

Enforcing Exclusion

Precarious Migrants and the Law in Canada

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UBCPress · Vancouver · Toronto

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Introduction

Citizens and permanent residents in Canada do not have to worry about whether they are legally allowed to see a doctor or enrol their children in school. They may have difficulties securing enrolment in their school of choice, and the nearest hospital may have a long waiting list, but, once at the gate, permanent residents and citizens expect that, eventually, they will be allowed in. They may face unemployment, economic uncertainty, and discrimination, but they have no reason to question whether they have the right to go to work once they have found a job. And if they are laid off, they will be able to collect Employment Insurance if they've worked for the required length of time, and, if necessary, they can rely on social assistance to provide a basic level of income. Citizens and permanent residents who find that they have been paid less than minimum wage or who suffer a workplace injury can apply for compensation, and, while they may risk employer retaliation for taking such action, they do not risk removal from Canada or restrictions on their ability to work. The network of laws that upholds these entitlements for citizens and permanent residents is certainly imperfect. In the case of migrant workers, however, it takes on another role, functioning as a multi-sited force for social and economic exclusion, reinforcing the subordinate status of migrant workers, and foreclosing the possibility of full membership in Canadian society.

Permanent residents and citizens have the right to live and work in Canada and are entitled to health care, education, and income support when they need it. But a growing number of people living and working in Canada have less than full migration status – for the most part, they are

in Canada with temporary status. Sometimes they lose their status or wait for months for their permits to be extended. Less frequently, people enter Canada with no status at all. Individuals sometimes become entitled to permanent status, but, due to processing delays, it takes years to obtain. Without either permanent or temporary status, people can be imprisoned or deported under Canadian immigration law. Indeed, the possibility of detention and/or deportation haunts non-permanent migrants even when they have status, because they know their status is fragile. It is also often contingent on an employer, a family member, or the discretion of a government decision-maker. Immigration law creates a hierarchy of status, but it does not do this work alone. Laws and policies governing social benefits also create distinctions between people with permanent status and people without it, usually with an exclusionary effect. Although laws protecting workers do not make the same distinctions, migration status profoundly influences workers' relationships with their employers. Unlike permanent residents and citizens, workers with less than full status risk losing their status if they report an employer's illegal activities or lose their job.

The lack of permanent immigration status not only limits the duration for which people may legally be present in Canada, but it also affects labour mobility, working conditions, and access to the health and social benefits that citizens and permanent residents take for granted. People with non-permanent status are categorically excluded from many benefits and protections in Canadian society. Based on information provided through interviews with migrants, as well as on analyses of laws, policies, and practices of multiple institutions, this book will explore how law and policy are implicated in this exclusion. I draw on the experiences of migrants without full status to understand the function of migration status in laws and policies that affect people's lives most deeply – in workplaces, employment standards, health law and hospital policy, school admission practices, and eligibility for income support. These areas have no formal connection to each other or to the laws and policies that govern immigration directly. Institutions like schools, hospitals, and workplaces cannot grant or withdraw migration status, but the way in which they administer services is directly affected by an individual's status. For migrants, a lack of permanent status is magnified through their interactions with such institutions,

interactions that cannot be neatly separated from each other in the lived experience of migrants.

Merely having or lacking migration status becomes relevant to the lives of individuals through their interactions with such institutions, which often deny or reduce services on the basis of status. These practices lend power to status: for example, if a hospital did not require an individual to show his or her permit to prove status, the relevance of a work permit would be diminished. Given that migration status is a factor affecting access to multiple institutions that provide basic and necessary services, it shapes social and economic life on a large scale and contributes to the subordination of precarious migrants as a group. I was drawn to research on the exclusionary aspects of migration status through my involvement as a lawyer and advocate in the area of immigration and refugee law, and particularly through interactions with people whose status fell short of permanent residence. For the most part, the goals that clients articulated to me were about obtaining status, making their status more stable, or moving from temporary to permanent status. Several aspects of my professional experience compelled me to examine the area of status in greater depth. First, although migration status is intimately related to the operation of law, it is clear that people can have less than full migration status in a variety of ways that are not specifically articulated in statutes or policies. In addition, while laws list ways in which people can become entitled to status or maintain status, and policies often use specific types of status as a filter to determine treatment or entitlement, the ways migration status could shape and govern people's lives called for new research.

Second, it was clear that migration status was a major priority for the people I met, and for good reason – it was often entwined with people's ability to meet their most basic and urgent needs, including access to health care. One woman I met had entered Canada as a live-in caregiver from Mexico, overstayed her work permit, and become pregnant. Her employer was the father of the child, and he had not only withheld her pay but had also prevented her from leaving his home/her workplace at will. She was six months pregnant when we met, but because she no longer had migration status, she could not obtain regular prenatal medical care. She had managed to leave her employer's residence while he was away for the weekend, and she was obtaining free medical attention from a community doctor willing

to see her off-hours. I gave her summary legal advice on her status situation. Her options to stay in Canada legally were few: without an employer's cooperation, the renewal of her work permit was impossible and the chance of eventual permanent residence was slim. In another instance of status compromising access to medical care, I spoke with a group of Latin American construction workers who had entered Canada without documentation. One of the workers had fallen and broken her arm but had not gone to the hospital because she was terrified that seeking medical assistance would bring her to the attention of the immigration authorities. For this worker, the status barrier existed even prior to contact with the hospital: if she had sought help, the hospital's answer to her would have been "no," or at least "not without paying," but her lack of status made her afraid even to ask the question.

Alongside health care, education is another area in which uncertain status can be a major barrier. I worked with a mother and daughter who were at risk of serious violence in Zimbabwe but had been deemed ineligible to make a refugee claim when they entered Canada. This family had made a further application for protection from inside Canada and they were hoping to have the merits of their case heard. In the meantime, the child's local school refused to enrol her unless she paid international student fees, which were far beyond the financial means of the family. The girl and her mother were not technically refugee claimants, but they could not be removed from Canada while their risk-based application was processed. Moreover, the federal government had suspended removals to Zimbabwe at the time, due to dangerous conditions in that country. Yet, although the mother was waiting to have her status determined by the government on the basis of risk, this circumstance fell short of what the school required to accept the child without fees. While the school was eventually persuaded to enrol the child without charging extra fees, its actual policy remained unchanged.

Finally, I was troubled by the contradiction of membership that arose repeatedly in people's experience: both the state and employers seemed to want migrants for their labour, but migrants had difficulty obtaining equal treatment both in workplaces and with regard to state-based entitlements. I thus wanted to examine the entire constellation of legal structures that would be likely to have an impact on the lives of non-permanent migrants

in a systematic way, but I wanted to approach this examination primarily through the experience and aims of those governed by the law, rather than with respect to the law's prerogative in governing them. Both interview-based and traditional legal research methods were essential in this study, but I privileged interview responses, drawing on them to refine my focus on the laws, policies, and practices of institutions.

A growing body of research confirms the lack of access to social benefits by non-permanent migrants, and there is a wealth of documentation to show that people without permanent status suffer exploitation at work.¹ What compelled me to do further research in this area was the desire not only to add to this work but to focus specifically on how the idea of migration status itself operates in laws, policies, and practices. Put another way, I take the harmful repercussions of non-permanent migration status as a starting point, not a conclusion. Thus, rather than seeking only to confirm the detrimental effects of non-permanent status, I am interested in understanding how migration status affects social and economic standing, and what laws and legally governed institutions have to do with migration status. Take, for example, the refusal to enrol a child of parents without status in a publicly funded school. Starting from migrants' reports that schools require status documents to enrol their children, the following questions arise as to exactly how this plays out: Is migration status a specific requirement under the relevant provincial education legislation? If not, is this status requirement a product of written policy? Is it an informal institutional practice to require proof of migration status? Is migration status explicitly required, or is the status document ancillary to another requirement, such as proof that a family resides in the area served by the school? What is the role of the federal immigration regime, if any? This book asks and answers these questions in multiple areas that affect migrants' lives, including employment standards and workers' compensation, health care, education, and income support programs.

Both federal and provincial laws are relevant to understanding how migration status works in Canada. While federal laws determine who has status, provincial laws determine the allocation of social benefits and the enforcement of employment standards and human rights. The federal government uses the *Immigration and Refugee Protection Act* to determine who gets migration status as well as the conditions and time limits attached

to this status. It is also within federal jurisdiction to enforce immigration laws through investigation, removal, and/or detention. Migration status originates in federal law, but it is relevant to a diverse array of laws, policies, and practices apart from the federal immigration regime. For example, laws governing workplace standards and safety are mostly provincial. While workplace laws do not explicitly require migration status to confer protection on workers, status becomes relevant to workers' access to these protections because it is entwined with the employment relationship: many migrants rely on the endorsement of their employers to maintain their status. Similarly, provincial laws determine health care coverage, eligibility for publicly funded education, and social assistance for low-income individuals, and each of these has its own manner of incorporating migration status as a requirement. A basic level of income is provided to qualified unemployed workers through Employment Insurance laws, which are not attached to federal immigration laws, but the absence of migration status can cause the disqualification of workers, as their work may be seen as "illegal."

In the abstract, it is possible to separate these various laws, and the institutions in which they are applied, but they are all bound together in migrants' lived experience. In order to consider the function of non-permanent migration status, I start from the perspectives of migrants themselves, moving from there to the content of laws, policies, and practices. In this book, I argue that migration status, as a legal construct, connects multiple legal and institutional sites, which operate together to exclude migrants from full status. I propose that this assemblage should be understood as a multi-sited enforcement regime in which the subordination of precarious migrants is created and maintained. The individuals I talked to in this study came from a range of migration status situations. They entered as temporary foreign workers, refugee claimants, or visitors, or without authorization. In many cases, their status changed during the time they were in Canada. Some worked or lived beyond the authorization given on their permits, some obtained permanent residence, and some were eventually deported. All of them, however, self-identified as having uncertain immigration status. While the federal immigration regime would label these individuals differently (for example, as "temporary foreign workers," "refugee claimants," or "visa overstays"), this book focuses

on the common element of their lack of permanent status and on what they share with respect to access to rights and benefits. To do this, I use the term “precarious migration status” to describe the non-permanent status of these people. While precarious migration itself is not new in the Canadian context, the proportion of precarious migrants relative to permanent migrants has been greater in recent decades than at any time since immigration numbers have been recorded. Furthermore, shifting political tides have changed the social and economic reception of non-permanent migrants, making Canada’s welcome ever more wary.

To situate the stories of the migrants I spoke with and the conclusions I draw, some background information is useful. In [Chapter 1](#), I briefly discuss the historical and demographic context of precarious migrants in Canada and explain the idea of precarious status and why I am using it. I then describe the method I used to conduct the study. I introduce the primary themes of “work” and the “social state,” as well as the questions and dilemmas that arise with regard to rights and membership for non-permanent migrants.

Migrant participants made it clear that migration status was a powerful feature of their lives, but the way they described it was not simply a repetition of the legislative taxonomy. Status is defined in the laws and regulations governing immigration and is applied through multiple other legal and institutional sites. Through the lived experience of participants, however, status emerges as something much more textured and dynamic than is obvious from the bare text of the law. In study interviews, status was prevalent as a framing construct of daily life and often served as a touchstone by which migrants assessed membership and belonging. In [Chapter 2](#), after a brief overview of federal laws on status, I focus on the nature and effect of precarious migration status as elaborated by study participants, providing a rich definition of migration status that serves as the backdrop for subsequent chapters.

Working life is a central focus of this project. All of the participants were involved in the paid labour force in Canada, and many identified work as a primary site of their participation in and contribution to Canada. For precarious migrants, problems like wage disparity, poor working conditions, and inability to unionize are well documented.² In this book, I aim not only to provide further examples of the manner in which precarious

migrants are subject to differential rights and entitlements, but also to implicate laws, policies, and institutional practices in the production of these conditions. In [Chapter 3](#), I examine the role of migration status in the employment relationship, where precarious status functions to exaggerate power differentials, reduce labour mobility and bargaining power, and create barriers to enforcing workers' rights. Status becomes relevant in the sphere of work for precarious migrants in their relationships with employers, with the labour market generally, and with the legal institutions meant to protect basic standards in the workplace. I canvass job deskilling, labour mobility and stability, and working conditions, including pay, hours, health, and safety. Within these contexts, I consider the remedies offered through law and the effect of migration status, particularly with regard to provincial legislation designed to protect minimum working conditions and worker health and safety. While the text of the law does not discriminate among workers on the basis of migration status, the experience of workers nonetheless indicates that having precarious migration status in working life creates not only a risk of deleterious conditions but also barriers to legally available remedies.

The question of access to social state entitlements for temporary residents goes to the heart of what troubles the liberal state: if such people live and work alongside permanent residents, on what basis is it justifiable to exclude them from the benefits associated with membership in Canadian society? Entitlements to education, health care, and income security are often based on status, either directly or through policy and practice. Yet, even where migrants are legally entitled, they are reluctant to claim benefits because they fear it would have an impact on their status in some way. In [Chapter 4](#), I examine the relationship between migration status and social entitlements, with a specific focus on health, education, and income security through Employment Insurance and social assistance programs. Laws and policies that govern the distribution of these entitlements often employ migration status as a filter through which benefits may be allocated or denied. Compared to workplace protections, social entitlements contain more explicit forms of exclusion and restriction, and also show deeper enmeshment with moral regulation and stereotyping of migrants.

Through laws, policies, and practices, migration status catalyzes state power. In both working life and in the social state, multiple sites function as locations of enforcement and discipline, which serve to exclude precarious migrants. Throughout these sites, the legal construct of migration status is often visible as a common factor. With respect to both working life and the social state, migration status is connected not only to issues of formal authorization, but also to migrants' ability to live and the conditions under which they do so. Migration status can have a profound effect on the way people earn their livelihoods as well as on their health, their material subsistence, and their inclusion in basic forms of belonging in Canada. The construct of migration status is generated in the legal texts of the federal immigration regime as an aspect of direct state control but is also picked up through other state structures, policies, and practices, many of which are present at a local level. Migrants are not only excluded directly through status requirements, but are also subject to disciplining effects through the implication that status could be removed at any time. The effect of migration status across multiple sites thus functions to create and maintain the economic and social exclusion of non-permanent migrants. In [Chapter 5](#), I propose that this exclusion is best understood under the rubric of enforcement. Specifically, I argue that enforcement of membership boundaries is woven into institutions and relationships far beyond those of the federal state, within provincial laws and local policies and practices. In identifying the specific ways in which enforcement and discipline occur *beyond* the prerogative of the federal immigration authority, it is possible not only to document exclusion, but also to assess proposed rights-based strategies to increase inclusion.

In terms of rights, state institutions' membership determinations trump equality concerns for precarious migrants – in effect, because such migrants are defined as non-members, they are not considered to be rights bearing. In case law, the membership claims of precarious migrants can be denied on the basis of their contravention of immigration laws, and migrants' behaviour can be subject to moral scrutiny under the rubric of status. Membership is thus positioned as a necessary precursor to rights, and is precluded in reference to migrants' transgression of immigration laws, even when the benefit at issue is unrelated to migration. Informed by the rich literature

on post-national membership and citizenship, I argue in [Chapter 6](#) that, while contesting membership or “getting status” in a formal way is an essential component of addressing exclusion, this is not likely to be viable under current social and economic conditions. I conclude that, while it is worth working toward possibilities for greater inclusion of migrants at the local level, neither alternatives to national membership nor approaches focusing on human rights provide a pathway to complete inclusion.

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Library and Archives Canada Cataloguing in Publication

Marsden, Sarah, author

Enforcing exclusion : precarious migrants and the law in Canada /
Sarah Grayce Marsden.
(Law and society series)

Includes bibliographical references and index.

Issued in print and electronic formats.

ISBN 978-0-7748-3773-6 (hardcover). – ISBN 978-0-7748-3775-0 (PDF). –
ISBN 978-0-7748-3776-7 (EPUB). – ISBN 978-0-7748-3777-4 (Kindle)

1. Aliens – Canada. 2. Refugees – Legal status, laws, etc. – Canada. I. Title.
II. Series: Law and society series (Vancouver, B.C.)

KE4452.M37 2018

342.7108'2

C2018-902066-0

KF4454.I5M37 2018

C2018-902067-9

Canada

UBC Press gratefully acknowledges the financial support for our publishing program of the Government of Canada (through the Canada Book Fund), the Canada Council for the Arts, and the British Columbia Arts Council.

This book has been published with the help of a grant from the Canadian Federation for the Humanities and Social Sciences, through the Awards to Scholarly Publications Program, using funds provided by the Social Sciences and Humanities Research Council of Canada.

Set in Zurich, Univers, and Minion by Apex CoVantage, LLC

Copy editor: Barbara Tessman

Proofreader: Carmen Tiampo

Indexer: Judy Dunlop

UBC Press

The University of British Columbia

2029 West Mall

Vancouver, BC V6T 1Z2

www.ubcpres.ca