtown area, several blocks away from the main core and through a gridded neighbourhood of numbered streets, I find a small independent grocery store in a strip mall that was pointed out to me by one of the migrant workers who I spoke to for this project, seeking something of the inverse of Brandon Hispano. The orange sign of "Tim Tom Asian Grocery" stands juxtaposed to the massive discount Superstore across the road. A glossy printed poster in the front advertises "Money Transfer to Philippines" and going through the door the first thing I notice is the smell of

³¹³ My initial impression that the McKenzie Seeds company had succumbed to hard times turns out to be mistaken; their headquarters have been moved to the other side of the railway tracks and they are currently Canada's largest supplier of seeds for flowers and vegetables.

³¹⁴ Statistics Canada, "Community Highlights for Brandon" online: Statistics Canada <http://www12.statcan.ca/census-recensement/2006/dp-pd/prof/92-591/error_erreur.cfm>. I recognize that these numbers add up to more than 100%.

seafood and savoury spices. The shelves are lined with dry goods in colourful reflective packaging with east-Asian alphabets, bean cakes and Pocky, sesame and peanut oils, hoi sin, bean and oyster sauces among others, dried noodles and ten-kilogram bags of rice, and the refrigerators at the back contain an assortment of fish (some of them with the heads still on), eel, squid tentacles, and cuts of pork and beef. As I get to the furthest aisle, however, I stop when I arrive at a can of Old El Paso refried beans. I look along the shelf and see that for a length of about five feet, the shelves of the Tim Tom Asian Grocery hold stacks of tortilla shells, small bottles of hot sauce with pictures of jalapeno peppers on them, “Columbo” brand baking supplies, canned chipotle and jalapeno peppers, and large cans of pinto and black beans.

A. Access³¹⁵

My initial hope for this project was to hear the stories NOC C & D migrant workers in the City of Toronto or in the Greater Toronto Area. As I have discussed above, physical spatial separation of migrant workers in farming communities and their proximity to small, predominantly white, English-speaking towns are frequently identified as key factors in the experiences of social exclusion of migrant agricultural workers. The physical proximity of live-in caregivers to their employers and the social dynamics of gender and race figure prominently into accounts of the social experiences of live-in caregivers, including those written by live-in caregivers themselves. In selecting Toronto as my site of investigation, I hoped to examine the program in a radically different social setting and to remove those specific localized barriers to participation in the life of the community; I felt that this would allow me to better investigate the structural role of law in the social experiences of individuals.³¹⁶ As one of the most

³¹⁵ I have chosen to include a relatively detailed discussion about the research process and particularly access because this was the single most challenging aspect of this project and it highlights the difficult research conditions for studying a program like NOC C & D. I have no doubt that the dearth of academic study concerning the social conditions of NOC C & D migrants is attributable in large part to these challenging conditions. I place myself at the centre of this discussion because I feel that it is my experience that will be of interest and utility to you, dear reader, rather than my findings.

³¹⁶ This has been described as the distinction between “spatial social exclusion” and “subjective social exclusion”: Gingrich, *supra* note 197 at 16. Gingrich notes that subjective social exclusion intersects with all other forms of social exclusion, and as discussed above, this type of social exclusion is often overlooked and usually obfuscated in the existing literature on the social experiences of migrant workers in Canada. For one exception to this general

ethnically diverse cities in the world and with 46% of its population identifying as “immigrant” in the 2006 census,³¹⁷ Toronto provides newcomers with many opportunities to connect with ethnic communities (especially for those who do not speak English), to establish connections with neighbours and other local community members, and to connect with activist and advocacy groups (such as WAC, J4MW and UFCW, which are all based out of Toronto).³¹⁸ Moreover, within rural communities there is a relatively clear division along the lines of race and gender, which separates permanent communities from temporary migrants. This division creates a public display of legal status where, as Basok writes, “the Mexican invasion of the local supermarket has become a part of the social landscape, as has the image of Mexican men riding their bicycles along rural roads.”³¹⁹ In the words of Jane Jacobs, “[i]n small settlements everyone knows your affairs. In the city everyone does not.”³²⁰ I felt this was an ideal place to learn how the legal category of Temporary Foreign Worker affected the individual’s understanding of themselves, the law, and their relationships within Canadian society.

The nature of the research setting and the members of the group that I sought to speak to necessitated that I make contact through people who had already established relationships with migrants in the city. I crafted my research design and ethics protocol such that I would recruit participants through labour, employment and immigration lawyers, advocacy groups, and front-line service providers who had contact with migrant workers in the city.³²¹ I moved to Toronto from Winnipeg at the same time as I started this project,³²² and when I came to the city I knew very few people and had no contacts in the migrant justice community. I was fortunate,

trend, see Luann Good Gingrich, “The Symbolic Economy of Trans-Border Governance: A Case Study of Subjective Exclusion and Migrant Women from Mexico” (2010) 29:1 *Refugee Survey Quarterly* 161. Institutional ethnography, which places fundamental importance on the experience of the individual, is thus an extremely useful method by which the structural processes which produce those subjectivities can be interrogated.

³¹⁷ Statistics Canada, “2006 Community Profiles” online: Government of Canada <<http://www12.statcan.gc.ca/census-recensement/2006/dp-pd/prof/92-591/>>.

³¹⁸ Vic Satzewich & Lloyd Wong. “Immigration, Ethnicity and Race: The Transformation of Transnationalism, Localism and Identities” in Leah F. Vosko & Wallace Clement, eds, *Changing Canada: Political Economy as Transformation* (Montreal: McGill-Queen’s University Press, 2003) at 371.

³¹⁹ Basok, *supra* note 51 at 3.

³²⁰ Jane Jacobs, *The Death and Life of Great American Cities* (New York: Random House, Inc. 1961) at 58.

³²¹ I understood that my findings would have to account for the fact that these migrant workers would have had a particular type of experience that would have led them to seek the help of a lawyer or advocacy group.

³²² Although my decision to move to Toronto was made prior to the decision to make the city my site of investigation.

however, in that other groups and projects that I became involved with (focused on both labour and migrant justice issues) brought me into contact with people who had direct experience working with NOC C & D migrants. As the year progressed and the time came to schedule interviews (I had been informally working to recruit participants throughout the year), it became more and more apparent that establishing contact would be significantly harder than I had anticipated.

In my conversation with Chris Ramsaroop, I asked him about whether and how J4MW has made contact with migrant workers in Toronto. He told me that “[i]t’s hard for us to be proactive. They usually make contact with us when they are referred by legal or health community clinics. Some hear about us through contacts when they come from other areas. But it’s hard to identify migrant workers in the city.” Sonia Singh also discussed the difficulties that a group associated with WAC had faced in their outreach to migrant workers in the City of Toronto. In one particular effort which sought to reach out to NOC C & D migrant restaurant workers, posters had been placed on walls near restaurants that had received positive LMOs, based on a CIC document that had been obtained through a freedom of information request. The poster provided a phone number and guaranteed anonymity, promoting an event where migrants could meet each other, be introduced to WAC and another group, Asian Community AIDS Services, and to learn how to become involved with the member driven organization. The uptake was disappointing; one person came to the event. “[A former migrant worker involved with WAC] feels that people aren’t going to come forward while they’re still working, and that we need a focused, ongoing outreach strategy. You can’t just have a few attempts because it just fizzles out.” WAC has engaged in cold outreach several times, but Sonia finds that “...usually people call when they’ve had a problem at work, and so they get involved through having the experience of unpaid wages.” She reflects: “[w]ith so few people coming forward, we need to be critical. We need to find ways of reaching out better. Everyone who has come to WAC has found a way of getting support and fighting back.”

Between January and July of 2013, I sent letters, e-mails, and made phone calls to dozens of legal clinics, labour and immigration lawyers, registered immigration consultants, advocacy groups, faith-based groups, local unions, service providers and personal contacts who

I hoped would be able to bring me into contact with four of the roughly 64 000 migrant workers in Toronto and the GTA for the purposes of conducting interviews (although this number does not distinguish between NOC 0, A & B, live-in caregivers or NOC C & D migrant workers).³²³ Based on a document similar to that relied on by WAC, which listed all of the positive LMOs issued in Canada in the last two years, I was able to see that, in addition to businesses where it is well-known that migrant workers are often hired (such as Tim Hortons, McDonald's and Royal Bank of Canada), requests had been made to hire migrant workers all around the city. It was easiest to identify small non-chain restaurants because the document was organized by company name and number (meaning that it was difficult to identify a specific Pizza Pizza or Subway restaurant for instance) and chances were higher that migrants would be classified as "low skill"; the list included restaurants I had eaten at, bars within several blocks of my home, and even a restaurant at York Lanes, the food court at York University out of which I conducted this project.³²⁴ Despite the ubiquity of migrant workers in the city, however, my efforts at making contact through advocate "gatekeepers" were, in the end, unsuccessful. Very few of these people had any contact with "low skill" migrant workers to begin with; especially for immigration lawyers in private practice, their work had focused more on obtaining LMOs for employers wishing to hire migrant workers. For those who did have contact with migrants, (and a migrant who was connected with one advocacy group was often connected with others) those few people had already participated in a number of studies with other more senior researchers. As viable connections became fewer and fewer, I began to hear the term "research fatigue" increasingly often.

The research conditions that I faced when trying to make contact with NOC C & D migrants in a large and diverse city such as Toronto may be an indicator of the social experiences of these migrants, although I admit that I am forced to speculate. It appears to me that NOC C & D migrants are susceptible to being a fragmented group due to their economic

³²³ Citizenship and Immigration Canada, "Canada – Foreign workers present on December 1st by province or territory and urban area" online: Government of Canada <<http://www.cic.gc.ca/english/resources/statistics/facts2012/temporary/10.asp>>.

³²⁴ The Globe and Mail, "Which Canadian companies are authorized to use temporary foreign workers? View the whole list" online: The Globe and Mail <<http://www.theglobeandmail.com/news/politics/which-companies-are-authorized-to-use-temporary-foreign-workers-view-the-entire-list/article11134042/>>.

and ethnic diversity, their placement in separated workplaces, and the impossibility of identifying one another in a city like Toronto (outside of pre-existing personal connections). While these conditions have made NOC C & D migrants a difficult group for advocates to make contact with, this does not necessarily mean that migrants are not joining and forming communities in different ways. For instance, the migrant worker who injured his finger at work made community connections through a Hindu temple, where members helped him to decide on a course of action, find a shelter, and ultimately connected him with WAC. On the other hand, Sonia expressed the concern that community connections "...have exerted a controlling force, not helping them to make their own decisions but telling them what to do... If you're dependent on just one person, strange power relationships can arise." Naveen also felt that NOC C & D workers had more opportunities to connect with local communities, although these opportunities may be limited by employers:

You can find huge communities, Tamil, Punjabi, Pakistani, Sunni Muslim Punjabi, Gujarati populations in Toronto, you can connect with these people. But what we've seen in restaurants is that employers try to ensure that the worker sleeps inside the restaurant, there's a cot in the back room, and the worker is told they can't go out. Because knowledge is power. As soon as they start to talk to other people going 'well I only make six bucks an hour' – 'well that's below minimum wage, you can't make six dollars an hour', they start to learn from other staff in the workplace... From the perspective of purely nefarious intentions, as an employer if you want to exploit a worker, a migrant worker is for you.

Of course, migrants may also form communities that provide support to one another and share knowledge of legal rights and Canadian culture; they may also develop their own strategies for resisting abusive employers or the legal structures which render them temporary, for instance by staying past the expiration of their visa/work permit and becoming undocumented. My experience as a researcher in Toronto, however, left me unable to discuss any of these developments from the perspective of migrant workers themselves.

i. An Ethical Dilemma

While my initial experiences attempting to make contact with and interview NOC C & D migrants were ultimately unsuccessful, they nevertheless provided valuable (but limited) insight into the social experiences of migrant workers living and working in Toronto. In

discussing those insights, however, I am confronted with a number of ethical red flags that require me to be reflective and careful in how much I disclose. In Martyn Hammersley and Paul Atkinson's text on ethnographic research methodology, the authors write that five primary ethical issues arise in the course of ethnographic research; four of those issues are relevant here, namely informed consent, privacy, harm and exploitation.³²⁵ The ethical issue arises because through the recruitment process I managed to make contact with two NOC C & D migrant workers who expressed a keen interest in participating in interviews, but neither of whom ultimately agreed to participate. Neither of them had participated in a research project, and neither had sought the assistance of advocates; one was a connection made through a friend (to be more accurate, literally a friend of a friend of a friend of a friend), the other a connection made through a former migrant worker who was involved with an advocacy group. The ethical *dilemma* arises because this information can contribute to an understanding of the social experiences of migrant workers in Toronto.

My biggest concern in reporting on the reasons and the process by which these contacts disintegrated is the issue of informed consent. Debates regarding the ethics of informed consent have concerned consent in the context of covert research, where research is necessarily carried out without the awareness or consent of participants, the fullness of the information which is given to participants (including deception), or situations where providing participants with an opportunity to decline to be observed or interviewed is impossible or impracticable.³²⁶ Especially in the context of a project which emphasizes participant agency, subjectivity of experience and which seeks to maximize narrative control of the group which is being studied, potential participants must have a right to not be researched.³²⁷ Moreover, the communications which would be the subject of my discussion took place prior to the

³²⁵ Hammersley & Atkinson, *supra* note 161 at 212.

³²⁶ *Ibid* at 211.

³²⁷ I am not an ethical absolutist, in the words of Hammersley and Atkinson, but rather prefer an ethical situationalism. My deliberation would unquestionably be different if I was denied access to a group which carried greater political power. For instance, for the purposes of my discussion above concerning contact between advocates and migrant workers, its general nature, lack of identifiable individuals, the relative power of those who I was in contact with, and our shared interest in improving the situation of migrants in Canada has led me to forego the formalities of obtaining informed consent from every one of a great many individuals. Furthermore, none of these people were vulnerable participants, and I had an approved ethics protocol from the university Research Ethics Board to contact advocates directly with regard to arranging interviews with migrant workers. See *ibid* at 219.

establishment of a research relationship, in private, and it is not for me to publicize those communications.³²⁸ It pains me to seal off these sections in my field notes, but I feel that any benefit that would be gained would be far outweighed by the harm done in denying the dignity and wishes of these participants, as well as to my own principles.

ii. Speaking to UFCW in Brandon, Manitoba

Through my review of the minimal literature on the social experiences of NOC C & D workers as well as through informal conversations with friends from the Brandon area, I was aware that a large number of “low skill” migrants had been hired to work at the Maple Leaf pork processing plant in Brandon.³²⁹ I had also read that those migrants worked pursuant to a collective agreement which included terms requiring the company to process migrant workers’ applications for permanent residency under the PNP.³³⁰ My interview with Naveen Mehta also offered significant insight into the situations of migrant workers in Brandon:

The difference between a unionized and a non-unionized Temporary Foreign Worker is like the difference between the sky and the ground. Or more accurately, the sky and a mine pit. Take the example of Brandon, Manitoba. Under the collective bargaining regime with Maple Leaf Foods, every migrant worker is entered into the Provincial Nominee Program. At Maple Leaf, 75% of people who have joined the workforce as Temporary Foreign Workers have become permanent residents. The union provides support services – for example, UFCW in Manitoba is the largest provider of English as a Second Language in the province. ... The union and the employer translate the collective agreement into a variety of languages, Mandarin, Ukrainian, Tagalog, whatever the case may be. ... The union ensures that they meet each other, have social nights, and create an environment conducive to creating a community, a culture of inclusivity and acceptance. ... There are migrant workers on the negotiating committee, on the executive board of the union... It gets them off the wrong road with a 90 foot brick wall in front of it, and onto the real and right road to immigration, *and* takes them to the front of the line, which has 600 000 people in it.

After approximately six months struggling to make contact with migrants in Toronto, I recalled this information and decided to see whether the UFCW Local 832 in Brandon would be willing to assist me in arranging interviews with migrant workers at the Maple Leaf plant. After

³²⁸ *Ibid* at 212.

³²⁹ Nakache & Kinoshita, *supra* note 7 at 36.

³³⁰ Baxter, *supra* note 286 at 45.

a phone call to the local union representative and several e-mails back and forth, the project was approved by local staff, and arrangements were made for me to meet with three people currently on work permits, as well as to conduct a group interview with three former migrant workers who have since become permanent residents. In addition to setting up interview times and recruiting participants, the local representatives also offered me space to conduct interviews and also provided me with a copy of the collective agreement between the UFCW and Maple Leaf Foods.

I was forced to consider the implications of this level of union involvement in two ways. First, the way in which participants are recruited will naturally have an impact on the nature of the information that emerges through the interview process. With all migrant worker participants being recruited through the union, we start from a standpoint where all participants are, at least nominally, socially included in at least one institution. This is certainly acceptable within institutional ethnography, which does not treat participants as a pool of subjects, but rather as experts on their own lives and of the phenomena under investigation. As a result, I do not obscure this involvement in my reporting or analysis, but rather treat it as part of participants' subjective experience and discuss union membership as it arose in participants' stories of social inclusion and exclusion. Secondly, I had to consider whether to accept the union's offer to use their space for conducting interviews. I was aware that with interviews being conducted in the union-owned Training Centre, they would not be taking place in a "neutral" space; for instance, a participant who wished to criticize the union might feel restricted from being able to say things that might be construed as negative (although one in particular did). My feeling was that migrant workers who had a strong anti-union sentiment were probably unlikely to participate in a project offered to them through the union, and so this was really more a product of my first consideration. In light of my objectives, however, I decided that this would be a fair place to conduct interviews. I knew that I would be asking participants deeply personal questions, and I did not want to risk them feeling like people were eavesdropping (if we met in a coffee shop or other public location). I also wanted to minimize the risk that a supervisor or manager from work might see them speaking to a person with an audio recorder writing down notes in this relatively small city. I wanted participants to feel safe

and comfortable, and I felt that by conducting interviews in a quiet, familiar space and in a private room, interviews would be better served than any other space that would have been available to me (even with the pro-union posters on the walls).

iii. Field Relations

With my field work consisting primarily of interviews with people I had never met and who I may not meet again, I did not have the opportunity to build as strong a relationship with participants as I would have liked. My relationship with each participant was unique, although I feel that gender and age factored into whether relationships were stronger or weaker; men seemed to be more relaxed talking to me, especially younger men who were close to my age, and as a result I feel that those interviews were more conversational and their stories emerged more detailed. There were several important factors that were present in my relationships with all participants, however, which warrant consideration here, namely citizenship status and ethnicity. As a person who was born in Canada and who holds both Canadian and British citizenship, I generally do not face questions as to my “belongingness” in Canada, aside from the obvious (and valid) criticism that I am a white settler on colonized land.³³¹ For all of the people who I spoke to, however, racism and xenophobia have been part of their experience in Canada (to varying degrees), perpetuated by people who look like me, and who may be even less aware of the challenges to their belonging in this nationalized space. I saw these factors as a potential source of fear, distrust or resentment that may prevent participants from being comfortable and open in our conversations, and I worked throughout to offset that potential power imbalance, even by means as simple as adjusting my voice and demeanour. Kirin Narayan, writing from the perspective of a native anthropologist often essentialized as a natural “insider,” argued against the rigid dichotomy of “insider/outsider” or “observed/observer,” suggesting that we instead “view each anthropologist in terms of shifting identifications amid a field of interpenetrating communities and power relations.”³³² I remained

³³¹ Of course, this criticism seeks to unsettle a power dynamic rather than to reinforce it, and so while it continues to force me to confront my privilege it has not generally shaken my sense of dignity or my legal or existential sense of being at “home” in Canada.

³³² Narayan, *supra* note 163 at 671.

conscious of power dynamics, also realizing that these dynamics are neither fixed nor essential; I had to be conscious of my position, without assuming that my personal characteristics would automatically serve to subordinate participants. While these were concerns of mine going into the interviews, my sense is that all participants were comfortable talking to a person who was interested in learning about their experiences in Canada, regardless of citizenship, skin colour or gender.

Under my ethics protocol I was approved to offer a \$50.00 honorarium to participants, and although I did not want to think of this as incentivizing their participation, I felt that it might make advocates more willing to help facilitate contact, and would also serve as a way of thanking them for their time. This amount was determined by the York University Research Ethics Board to be enough to be a meaningful signal of appreciation and incentive, but not enough to compromise the freedom of consent. While I had told union representatives that an honorarium would be offered, this had not been communicated to participants; as they read the informed consent form at the start of our interviews, they were invariably surprised to see that they would receive this token of appreciation. Of course, the advantage in this situation is that participants were interested and willing to share their experiences without any consideration of financial reward; they entered the interview expecting no more than to share their stories. The potential disadvantage is the risk that the interview process might be, in a sense, “cheapened,” reduced to a financial transaction rather than an honest and open human interaction. Conscious of this dynamic, I clarified that this was offered thank them for their time, that they would receive it even if they decided to end the interview immediately, and that I was looking forward to hearing their stories.

Finally, special consideration must be given to the safety and well-being of participants who are considered to be vulnerable, and I have taken these considerations into account throughout the recruitment, interview, research and writing processes. All participants were informed as to the risks that they face due to their unique legal status, namely with regard to employers, which was significantly lower for those who are now permanent residents than for those who are currently on work permits. They were all informed that I am a graduate student and not a lawyer. We discussed the possibility that questions might be personal or emotionally

difficult to answer, and that they could refuse to answer any question or choose to end the interview entirely if they felt any discomfort; they would not lose their honorarium in exercising that right. Moreover, I explained that they would be guaranteed anonymity to the fullest extent offered by law, and I have ensured that their names and any features which may be used to identify them have been changed to pseudonyms in both my writing and in my field notes. The only documentation containing their identities is their signed informed consent forms, which are sealed in an envelope and stored safely.

iv. Local Socio-Spatial Structures: The Union

The migrant workers who I spoke to in Brandon enter into a local socio-spatial setting where the conditions for social inclusion are optimal, perhaps for anywhere in Canada (for those migrants who come to Canada with the intention of settling permanently).³³³ Through a federal immigration program which offers no explicit opportunity to settle permanently, they enter a provincial context where the law provides a pathway to permanent residency, a local spatial context where they are not physically segregated from other community members (although, as will be seen, racial divisions have been apparent), and, significantly, a unionized workplace. I characterize the union as its own local socio-spatial structure; as a social institution with its own internal rules, external governing structures (in the form of labour relations regimes) and its role in workplace relations, it falls within the definition of “structure” that I have been employing, namely to refer to sets of rules which enact and reproduce social activity. Moreover, its membership is defined and is both subject and beneficiary to its rules, and as Harry Arthurs writes, “...domestic labour law and industrial relations issues are implicated in a complex and comprehensive international political economy.”³³⁴ The union is both subject to changing global and domestic structural changes, in addition to forming part of the cluster of socio-spatial structures which operates in the day to day lived experiences of individuals.

Limitations in my methodology and fieldwork made it difficult to discern, with certainty, the structural role played by the union in the experiences of individuals as it was superimposed

³³³ Nakache & Kinoshita, *supra* note 7 at 33. See also Interview of Naveen Mehta by Brendan Jowett (18 June 2013) Toronto, ON.

³³⁴ Arthurs, *supra* note 94 at 23.

over the local, provincial and national contexts. This project set out to examine the social impacts of the legal framework of NOC C & D from the perspective of migrant workers who came to Canada through that program, supplemented with the experiences of advocates who had experience working within that program. While I asked all of the migrant workers who I interviewed about their views on the union and the role that the union had played in helping them to feel more or less socially included in the community in Brandon, few of them had stories of direct experiences with the union or a consciousness about the union's role in their lives. I conducted a group interview with three former migrant workers who have since obtained permanent residency, however, and two important points about the union's role in promoting social inclusion among migrant workers in Brandon emerged.

Isabella came to Brandon from El Salvador in 2006 and had recently applied for her Canadian citizenship; her English, while good, was weaker than other participants and I found that I occasionally had to elicit responses from her rather than wait for her to jump into the conversation. Gabriel came directly from Colombia in 2007 and has also applied for citizenship. He stopped working at Maple Leaf after being granted permanent residency, and now has a permanent job working for the City of Brandon. Tomas, who left Honduras for Brandon in 2009, will be eligible to apply for Canadian citizenship next year. Tomas' English was the strongest of all of the migrants I spoke to, which occasionally made him overly dominant in the group; I worked to temper this by facing Isabella and Gabriel more often as I asked questions. The group interview format allowed them to share ideas on various topics, and to discuss their own experiences of immigration through NOC C & D. Throughout our discussion, two important points arose concerning the role of the union in alleviating socially exclusionary effects of NOC C & D. These are firstly, that the union has been providing language training classes to help migrants participate in community life and, more recently, to improve migrants' chances of establishing permanent residency, and secondly, that it provides migrant workers with a safe place to seek the enforcement of employment-related rights.

The three *current* migrant workers who I met with already speak English very well, and one of them has been attending UFCW's English classes weekly. All of the former migrants who participated in this group interview, however, had made far greater use of these classes when

they first arrived in Brandon. They told me that these classes were helpful not only for learning the language so that they could meet Canadian people, but also for meeting other migrants: “[l]anguage is a big barrier to feeling like part of the community at the beginning,” Gabriel told me; Tomas echoed in agreement, “a *big* barrier.” Many of the migrants who came to Brandon would initially have to rely on others to translate for them in order to get a driver’s licence, go to the doctor or read signs that were posted. Isabella, for instance, had not filled out her own immigration paperwork because she did not understand it; the person who filled out the forms forgot to include that she had a dependent son still in El Salvador. She was thankful for a Canadian supervisor who helped her understand the process, fill out the necessary paperwork, and fix the problem. The significance of the English classes offered by UFCW has increased considerably for the more recent migrants to Brandon; it is no longer simply a matter of feeling a part of the community, but rather is critical to one’s ability to obtain permanent residency and remain in the community. Isabella told me that “[b]efore, the process was easy for us, because we didn’t have to pass a test to apply for permanent residency. But now the law has changed.³³⁵ The new immigrants who come to Canada, they have to pass an English test to apply for permanent residency.” The group found that this resulted in a trade-off; newer migrants were learning to speak English faster and with higher fluency, but there was an increased sense of insecurity. Tomas, now a supervisor at Maple Leaf, shares that management was not impressed with this regulatory change: “to work at Maple Leaf they don’t really need to speak English.”

As outlined in Chapter Two, migrant workers are not eligible for enrolment in newcomer settlement services offered by the federal government, including language classes, and have differential access to programs offered by the provinces and by other civil society organizations; for instance, in Manitoba, provincial language training is only available *after* a person has been nominated under the PNP.³³⁶ Moreover, migrant workers are generally restricted from enrolling in studies at postsecondary institutions.³³⁷ The implications of this are clear: not only are most non-English-speaking migrant workers limited in the places they can turn to facilitate their

³³⁵ Citizenship and Immigration Canada, *supra* note 299.

³³⁶ Alboim, *supra* note 288 at 49. See also Faraday, *supra* note 3 at 86.

³³⁷ The *Regulations*, *supra* note 46 at ss. 185 & 188.

social inclusion, but they are also at a disadvantage when it comes to applying for permanent residency under PNPs in light of the recent federal changes. By providing these services and making it known to migrant workers that they are available, as well as helping migrant workers to meet each other in classes, the union serves a structural role in the experiences of individuals that may not be experienced by migrants in non-unionized workplaces.

The second significant way in which the role of the union was discussed in relation to social inclusion was as a site where migrant workers could go to get support in enforcing their legal rights and to get information about their rights. Isabella, Tomas and Gabriel all shared that a lack of knowledge of the law makes it difficult to know whether rights are being violated, and that the union provides workplace rights information, in Spanish, at the union office. Andrés, one of the current migrant workers who I spoke to, gave a different opinion; while some material was provided in Spanish, most was in English, and he said that he would like to receive more training in what they can offer. He also said that he would like more information on the collective bargaining agreement, although it was not clear whether he had sought this information out; under the Maple Leaf/UFCW collective bargaining agreement there is a provision which reads “[t]he Company agrees to pay for the translation of the Collective Bargaining Agreement into any language that is the first language for 100 workers or more,”³³⁸ and Naveen told me that the collective agreement is available in Spanish. Andrés agreed with the group interview participants, however, in saying that he did feel like he could turn to the union for support in enforcing his rights. Capturing many of the differences between a unionized context under NOC C & D and the issues that arise in the farming and domestic context, Tomas told me that:

[t]he first people we know we can go to if we have any kind of problem is the union, because otherwise we were sort of just between work and the house, and the problems you had might have been inside the workplace, so people usually go to the union to ask for help or make a complaint.

Naveen Mehta explained that:

³³⁸ United Food & Commercial Workers Union, Local No 832 & Maple Leaf Foods Inc. (2009) *Agreement Between Maple Leaf Foods Inc. and United Food & Commercial Workers Union, Local No 832, exp. 31 December 2014*. Brandon, MB.

...in a unionized environment you can file a grievance; you have your issue heard before an arbitrator, and the union is paying for it. When you pay your dues, that's your insurance policy, we grieve these types of things and negotiate them into the collective agreement.

Of course, in addition to the reactionary support offered by the union, it may also be the case that the union has played a role in deterring abuses from happening in the first place. My methodology, which did not involve speaking to employers or supervisors at Maple Leaf or representatives at the local union, does not allow me to draw this conclusion, however none of the migrant workers or former migrant workers who I spoke to had felt that they had the need to enforce their rights with the union.

The drawbacks to not having focused specifically on the structural role of the union in the social experiences of migrant workers are that, firstly, this would offer a fuller understanding of the socio-spatial context in which these migrants are living, and secondly, that it may be able to illuminate certain policy recommendations that might help government and civil society organizations to foster the social inclusion of migrant workers. This was simply not feasible given the parameters of this project, limitations in time and resources, and the information which emerged through interviews; participants did not have much direct contact with the union, and generally they were not overly concerned about union activity (although the union did play somewhat into Andrés' experience). The advantage to performing this research (which is much more concerned with the daily lives of migrants in the community) in a unionized setting, is that the presence of the union may have mitigated other factors which might be considered to be "socially exclusionary," but which could not be directly attributed to the law. The stories that I will share in the following section are not stories of abusive employers confiscating passports, stealing wages or cramming workers into dilapidated bunkhouses; they are not stories of recruitment agents making empty promises and extorting a lifetime of savings from unsuspecting migrants, or of migrants being separated from host communities by miles of open farmland. They are, rather, stories of the neutral application of the law,³³⁹ a "best case scenario" where the law operates as it is written and as it was imagined

³³⁹ While this is not original terminology, I credit my use of this term to Professor Faisal Bhabha who has employed it in private conversations.

by legislators. The experiences of social exclusion which are identified in each story, unique to each individual based on their interests, passions and priorities, are directly and solely constructed by the legal framework of NOC C & D.

B. The Lived Experiences of NOC C & D Migrant Workers

“Stories, in the context of law, bring feeling back into jurisprudence, and they tend to work from experiential understanding.”

- Sherene Razack, *Looking White People in the Eye*³⁴⁰

Each of the stories that I heard in Brandon was unique. While there were certain similarities that arose between stories, people’s experiences of the law varied greatly with their differing interests, ambitions, and priorities. Certain conditions did shape the nature of the stories that I heard, however. First, being monolingual for all practical purposes, I required participants who had the ability to accommodate me and speak in their second language; every person emphasized the importance of being able to speak English in order to participate in the social and cultural life of the community in Brandon. The stories of migrants who were unable to speak English would undoubtedly reveal vastly different experiences, and considering that NOC C & D migrant workers are generally not eligible to receive settlement services (including language classes) such a perspective may be more representative of the experiences of “low skill” migrants more generally. Second, although there is a significant Chinese and Ukrainian population working at Maple Leaf, all of the participants I spoke to came from Latin American countries, and I came to see that a significant Latin community had developed in the city; Isabella was an important organizer within that community. I was not able to tell whether the same was true for the Chinese or Ukrainian communities, and so the social experiences of Latin migrants may vary from those other cultural communities. I did, however, ask the union representatives who I was in contact with to try and recruit both male and female participants in order to ensure that different voices would be heard (although of course as a man telling these stories my own perspective doubtless colours my interpretation of women’s stories).

³⁴⁰ Razack, *supra* note 174 at 38.

What struck me as I spoke to each of the three migrant workers who are currently on work permits, however, is that each of them consistently returned to their own common theme which defined, *for them*, what it meant to be a migrant worker in Canada. Each of them faced a legally constructed limitation which, while by no means fatal to their participation in the community, presented barriers to their full participation in social, political or economic life. Through these stories I argue that although migrants in Brandon have individually and collectively fostered processes of social inclusion within the community, the legal structure of NOC C & D continues to present barriers to individual migrants' full participation in the social life of the community, which are felt differently in relation to the ambitions, concerns, passions and priorities of each individual.

i. Andrés' Story

"Canada knows that we're here, they know we exist... I don't think it's enough for a country like Canada to not protect the people who come here."

- Andrés

It is a weekday morning in mid-July, 2013, and I am surveying the Brandon Room in the UFCW Training Centre in Brandon, waiting to meet with Andrés, a migrant worker from El Salvador. An offshoot of the UFCW Training Centre, the Brandon Room has a large open floor and a high ceiling, with rectangular folding tables presently arranged in a large square. There are pro-union posters sparsely placed along the walls; Rosie the Riveter tells me that "A woman's place is in her union." An employee of the Training Centre who speaks English with a Spanish accent tells me that the room serves as a banquet hall and social space available for the use of UFCW members and for rental by the general public; all of the smaller classrooms in the Training Centre were in use for English classes that morning. When Andrés walks in the door of the Brandon Room, he is accompanied by a union representative who speaks English as her first language, who I had met the night before. She has driven him to the Training Centre to meet with me; all of the migrant workers I spoke to expressed a deep respect for her fluency in Spanish and an appreciation of her sense of humour and warm personality. After a few brief and friendly words, she leaves us to talk.

Andrés stands at a medium height and his relatively muscular frame is covered by a form-fitting shirt. He carries himself casually as we introduce ourselves and sit down at a table, where he leans back in his chair and folds his hands across his lap. His hair is sculpted with gel, and he wears designer jeans with clean athletic shoes. In his hands he holds a pair of wraparound aviator sunglasses; he also carries an envelope and a piece of paper, a form which reads “Maple Leaf Employee Benefit Plan.” In his early thirties, he has been in Brandon for ten months and works at Maple Leaf as an industrial butcher under NOC D Code 9462, cutting flesh from the hogs after they have been slaughtered. He speaks softly but clearly and generally maintains eye contact while he is speaking.³⁴¹ His English is very strong.

I came here looking for an opportunity to start again, because my country is really dangerous right now. ... My age and being a guy made it really hard for me in El Salvador. The gangsters all think that you're from another gang, and it's really dangerous to cross from one area of town to another. ... They tried to kill me two or three times. ... Even when I was a student in secondary school they attacked a microbus that was going to school, they broke the windows and stole things from us. ... Here, Maple Leaf offered me an opportunity to come and work, and to have the benefits of this country, like the security. I feel safe here when I walk the street.

Andrés' unease over safety in El Salvador arises not only out of fear of gangsters, but also concern that the government fails to protect its people through proper application of the law and provision of social security benefits. He tells me that “health, education and social security, those are the basic social problems in my country.” His views on government and the importance of the rule of law come out when I raise an apparent contradiction within his story. He had been studying law in university, but was unable to complete his degree because university was too expensive; this led him to find work in construction and then in an IT centre for a major computer manufacturer. Excited to find this common ground (and disheartened to hear about the circumstances that prevented him from finishing law school), I ask him what kind of law he was interested in practicing. In light of his views on security, his response surprises me: “Criminal defence. I don't want to point to people and say ‘he's guilty’.” Andrés

³⁴¹ Without following these individuals for any prolonged period of time, I am limited in my ability to provide contextual insight into how participants interact with the social world around them, and so I must rely on the few details which were immediately apparent. Manner of dress and demeanour were some of the few factors I could rely on (outside of the content of our conversations) to better understand the people who I spoke to. I have no intention of mimicking Joan Rivers, although stylistically I may be painfully close.

ultimately sees two different types of law applying in El Salvador – the law of wealthy gangsters, and the law of the poor who are forced into criminality by poverty:

I would try to defend the people who need defence, you know, the people in jail. Because the criminals, they have money, they can pay for a really good lawyer, but they also don't get arrested. But if you're poor you don't have anything. ... There are a lot of mistakes in the law in my country... so people go to jail for a long time for something like stealing a chicken.

This kind of sense of community responsibility resonates throughout our discussion. He tells me about organizing neighbourhood clean-ups with his nephew for his birthday, assisting elderly people and orphans through his church, volunteering at the law school's legal aid clinic, and he laughs as he talks about the difficulties of coaching a children's soccer team: "They're always trying to get the ball, you're like 'that's not your position! Go there!'" Laughing and trailing off he says "they'll figure it out eventually." "I'm a social person, I believe in society, in benefits for everybody. ... I don't like to support political parties but I like to provide support in my community." Despite his mistrust of the government in El Salvador, he would keep informed around election time and says that he votes with the best interests of the country in mind: "I vote in every election and try to know the best option for the country, not just for myself... I really believe in responsibilities to your country." He has been acquainting himself with Canada's political system by reading the newspaper and following current affairs.

Andrés learned about the possibility of working for Maple Leaf through friends who had taken positions with the company in Edmonton and Lethbridge, Alberta.³⁴² He had been hoping to come to Canada for several years prior to being hired to work for Maple Leaf in Brandon, missing an offer to work for the company in Saskatchewan in 2009. He says that he did not believe it was true that he could settle in Canada permanently, but once his friends left for Alberta he decided to apply. I ask him if he would have come if he did not have the chance to settle permanently; he responds that any length of time in a safe place is better than no time,

³⁴² In Alberta, NOC D industrial butchers and meat cutters are eligible to apply for permanent residency if they have a minimum of a high school education, three years similar work experience in their country of origin, six months work experience in Alberta, and complete an interview with departmental staff who assess candidates' "suitability" for the Alberta Immigrant Nomination Program. There are, in other words, many more hurdles for migrant workers in Alberta than in Manitoba: see Government of Alberta "Semi-Skilled Worker Criteria" online: Government of Alberta <<http://www.albertacanada.com/immigration/immigrating/ainp-eds-semi-skilled-criteria.aspx>>.

and so he would have taken such an offer regardless. Andrés left his mother and sister in El Salvador, as well as his niece and nephew; he says that the dangers in El Salvador are not as significant for women, but that for his nephew it is important to make sure that he is safe as he grows up.³⁴³ He continues to speak to his family on the phone every week to stay up to date on family affairs, and he sends about \$100 a week to his sister to help her care for the children; once he has become a permanent resident under Manitoba's PNP he hopes that he will be able to help them come to Canada.³⁴⁴

a. Community Life

Since Andrés arrived in Brandon in September, 2012, he has had to make many adjustments in his life, but he says that of all the things that helped him to feel like a part of the community, his ability to speak English is by far the most important. Learning much of his English during his job at the IT centre, Andrés stresses "...imagine if you were here without speaking English, that's an additional problem right?" He has passed his International English Language Testing System ['IELTS'] test, which is required for nomination under the PNP.³⁴⁵ Moreover, his language skills have allowed him not only to make friends with other workers at Maple Leaf, who he says have formed a community of Latin people, but also with some English-speaking Canadian-born citizens.³⁴⁶ "We like to go to the Double Decker and play pool, hang out downtown, maybe have something to eat. I like to go with Canadian people because I can learn English from them and I also share some Spanish." Andrés plays on a local soccer team which consists of mostly Salvadorian migrants and permanent residents (with one player who is a

³⁴³ While I have no doubt that Andrés' experiences of violence in El Salvador were serious, I was left wondering whether the country was truly less dangerous for women. Rather than challenging him on this point, I decided to ask a female participant about her perspective. While I did not have a chance to speak to a woman from El Salvador about her feelings towards security I did have the opportunity to ask a woman from Honduras, as will be seen in my interview with Sofia, who had her own concerns about violence in her country.

³⁴⁴ Due to the structure of the family class, it will be difficult for Andrés to assist his sister and her children in coming to Canada even once he has received his permanent residency. He may be able to sponsor his mother (although there is currently a moratorium on parent and grandparent sponsorships) but his adult sister and her children will have to apply to come independently: see the *Regulations* ss. 116-137.

³⁴⁵ He points out that the standardized IELTS test uses speakers with British accents, which made it more difficult.

³⁴⁶ My use of the term "Canadian" is intended to refer not to an inherent personal characteristic, but rather to people who were born in Canada and who hold Canadian citizenship in the formal legal sense, as far as participants know.

Canadian citizen) and which plays against other local teams, including a Ukrainian team also predominantly from Maple Leaf. He has also been dating a Canadian woman, and while his language is not at such a high level that he can communicate everything he wants, he finds that cultural differences are rarely an issue in the relationship. She helps him to translate government or work papers and documents, and helps him with words or processes that he doesn't understand.

Not all of Andrés' experiences in the community have been so positive. He tells me about experiencing racism in the community, as well as facing discrimination in the workplace which he attributes to the fact that "...we are forced to be there because we have a work permit and a contract." In this predominantly white settlement which treads a line between town and city (despite being a city by name), there is still a consciousness about the newcomers, who are discernible along ethnic lines: "Some guys had really bad behaviour, they stole things from the Superstore, and it's a small town, so everybody knew about that. And after that they started to judge everybody in the same way." Andrés' first mention of racism comes after I ask about his participation in community groups, giving church as an example. "I have gone (to church) but there's still racism there, even though it's a church... they're good people, but they have that failure." He tries to explain the racism in the community, which leads to him discussing perceptions of more systemic discrimination:

I think they think we are here to just take their heritage or something. They feel like we're going to steal their jobs, or their opportunities. The problem is that after we complete our contract with Maple Leaf, some people go out and get a different job. ... The thing is, we're here working in places that they don't want to work, but we don't have to be here. ... We earn 15% less than the people here.³⁴⁷ Recently I heard that RBC fired around 40 people, and then contracted people who they can pay less.³⁴⁸ Imagine

³⁴⁷ Legally speaking, this is not entirely accurate. Under rules that were introduced in 2012, employers could pay migrant workers classified as "skilled" up to 15% below the prevailing wage, provided that Canadian employees were receiving the same wage and it remained above minimum wage. These rules have since been removed meaning that migrant workers of all skill levels must be paid the prevailing wage offered to all workers. Although this provision does not (and would not) apply to Andrés, it is important to recognize that the existence of such a provision has left him with the perception that he is not being treated equally. See Human Resources and Skills Development Canada, "Temporary Foreign Worker Program: Accelerated Labour Market Opinion Fact Sheet" online: Government of Canada <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/almo/factsheet.shtml> and Proposed Regulations (2013) C Gaz I, 1379 (*Regulations Amending the Immigration and Refugee Protection Regulations*).

³⁴⁸ See for example Kathy Tomlinson, "RBC replaces Canadian staff with foreign workers" online: CBC News <<http://www.cbc.ca/news/canada/british-columbia/rbc-replaces-canadian-staff-with-foreign-workers-1.1315008>>

the future if you need employees, you can get Latin guys there and pay them 15% less, who's going to contribute? ... I think it should be equal.

I ask him if this has affected his thinking:

In my country when you go to work, you have to start from the bottom, and it's ok for us, even for me, I can start from the bottom... If I earned 15% less it doesn't matter for me. The problem is not going to be for me in the future, it's going to be for Canadian people.

Andrés also tells me about facing hostility in the workplace. He says that management at Maple Leaf will address employees differently depending on whether they are on a work permit or permanent residents, the difference between choosing to be there and *having* to be there; he says that managers are more polite and patient with those who have a choice to continue working at Maple Leaf. Relations among employees, particularly between those with work permits and those with permanent residency, can also be a source of tension, not based on a hierarchy (which I thought might be the case) but rather because many of the permanent residents who are still at Maple Leaf *do not* actually have as much choice to stay there as Andrés previously indicated. Low English levels among permanent residents mean that getting a job outside of Maple Leaf is extremely difficult, and other permanent residents have amassed a debt which can only be paid off through the higher wages that they earn after working for several years at Maple Leaf.³⁴⁹ “If they're stuck there they're not going to be happy and the environment starts to be bad because you're mad all the time, you're going to work and you're angry.”

Andrés does not face spatial separation from the community in his living arrangements, although he does not have a vehicle which makes it difficult to get around a city that was built

and CTV News, “Backlash over RBC case puts foreign-workers program in the spotlight” online: CTV News <<http://www.ctvnews.ca/canada/backlash-over-rbc-case-puts-foreign-workers-program-in-the-spotlight-1.1230022>>. For a media article (written by an academic researcher) indicating that RBC's is only one case of many, see Salimah Valiani, “RBC only one of many Canadian employers misusing temporary migrant workers” online: Toronto Star <http://www.thestar.com/opinion/commentary/2013/04/15/temporary_foreign_worker_problem_goes_well_beyond_rbc.html>.

³⁴⁹ Federal changes to the PNP in 2012 introduced a requirement that provincial nominees possess a certain level of English before being eligible to apply for permanent residency. As will be seen below, many of the permanent residents at Maple Leaf were not required to pass an English test before attaining permanent residency status, and so their language skills are lower than those of the newer recruits: see Citizenship and Immigration Canada, *supra* note 299.

for cars; Tomas, Gabriel and Isabella all highlighted the difficulties of dealing with a less-than-adequate public transportation system as well, especially in the dead of the Manitoba winter.³⁵⁰ Fortunately for Andrés, his home is relatively close to the downtown area, to the Superstore where he does his grocery shopping, and to 18th Street where there are other places he can go to socialize. “I think it’s when I started to get involved in the activities that are available, like going to the theatre, those kinds of things help you feel more involved in the community.” From outside, the house (which he shares with four other migrant men) is relatively small but well-kept, surrounded by trees and a small yard, no different than any of the neighbours’ homes that line the street in either direction. The housing was arranged by Maple Leaf,³⁵¹ who also paid the first month’s rent; they now pay for the house themselves. Quarters are cramped: “I don’t have my own space. I don’t have my own room (he shares with another roommate) and I just need my own space.” Thinking back to what I had heard from all of the advocates who I spoke to, I asked him whether Maple Leaf had imposed any restrictions on their behaviour in the house; the company had not, although the landlord expressly told them not to have loud parties in the yard. I ask whether he felt this to be discriminatory; he says the tenants just don’t want to have issues with neighbours or the landlord. As we build rapport, sharing jokes and him even asking me questions about myself, I feel that he would be comfortable discussing more personal subject matter,³⁵² and so I asked him about whether his housing situation affects him in his intimate life:

It’s a problem. It affects you a lot. You can’t bring anybody back to the house because there’s a guy playing video games or another guy is sleeping. With the other guys in the house you can put on music or something, but there are a lot of restrictions that you have here.

³⁵⁰ Gabriel in particular pointed out that it is difficult to get credit as a migrant worker, which makes buying a car impossible in the first two years that a person is in Canada. “It makes life easier for everything, to get groceries and stuff like that, plan more activities, and in the winter it’s necessary.”

³⁵¹ Ensuring the availability of suitable and affordable housing is a necessary provision in the NOC C & D employment contract: see Human Resources and Skills Development Canada, *supra* note 227.

³⁵² This was a topic where gender dynamics became the most apparent. I spoke to four men and two women, and found that the men were both more forthcoming about their intimate relations and that I was more willing to ask them questions concerning that subject. This was where my own position as a male became most evident. Family status also factored into this dynamic, as one of the women who I spoke to, Sofia, was married and was clearly very distressed by separation from her husband; I felt that it would not be respectful of her feelings to ask her questions concerning intimate relations in Canada.

b. Feelings of Insecurity

Throughout our discussion of his various relationships within Brandon Andrés expresses feelings of uncertainty and insecurity, a sense that these relationships and his life in Canada could all be abruptly brought to an end and a hesitation to fully immerse himself in his relations with Canadians:

For me it's kind of a big issue because I don't know how much longer I'm going to stay here or if tomorrow they're going to fire me. I think the problem is that I feel insecure in the company, so I have nothing that's going to protect me in the end. Maybe the union will try to help me. I always try to follow the rules, but they could find one little thing and say 'that's it'. I have to protect my back all the time.

Two of the current migrant workers who I spoke to expressed feelings of insecurity regarding their legal status (in varying degrees), even in a province which offers pathways to permanent residency for “low-skill” migrant workers, although Andrés was the participant who expressed the strongest feelings of insecurity. The root of Andrés' unease is a medical condition which has caused him to miss significant periods of work, and it is the reason why he is holding an employee benefit form, which he hopes will help him to receive interim financial assistance. “I've been sick, or at least on sick leave, for [a number of] weeks” he told me. I asked him whether this causes him concern for the security of his job or for him being in Canada:

I don't feel safe. They might try to fire me, I'm not sure, because honestly I think the company is a really good company and they gave me this opportunity, but they're only looking for people who are able to work. If you get sick it's not a good sign for them, they're going to think 'oh this guy will get sick again, we need to send him back to his country', even if you're a good worker. I don't think they're going to fire me yet because I'm a good worker, I'm going to try my best. I only need to hold a scalpel in my hand... Maybe I'm going to feel comfortable again in the company, but right now I just feel like a piece of meat.

Andrés' feelings of insecurity and uncertainty, captured in these fluctuating expressions of worry and reassurance, stem from the risk of him losing his job and his work permit, and being forced to return to El Salvador before he can establish permanent residency in Canada. Although he was able to get health care to treat his condition, the decision to exercise this right was accompanied by considerable risk (or the perception of risk) to his legal status. This risk,

the product of the NOC C & D legal framework, resonates through his work life, his social life in the community, and his personal relationships. For instance, in his relationship with his girlfriend:

I don't want to get involved in a relationship that is probably going to break my heart or break her heart. I also don't want to get married just because of that, I want to feel love. ... I had to explain the work permit to her, and that had a really bad impact on the relationship because you don't know how long I'm going to stay here.

At work:

I think everybody feels insecurity in the company. ... I've been talking with a lot of people and they've said the same thing – 'just be careful because here you're not permanent, you're here today but tomorrow you might not be here'. ... The work is all dangerous. If you're injured, you feel like you have to get back to work right away, you can't even tell anyone. For example a jitney (a heavy transport machine) hit my ankle and it got big and inflamed, and when I told my supervisor he treated me like I was a liar, told me to go back to work. It's still a problem for me, it's hard to walk or run, play soccer. People are really scared.

The fear of unpredictable, arbitrary action on the part of the company raises concerns in many other facets of his life. He tells me that he is afraid to drive a car (for instance his girlfriend's car) because he does not know what will happen if he gets into an accident, unrelated to work entirely. He says that he is apprehensive about coaching a children's soccer team out of fear that he will offend parents who might lobby the company to terminate him. Even in personal relationships with friends this type of fear can bleed into the most innocent of conversations. Andrés gives an example where he was censured by another colleague on a work permit:

I don't want to offend anybody. ... One day, for example, I said 'here it's really hard to get an appointment with a doctor, it's like you want to see the Queen or something' and my friend said (whispering) 'don't say that!' I said 'why, what did I say wrong?' 'If you say that they could fire you!' 'Why?' 'Because the Queen is the Queen, you know?' They have this pressure on their minds, it was a joke and I was saying nothing wrong ... But they are thinking all the time that they are doing something wrong and they're scared... All you have is the job. If you lose the job, you lose the chance to be here. Everything is connected to that...

It's a kind of attitude in my head, because I'm here, I'm working, I wake up every morning here, but I might not be here tomorrow. It means a lot when they say "temporary," a lot, because it connects to everything in my life here.

I can give no better analysis of the impact of the NOC C & D legal framework on Andrés' state of being than he gave himself:

Your mind works in two ways. The first is conscious and the second is unconscious. For the conscious, I try to focus on what I have to do, what I have to learn, everything here. But the unconscious part is all the time thinking about my status. There's a part of your brain, your thoughts are not there but... your unconscious is still there, and it knows everything that's going on in your life, and it creates an additional pressure.

c. Insecurity, Private Decision Making and Social Exclusion

Andrés' feelings of insecurity arising out of his temporary status and work permit are not so strong that they paralyze him or cause him to withdraw from the social life of the community entirely; from an outsider standpoint, it would appear that Andrés is flourishing in Brandon. Rather, cognizance of his status is an ever-present condition which factors into his daily decisions and relationships, most strongly with his employer (such that a serious illness causes him severe stress whereas a less serious injury at work caused him to continue working) but also in his interactions with the community, with friends, and with intimate partners. His insecurity is embedded within his ontology. From Andrés' perspective, the instability that permeates through all of his social relationships presents a barrier to the formation of strong social ties and attachments to the community – relationships which could be ended by a decision made in a Maple Leaf office, in a private conversation or by a single manager, and with no opportunity for Andrés to provide his perspective. I will argue that Andrés has experienced social exclusion both in his subjective feelings of having no personal control or public oversight of the decisions which deeply affect him, and the resulting feelings of instability which affect his social relationships.

Andrés' experiences in his personal relationships are the product of a larger process of social exclusion which wrestles fundamental decisions concerning his social relationships out of his control, and places that control not in the hands of a public decision maker subject to public oversight, but rather to a private corporation. His need to access health care has led to the heightened perception that, within the legal structure of NOC C & D or any TFWP (national socio-spatial structures), he has no legal protection to prevent or challenge the loss of

employment specified in his work permit, such as due process rights or the common-law duty of procedural fairness.³⁵³ Andrés' feelings also highlight the situation of NOC C & D and the TFWP in a global context where decisions that had historically been the concern of the nation state have effectively been relinquished to private corporations.³⁵⁴ A Canadian citizen or permanent resident would doubtless be disadvantaged by the loss of their job, but for Andrés termination from Maple Leaf could also mean the loss of the safety and security that comes with being in Canada, the loss of the future that he has imagined for himself and (potentially) his family, in addition to the loss of those social relationships that he has built in the community. While an administrative scheme has developed around refugee or H & C claims, setting out a process by which decisions are to be made and overseen publicly and which is subject to the requirements of procedural fairness set out in *Baker v. Canada (Minister of Citizenship and Immigration)*,³⁵⁵ no such regime exists within the structure of NOC C & D or within provincial law (although the implications of labour law are discussed below). Andrés' life is thus deeply affected by a decision making process which he sees as being essentially privatized. Termination would require that he either find a new employer and go through the LMO and work permit process (which would mean several months of unemployment and would restart his claim under the PNP, if he can find a job), work illegally and eventually lose his temporary status, file an H & C claim (which, as discussed in Chapter Two would be difficult to

³⁵³ Under the Supreme Court of Canada decision in *Knight v. Indian Head School Division No. 19* [1990] 1 SCR 653 the common law duty of procedural fairness in administrative decision making arises when the decision to be made 1) is administrative or quasi-judicial in nature (rather than legislative or policy-oriented), 2) is based on the delegation to the board of a statutory power and 3) engages the claimant's rights, privileges or interests. This would not give rise to the general duty of fairness as the contract between Maple Leaf and Andrés is a private "master/servant" employment relationship, despite its being facilitated by the federal government.

³⁵⁴ See Teeple, *supra* note 191 at 10.

³⁵⁵ [1999] 2 SCR 817. I do not intend to romanticize the security or assurance provided by these processes or to imply that refugee or H & C claimants enjoy any greater degree of certainty than migrant workers; for instance, refugee claim approval rates, often a matter of life and death, hover around 30% under the current federal Conservative government: see Debra Block, "Acceptance Rates for Refugees to Canada Decline Substantially Since 2006" online: Toronto Star <http://www.thestar.com/news/canada/2012/11/01/acceptance_rates_for_refugees_to_canada_decline_substantially_since_2006.html>. Moreover, the fairness of decisions made pursuant to these regimes, for instance in the context of seeking leave for judicial review of refugee determinations, has been challenged on the basis of the vast disparity in grant rates among judges: see Sean Rehaag, "Judicial Review of Refugee Determinations: The Luck of the Draw?" (2012) 38:1 Queen's LJ 1. My point is that some sort of public process exists for these decisions which have major implications for the lives of the people affected by them.

establish, especially this early into his time in Canada, and would not prevent the issuance of a removal order) or that he return to El Salvador.³⁵⁶

For Andrés, a person who has faith in the rule of law and left his home country because he perceived the law as being abused in its application, he feels as though he has moved from one system of insecurity to another. Far from the agricultural migrant workers who Adrian Smith spoke to, who express a view of law as system which disempowers them and which they do not trust to enforce their rights,³⁵⁷ Andrés feels excluded from the certainty and fairness that he believes law can deliver, law being an aspect of the social and political life of a given community. He tells me how he feels that he has experienced exclusion from the protection of law:

If you have permanent residency, I think the government is going to protect you, but right now the only protection we have is the union. There is nobody else who can take care of us; for example there is no institution where they will say 'let me review your case, let me see what I can do for you', nothing. If Maple Leaf does something and the union can't protect you, you're out. ... I think there should be a government institution that says 'ok, you brought people here, and when there are issues that can't be resolved people can come to us and we will see what we can do about that'.

I don't think it's enough for a country like Canada to not protect the people who come here. I always say that, you know, 'this is Canada', we expect more; they have to respect the law, they have to protect people. ...

The process shouldn't just be in English, there should be Spanish to help people... how are you going to do it when you're talking to another guy who only speaks English? ... Outside this building (the UFCW training centre) nobody is going to take care of us, and that's terrible. The country knows that we're here, they know that we exist... but there is nothing there to protect those guys and give them a second chance when everything fails.

Andrés' experiences of social exclusion are part of a structural process. The legal framework of NOC C & D is a form of rule-making which seeks to reproduce certain social practices, namely in this case restricting Andrés from performing work in Canada outside of his

³⁵⁶ An H&C claim would also require Andrés to enter an entirely different process, would be difficult to establish, and would not take into account his general fear of danger in returning to El Salvador: see *IRPA, supra* note 19 at s 25. A claim for refugee status would surely fail in the analysis status set out in *Canada (Attorney General) v. Ward* [1993] 2 SCR 689.

³⁵⁷ Smith, *supra* note 156 at 105.

work permit, and sanctioning his removal from the country upon the expiration of his temporary resident visa (should he not receive permanent residency). Both of these are closely tied to Andrés' continued employment relationship with Maple Leaf. This is not to say that Andrés has no agency; it is open to him to resist these legal structures, to say that he will not allow these rules to affect him, and choose to engage in social practices which are not legally sanctioned (for instance by working outside of his work permit or by going out of status). When I asked him what he would do if he lost his job at Maple Leaf, however, his response indicated that he would choose to follow practices prescribed by law, but that he was uncertain about whether those practices would truly benefit him:

I would try to get a chance to change employers, to get an opportunity in a different company, because I'm here to work, I'm here to help my family... I'm a person, I'm a human being, I need the job, they need me and I need them.

Again, for Andrés, who wants to follow the law and believes that repercussions would arise for going against it,³⁵⁸ the legal framework of NOC C & D leads to him experiencing social exclusion in two ways: firstly, it inhibits him in his ability to form strong social ties and attachments in his personal relationships and within the community due to a state of precarity which is legally constructed, and secondly, in his perception of being excluded from the protection of law, with power over decisions which deeply affect him being placed in the hands of an unpredictable and unaccountable private decision maker. His exclusionary inclusion is constructed by a legal framework which renders his social life in Canada precarious if not temporary.

d. Union Protection

For Andrés, the single place where he sees a source of stability in his legal status lies with the union, although he is not fully aware of what protection the union can offer. What he appears to desire, and what he believes an institutionalized process would afford him, is the ability to explain his ongoing medical condition, to have his explanation fairly considered, and to make arrangements for him to return back to work. No such process is provided for under the *IRPA*, the *Regulations*, or the standard NOC C & D contract. Under the collective agreement

³⁵⁸ In fact, Andrés' closing words in our conversation were "[t]his is Canada. You can do whatever you want if you respect the law."

between Maple Leaf and UFCW, however, provisions for a form of due process are expressly provided which take into account the special circumstances of migrant workers. The relevant provision of the collective bargaining agreement reads:

In the event of the termination of a non-probationary foreign worker, the parties agree to an expedited arbitration hearing to take place within six (6) weeks of the termination. The Company will continue to process all necessary paperwork required for the employee to remain in Brandon until such time as the arbitrator's award is received.³⁵⁹

Having been in Canada for more than six months, Andrés is a non-probationary foreign worker. The collective bargaining agreement contains terms which govern disciplinary interviews to be held by the company, and which allow for a shop steward to be present at the interview; translators must also be provided for employees whose first language is not English, and the union must be notified in the event that a disciplinary interview takes place.³⁶⁰ While Andrés expressed frustration with the absence notification system, which requires him to call in his absence every day, he has not been called in for a disciplinary interview. If Andrés were to lose his job, the labour arbitration process would provide a consideration of whether the company had used progressive discipline techniques, such as issuing warnings that his continued absence would risk sanctions, or requesting a doctor's note. This process would be overseen and handled by the union, with reinstatement as a remedy available to an arbitrator. In that sense, there *is* a process that would govern Andrés' termination, although it is not the regulatory process that he envisions; what is problematic is that Andrés is not *aware* of the process, and thus his feelings of insecurity continue. Of course, none of this would be the case in an individual employment relationship governed only by the NOC C & D contract, which is not overseen by the government, and by provincial employment standards legislation, which typically provides for a period of reasonable notice upon termination but not for reinstatement. As local social structures, the collective agreement and the union theoretically provide Andrés with at least a degree of the protection and certainty that he is seeking, however they are of little comfort to him when he does not know that these processes are in place. While the legal structure of NOC C & D constructs Andrés' feelings of insecurity and subsequent experiences of

³⁵⁹ United Food & Commercial Workers Union, Local No 832, *supra* note 337 at s 33.04.

³⁶⁰ *Ibid* at s 21.

social exclusion, a lack of communication between Andrés and the union means that these exclusionary effects are not mitigated.

ii. Sofia's Story

"I don't know how I will go two years without seeing my family, seeing my daughter."
- Sofia

Sofia arrived in Brandon from Honduras in December 2012 as part of a group of 21 Hondurans and 30 Salvadorians hired by Maple Leaf. She had never seen snow and was ill-prepared for the bitterly cold winter. "When we came, the clothes we had were inappropriate, all we had were sweaters, but Maple Leaf gave us a gift card to Shopper's Mall." More than that, however, it was the efforts of the Latin community already established in Brandon who helped the newcomers adjust to the new climate and their new lives:

When we arrived at the hotel, there were some people from different countries, Honduras, Colombia, Spanish speakers, they came to our hotel and gave us used jackets... They also told us about Value Village and that we could get stuff cheaper there, because at the beginning we didn't know.

At Maple Leaf there is an association, a Honduras association with a president and treasurer and so on, and they are there to share with everybody. When we went to the apartment we didn't have a TV, we didn't know where to get groceries, we didn't have anything to cook with, no furniture, no microwave, and those people started collecting things, used things, not just jackets but everything. Microwave, a sofa because we didn't have anywhere to sit, TV, dishes, food... Maple Leaf gave us one bed, but not the other things that we need, so that association helped us with that, they helped everybody from Honduras but also El Salvador and Colombia.

Sofia speaks gently and slowly, and is dressed casually in the morning before her afternoon shift, her hair loosely held up out of her face revealing heart-shaped earrings, no make-up. In her mid-thirties, she wears pink flats and jeans, and occasionally tucks her hands into the sleeves of her black hoody, perhaps a bit shy, although it is difficult to tell whether she is naturally reserved, not fully comfortable talking to me, or whether she is not fully confident speaking in her second language. Her English, which she learned studying public relations in university, is still very good, but she is improving it by taking language classes offered at the UFCW's Training Centre once a week, and our conversation takes place in one of the small

classrooms in the Training Centre. She tells me about her family's financial difficulties in Honduras, where her husband was unable to find employment and where she was struggling to provide for her nine-year-old daughter Mia, who was enrolled in a private school so that she could learn English: "I know that speaking English helped me to get a better job, so she is in a private bilingual school to help her learn English." Sofia had also stopped studying public relations in university in order to be able to afford this opportunity: "I had to do it, for her." Personal safety was also a concern, and Sofia had been robbed along with the rest of the passengers on a bus while driving to a Maple Leaf meeting; from her perspective, she was at a greater risk of violence in Honduras as a woman. Reading a Maple Leaf advertisement seeking employees in the newspaper, she and her husband arrived at an employment office at four o'clock in the morning, with a line of about 200 people already formed. She received a number making her eligible to be interviewed and tested for English skills, reading and writing, and physical tests; these tests were carried out by Maple Leaf. Her husband, who does not speak English, did not receive a number. It was not until after she was offered the job that she learned it would require at least two years' separation from her husband and daughter before they would be able to join her in Canada. She describes a conversation with her husband:

We talked about life in Honduras. In Honduras things were getting worse with the gangsters, with the economy, so we talked with the family and it was hard, but in Canada things were going to be better. It was going to be safer, I was going to be better paid... I told Mia that and she said 'no mom, don't leave'... I explained to her that it's just going to be two years and that everything is going to be beautiful here, that it will be better for her studies, that she will be safe, that I was not going to run away. I miss my family, I miss her.

Once the decision was made to come to Canada and Sofia signed a contract in June of 2012, she quit her job working as a receptionist in an eye clinic for low-income people immediately, so that she could spend as much time as possible with Mia before she left in July. Delays in the visa issuance process caused further financial difficulty, and for six months the family went with no steady income, relying on her mother for support and eventually taking money out of Mia's education fund to help the family get by. By November, however, her husband had found work, her visa had been issued, and she was able to stop worrying about whether the opportunity to come to Canada had been a pipe dream.

Separation from her family has been by far the most difficult part of Sofia's experience in Canada. Despite the warm reception from the already-settled Latin community in Brandon, December was an especially difficult month for Sofia as she faced her first Christmas without her family: "I wanted to see them, to talk to them, and when I received my first paycheque working with Maple Leaf the first thing I did is go to Wal-Mart and bought a tablet." As she continues telling me about her first Christmas here, the expression changes on her face; the smile that she had up to this point slowly releases, and her eyes moisten:

We celebrate Christmas on the 24th and we also celebrate on December 31st. I was working on Christmas Eve and because we just started we didn't know anything about the job and the supervisors had told us to clean the floor. It was so hard for us because we were not used to that kind of job. I had been working in a call centre and in an eye clinic in Honduras ... I was sitting all day, and I came here and here we were picking up the garbage, the meat that goes on the floor... The work was dirty, repetitive, tiring. It's a big difference... It's difficult to describe the feeling that I had, I don't know the word in English.

I ask her what the word is in Spanish: "Denigrante."

She tells me about going home from work that night:

I kept thinking 'what am I doing here?' I wanted to go home, I was thinking of my family and that right now they are all together for Christmas in Honduras, and I started crying. Thank God, they sent us home early on the 24th, so when I came home I was crying, crying, everybody was with their family and I was alone. It was so hard, it was the first time I had been separated from my family.

They were all on Skype at midnight, everybody was there, and when I saw them I just started crying... I knew it was going to be difficult when I first came here, and that was my first experience with it. Now I'm fine.

a. Community Life

Over the course of the conversations that I had with migrant workers and former migrant workers in Brandon as well as my (brief) observations in the community, I had come to see that a Latin presence had developed in the city, as seen with Sofia's initial experience arriving in Canada. As I am talking to Sofia, I make the mistake of asking her a compound question: "[i]s there a large Latin community here that you're a part of?" She responds: "well, there's a large Latin community, but I'm not part of it." I ask her whether this is voluntary: "Mmhmm. Yes, they are really good, and sometimes I go, not all the time. They just have

parties.” I ask her why she chooses not to be more involved with that community, and she can’t think of a specific reason; she simply says that “...most of the time I just stay at home.” When she talks about her participation in certain events, however, she smiles widely and her shoulders shrug up as she gushes about the Latin cultural events that the group puts on, such as pavilions at the Royal Manitoba Winter Fair, as well as Latin-themed dinners and parties:

They plan to do it, a group of Spanish people. Anyone can go, but it’s a Latin party. We play our music – Spanish music. There’s always dancing. And sometimes other people come, like the Ukrainian people and Indian (Indigenous) people. And my boss! ... It makes me feel so happy because they are sharing with us in our culture, like he (her boss) was dancing, we laughed at him, ‘oh I didn’t know you danced to Latin music!’ It’s like he’s part of our culture.

The concern that Sofia expresses with these parties is that the alcohol consumption, especially that of women, goes somewhat against her sensibilities: “Everybody here drinks... beer, tequila. People here drink a *lot*. I don’t drink but some of the women, they just... in Honduras it’s not normal for women to drink a lot or be drunk and running around, but here I see it a lot.”

Sofia says that she is generally happy with her housing, which is also located in a residential neighbourhood and near Shopper’s Mall, one of her favoured locations to socialize in the city. Her friendships are primarily with other Latin people from Maple Leaf, and they will occasionally go to restaurants along 18th Street, although they prefer to spend time at each other’s houses. Again, Sofia tells me that she tends to spend most of her time at home. She lives with two other women in a basement apartment, and between the three of them they work the evening, afternoon and morning shifts at Maple Leaf; she shares a room with the person who works in the morning. Sofia suggests that this rotational living arrangement might be for the best, as they all have different and sometimes conflicting personalities. One particular conflict has impacted her social life, and she raised it when I asked whether she would host friends at her house; she answers tentatively: “Umm... we don’t usually do that because one of my roommates, she just got married with a man from Pakistan, so her husband doesn’t allow it, to have people to the house. We usually go somewhere else.” I try to clarify, asking whether there are four people living in the house then: “No he still lives in Pakistan. We used to fight about it but she says ‘we are married so we have to follow the rules’.” She says that Maple Leaf has not attempted to control the activity that goes on in the house.

Sofia has deliberately been attending an English-speaking church with her roommate so that they can hear mass in English and meet Canadian people; there is a Spanish-speaking mass which is offered in the city. I ask her if this has given her the opportunity to get to know Canadian people:

No, not really, because we just go to church and listen to the pastor, and then we go. Maybe it's because sometimes they think that we don't speak English, and they don't realize that we can speak English. When they realize we do they are sometimes surprised.

Later in our conversation the subject of church arises again, but here Sofia expresses (hesitating to speak poorly of churchgoers) deeper concerns:

Me and my roommate go, and we are there together, and nobody talks to us, we went to church for four weeks and nobody asked 'where are you from? How are you doing?' Because all of the people just see Spanish people. Maybe they think that we don't speak English. I don't know if that's why they don't talk to us. But I still go.

Sofia does not label her experiences in the church or in the community as instances of racism or discrimination, although she has felt that she has been treated differently in certain settings on the basis of her ethnicity. She tells me that she has felt ignored by employees in stores who will not ask if she needs help, or to the contrary:

...you go to the store and they harass you, they think you're there not wanting to buy anything. Maybe they see you and think 'oh, you're Spanish, you're not going to buy, you can't afford things'... When it happens I feel like, ok, I'm not Canadian.

Later in our discussion, Sofia draws an interesting connection between these experiences and the changes that she expects to come with establishing permanent residency: "In your mind if people are looking at you you will be able to say 'I'm a permanent resident, I belong here' and it will make you feel better." While it seems that she does not expect this kind of behaviour to end entirely, she expects that it will have implications for the way in which that treatment is experienced, and that permanent residency status will give her a degree of self-assurance in these situations.

I ask Sofia about whether she has any feelings of insecurity concerning her legal status, and she tells me that she does not feel insecure. Although she initially felt that she would not be able to refuse to do work that she felt was unsafe, "now I know that if something is

dangerous I can say ‘no’.” In terms of her political involvement, she does not tend to follow Canadian political affairs, and was jaded by politics in Honduras, which she sees as being largely corrupt. She does not discuss legal status as something which affects her in her day to day decision making in the sense that it might compromise her employment at Maple Leaf, but she does express the feeling that being labelled as “foreign” impacts the way she understands herself in relation to the community. Among the things that she says when I ask whether life will be different when she has her permanent residency, Sofia replies “[i]t’s going to be different because right now we are foreign people, and with permanent residence you will feel like ‘ok, I am a part of the community’, but right now you are still foreign.” She also says that working at Maple Leaf in and of itself makes her feel foreign:

Maple Leaf is not good work to Canadians... they think it’s work for Latin people because it pays less and is hard work... maybe we are making the same but it’s harder, it’s a hard job. There are very few Canadians who work at Maple Leaf, they’re mostly Latin, Chinese... In Honduras there are maquilas, it’s where people work with low education, they can’t afford college, so they work in the maquila. Maple Leaf is like the maquila and people with an education don’t want to work there... you’re doing something that’s just physical... and you cannot work another job because of the work permit.

Sofia continues to tell me what it will be like when she has established her permanent residency:

Right now we are just on a work permit, we are not allowed to do other work, you cannot have a car, you cannot study. I think with permanent residency I am going to feel like part of the people. We’re going to have the same rights as other people. The right to have my family here, to see my daughter.

b. Family Separation and Social Exclusion

With her husband and daughter still in Honduras, Sofia’s life continues to be heavily split between Honduras and Canada. Unlike Andrés, who says that “I disconnect my mind from (El Salvador), because it’s like you’re splitting your life, half in my country and half here,” Sofia maintains daily contact with her husband and continues to rely on public services to take care of her daughter. For instance, the family continues to depend on the Honduran health care system to provide care for Mia, who has asthma and occasionally needs to go the hospital when she has trouble breathing; Sofia is not able to take her to the hospital or comfort her when she

has an asthma attack. While Sofia was still working as a receptionist in the public eye clinic, the doctors there were also willing to examine Mia's eyes for free; the family no longer has access to this benefit. She also tells me about the concern that she feels for her husband, now working as a manager in a shopping plaza, who has been receiving threatening phone calls from people demanding money; they have threatened to kill him or somebody in the store, and he is considering moving with Mia to a new city and getting a new job: "I told him not to worry, I'll be able to take care of them if he is going to do it." She continues to shoulder heavy responsibilities for her family in Honduras, and she says that the biggest limitation that she faces with her temporary status, aside from there being no provision for her family to join her, is the economic restrictions it imposes. "Maple Leaf is not giving us the eight hours a day that we are supposed to be working. Sometimes I only work four, maybe six hours." This creates problems for a family which depends largely on remittances for survival, and for a committed mother who desperately wants to visit her family in Honduras:

I don't know how I will go two years without seeing my family, seeing my daughter. I have been working to save up money to go and visit my family in September, but it's expensive to go to Honduras, really, really expensive, but I need to do it, I love her (Mia)... We would like to have another job so we can work because we need to send money home... but we cannot work anywhere but Maple Leaf because our work permit binds us to Maple Leaf.

It is not only the restrictions on earning an extra income which prevents Sofia from having access to money: "The banks, they will not give us a loan because we are not residents. We are just on a work permit. We can't get anything. Right now I need money to go to Honduras, and I have to save the money to go there."

I should say at this point that I do not intend to use my analysis to "validate" or "substantiate" Sofia's story. Sofia's experiences of family separation have been very difficult for her, although she is a strong and determined person who has clearly been a major source of emotional and economic support for her family. Rather, my intention is to demonstrate that Sofia's experience is also of a certain type, part of a certain pattern of social ordering which poses barriers to a person's full participation in the social, political or economic life of the community.

Sofia's story raises questions about the connections between "family," "social" and "community," as well as the implications of her own agency for whether her experience is one of social exclusion. Doubtless, the family is a core social institution, but it is not self-evident that family separation in and of itself is coterminous with social exclusion. To begin with, if we were to understand social exclusion as barriers to participation in *any* institution which comprises part of a society, family configurations vary so greatly that it would be nearly impossible to define full participation. The nuclear family is no longer the dominant family structure in Canada, with developments such as an increase in same-sex parenting relationships, a decline in the rate of marriage, a rise in the number of single people, an increase in the occurrence of common-law relationships, and increasing rates of divorce and single parenthood bringing considerable diversity to the way in which family life is lived; a great many parents do not have as much contact with their children as they would like.³⁶¹ Moreover, the process of immigration has significant implications for family and kinship networks generally, with Canadian immigration law placing limitations on who can be sponsored by principal applicants as members of the family class;³⁶² this can pose difficulties for families who do not fit within certain cultural assumptions about family structures, particularly those which normalize the nuclear family.³⁶³ Even among Canadian nuclear family structures, a trend towards increasing domestic labour mobility is making family separation more common for Canadian citizens and permanent residents.³⁶⁴ While family separation, especially involuntary family separation, is clearly an issue of great concern for individuals and for Canadian society, participation in this

³⁶¹ Heather Scoffield, "Census: Nuclear family no longer the norm in Canada" online: Toronto Star <http://www.thestar.com/news/canada/2012/09/19/census_nuclear_family_is_no_longer_the_norm_in_canada.html>.

³⁶² This is generally restricted to spouses/common-law partners, dependent children, parents and grandparents, and underage family members who are orphaned: see the *Regulations* at s. 117.

³⁶³ See for example Hania Zlotnick, "Migration and the Family: A Female Perspective" (1995) 4:2-3 *Asian and Pacific Migration Journal* 253.

³⁶⁴ Of course, this happens in a different social, economic and legal context, with different migratory intentions, no legal restrictions on where workers can perform work, and no restrictions on family mobility: see for example Martha MacDonald, Peter Sinclair & Deatra Walsh, "Labour migration and mobility in Newfoundland: Social transformation and community in three rural areas" in Maureen Reed & John Parkins, eds, *The Social Transformation of Rural Canada: New Insights into Community, Culture and Citizenship* (Vancouver: UBC Press, 2012).

institution varies so greatly that it is difficult if not impossible to identify when somebody is fully participating in the “family.”

While the language of social exclusion can be construed broadly or narrowly, it is clearly intended in all of its uses to denote relationships between individuals or groups and the broader community. It is concerned with socio-spatial structural barriers which are erected and perpetuated within and outside of the community, and the processes by which those barriers serve to detach people from community life. Structural factors which enact processes of family separation can then be said to be socially exclusionary only if family separation interferes with the relationships between individuals or groups and the broader community. I argue here that in Sofia’s case, it does. I begin by demonstrating that family separation has traditionally been used as a tool in systems of migrant labour which has served to prevent migrant workers from developing close ties and participating in community life; mutual dependence between the migrant worker and the family at home ensures that migrants will return at the end of their authorized period of stay. I then go on to consider other ways in which family separation leads to Sofia experiencing social exclusion in the community, namely that Canada offloads the public services necessary to Sofia’s family life to another community, and also prevents her from participating in the social activities that often accompany family life.

Examining systems of migrant labour in South Africa and California, sociologist Michael Burawoy notes that traditional studies of labour migration have focused on questions of why people *immigrate* and what the consequences are for those *immigrants*. In the case of *migrant* labour, however, he finds that these questions do not adequately account for the cyclical nature of a system of migrant labour, where political mechanisms regulate movement between the sites of work and “home.” His investigation centres around the question of “...how structural, particularly political and legal, constraints make permanent ‘integration’ impossible.”³⁶⁵ Burawoy argues that the conditions for such a system of labour “naturally revolve around the separation of the means of renewal from the means of maintenance of a labor force.” This requires “the (coercive) separation of the family from the worker (in such a manner as to preserve their mutual dependence) through a series of legal and political

³⁶⁵ Burawoy, *supra* note 171051.

measures and institutions.”³⁶⁶ With labour force maintenance and labour force reproduction taking place in different sites, the two sites become emotionally and economically interdependent: the site of labour force reproduction (relegated to the migrant’s country of origin) depends on remittances from the primary income-earning family member abroad for economic survival; the primary income earner depends on the family because they have no legal status in the country where they work and will be forced (at least in law) to return.³⁶⁷ This system is designed so as to actively “...prevent the stabilization of families (in the places where work is performed), uphold the continued interdependence of worker and family, and, finally, regulate the circulation of labor between the place of work and ‘home’.”³⁶⁸ Studying the operation of the SAWP in Canada, Kerry Preibisch has demonstrated that both the Canadian and sending countries’ governments display a clear preference for workers who are married or who have dependent children in their home country so as to increase the likelihood that they will leave the country at the end of the season; this ensures that migrant agricultural workers develop only “limited social commitments” in host communities.³⁶⁹ Stephen Castles further wrote that “[o]nce children are born to migrants in the new country, or grow up and go to school there, some degree of permanent settlement is inevitable.”³⁷⁰ In other words, Sofia’s experience of family separation is the product of a system which is designed to prevent her from developing ties to the community by imposing a disjuncture between her reproductive life from her economic life.

The legal framework of the federal NOC C & D program enacts precisely this coercive separation in Sofia’s life; hers is the lived experience of structural processes which intentionally sever her reproductive life from her daily maintenance, a central aspect of her social being from her economic life.³⁷¹ As seen in Chapter Two, NOC C & D migrants (as well as SAWP workers and live-in caregivers) face significantly lower prospects of being found to have the ability to

³⁶⁶ *Ibid* at 1058.

³⁶⁷ *Ibid* at 1053.

³⁶⁸ *Ibid* at 1060.

³⁶⁹ Preibisch, *supra* note 59 at 211.

³⁷⁰ Stephen Castles, “The Guests who Stayed: The Debate on Foreigners Policy in the German Federal Republic” (1985) 19:3 *International Migration Review* 517 at 520 from Satzewich, *supra* note 10 at 18.

³⁷¹ I should not that this is not the case for Andrés, who came to Canada single and who has begun to establish his own reproductive life in Brandon, albeit difficult due to his perception of having precarious status.

support family members in Canada than NOC 0, A & B workers, and yet while the spouses of these “high skill” workers are eligible to receive open work permits, “low skill” workers’ spouses will not be issued open work permits.³⁷² This is consistent with the process utilized by the government to prevent “low skill” migrant workers from forming the strong social bonds which develop when people’s reproductive lives are rooted in the same location where they are working, keeping in mind that while the provinces may develop their own permanent immigration programs, the federal legal structure maintains “low skill” workers within a “rotation system of immigration, the only temporary feature of which [is] the worker.”³⁷³ Pointing to the importance of the emotional support provided by family and other community institutions for the working class in industrial societies, Ira Katznelson wrote that:

[w]ithin the community, shared institutions of family, worship, politics, conversation, shopping and recreation facilitate the reproduction... of the ties of affect made even more important by the increasing depersonalization and routinization of workplace relations.³⁷⁴

For Sofia, the routinization of workplace relations is inextricably linked to separation from her major source of such emotional support. She does not seek that emotional support from within the community; she seeks it in Honduras.

The legal framework of NOC C & D also prevents Sofia and her family from accessing the same social, political and economic state benefits that most Canadian citizens and permanent residents rely upon. One of the major aspects of participation in the social and political life of a community is the use of public services which improve the quality of life for residents. The Commission of the European Communities stressed that, in addition to poverty, social exclusion also refers to “inadequate rights in housing, education, health and access to services.”³⁷⁵ In its original usage, the language of social exclusion was deployed to refer to the inability of marginalized people to access the benefits of the French welfare state, although it has since

³⁷² Nakache & Kinoshita, *supra* note 7 at 33. Not being selected by Maple Leaf to work in their Brandon plant (arguably a privatization of decisions regarding family unification), Sofia’s husband would have to find another employer in Brandon willing to apply for an LMO and bring him to Canada as a migrant worker.

³⁷³ Fudge & MacPhail, *supra* note 9 at 846.

³⁷⁴ Ira Katznelson, “Community Capitalist Development and the Emergence of Class” (1979) 9:2 *Politics and Society* 203 at 232 from Satzewich, *supra* note 10 at 22.

³⁷⁵ Commission of the European Communities, *supra* note 80 at 1.

taken on a wider meaning.³⁷⁶ Burawoy's analysis of migrant labour regimes as a separation of the processes of labour force maintenance and labour force reproduction is also helpful; examining migrant labour in South Africa's gold-mining industry, he notes that:

[f]unctions normally performed by the state, such as provision of welfare facilities, education, and social security, are transferred to the communal context of the precapitalist economy. The provision of urban amenities is therefore limited to those necessary for the single productive worker.³⁷⁷

With her husband and daughter still in Honduras, Sofia continues to be highly dependent on the Honduran social system (or her family's own resources) for the maintenance of her family unit. While the Canadian state has allowed Sofia to cross its borders and providing for her immediate maintenance needs, it has accepted no responsibility for the welfare of the social and economic reproductive unit upon which her well-being depends. With Mia experiencing asthma attacks in addition to the ongoing health care needs of a nine-year-old girl, it is the Honduran health care system that is shouldering the responsibilities for ensuring that she receives medical attention when she needs it; she receives neither the care nor the quality of Canada's health care system. The family continues to pay to send Mia to a private school, solely so that she can learn English, while the Province of Manitoba offers her none of the benefit of its education programs. This is not only an exclusionary process in and of itself (in the sense that the law creates conditions which make it impossible for Sofia's daughter to attend school in Canada), but is also part of a continued process of social exclusion; the time that Mia spends excluded from Manitoba's education system is time that she loses in building relationships with other children, improving her English, and learning the skills necessary for living in Canadian society. In restricting Sofia's family from joining her in Canada, the legal framework of NOC C & D prevents the economic and social unit of which Sofia is a vital part from participating in the benefits which normally accompany community life. The process of labour force renewal is externalized, instead organized by the Honduran state.³⁷⁸

³⁷⁶ Burchardt et al., *supra* note 76 at 230.

³⁷⁷ Burawoy, *supra* note 17 at 1056. Burawoy's study examined rural to urban labour migration in Apartheid-era South Africa, but the principles are largely the same for Canada's TFWP which brings workers from relatively poor countries to a relatively wealthy country.

³⁷⁸ *Ibid* at 1052.

Finally, we must consider the implications of Sofia's agency on the question of whether her experiences are instances of social exclusion. As discussed in Chapter One, Burchardt et al. raised the question of whether, if no apparent barriers to social participation exist but a person does not participate in community life, an individual can be said to be "socially excluded" in such a way that demands society's attention. This depends on the perspective that one takes; if one views social exclusion as an inherent problem for society, then all forms of exclusion, even those which are voluntary, require redress. If one views social exclusion as a concern because it affects individuals, however, then they advocate engaging in a separate consideration of whether the exclusion is "problematic" in relation to the true voluntariness of withdrawal and the happiness of the individual. I will take the latter approach, which stresses individual autonomy.

There are opportunities for Sofia to be socially involved with the community and in particular the Latin community that has developed in Brandon over several years of temporary-turned-permanent migration to the city, and yet she feels, by choice, that she is not a part of this group; in other words, the group itself does not pose barriers to her participation. While she has developed friendships with people within the community, most of her time is spent between work and home, home being a place where she does not have particularly strong relationships with her roommates, and which does not provide her with a space for other social interaction. Reflecting on her perceptions of excessive alcohol consumption at some of these events, it appears that Sofia feels somewhat alienated at these community events and that partying in this way is not how she prefers to spend her social time. This does not appear to be a form of "problematic" social exclusion. She has not, however, substituted this with other forms of community participation. Reflecting on this, I began to draw inferences from the hopes that she expresses for her and her family in the future in Canada:

I want [Mia] to go to school here, to have friends, to have a better future... I do not want her to forget Spanish or her culture... I want her to always have God in her mind, to have a love of family – families here are strong, they take care of each other. I like when I see old people driving together in their car.

For Sofia, achieving these hopes for her family would necessarily entail participation in community life in a way that she has, up to this point, been excluded from. She has not been

able to participate in the community life of the school, to meet her daughter's teachers or to make friends with other parents. She has not been able to take her daughter to typical children's activities. She may develop a new interest in participating in other events offered by the Latin community when it provides her daughter with a chance to be exposed to Spanish language and culture. She has not, up to this point, been able to publicly express her identity as a wife or mother in Brandon. While family separation has not been a "problematic" barrier to Sofia's participation in the social opportunities which have been presented to her, it has been a barrier to participation in the social life of the community in the way that Sofia, given her interests and priorities, would like to participate. This separation is directly constructed by the national socio-spatial legal structure of NOC C & D, and is perpetuated by the state apparatus that enforces the law. It is part of a legal process which, when applied as it is written, is intended to reproduce social outcomes which marginalize migrant workers, prevent them from forming strong social ties in Canada, and in turn keep them detached from the community. For Sofia, whose life centres around her husband and daughter, she cannot feel like she is participating in community life until she is joined by her family.

iii. Elias' Story

"I feel disconnected at the moment. I feel disconnected from my work, my world."
- Elias

I have taken liberties with the order in which I have presented these stories. Elias is actually the first migrant worker who I am scheduled to meet with in Brandon, and as I wait for him at the UFCW Training Centre on a weekday evening there are perhaps a dozen people between the hallway and one of the classrooms about to begin an English class. A stocky man in a black leather jacket (it is 25 degrees outside) walks in the front door beaming and greets a friend with an energetic handshake, and in a Spanish accent says "cómo estás, how are you?" In the brief opportunity I have to chat with two of them, they tell me that they are working for their IELTS in order to be eligible for nomination under the PNP; both arrived from El Salvador in December 2012. Shortly after they leave for class, Elias enters the front door with the union representative who has arranged interviews for me; she has driven him here directly from work. Elias is heavyset with a patchy goatee, closely trimmed hair, and in his early twenties. He

has a big smile as we introduce ourselves and wears clean and dark wide-leg jeans and sneakers, with a new black band t-shirt. His voice is clear and expressive, and his English, like the other migrants I spoke to, is excellent.

Elias learned about the opportunity to come to Canada through Maple Leaf as he was doing quality control work as a printer for the main newspaper in El Salvador; he came across an advertisement as he was analyzing print quality. Like Andrés, his motivation to leave the country arose out of safety concerns, and his voice becomes hushed as he talks about his experiences with crime in El Salvador:

I lost some relatives back home because of the gangsters and gang organizations. Three months before I came to Canada, some robbers, two guys on a motorcycle, pointed guns at my car. I was driving to university, and they stole my laptop, 35 dollars from my pocket, my cell phone. The thing is that you can be a doctor, you can be a professional, but you will not be able to get a peaceful place to live like this.

He faced difficult decisions throughout the application, interview and acceptance process, as he was six months away from finishing his university degree as an industrial technician, having already studied in this difficult program for four years; the government had awarded him scholarships for his entire course of study. He was told by Maple Leaf's recruitment officer that he would have to think hard about this decision, which would mean the end of his education and his career, but Elias felt that if he didn't take this opportunity to migrate to Canada, there might not be another; he had applied to work in Canada (and subsequently take up permanent residency) under the FSW class several years before, but was unable to qualify under the point system. After an interview and testing process, he signed a contract without consulting his family or his employer, all of whom were shocked by his decision when word came that his visa had been approved. His parents, younger brother and sister, and girlfriend all still live in El Salvador.

Elias reveals much about his interests, passions and priorities as he laments the various social problems that plague El Salvador. Aside from crime and political corruption, he feels that the country has mismanaged its natural resources and especially its human and intellectual capital:

El Salvador should not be a poor country. It's a small country but they have a lot of natural resources... My country loses a lot because we (professionals) have been

created by our system. People have certain hope in us to improve the country, to help the country grow up but imagine, the main university, they only do about five or six patents per year, and those patents are not technologically related. That's why countries like El Salvador and Honduras will not be able to grow up, because they do not spend on technology and technological education. ...

The pace of his speech quickens, he leans forward in his chair, and uses his hands to help illustrate his points:

In my case, because of my roots in technology where the university, the private sector and the government need to work together, that never happened. For example, I designed many electric cars, I love to design things, to become knowledgeable in practical things, and people love technology – I'm not saying we need to make a spacecraft, we just need to have the appropriate technology to use our resources in a proper manner, in the best way. But that is pretty difficult for the government in El Salvador.

Much of Elias' work throughout his technical training was extracurricular and voluntary, and was done both out of his love for technology and with the good of the community in mind. The university was also the centre of his social life. He tells me about a German company who called to offer him work on developing a highly energy efficient, low-cost lamp that could be used by people in rural areas in El Salvador who did not have electricity; he already had a full time job but offered to work on the project on a volunteer basis because he liked its public purpose. For another project, he helped to secure funding from a technological institute to help his group design a low-cost electronic scale to weigh babies, to replace outdated spring scales that were being used at the time. He goes into minute detail for each project, telling me about the various circuits that were installed, the technology that was used, the collaboration between industrial technologists from other institutions and other countries, and the rigours of his schooling. As he tells me about these various projects, he draws invisible diagrams on the table with his fingers and builds an imaginary tower in the air with his hands. "It's nice because you have the opportunity to help others."

a. Community Life

Although Elias feels that the ability to speak English is crucial to participation in community life in Brandon (for both informal personal relationships as well as eligibility to

apply for permanent residency under the PNP), he tells me that his English is actually getting worse. Learning most of his English in university and practicing by working in a call centre several years before coming to Brandon, he tells me that most of his friends in Brandon prefer to speak in Spanish:

[H]ere I don't have the opportunity to talk with Canadian people, I don't know why, but here a bunch of Spanish guys live with me and they don't like speaking English. And at the company you don't have the opportunity either, you just do your job.

Even within Maple Leaf, he says that a general lack of ability in English means that there is very little intermingling between the various ethnic groups working at the facility. He tells me that many people who established permanent residency prior to the relatively recent changes to the provincial nomination process at the federal level (requiring a certain level of ability in an official language) continue to have very little ability to speak English. This has also created greater uncertainty for more recent arrivals who do not speak English but will need to learn to apply under the PNP. Elias' major concern for these people, however, is less to do with community involvement, and more to do with improved employment opportunities:

[L]anguage is the main barrier to finding a better future here in Canada. Otherwise you will stay in Maple Leaf all your life... If you don't improve your language, you will not be able to find something better.

Curious about workplace relations, I ask Elias if he has ever been asked to do something he felt was unsafe in the workplace: "Not really. They follow the security rules very well." I ask him what he would do if he was asked to do something that he felt was unsafe; he receives my question with a cocked eyebrow and asks with puzzlement "[i]f something was not safe for me?" He explains step-by-step:

First, I would advise him that he would have all of the responsibility if something happened to me. Simple as that. If something happened to me or I hit someone else, they would have the complete responsibility. And it's very high because those machines weigh about two-thousand pounds. It isn't a small car.

I ask if he felt like he would have the ability to enforce his legal rights and refuse dangerous work:

For sure. If I think that something bad might happen, I will advise my supervisor. If my supervisor doesn't take my advice and make the right decision, I would have to go to the

next level. You can go to human resources if you want, or the managers. You can go to the union as well... The union really protects you, in different ways. If you feel like you are working in an unsafe environment, you can advise them. If you don't feel comfortable with a supervisor you can come here (the union office) on your own or with a group of people. You can write your concerns to the union.

As for his political participation in the community (aside from the fact that he cannot vote), Elias has not become involved in political activities, although like Andrés he is working to familiarize himself with the political system, occasionally reading the Brandon Sun and the Winnipeg Free Press.

Elias feels a degree of uncertainty as a result of his temporary status and work permit, telling me about a friend who became sick during his probationary period and was fired due to absenteeism; this person was able to secure another work permit with a different employer but had to start the PNP process from the beginning:

The first six months was really difficult, because the first six months even the union cannot protect you because you're on probation"... If the company says 'we don't need your services anymore' or you make a mistake in the company, like if I have an incident – whatever kind of incident, you know, human beings – next week I will be back home. So I'm not very sure if I will be living in Canada, if I can spend my life in Canada, until I get my permanent residency. So you feel uncertainty.

Elias only discusses these feelings of insecurity once throughout our conversation, and only directly in relation to his employment; it did not arise in other seemingly unrelated areas of his life.

Elias' closest friends in the city are his four roommates, also Maple Leaf workers from El Salvador and Honduras, who all live together in a house on a residential street several blocks from the downtown area and near the Tim Tom Asian Grocery, which Elias would later point out to me on the ride home. Finding their housing arranged by Maple Leaf to be too expensive, they have since found their own rental home, a brick side-by-side no different than any of the other houses on the street, aside from being perhaps a bit older. Each has his own room and they are mindful of those who may be sleeping at different times because of the nature of shift work. The group tends to spend their social time having drinks and barbeques at home; the city's small size means that going to restaurants becomes somewhat repetitive. He tells me that he does spend time with some Canadian people, but that most of his closer personal

relationships are with Latin people. He says that socializing in public locations is also difficult because of his relationship: “I want to avoid whatever kind of problems in the bar because my marital status is not the best, you know? It's easier to behave myself.” I ask whether he is ever tempted to “misbehave”:³⁷⁹

Oh, temptations! (He gives a throaty laugh) But you might lose your own relations back home for that. Even people who are married, they might make other relationships here, and when they bring their family over to Canada they have another girl or another man, so it's complicated. But it doesn't happen with me. I don't have a relationship here. I am pretty focused on my objectives, and when I want to reach something I keep focusing on it. So during the weekends I just drink some beers with my friends, we have barbeques and I study my books.

Elias also likes to participate in the events hosted by the Latin community in Brandon, such as pavilions at the Royal Manitoba Winter Fair, and finds that for the most part his cultural background is appreciated in the city. He had never experienced racism before coming to Canada, and he tells me about one instance where a local person was yelling at him and his friends as they played soccer, telling them to “go back home.” This vexes Elias because he feels that he has made personal sacrifices to do a job that local people do not want, and that “[s]ometimes you don't feel complete acceptance from the people here in Brandon.” He is optimistic, however, for the future of people in the city: “The children are completely different. They are growing up here, they will go to school and make friends with many different people, so it's not the same as it is for us here, now.”

Elias stays in relatively frequent contact with his girlfriend and family by telephone, text message and Skype. He continues to send remittances back to his parents and siblings – he has a sister who is 21, and a brother who is fourteen. He wishes that they could join him in Canada and intends to help them come to the country at some point, although he understands that Canada's family reunification system will make it difficult to sponsor them into the country as permanent residents. He says that he would marry his girlfriend in order to help her come to Canada, as long as she reached a certain level of English and was trained in a trade, although at the same time he expresses concern with this plan: “I'm afraid we would have to get married.

³⁷⁹ This was a question that I did not feel was appropriate to ask Sofia, who was clearly very distressed by family separation. It appeared to me that Elias' relationship, while still meaningful to him, did not have the same level of commitment as Sofia's.

I'm really afraid of that! I don't want to get married! But I will have to do it."³⁸⁰ He has found separation from his parents and girlfriend to be one of the most difficult parts of the migration experience: "I don't care about the weather, I don't care about the different cultural things, you are very far from the people you love, and that really kills you."

b. Education and Community Involvement

While Elias' adjustment to life in Brandon has been difficult due to factors such as separation from his family and girlfriend and insecurity arising out of his work permit, he tells me that:

[t]he biggest change in my life is that last year has been the first year in my life that I remember that I wasn't studying. It's strange because I've always tried to be working, then go back to university, work, go back to university, that kind of life. But I don't have that kind of life here.

He also relates his feelings of disconnect from the community in Brandon primarily to his inability to study in a post-secondary institution. I ask him directly if he feels like he participates in the community in Brandon, and his immediate response is:

No. Not like back home, not really. Imagine. First of all, you are not able to study, because the work permit will not allow you to do that. You cannot to the university even to take an English course, you only have this place (the UFCW Training Centre). So how are you going to be able to belong to the community? Not yet, not until you get your permanent residency, because you will be able to go to the university, to work in another company if you want, to expand your ideas and work with other inside the community.

³⁸⁰ Elias' plan is also legally problematic. Under s. 4 of the *Regulations*:

a foreign national shall not be considered a spouse, a common-law partner or a conjugal partner of a person if the marriage, common-law partnership or conjugal partnership a) was entered into primarily for the purpose of acquiring any status or privilege under the Act; or b) is not genuine: see the *Regulations*, *supra* note 46 at s 4.

Moreover, changes were introduced to the *Regulations* in 2012 which made permanent residency conditional for spouses applying for permanent residency under the family class who have been spouses/common-law/conjugal partners for less than two years and who do not have a child together. The condition attaching to permanent residency established through this avenue is that the person must cohabit in a conjugal relationship with their partner for a continuous period of two years following the day on which they become a permanent resident: see the *Regulations* at s 72.1. According to CIC, these changes were introduced in order to curb such "relationships of convenience:" see Citizenship and Immigration Canada, "News Release – 'The Jig is up on Marriage Fraud,' says Minister Kenney" online: Government of Canada <<http://www.cic.gc.ca/english/department/media/releases/2012/2012-10-26.asp>>.

When I ask him who he tends to socialize with, he answers:

The only thing, like I told you, I'd like to go to the university because it's the only way that you can... (he pauses and thinks for a moment) I mean, I've been studying and working since I was fourteen, and when I got my job at Maple Leaf it was the first time I really stopped moving forward. I miss my laboratories, I miss my campus. After I finish university I can be more useful to this town and to Canada as well.

Although he is working toward provincial certification to handle different machinery specific to his job at Maple Leaf, it is neither consistent with his prior training nor does it bring him into contact with the university community. He further describes this feeling of deskilling in relation to community life: "I feel like the community here is not taking the good things I can offer, like I'm just a (his position at Maple Leaf), I feel like I'm losing my time."

Even when he is discussing subjects which seem completely unrelated to education or university life, Elias returns to talk about his experience of being restricted from taking classes or participating in the life of the university. For instance, as he tells me about the winter activities that he has been introduced to by Canadian friends:

We went toe... bog? Toe-boggin? Tobogganing? Yes! I go sometimes, I do that too, with Canadian friends. But as I said before, it's difficult because you don't feel completely connected to the community because of your residency status. You are not allowed to belong to many things, and one of those things is education.

Elias tells me about an attempt to enrol in an English course at the local college:

When I came here the first week I went to Assiniboine Community College, I asked if I could take an English course there, and they said (his tone goes higher pitched and his syllables become sharply enunciated) 'No!' (his tone returns back) 'Why, it's just English?' (his tone becomes sharp again) 'It's academic English, you only have a work permit'. (His tone returns) It's because at the end of the course you will be able to give classes or learn a methodology, that type of thing, so you can't take it.

Although he knew that English classes were offered at the UFCW Training Centre, he wanted to be involved with a university community, to meet people who are like minded (although there is no specific program for his interests at Assiniboine Community College or at Brandon University), and to improve his own ideas. When I ask him whether he wants to continue his studies as an industrial technologist once he gets his permanent residency, his response is

emphatic: “I don’t *want* to. I *have* to. I don’t have another choice... I feel disconnected at the moment. I feel disconnected from my work, my world.”

c. Restrictions on Studying and Social Exclusion

All of the migrant workers who I spoke to in Brandon had aspirations that involved furthering their education and eventually moving on from Maple Leaf. Andrés told me that he would like to eventually take classes on sports management so that better sports training and education programs could be developed in the city. Sofia told me that she wanted to take English classes at Brandon University but knew that she could not because of her work permit; due to the timing of her shift, the English classes offered by UFCW are not convenient for her, and require her to sacrifice sleep in order to attend. She plans to take university courses in nursing once she becomes a permanent resident. For Elias, however, this was a theme that arose consistently throughout our conversation, and it was clear that he saw education and involvement in university life as critical not only for his economic betterment (which was not a concern which he expressed), but also for his personal and social well-being. I argue that his experience can be understood as one of social exclusion which is directly constructed by the legal framework of NOC C & D.

If full participation in the economic life of the community is understood as including the ability of workers to freely sell their labour power, to utilize their labour mobility to seek better working conditions and better treatment from employers, or to put their full training to use, then the TFWP has an inherent socially exclusionary element to it. One of the defining features of the TFWP and NOC C & D is that they serve to circumscribe the labour mobility of migrant workers through the issuance of a temporary visa and a closed work permit.³⁸¹ As discussed in Chapter Two, this is accomplished through the attachment of a number of conditions to the temporary visa, namely those which limit the migrant’s length of stay, mobility within the country, work they may engage in, and study.³⁸² While work permits issued under NOC C & D could theoretically be issued without restrictions on engaging in study, they typically expressly prohibit these “low skill” migrants from enrolling in university or college programs, or taking

³⁸¹ See generally Smith, *supra* note 156 at 100; Basok, *supra* note 55 and Satzewich, *supra* note 10 at 40.

³⁸² The *Regulations*, *supra* note 46 at ss 183 & 185.

training to improve their skills; Tomas, who participated in the group interview, told me that his work permit explicitly stated that he could not study.³⁸³ A separate study permit is required under s. 212 of the *Regulations*, which requires the applicant to provide a letter of acceptance from the intended educational institution and to establish that they can financially support themselves without working throughout the course of study, although no permit is necessary for courses of study under six months.³⁸⁴ Faraday writes that these restrictions, built into the legal framework of NOC C & D, “undermine social inclusion” and “drive a deskilling of the migrant labour force both by preventing workers from developing skills and by preventing them from maintaining the currency of their existing skills.”³⁸⁵ Elias’ story embodies Faraday’s assertion, and demonstrates that the legal framework of NOC C & D constructs his experience of social exclusion not only in relation to the economic life of the community, but the social life as well. For Elias, this goes beyond the basic economic form of social exclusion enacted by the TFWP.

While the structural force of NOC C & D has operated at least partially to deter Sofia and Andrés from even attempting to take any type of course in a post-secondary institution (they may have other motivations, but both said that the law prevented them from being able to study), Elias tested the limitations that the law sought to impose on him. Fully aware that he could not take courses in any of Assiniboine Community College’s technological courses, he tried to participate in the life of the university in as marginal a way as he could, applying for a course which would not only have allowed him to become involved with the university community, but also to improve his language skills for communication with Canadian people more generally. He would have met classmates, been able to participate in college events, perhaps talk to instructors about their work and potential future technical courses he could take, find ways of getting involved in extracurricular projects, and meet other students with similar interests and passions to him. In following the law as it is written, the administration of the college denied Elias the ability to participate in the university community in even this marginal way, foreclosing the relationships that he imagined he might develop, keeping him at

³⁸³ Faraday, *supra* note 3 at 31. This is authorized under s. 185(c) of the *Regulations*.

³⁸⁴ The *Regulations*, *supra* note 46 at ss 188(1)(c), 219 & 220.

³⁸⁵ Faraday, *supra* note 3 at 79.

a distance from the community. The legal structure of NOC C & D erects barriers which, taking the interests and passions of this particular person into account, has prevented Elias from fully participating in the social life of the community.

C. Conclusion

A variety of factors have converged in this particular workplace in Brandon, Manitoba, which together have significantly mitigated the exclusionary effects of a legal framework which gives structure to the exclusionary inclusion of migrant workers. In the socio-spatial context of a provincial program which allows a pathway to permanent residency for “low skill” migrant workers, a unionized workplace and a setting which reduces spatial barriers to social inclusion, migrant workers have been able to feel like participants in the social and economic life of the settled community, developing friendships, relationships, attending economic and social institutions, and building their own community to support newcomers and each other. Despite conditions which are optimal for social inclusion, however, the law and in particular the legal framework of NOC C & D continues to directly construct experiences of social exclusion among “low skill” migrant workers in its neutral application, which have been felt more or less strongly in relation to each person’s unique personality and the interests, passions and ambitions that accompany it. For Andrés, the law constructs an ever-present sense of insecurity which weakens his personal relationships and causes him to feel abandoned by law. For Sofia, the law separates her from her family, creating a disjuncture between her economic and reproductive lives and excluding her from participating in community life as a wife and mother. And for Elias, restrictions on his ability not only to practice his profession, but simply to study it, has excluded him from the community that he feels would best nurture his interests and passions.

In investigating the social dimensions of exclusionary inclusion, I wanted to answer, in part, Nandita Sharma’s question of how borders and movement across space can render people “homeless” in the places where they live their lives, and so I asked Andrés, Elias and Sofia what “home” means to them. Their answers are telling:

For Andrés: “[i]f I could use one word to describe this feeling it is ‘hope’.”

For Elias:

Home is a place where I can be happy with my life and do the things that make me happy, in this case perform my profession, becoming a professional, working in my profession. I must be able to work as a technologist. That will make me happy if I could do the things that I've loved to do since I was a child. I will feel like I'm a member of the community because I can apply all my knowledge, I'm giving the things that I love to do for my community.

And for Sofia: "For me, home is being with my husband and daughter, it doesn't matter where."

Conclusion: Responses to Social Exclusion and the Changing Face of Immigration to Canada

As Canada shifts towards a model of immigration which predominantly constitutes people as labour power rather than complex human beings with social needs, increasing attention must be paid to the human costs of this shift – to the social dimensions of exclusionary inclusion. While the stories of these six migrant workers/former migrant workers in Brandon, Manitoba, illustrate a group of people fostering social inclusion through the creation of their own community as well as participation in the broader community, each person is also subject to a legal regime which names them as “temporary” and operates to detach them from the communities in which they live and work. This regime affects different people in different ways, but through the stories of Sofia, Elias and Andrés, we can see that the legal framework of NOC C & D targets aspects of their lives that are crucial to their social participation – for Andrés’ a sense of security, for Sofia her family, and for Elias his education – so as to prevent them from feeling and participating as members of the community; this is the *best case scenario*, where workers are unionized, do not face spatial separation from the community, and have pathways to permanent residency through the PNP (for those who choose). Dorothy Smith’s methodology of institutional ethnography allows us to take these detailed accounts, the stories of individuals, and to identify the extralocal structures and processes which have generalizable effects across many local settings; doubtless, Sofia, Andrés and Elias are not alone in their experiences among the tens of thousands of “low skill” migrant workers in Canada at any given time. We can see clearly that these individual experiences of social exclusion are not the product of an unscrupulous employer or individual xenophobic community members, nor are they the product of spatial separation; these experiences are directly constructed by federal legal structures which may be mitigated or exacerbated as they articulate with provincial law and policy. The question, then, is how to respond to such legally constructed forms of social exclusion. I begin by discussing the difficulties in advancing policy proposals to a government which has intentionally created the situation sought to be remedied, and instead propose a number of demands around which migrant justice advocates may wish to coalesce. I then identify places where further research is necessary to advance the

project of social inclusion for migrant workers. Finally, I discuss the importance of this type of research in destabilizing the social practice of difference-making, and intervening in public discourse around migrants.

In Chapter One I drew from academic discussions on social exclusion in the European context to deepen the conversation on social exclusion of migrant workers in Canada. I noted that social exclusion has been a popular concept among policymakers, being particularly useful in identifying the dynamic structural processes which erect barriers to people's participation in the social, political and economic life of the community; this in turn allows policymakers to address those processes. Social exclusion in this context has generally been viewed as a failing of the liberal democratic welfare state to maximize participation in its economic and political system, to make its legal and social rights accessible to all, and to allow for strong civil society relationships; it assumes some sort of societal will to address these shortcomings. In the context of NOC C & D migrant workers, however, my research shows that social exclusion is inherent to the program (so long as people remain migrant workers), and that far from being an unanticipated or undesirable consequence that the government has an interest in addressing, there are strong indications that social exclusion is strategically constructed in the case of "low skill" workers. Exclusion from full participation in economic life is essentially a built-in feature of NOC C & D and the TFWPs generally; the program is designed to fill certain positions, to keep wages in certain industry sectors low, and to prevent the circulation of workers within the labour market, whether they are in search of higher wages or in flight from an abusive employer.³⁸⁶ Moreover, exclusion from political participation is also built into the legal framework of NOC C & D.³⁸⁷ These two forms of social exclusion, whether they are temporary or permanent for the particular migrant worker, are essential to the operation of the TFWP. Other legal measures which I have shown to construct experiences of social exclusion, namely family separation and restrictions on studying, are logical extensions of a program which seeks

³⁸⁶ Fudge & MacPhail, *supra* note 9 at 847.

³⁸⁷ While permanent residents do not have voting rights under the *Charter*, they are placed on a track whereby they acquire an "expanding set of rights" and eventually become eligible for citizenship and its accompanying political rights. This is not the case with NOC C & D workers under the federal legal framework – they *may* become eligible for these rights, but only if they are in a province with an advantageous PNP and an employer is willing to hire them on a permanent basis: see Walzer, *supra* note 118 at 34.

to reduce complex human beings to economic units and deny, suppress or suspend as much of their social existence as possible. This intention can plainly be seen in federal policy towards family unity of “high skill” versus “low skill” workers. In this context, social exclusion is not a failing of the liberal state, but a *creation* of it, a means of providing a cheap labour force to Canadian employers who can in turn be more economically competitive both domestically and globally. The development of a tractable, flexible migrant labour force constituted by people whose only alternative is poverty and violence in countries marginalized by global capitalism has been Canada and many other wealthy countries’ response to globalization.³⁸⁸

Advancing policy proposals directly to a state which has organized itself in response to global capitalism in this way and which demonstrates no intention to remediate the exclusionary impact of the TFWP risks participating in the illusion that the state has an interest in the inclusion of those it has constructed as outsiders. While my research findings are novel in this discussion in that they reveal social exclusion among these migrant workers to be directly attributable to law itself rather than the particularities of certain local contexts, it has long been understood that social exclusion constructed by NOC C & D is the product of the state favouring economic over human interests, rather than a side-effect of measures intended to maximize human well-being.³⁸⁹ “Policy proposals” must therefore be reframed as demands around which academics, activists, NGOs, lawyers, progressive legislators and advocacy organizations can, and already have, coalesced. To begin with, this type of research offers a language by which we can name the structural processes and effects of temporary labour migration, and call attention to the lived experiences of the people who come to Canada under the official moniker of “TFW.” It exposes these experiences as the product of law, as it is written and neutrally applied, and places responsibility for social exclusion squarely on the legislative bodies which perpetuate it. While much of the advocacy work which aims to improve circumstances for migrant workers has revolved around improved access to legal rights, the language of social exclusion provides a coherent framework within which concerns about the social, political and economic lives of migrants can be understood as interconnected and part of the same phenomenon of exclusionary inclusion.

³⁸⁸ Sharma, *supra* note 8 at 426

³⁸⁹ See Fudge & MacPhail, *supra* note 9 at 843, and *ibid*, generally.

With social exclusion being inherent to the TFWP, the only way to eliminate the exclusion suffered as a result of this legal immigration framework (aside from the exclusion inflicted on all people who wish to cross the Canadian border but are prevented by the very existence of national borders) is to offer permanent residency to “low skill” workers on arrival. This has long been a demand of many migrant justice advocates. Permanent residency, or at least the prospect of permanent residency, is a crucial factor in the social experiences of all of the migrant workers who participated in this project, and while they have each experienced social exclusion in their own particular way, the prospect of permanent residency colours their experiences as, at least, prospective *future* members rather than permanent outsiders. This would also offer these *immigrants* access to federally and provincially funded settlement services, including language classes, which all participants said were central to them feeling that they had at least some opportunity to participate in community life. Part of the process of offering permanent residency on arrival would require revisiting the “point” system of the federal skilled worker class, which (in 1967) purported to replace explicitly racist and sexist immigration criteria with the explicitly class-based criteria of “skill” and “education” (and nevertheless perpetuated systemic racism).³⁹⁰ This focus on “skill,” a seemingly neutral and justifiable criteria, ideologically conceals a preference for middle class immigrants from wealthy countries, more often than not predominantly White countries in the Global North, more often than not male. A system which shifted focus to *necessity*, determined in consultation with relevant stakeholders (including public interest groups and, most importantly, First Nations groups, rather than industry alone) would allow migrants to decide how they wish to participate in community life. A person’s history of work in a particular sector might become a more relevant subject for consideration, and flexibility could be provided for language requirements in certain sectors where migrants did not have the opportunity to learn English or French prior to coming to Canada. The extent to which wages and working conditions would have to rise and adjust (throughout the economy) so as to attract (rather than constrain) people to remain in these positions is the economic cost of a more inclusive society which does not rely on the construction of a permanent class of disenfranchised outsiders in order to

³⁹⁰ Sedef Arat-Koc, “From ‘Mothers of the Nation’ to Migrant Workers” in Abigail Bakan & Daiva Stasiulis, eds, *Not One of the Family: Foreign Domestic Workers in Canada* (Toronto: University of Toronto Press, 1997) 53 at 77.

function. There are, however, practical concerns with this demand. Processing times for prospective immigrants wishing to come to Canada as permanent residents often take periods of several years, whereas applications to come as a temporary foreign worker may be processed in a matter of months or even weeks. While permanent residency on arrival would increase the social inclusion of migrants, it may not be a demand that advocates are particularly interested in advancing; migrant workers who have alternative pathways to permanent residency may prefer to undergo a period of legally-constructed social exclusion within Canada rather than being physically and totally excluded while they wait for applications to be processed, although this may not be the case for migrants with no such prospects.

If a period of social exclusion is to be insisted upon by the government (or preferred by migrant justice advocates), the less onerous demand of open or industry-sector/province specific work permits³⁹¹ would decrease economic exclusion and reduce the power imbalance between migrants and employers. In light of Sofia's concerns about not receiving enough work and wishing to make more money, an open work permit would also allow her to find additional part-time employment. Counterintuitively, from the perspective of migrants open work permits may *not* be desirable; the high cost to an employer of bringing migrant workers to Canada might dissuade them from offering employment (and immigration opportunities, in certain provinces) to migrants in the first place. Pathways to permanent residency are also critical. The expansion of the Canadian Experience Class to include workers in NOC C & D occupations would prevent permanent exclusion, rather than labouring in Canada for four years as a permanent outsider and then being forced to leave the country. PNPs in some provinces (which does not include Ontario, the largest importer of migrant labour), for certain workers, mimic the effects of the latter program, however the federal legal framework leaves provinces with the option to permanently exclude "low skill" migrants (and facilitates it with the four-in, four-out rule), which some provinces exercise; provinces such as Ontario which reap the benefits of "low skill" migrant labour without offering means to establish membership are also responsible for migrants' experiences of social exclusion. Again, the concern with PNPs is that they place excessive reliance on employers to agree to continued employment, risking an exacerbated

³⁹¹ Faraday, *supra* note 3 at 6.

power imbalance. These measures would not necessarily mean that *immigrant* workers would not face social exclusion at all, but it would reduce the socially exclusionary impact of law (at least immigration law).

While the fear with half-measures is always that they will have the effect of concealing rather than eradicating structural inequities, my interviews with NOC C & D migrant workers reveal less onerous demands that would significantly ease migrants' own experiences of social exclusion. The first is expanding the issuance of open work permits to the spouses or partners of NOC C & D migrant workers (if not to migrant workers themselves); this demand might even find the support of governments in provinces such as Manitoba who are looking to attract immigrants. As seen in Sofia's story in particular, family separation is not only personally and emotionally difficult, but it also has impacts on her relationships within the community in such a way that it is socially exclusionary. Such a policy could be adopted on a province-by-province basis, and spouse/partners' work permits could be province-specific; even if Sofia's husband had to find work in Winnipeg, for example, it would allow the family to support itself financially, to enrol Mia in school so that she can become accustomed to life in Canada at a younger age, and to have some semblance of a family life in that transition period. By allowing Sofia's family to migrate along with her, they would have the opportunity to participate in community life as part of a family unit, increasing both social inclusion and the likelihood that they will remain in Brandon. This idea may face opposition from those concerned that migrant spouses or partners may be unable to find work (particularly if they do not speak English or French) and place pressure on Canada's social security system, those who do not wish to bear the costs of providing education and social services to children, and of course by those in favour of keeping the TFWP *temporary*. To address these concerns, work permits could be issued with an arranged offer of employment, at least giving migrant spouses and partners the *opportunity* to migrate with their family unit rather than precluding them outright. Again, province-wide permits would broaden migrant spouses and partners' options for finding an arranged offer of employment. As for concerns with paying for children's schooling and social services (aside from the fact that in this scenario both parents would be paying taxes), a Statistics Canada report tracing the connection between children's age of migration and education attainment

demonstrates that the rates of high school graduation of children who migrate to Canada decrease yearly after a child's most sensitive period for learning a second language (after age nine).³⁹² While fifteen percent of boys and eleven percent of girls who immigrated before the age of nine did not complete high school, that number rose to between twenty and twenty-five percent after age thirteen. The report notes that “[e]ducational attainment is directly related to future productivity.” If migrant workers already have the opportunity to obtain permanent residency in a province like Manitoba, then it is not only socially, but also economically preferable for their children to migrate as early as possible.

The second potential demand which arises is to cease the practice of imposing restrictions on engaging in studies for “low skill” migrant workers who wish to improve their skills, from learning a trade to learning English. As seen in Elias’ case, “low skill” migrants may in fact be *highly* skilled (both objectively and within the Government of Canada’s definition). Allowing migrants to gain equivalency and to maintain and improve these skills while on a work permit would not only lessen the socially exclusionary effects of NOC C & D, allowing people like Elias to develop fulfilling friendships and participate in educational institutions, but also provide communities with the benefit of these skills from a person who is already a community member. Again, this might be supported by provinces like Manitoba, who could request that Manitoba-bound migrants be given study permits. Objectors to this demand may argue that Canadian taxpayers would then be subsidizing foreign students, or that people will deliberately use the TFWP to obtain access to publicly-funded post-secondary education. These concerns are also easily addressed. To begin with, I reiterate that migrant workers *are* taxpayers, despite not being recognized as Canadians, and that it is patently unfair for Canada to happily collect taxes from these workers while excluding them from the social benefits purchased with those taxes. Secondly, subsidizing the university education of people like Elias, whose training has already largely been funded by the government of El Salvador, would avail the country of his knowledge and expertise – the kinds of skills Canada seeks in permanent immigrants – so that once he establishes permanent residency he can be more economically productive, working either in a better position at Maple Leaf or for another employer. Of course it would remain to

³⁹² Miles Corak, “Age at Immigration and the Education Outcomes of Children” online: Statistics Canada <<http://www.statcan.gc.ca/pub/11f0019m/11f0019m2011336-eng.pdf>>.

him to demonstrate his intention to remain in the Province of Manitoba for the purposes of its PNP. At a bare minimum, despite the fact that migrants are taxpayers and that it would be economically beneficial for Canada to allow them to improve their education, migrants could be offered the freedom to decide to take classes at an international student rate, allowing them to choose whether these high fees were a sound investment for them.

Finally, and perhaps the most complicated, is Andrés' suggestion of an institution which would oversee the operation of NOC C & D and the TFWP to ensure fairness in decision making and to protect the rights of migrant workers. Such a proposal was made in Fay Faraday's report *Made in Canada: How the Law Constructs Migrant Workers' Insecurity*, where Faraday advocated for the development of an Office of the Migrant Worker Advocate. Faraday envisions the creation of an Office of the Migrant Worker Advocate which would serve as a point of first contact for migrant workers coming to Canada, and would also provide information and assistance in enforcing legal rights, coordination with community groups, and a hotline to report employment abuses or termination.³⁹³ In the absence of the union protection workers at Maple Leaf have, such an institution might serve to alleviate the socially exclusionary effects of insecurity brought by NOC C & D. Drawing from my own experience, this would also help researchers, advocates and organizers to make contact with migrants and to develop a better understanding of NOC C & D, which is so vast in its scope, in order to develop strategies for alleviating the socially exclusionary effects of the program alongside migrants themselves.

Further research on the operation of NOC C & D is necessary for both scholarly and strategic purposes. From an academic standpoint, we must accept that developing a fuller understanding the social dimensions of exclusionary inclusion in Canada will require us to step away from the generalizing methodologies that have been used in distinct social settings with a history of migrant labour and to examine how exclusionary inclusion is experienced by individuals or small pockets of people. The staggering diversity of NOC C & D necessitates a multiplicity of small-scale investigations in order to learn how migrants negotiate their own social inclusion, how they interact with local and especially cultural communities, and to develop strategies for alleviating the exclusionary effects of the TFWP. How does a dishwasher

³⁹³ Faraday, *supra* note 3 at 96.

from Thailand working in Moncton fare in the community? Or a construction worker from Ireland on a three-month contract in Fort McMurray? While NOC C & D migrant workers comprise a specific legal group, the membership of that group is radically diverse and experiences are bound to be highly varied; there is no “standard story” for NOC C & D migrants (although Brandon itself is a place where further and broader ethnographic investigation is certainly warranted). My inclination is that my study has barely skimmed the surface of the deeper harmful effects of social exclusion on migrant workers and on Canadian communities. I imagine that the difficult research conditions of NOC C & D, particularly in settings like Toronto, have deterred researchers from confronting this pressing public issue, and I will attest to the fact that simply gaining access to NOC C & D migrants was extremely personally trying; I am also inclined to think that there is a strong correlation between the fact that the migrant workers I eventually met with are likely among those who have had less extreme socially exclusionary experiences. Research on NOC C & D will be much more difficult than conducting surveys with groups of men in rural Wal-Marts on Friday nights, or speaking to women of colour seen taking White children to parks on weekday afternoons. We will have to explore our various connections with advocates and cultural communities, put up posters, press the data held by CIC, and talk to people “on the ground” in order to elicit these various stories and to better understand the new face of Canadian immigration.

Further research on NOC C & D is also necessary for strategic purposes, to assist advocates and community members (including migrant workers themselves) who work to further the interests of migrants on both social and political levels. I would argue that this research needs to be performed quickly. One particular revelation which is starting to arise is that on April 1, 2015, all NOC C & D migrant workers who were present in Canada on April 1, 2011, and who have not obtained permanent residency (for instance those who have worked on tied work permits in Ontario) will fall out of status when the four-in, four-out rule comes into play. This means that potentially thousands of people who have been in Canada working and building relationships for *at least* four years will lose status on the same day, purportedly to prevent them from losing ties with their home country and to encourage them to establish permanent residency, despite the fact that this may be impossible. Documenting and

publicizing the stories of migrant workers and especially instances of social *inclusion* wherein they actively participate as community members will be important to disrupt nationalist discourses and to increase public support in pushing for alternatives to removal, such as regularization. Further research is also warranted in the area of H & C claims, often seen as an opaque and unpredictable process, where establishment serves as a basis for positive consideration. The criteria in CIC's IP5 Guidelines indicate that a history of stable employment, sound financial management, "integra(tion) into the community through involvement in community organizations, volunteer(ing)..." and participation in linguistic or other studies are all indicative of establishment.³⁹⁴ What does this mean for migrants who become deeply involved the communities they live in? Would contractualist arguments result in denial of claims since the hardship of losing these connections is explicitly contemplated by the *IRPA* and *Regulations*? While there is little work uncovering the internal logic of H & C claims,³⁹⁵ there is a significant body of literature concerning the role of narrative in the refugee determination process. Crucial to decision-making in this context are the socially and culturally developed preconceptions which inform adjudicators' assessment of a claimant's story, both in relation to their credibility and the political situation from which they seek asylum.³⁹⁶ While the H & C decision-making process is markedly different than refugee determinations, particularly with regard to the political determinations required in refugee claims, consistency of a claimant's story with an adjudicator's externally-informed understandings (for instance through media, mailing lists or general reading) and familiarity with common narratives may still promote findings of disproportionate or undue hardship. Further research into this subject would help to make the stories of migrant workers in Canadian communities more familiar and perhaps throw into question assumptions that migrants *do not* become established. This research may also provide legal strategies for framing migrants' H & C claims, especially when we can expect to see a great number of claims in 2015.

³⁹⁴ See Citizenship and Immigration Canada, IP5 Guidelines, *supra* note 251 at s 5.10.

³⁹⁵ The major exception in Canada being Catherine Dauvergne's work on articulations of national identity in the H & C assessment process: see Catherine Dauvergne, *Humanitarianism, Identity, and Nation: Migration Laws of Canada and Australia* (Vancouver: UBC Press, 2005).

³⁹⁶ Jenni Millbank, "The Right of Truth: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations" (2009) 21 Int'l J. Refugee L. 1 at 11.

In a time when people are more likely to enter Canada under the auspices of Maple Leaf or another such corporate banner than as recognized members of the (imagined) national community, it becomes increasingly important to understand not only how exclusionary inclusion is enacted at the political level, but also how it is experienced at the social level. Through the individual stories of migrant workers, this thesis has illuminated some of the ways in which the application and operation of law itself renders people not only politically but *socially* “homeless” within the nation. Significantly, NOC C & D takes this state of homelessness, originally confined to a select few specific social settings (agriculture and domestic work, which have been studied in detail), and disperses it throughout settings and industry sectors where it has never been seen before, where it is difficult to monitor, and where conditions for fostering social inclusion are not as ideal as they are in Brandon, Manitoba. This project continues the investigation into how exclusionary inclusion is enacted socially, and how the law has been mobilized to detach people from the communities in which they live and work; it targets the ordinary human aspirations, passions and priorities which are vital to people’s participation in community life, and prevents people from realizing these ends. The social dimensions of exclusionary inclusion are rapidly becoming more complex and harder to observe; understanding and responding to the changing face of migration to Canada will be both difficult and necessary.

Nandita Sharma’s project in *Home Economics* is to question and undo “...social practices of *difference-making* so that we can realize justice for migrants and for all of us on this planet,”³⁹⁷ and my research approaches this task from a new perspective. While Sharma examines the ideological practices that were necessary for the creation of the legal category of “TFW,” my research offers an examination of the day-to-day operation of a primary and powerful tool which constructs social difference, that being law and the legal framework of the TFWP, and the ways in which it constructs the social realities of the people who are differentiated by it. This perspective reveals both the absurdity of law’s attempts to reduce complex and autonomous human beings to pure economic units, while also revealing the harm that is experienced and the risks that are faced by those who are subject to such regimes.

³⁹⁷ Sharma, *supra* note 12 at 140.

Research of this nature provides a counter-narrative to the “Outsider” threat against which the Canadian citizen Self was fortified, and humanizes people who, in the nationalized imagination, are easily conflated with a legal category; “[n]aming someone a migrant worker is no longer seen as a *social* process but as an embodiment of what that person actually is.”³⁹⁸ Examining the social dimension of exclusionary inclusion provides another perspective on Sharma’s argument that the “foreignness” of migrant workers is not something inherent to them, but rather a state which is constructed and reinforced by law; social exclusion is arbitrarily imposed on those who are imagined as “foreign.” It substantiates Sharma’s assertion that the traditional arguments for excluding people from the national territory so as to reinforce “Outsider” status – including perceived terror and security threats, threats to “Canadian” jobs, threats to Canada’s social security system and threats to Canadian “cultural values” (a stand-in for Canadian White supremacy) – have served to legitimize the temporary if not permanent social exclusion of people like Andrés, Sofia, Elias, Tomas, Isabella and Gabriel, who were invited to Brandon, Manitoba, to do jobs that Canadians were not willing to do, who pay taxes, who obey the law, and are not seeking to “take advantage” of the country’s social security system.³⁹⁹ Storytelling will play a crucial role in interrupting those state practices of difference-making, and it is necessary that we continue to bring attention to the more familiar stories of migrant agricultural workers and domestic workers in Canada, as well as the less familiar stories such as those of six individual migrant workers in a meat-processing plant in southern Manitoba.

³⁹⁸ *Ibid* at 54.

³⁹⁹ Sharma, *supra* note 8 at 436.

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