

# CANADIAN COUNCIL FOR REFUGEES

## NON-CITIZENS IN CANADA: EQUALLY HUMAN, EQUALLY ENTITLED TO RIGHTS

Report to the UN Committee on Economic, Social and Cultural Rights  
on Canada's compliance with  
the International Covenant on Economic, Social and Cultural Rights

March 2006

### BACKGROUND INFORMATION

#### Table of contents

1. Articles from the International Covenant on Economic, Social and Cultural Rights that are violated.....	2
2. Articles from the Convention on the Rights of the Child that are violated .....	3
3. FAMILY REUNIFICATION .....	3
a) Denial as punishment: The impact of 117(9) (d).....	3
b) Family reunification for people who are poor .....	5
• Previous sponsorship debt.....	5
• In receipt of social assistance.....	6
• Cost Recovery Fees.....	8
c) Family reunification for live in caregivers and seasonal agricultural workers.....	11
d) Family reunification for children .....	13
• Parents and siblings not considered members of family.....	13
• Separation of children from parents through deportation of parent.....	15
e) DNA testing requests .....	21
f) Processing delays for Refugee family reunification .....	24
g) Limbo due to moratoria country list, security clearance.....	25
h) Acceptable identity documents .....	25
4. THE RIGHT TO NON-DISCRIMINATORY ACCESS TO GOVERNMENT BENEFITS AND SERVICES .....	27
a) National Child Tax Benefit Supplement, Energy Cost Benefit .....	27
b) Access to Employment Insurance benefits .....	29
5. THE RIGHT OF SEASONAL AGRICULTURAL WORKERS AND LIVE-IN CAREGIVERS TO ORGANIZE AND BARGAIN COLLECTIVELY .....	30

## **1. ARTICLES FROM THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS THAT ARE VIOLATED**

**Article 2.2:** The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

**Article 8.1(a):** The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others.

**Article 10.1:** The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

**Article 10.2:** Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

**Article 10.3:** Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

**Article 11.1:** The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

**Article 11.2:** The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed.

**Article 12.1:** The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

## **2. ARTICLES FROM THE CONVENTION ON THE RIGHTS OF THE CHILD THAT ARE VIOLATED**

**Article 9.1:** States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

**Article 10.1:** In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

## **3. FAMILY REUNIFICATION**

### **a) Denial as punishment: The impact of 117(9) (d)**

Section 117(9) (d) of IRPA denies family reunification to anyone who was not examined by a visa officer because they were not declared on a previous application for landing. It applies regardless of the circumstances and without regard to the best interests of any children affected. There is no appeal from the denial and it applies forever, permanently punishing people for failing to declare dependants. The denial applies even if the inclusion of the dependant would have made no material difference to the original application.

The Federal Court in *Dave and Tallon* has also decided that people who fail to advise immigration of a change in status after submitting their applications are also caught by the section. Throughout court challenges, Citizenship and Immigration Canada has advocated and litigated for the broadest application of the section.

The Federal Court and the Federal Court of Appeal in *De Guzman* found that the section was not contrary to section 7 of the Canadian Charter of Rights and Freedoms, which protects "security of the person", because there is always recourse to a discretionary humanitarian and compassionate application, under section 25(1) of the *Immigration and Refugee Protection Act*.

Advocates for refugees and immigrants disagree. The existence of a discretionary remedy is not a substitute for an acceptable review process. Applicants are unaware of a section 25(1) process; no forms are available; Citizenship and Immigration Canada does not counsel use of the section; no guidelines exist for these cases and there is no review process to ensure adequate consideration of humanitarian and compassionate factors or the best interests of a child. While a section 25(1) application exists as a theoretical option, it is practically non-existent.

Many factors cause people not to declare dependants on applications for immigration, some of which are entirely innocent. Sometimes refugees believe their family members are dead, others have lost legal or physical custody and/or contact with their family members and others might innocently misunderstand their ongoing disclosure obligations to immigration authorities. Ignorance, duress, or honest but mistaken beliefs are no excuse in the eyes of the law. This regulation punishes everyone, by permanently separating them from their spouses and children. Even those who deliberately fail to disclose family members should not be punished in this way.

Citizenship and Immigration Canada argues that it is necessary to enforce this section to maintain the integrity of the immigration system and to provide an incentive for people to tell the truth. IRPA already contains provisions aimed at discouraging and punishing misrepresentations, which impose a two-year period of inadmissibility on those who misrepresent. These provisions are adequate protection for system integrity. In consultations in March 2006, Citizenship and Immigration Canada representatives advised that they will not consider repealing the section.

#### *Case examples*

➤ SH has been separated from her daughter since September 2001, when she arrived in Canada. On the death of her husband, both of her children were legally removed from her by a Taliban court and given to her in-laws. Her younger son was returned to her when he would not settle, but her daughter M was not. When she applied to come to Canada as a sponsored refugee, M was not included because she had no physical or legal custody of her and believed she was lost to her. After her refugee interview, SH decided she would not leave her daughter behind and returned to Kabul so she could visit M periodically. With the events of September 11<sup>th</sup>, 2001, however she was forced to choose between remaining in a war zone and bringing her son to safety in Canada. She chose safety and has lived with the pain of separation from her daughter ever since. Since the death of her mother-in-law and the return of M to her family in 2003, she has been trying to bring her daughter to Canada. Her application was refused pursuant to regulation 117(9) (d) of IRPA.

The child in the meantime, has suffered seriously, has been handed from one caregiver to another, has lost weight, refused to eat and been hospitalized on several occasions. She refused to acknowledge SH as her mother when she visited last year. Another special application on H&C grounds has been submitted; in the meantime the mother and her child remain separated.

➤ MH came to Canada as a Convention Refugee from Afghanistan. At the time she applied and at the time of her interview she was a single woman. After her interview she married NN. She was not aware she had to advise Citizenship and Immigration Canada of her marriage and was never asked any questions about her marital status on arrival in Canada. When she applied to sponsor her husband, the application was refused pursuant to regulation 117(9) (d). Her appeal to the Immigration Appeal Division (IAD) was refused when the IAD found section 117(9) (d) includes situations where there is a failure to disclose dependants prior to arrival, not just on the original application form. This means that even where the person makes no deliberate or intentional misrepresentation, but is innocently unaware that they must advise the visa office about changes in status or dependants, they will be permanently unable to bring them to Canada. When she learned she could not sponsor her husband, she was entirely bewildered. She cannot understand how the law can be so unfair.

*Relevant legislative provisions*

Can. Reg. 2002-227, *Immigration and Refugee Protection Regulations*, section 117(9) (d).

(9) Excluded relationships –A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if  
(d) subject to subsection (10), the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.

*Immigration and Refugee Protection Act, S.C. 2001, c. 27, section 65 [Hereinafter IRPA]*

Humanitarian and compassionate considerations - In an appeal under subsection 63(1) or (2) respecting an application based on membership in the family class, the Immigration Appeal Division may not consider humanitarian and compassionate considerations unless it has decided that the foreign national is a member of the family class and that their sponsor is a sponsor within the meaning of the regulations.

*Relevant jurisprudence*

*De Guzman v. Canada (MCI)* [2005] F.C.J. No. 2119

*De Guzman v. Canada (MCI)*[2004] F.C.J. No. 1557

*Azizi v. Canada (MCI)* [2005] F.C.J. No. 2041

*Dave v. Canada (MCI)* [2005] F.C.J. No. 686

*Tallon v. Canada (MCI)* [2005] F.C.J. No. 1288

*As discussed by international human rights bodies*

U.N. Committee on the Rights of the Child. In 1995 the Committee expressed regret at: “the insufficient measures aimed at family reunification with a view to ensuring that it is dealt with in a positive, humane and expeditious manner” and at: “the delays in dealing with reunification of the family in cases where one or more members of the family have been considered eligible for refugee status in Canada.” (Para 13)

*Policy recommendation*

Repeal Can. Reg. 2002-227, *Immigration and Refugee Protection Regulations*, section 117(9) (d). [Hereinafter IRPA Regulation]

**b) Family reunification for people who are poor****• Previous sponsorship debt**

IRPA Regulation 133(1) (h) (i) provides that a sponsorship application will not be approved if, on the day the application is filed and until the day a decision is made by an immigration officer, the sponsor is in default of any previous immigration undertaking. Requiring debt repayment before permitting a sponsorship application to proceed gives the unseemly appearance that Canada uses family reunification to enforce debt recovery. The use of this provision as a means of collecting money is a clear instance of placing the financial interests of the state above the human rights of those under its control.

*Case examples*

➤ MM is a single parent of five children, originally from Jamaica. As soon as she arrived in 1995, MM sponsored her eldest son, who had been unable to accompany her. At the time of this sponsorship she was in receipt of social assistance and the visa officer was aware of this. MM relied on social assistance for about two years and her sponsored son was among the beneficiaries of this assistance. In 1998 she started to work but as she was supporting 5 children at the time, her income was topped-up by social assistance. In 2002 she managed to become self-supporting, at great personal cost, as a single mother with 5 children.

On October 19, 2002 she married RS and they have a son who was born in June 2003. MM sponsored her husband, but the application was denied because her eldest son had been included in her social assistance payments, making her in breach of a previous sponsorship undertaking.

MM intends to pay back the sponsorship debt but she cannot do it on her own, while struggling to support her family as a single mother. Her husband considers himself to be the father of all of the children, and wants to assume his responsibilities. However, he cannot help pay back the debt while living in Jamaica. This family has been separated since 2002 and will be separated forever unless, or until, they can repay the debt.

➤ In the case of BC, his application to sponsor his wife to Canada was refused. She is a citizen of Bangladesh. BC had previously sponsored his parents, two brothers and a sister. For a period of five years his parents received social assistance after their arrival and he was therefore in default of his original undertaking for his family. BC's sponsorship was refused and on appeal, the IAD found insufficient humanitarian and compassionate factors, notwithstanding the facts that he was hard working, at times with two jobs, and his wife was expecting their child. (*Chowdhury v. Canada (MCI)* [2004] I.A.D.D. No. 915.)

*Relevant legislation**IRPA Regulation section 133(1)*

Requirements for sponsor –a sponsorship application shall only be approved by an officer if, on the day on which the application was filed and from that day until the day a decision is made with respect to the application, there is evidence that the sponsor.....

(g) subject to paragraph 137 (c), is not in default of

(i) any undertaking, or

(ii) any support payment obligations ordered by a court.

*Policy recommendation*

*IRPA Regulation section 133(1) (g) (i) should be repealed*

**• In receipt of social assistance**

Being in receipt of social assistance makes a person ineligible to sponsor and prevents family reunification under a variety of circumstances. Even where there are compelling humanitarian and compassionate considerations, including the best interests of children affected, the regulatory exclusion means families have to appeal to the Immigration Appeal Division. Such appeals add a minimum of two years to the already lengthy sponsorship process.

IRPA section 39 discriminates by denying family reunification for people who are so poor they need to resort to social assistance. The Ontario Court of Appeal in *Falkiner vs. Ministry of Community and Social Services*, [59 O.R. (3<sup>rd</sup>) 481, (Ontario Court of Appeal) [2002] S.C.C.A. No. 297 (Supreme Court of Canada) recognized that people on social assistance are a marginalized, vulnerable and excluded group who need the protection from discrimination of section 15 of the Canadian Charter. The Court found that they are a group analogous to groups defined by race, national or ethnic origin, colour, religion, sex, age or mental or physical disability for the purposes of Canada's equality rights protection. People on social assistance need, and are entitled to, protection from discrimination yet section 39 specifically denies them the right to family reunification on the basis of their need for social assistance.

Many refugees need social assistance while they overcome trauma, learn English or French and marketable skills to ensure successful integration. Many others (overwhelmingly women) need social assistance because they are struggling as single parents in Canada, without affordable child care or fair and adequate wages for women. For many women seeking to leave an abusive relationship, social assistance is often the only option. People resort to social assistance for a myriad of reasons and anyone who needs social assistance is already struggling with multiple disadvantages. Family reunification in many instances would contribute to psychological health and reduce agony and stress. Denying family reunification to this already marginalized and vulnerable group is to add additional psychological stress and disadvantage to people who are already vulnerable.

#### *Case examples*

➤ ATJ's application to sponsor his wife and four minor children from Pakistan was refused because of financial reasons. He had been separated from his wife and children since his arrival in Canada in 1999, and his most recent tax return showed an income of \$25,000. ATJ's application to sponsor his family was refused by both the visa office and on appeal to the Immigration Appeal Division (IAD). The IAD determined that ATJ did not have sufficient income to support his family despite his continuous and steady employment and that there were insufficient humanitarian and compassionate reasons to exempt him from the income requirements. (*Jabbar v. Canada (MCI)* [2005] I.A.D.D. No. 131)

➤ JA was refused the right to sponsor her daughter from Honduras because she had been on social assistance and there was an assumption that her daughter would continue on social assistance contrary to s. 39. She applied to sponsor her daughter in March 2001 and was refused in September of 2002. She appealed to the IAD and fortunately for her, the appeal was granted on humanitarian and compassionate grounds in October 2003. In this case, with further delays of a minimum of six to eight months to send the case back to the visa post, what "fortunate" means for JA is that she will have been separated from her daughter for a minimum of three additional years. These three years fall at a critical time in her daughter's development. (*Medina v. Canada (MCI)*[2003]I.A.D.D. No. 1213)

#### *Relevant legislative provision*

##### *IRPA section 39.*

Financial reasons - A foreign national is inadmissible for financial reasons if they are or will be unable or unwilling to support themselves or any other person who is dependent

on them, and have not satisfied an officer that adequate arrangements for care and support, other than those that involve social assistance, have been made.

*IRPA Regulations 133.(1)*

Requirements for sponsor - A sponsorship application shall only be approved by an officer if, on the day on which the application was filed and from that day until the day a decision is made with respect to the application, there is evidence that the sponsor (k) is not in receipt of social assistance for a reason other than disability.

*Policy recommendation*

*IRPA* section 133(1) (g) (i) should be repealed.

*IRPA* section 39 should be repealed.

- **Cost Recovery Fees**

Canada charges refugees and protected persons cost recovery fees of \$550 per adult, \$150 per child to apply for permanent residence and include their family members. These fees are a significant barrier to family reunification since refugees who cannot pay the fees and cannot borrow the money for the fees, are unable to become permanent residents and cannot bring their families to join them in Canada.

Charitable organizations responding to the needs of refugees in Canada are overburdened with these fees and find themselves paying the government cost recovery fees rather than using scarce resources to cover other needs. (The cost recovery fees are not charged to refugees selected abroad).

In the case of separated refugee children who are being processed for landing in Canada without their parents, each child is treated as a principal applicant and must pay a processing fee of \$550. This constitutes a serious barrier to the child becoming a permanent resident in Canada and potential reunification with parents through sponsorship once they turn 18. Perversely, two refugee children who are siblings actually must pay more than a refugee parent and a child: each sibling must apply as a principal applicant and together pay a total of \$1,100, while the parent and child would pay \$700 (\$550 for the adult + \$150 for the child).

The CCR requested an explanation for the fees charged to refugees and protected persons accepted in Canada, and why these people are treated differently from refugees accepted outside of Canada. The Government response was that refugees accepted outside Canada would have to pay other costs, such as medicals, travel, etc. It should be noted, however, that refugees and protected persons accepted in Canada have already paid their own transportation costs and still have to pay medical costs in addition to the costs for family members overseas being processed with them.

*Impact of fees on NGOs helping refugees*

Small non-government charitable organizations are often asked to assist with the application fees for refugees and in some cases most of the funds being raised by such groups are being expended on loans to refugees to pay these processing fees. For example, Jeremiah's Field, an interest-free loan organization set up by a refugee support group at Bloor Street United Church in Toronto paid out \$10,000 in loans to pay the processing fee in 2004. In 2004, of 36 requests for loans, 30



were requests to pay the processing fee. In the first half of 2005, of 16 requests for loans, 15 were for the processing fee. Jeremiah's Field would prefer that loans be provided to refugees and their families to assist with travel costs for refugee reunification and settlement in Canada, but instead, most of the money they raise and distribute as loans is being paid to the Canadian government to cover the cost recovery fee of applications for permanent residence by refugees.

According to the CIC website Facts and Figures for 2004, there were 11,265 protected persons (the formal name given to refugees in the law) recognized as such in Canada in 2004 and 3,959 dependants abroad of these protected persons, for a total of 15,224 protected persons. If about 1/3 of these are adults or other principal applicants (it is probably a higher percentage), the fees collected just for the applications for permanent residence of these refugees amount to a total of approximately \$4,250,000 ( $5,000 \times \$550 = \$2,750,000$  for adults and  $10,000 \times \$150 = \$1,500,000$  for the children). No fees are collected from government assisted and privately sponsored refugees: the number of these in 2004 was 10,757.

The total number of immigrants and refugees for 2004 was 221,352; the total number of immigrants for 2004 was 195,371. Fees and Right of Permanent Residence Fees for all immigrants (assuming again that 1/3 are adults) would be about  $65,000 \times [\$550 + \$975 = \$1,525] = \$99,125,000 + [129,000 \text{ children} \times \$150 = \$19,350,000] = \$118,475,000$ . So the total fees collected from immigrants and refugees =  $\$4,250,000 + \$118,475,000 = \$122,725,000$ . The \$4,250,000 collected from refugee and their dependants amounts to only about 0.34% of the total fees collected from immigrants and refugees in 2004.

#### *Case examples*

➤ TC, a Tibetan living a precarious existence with his wife and four children in Nepal, managed to reach Canada in June 2001 and claimed refugee status. He was granted refugee status in April 2002 and was told he must apply for permanent resident status within six months. He had the right to include his wife and children in the application but that would have cost \$1,700 (\$550 each for him and his wife and \$150 each for the four children). Although TC was looking for work and volunteering as a translator at a local hospital, he was unemployed and his social assistance amounted to about \$550 per month for his rent and expenses. He could not afford to include his family but he managed to borrow the \$550 he needed to apply for himself. He submitted the application just before the six month deadline in October 2002. By November 2003 he had been granted permanent resident status. At that point he was still unemployed but he was finally able to borrow the \$1,150 to start the applications for his wife and children in November 2004. His application to bring his family to Canada is being processed but he worries constantly about the safety of his wife and children since the political and security situation in Nepal continues to deteriorate. His children have been unable to attend school for months at a time due to the security situation. If not for the fees, TC would have been able to include his spouse and four children in his application immediately after he was granted Convention refugee status and the family might now be reunited.

➤ AM and MM are a brother and sister from Angola who arrived in Canada in March 2001 and were granted Convention refugee status in September 2002. Within six months of their positive refugee decision, in January 2003, they applied to be landed and a request was made that they be exempted from the \$550 processing fees since they were both full time high school students receiving social assistance and had no funds to pay the \$1,100 total required. The request was

refused and counsel sought to judicially review the refusal to waive the fees but the Federal Court did not grant leave for judicial review. Finally, two years later, the Children's Aid Society of Toronto approved grants to pay the processing fees for these two young people. The applications were submitted in 2005. No decision has yet been made on the applications. Since they were sent well past the 6-month period for applying for permanent residence as refugees, they are being dealt with as humanitarian and compassionate (H&C) cases. The average processing time for H&C cases is between two to three years.

➤ YA, AA, AA and BA are four siblings who came to Canada and made refugee claims. At the time of their arrival they were all unaccompanied minors and arrived in Canada to be reunited with their aunt, their only surviving family member. Their claims to refugee status were refused in 2003 because the Immigration and Refugee Board was not convinced of their identity. After two Judicial Review applications to the Federal Court they were ultimately granted a second Pre-Removal Risk Assessment where they were able to conclusively establish their identity and were found to be in need of protection. These children were required to pay \$2,200 in cost recovery fees in order to have their applications for permanent residence processed. The fee was determined because each applicant was considered to be a "principal applicant" notwithstanding that they were all one family, and most of them were still children.

*Relevant legislation provision*

*IRPA* Regulations 175, 176, 295(1)(2)

*IRPA* Regulation 295(2) fees are not applied to refugees selected by government or private sponsors from outside of Canada.

*Relevant jurisprudence*

*Berhanue v. M.C.I.* [2005] FC No. 885: this is the case of an Ethiopian refugee who was unable to pay the \$550 fee. He therefore requested an exemption when he applied for permanent residence. His application was returned as incomplete without the fee; leave for judicial review was granted but by the time the matter came before the Court, friends had helped him to pay the \$550 fee, so the Court found the matter was moot. However, Mr. Justice Harrington stated at the end of the decision: "I was assured that this case is important because there are many other refugees who are not able to pay the processing fee and find themselves in somewhat of a limbo. They cannot be returned to their country, but on the other hand not being permanent residents will be unable to sponsor family members, and their ultimate goal of citizenship is severely hampered. It would be more appropriate that the issues raised in this case be canvassed in another in which the cost recovery or processing fee has not been paid."

*Policy recommendation*

The cost recovery fee or processing fee for the application for permanent residence of all protected persons and their family members should be waived.

### **c) Family reunification for live in caregivers and seasonal agricultural workers**

Canada treats the families of immigrants and highly skilled temporary workers more favourably than those working under temporary work authorizations in the least desired, lowest paid sectors of the economy.

Canada's immigration "points" system privileges people with higher education, professional skills and/or investment capital. Those qualifying for permanent residence under this points system can bring close family members with them as of right. Select groups of highly skilled temporary workers are also allowed to bring close family members with them to Canada. In 2001, CIC launched a program to allow spouses of highly skilled temporary workers to work in Canada. The Spousal Employment Authorization initiative includes the spouses and common-law partners of management and professional employees as well as those of other "skilled" workers. This agreement does not apply to the spouses and partners of "low-skilled" temporary workers. Manual labourers do not qualify for permanent residence status under the immigration points system. The migration channels available to them, such as the Live-in Caregiver Program and the Seasonal Agricultural Workers Program, grant only a temporary work authorization and do not allow workers to bring family members with them to Canada.

Canada is moving in the direction of expanding temporary worker programs without addressing the serious inequities in access to family. In October 2005, then Minister of Citizenship and Immigration Joe Volpe publicly announced plans to bring in more temporary workers to fill jobs in the trades sector. The new Conservative government is expected to follow through, having prioritized a closer link between immigration and labour needs. Meanwhile, Canada has yet to make a serious commitment to protecting temporary workers rights by signing the Convention on the Protection of the Rights of All Migrant Workers and their Families.

Under the Live-in Caregiver Program, caregivers, most of whom are women from the Philippines and other countries, leave their own children behind to come and care for Canadian children. Foreign domestic workers are required to complete two years of live-in employment over a three-year period before they can even apply for permanent residence and begin the process of reuniting with family members. Processing delays prolong the waiting. The National Alliance of Philippine Women in Canada reports that live-in caregivers routinely wait five to eight years to be reunited with their families, with serious consequences for family ties and the ability of separated family members to adapt once they finally arrive in Canada.

Under the Seasonal Agricultural Program, Mexican and Caribbean labourers leave partners and children behind to spend up to 8 months a year in Canada. Some of these workers come year after year, for up to twenty years, spending more than half of their working life thousands of miles away from their families. For months at a time, whole communities in Mexico are emptied of their male residents, leaving only women and children behind. These workers have no access to family reunification processes and can never qualify to immigrate to Canada permanently.

Applicants with families are favoured over those who are single, since they are considered more likely to return home at the end of the growing season. Thus the program deliberately separates families, contrary to the IRPA objective of reuniting families. Long periods of separation undermine family ties, sometimes leading to family breakdown.

Family separation also increases worker isolation, one of the factors that make program participants vulnerable to labour exploitation. Temporary agricultural workers are housed on their employers' property, an arrangement that gives employers increased control over their workers' behaviour. Growers limit workers' mobility on and off the farm, as well as the entry of visitors. Advocates report considerable difficulty gaining access to visit workers on farms.

*Case examples (Source: National Alliance of Philippine Women in Canada)*

- LC, a former midwife from the Philippines, worked for over ten years as a domestic worker in Taiwan, Dubai and Canada before being reunited with her husband and five children. The years of separation took their toll on the family. Re-adaptation was difficult. "It was in Canada that my marriage broke down," said LC "I suppose it broke down since I was always away."
- AL, the son of a domestic worker, was reunited with his mother after four years of separation. Obligated to work two jobs to make ends meet, his mother had little time to support and guide AL. As a result, AL dropped out of high school and got involved in drugs and gangs at the age of 16.

AL is not alone. Filipino youth in Vancouver have an estimated 60% high school drop out rate.

- Most seasonal agricultural workers are in Canada because of their strong commitment to supporting their families. Ironically, the price they pay is family separation. E, a worker who has been coming to Canada for 17 years, has missed the births of all of his grandchildren.

*More information*

"Strategic discussion paper for the Filipino-Canadian community on the Live-in Caregiver Program", Prepared by Luningning Alicuitas-Imperial, Barrister and Solicitor for the Kalayaab Resource and Training Centre. February 2005. (Includes analysis of possibilities for launching a court challenge against the Live-in Caregiver Program)

Preibisch, K (2004). Migrant agricultural workers and processes of social inclusion in rural Canada. *Canadian Journal of Latin American and Caribbean Studies*, 29(57-8): 203-239.  
"El Contrato" National Film Board of Canada, film by Min Sook Lee, 2003.

*As mentioned by human rights bodies*

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 44.1: States Parties, recognizing that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, shall take appropriate measures to ensure the protection of the unity of the families of migrant workers. Article 44.2: States Parties shall take measures that they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers with their spouses or persons who have with the migrant worker a relationship that, according to applicable law, produces effects equivalent to marriage, as well as with their minor dependent unmarried children.

International Labour Organization: “Prolonged separation and isolation of family members lead to hardships and stress affecting both the migrants and the dependants left behind, which may give rise to social, psychological and health problems, and even affect workers’ productivity. Therefore, family reunification should be facilitated. Even in the case of seasonal and special-purpose workers, countries should favourably consider allowing family migration or reunification.” Conclusions of the tripartite meeting of experts on future ILO activities in the field of migration. Geneva, April 1997.

<http://www.ilo.org/public/english/bureau/inf/magazine/20/20migran.htm>

#### *Policy recommendations*

That the immigration points system be revised to genuinely reflect Canadian labor needs, including needs for caregivers, agricultural workers and others whose skills are not currently recognized under this system;

That the above-mentioned workers be granted access to permanent residence and to family reunification, in recognition of their human dignity and their significant contribution to Canadian society;

That Canada sign the United Nations Convention on the Protection of the Rights and Welfare of All Migrant Workers and their Families.

#### **d) Family reunification for children**

##### **• Parents and siblings not considered members of family**

Children accepted as Convention refugees or protected persons in Canada cannot include their parents as family members in their application for permanent residence. Even if the parents are in Canada, the parents must apply independently on humanitarian and compassionate (H&C) grounds under section 25(1) of the IRPA and if granted approval in principle, must then satisfy all the regular admissibility criteria including medical and financial admissibility. If they were included as family members of the refugee child, they would be exempt from medical admissibility due to excessive demand and exempt from financial admissibility.

The government has vigorously opposed any attempt to include parents of minor Convention refugees as family members of their dependent children. They have argued that it is necessary to protect children from unscrupulous parents who might send their children abroad to Canada with smugglers in an attempt to establish a beachhead or an anchor for the family in Canada. No evidence of such action by parents has actually been presented to back up this concern. Furthermore, it has been pointed out that this concern is irrelevant in the cases in which the parent or parents are already in Canada and are caring for the child who has been granted refugee status. Citizenship and Immigration Canada has argued that the parents are able to apply for landing on humanitarian and compassionate grounds pursuant to section 25(1) of the *Immigration and Refugee Protection Act*. This does not take account of the fact that this is a discretionary remedy. Even if approved in principle for landing from within Canada under the H&C provisions, the parent and any dependants would still have to meet all of the normal admissibility criteria for landing, including medical and financial criteria. Under IRPA family

members of protected persons are exempt from medical and financial inadmissibility criteria, and this means they are much more likely to be granted permanent resident status.

*Case examples*

- AF is a Nigerian woman who fled to Canada in 1998 and sought refugee status. Her claim was refused in 2000 and she submitted an H&C application. In 2001 her daughter (aged 14) and son (aged 12) came to Canada and made refugee claims which were granted in 2003. The children then sought to include their mother, upon whom they were dependent, in their applications for landing. This was refused and a judicial review of that decision is still before the Court. AF applied to be landed on H&C grounds a second time (her first application had been refused) and in 2005 her second H&C application was approved but she has still not become a permanent residence, although her two children now have that status.
  
- LS is a woman from Grenada who fled to Canada from an abusive spouse in 1994, leaving her three children with relatives in Grenada. In 1997 her son G arrived in Canada and in 1999 her second son K arrived. They were both being abused by relatives. In 2001 LS and her two sons made refugee claims. In August 2003 the two boys were granted refugee status but LS was refused on the grounds that she could get effective protection in Grenada from her abusive spouse. As her sons could not include her in their application for permanent residence, she returned to Grenada in January 2004. While their mother was back in Grenada, one of the sons in Canada was suspended from school and taken into foster care as he was having significant behaviour problems. Following the severe hurricane in September 2004, LS and her remaining daughter A came to Canada. LS subsequently learned that her daughter had been experiencing sexual abuse by a friend of the family from age 7 until her mother returned. In 2005 A made a refugee claim which was granted in February 2006. LS has applied for permanent residence on H&C grounds but is still awaiting a decision and until she is approved, she is not permitted to work, so she is forced to rely on welfare to care for her children in Canada.
  
- DT is a member of the Uyghur ethnic minority in China. She fled to Turkey in 1988 leaving her infant daughter N with her parents. In 1991, having been accepted as a refugee in Turkey she was granted Turkish citizenship, but she was not permitted to sponsor her daughter to join her in Turkey. Her daughter visited from 1995 until 1997 but was forced to return to China. She was in danger in China and finally in 2000 DT brought her to Turkey again to visit and then obtained visas for them to travel as tourists to the United States. In November 2000 they made refugee claims in Canada. N was 14 when she arrived in Canada with her mother. The refugee claims were heard separately and DT was refused due to her status in Turkey. N was accepted in 2004 and tried to include her mother in her application for landing. This was refused. Although DT made an H&C application in 2004, this is still pending. DT had an accident in Canada and is now unable to walk. She suffers considerable depression and has not been able to find work. She is receiving social assistance as a disabled person and her daughter is still attending school full-time. Even if DT is approved for landing on H&C grounds, she will likely be medically and financially inadmissible to Canada. If she had been treated as the family member of her daughter N who is a refugee, she would have been exempt from the medical and financial criteria for landing. Both DT and N fear that they will be separated again if DT's application on H&C grounds is refused. Neither of them have any other family members.

➤ AH and his wife came to Canada from Kenya in 2000, leaving two daughter aged 8 and 9 with relatives. They made refugee claims which were denied in 2002. AH learned in 2003 that he is HIV positive. The two daughters arrived in Canada in 2003 and also made refugee claims. They were granted refugee status in 2004 and applied for landing including their parents. Citizenship and Immigration Canada refused to include their parents but the H&C application by their parents was granted approval in principle in May of 2005. The two children are now permanent residents but they are just 12 and 13 years old and rely on their parents. The parents still do not have permanent residence and worry that they will be found medically inadmissible due to AH's HIV status. They have been granted leave to seek judicial review of the failure to include them in their daughters' application for permanent residence.

*Relevant legislative provisions*

IRPA Regulations 1(3) and 176.

*Policy recommendation*

Permit children recognized as refugees or protected persons to include their parents and siblings in their application for permanent residence in Canada.

• **Separation of children from parents through deportation of parent**

Children born in Canada are citizens by birth, regardless of the immigration status of their parents. If one parent is facing removal from Canada through deportation, and that deportation could affect the best interests of a child who has a right to remain in Canada, immigration officials take the position that this issue should not delay deportation of the parent, with or without the child. Immigration officials and the Federal Court of Canada take the position that the best interests of the child is only one of the factors to be considered in making a decision to proceed with deportation of the parent, and unless there is proof of serious, irreparable harm to the child, they will not even delay the deportation until any humanitarian application of the parent has been decided.

As a result, parents are required to take formal legal proceedings in the Federal Court to seek a stay of removal while the humanitarian application is being dealt with, or to seek an Order from the Family Court granting custody to the parent facing removal and ordering that the child not be removed from Canada.

Counsel for the Federal Department of Justice has vigorously opposed any attempts to delay deportation of the parent until the child's best interests can be determined. There is inconsistent jurisprudence from the Federal Court and the Family Court on this issue and there is great uncertainty about whether a child will be needlessly uprooted from their home, or needlessly separated from a primary caregiver, depending on the point of view of the particular judge dealing with the application.

*Relevant legislative provision*

IRPA section 25(1) - allows for a humanitarian and compassionate decision to be made and specified that it will be made "taking into account the best interests of a child directly affected..."

IRPA section 48(1) provides that a "If a removal order is enforceable, the foreign national must leave Canada immediately and it must be enforced as soon as reasonably practicable"

*IRPA* section 50 provides that: “a removal order is stayed (a) if a decision that was made in a judicial proceeding -- at which the Minister shall be given the opportunity to make submissions -- would be directly contravened by the enforcement of the removal order....”

CIC Manual Inland Processing chapter 5, section 12.10: Immigration policy guidelines set out in the section entitled “Separation of parents and children” indicate that “the lengthy separation of family members could create a hardship that may warrant a positive H&C decision” and the policy advises officer dealing with these cases to balance the different and important interests at stake including: family interests, the circumstances of all the family members, with particular attention given to the interests and situation of dependent children related to the individual without status, particular circumstances of the applicant’s child, financial dependence involved in the family ties, and the degree of hardship in relation to the applicant’s personal circumstances.

#### *Relevant jurisprudence*

*Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 (Supreme Court of Canada) The court stated that, in dealing with an application for landing on humanitarian and compassionate grounds, Immigration officers are expected to exercise their discretion reasonably, in accordance with the immigration policy guidelines and this would mean that “children’s best interests” would be “an important factor” and that officers should give them “substantial weight and be alert, alive and sensitive to them.” (Paragraph 75)

*Hawthorne v. Canada (Minister of Citizenship and Immigration)* [2002] FCA No. 475 (Federal Court of Appeal) The Court found that for an officer to be “alert, alive and sensitive” to the best interests of a child affected by the decision to deport, “may be satisfied, depending on the circumstances of each case, by considering the degree of hardship to which the removal of a parent exposes the child.”

*Simoes v. Canada (M.C.I)* [2000] F.C.J. No. 936 The Applicant was seeking a delay of the removal of the parent from Canada until a pending H&C application involving separation of parent and child was dealt with. The Federal Court judge found as follows: “I am in complete agreement with the view expressed by Dawson J. In my opinion, *Baker* does not require a removal officer to undertake a substantive review of the children’s best interests, including the fact that the children are Canadian. This is clearly within the mandate of an H&C officer. To “read in” such a mandate at the removals stage would, in effect, result in a “pre H&C” application, which in my opinion is not what the law requires. Section 48 of the *Immigration Act* provides the following: “Subject to sections 49 and 50, a removal order shall be executed as soon as reasonably practicable.””

*Alexander v. Powell* [2005] O.J. No. 500 (Ontario Court of Justice). In this case, the two children are Canadian citizens and their mother and sole caregiver, a citizen of Grenada, was facing removal to Grenada. The mother had made an H&C application that had not been determined but the government was seeking to deport the mother immediately, before the H&C decision. Because of the devastation in Grenada caused by Hurricane Ivan in September 2004, and because of the mother’s poverty, she feared that her children would be facing extreme hardship if removed with her to Grenada or if left behind in Canada without her to care for them. She sought



an order in the Family court to prevent the removal of the children from Canada and to place them in her custody. Judge Waldman of the Ontario Court of Justice granted this order in part, finding that the children should be placed in their mother's custody and that they should not be removed to Grenada for at least six months, pending further information as to whether the situation in Grenada had returned to normal. However, the government sought to remove the mother anyway, arguing that the Order of Judge Waldman was not the kind of order contemplated by section 50 of the IRPA and that the mother could still have custody of her two children, even if she was removed to Grenada and they were left in Canada. The Federal Court agreed with this position.

*Alexander v. Canada (Solicitor General)* [2005] F.C.J. No.1416: Judge Dawson states: "Having reviewed the jurisprudence and international conventions relied upon by the parties, I conclude that the enforcement of the removal order against Ms. Alexander would not directly contravene either the interim or final order of the Ontario Court of Justice. Accordingly, no statutory stay arose pursuant to subsection 50(a) of the Act. My reasons for this conclusion are as follows.

[31] First, after awarding custody to Ms. Alexander, the orders went on to provide that Ms. Alexander's children "shall not be removed from the Province of Ontario". Applying the grammatical and ordinary sense of the phrase "directly contravened", as found in subsection 50(a) of the Act, I find that the orders would only be directly contravened if either of Ms. Alexander's children were removed from Ontario. The removal order applies only to Ms. Alexander, because her two children are Canadian citizens who enjoy an absolute right to remain in Canada. Thus, the removal order does not interfere with the physical location of Ms. Alexander's children. Faced with removal, Ms. Alexander could (as she had earlier contemplated if her request for a stay was unsuccessful) apply to the Ontario Court of Justice for a variation of its order, or Ms. Alexander could make arrangements to leave her children in Canada. Neither of those options would contravene the interim or final order.

[40] In so concluding, I have considered Ms. Alexander's argument that, because she has been granted sole custody of her children, her children must remain in her physical care. It follows, she says, that if she is removed from Canada her children must go with her, and this would remove them from Ontario in direct contravention of the relevant orders. However, I am unable to conclude that the grant of custody, or sole custody, necessitates that the custodial parent maintain physical care of a child at all times. For example, a grant of custody would not, as a matter of law, automatically be affected by the incarceration or extradition of the custodial parent.

Similarly, custodial parents may send their children out of the country for education or other reasons. In *Chou v. Chou*, [2005] O.J. No. 1374, the Ontario Superior Court of Justice recently described the meaning of "custody" in the following terms:

It consists of a bundle of rights and obligations, called "incidents" in sections 20 and 21 of the Children's Law Reform Act, R.S.O. 1990, c. C-12, as amended. Family law cases often deal with the allocation of rights of custody. Those rights include the right to physical care and control of the child, to control the child's place of residence, to discipline the child, to make decisions about the child's education, to raise the child in a

particular religion or no religion, to make decisions about medical care and treatment.

[underlining added]

[41] Thus, custody allows the custodial parent to control the child's place of residence, but does not necessarily require that the parent reside with the child...."

*Comfort Johnson and Randy Agyei*, December 12, 2005, D260/00 (Ontario Court of Justice). In this case, a woman from Ghana with two children born in Canada, is facing removal to Ghana, and asked the Court for a non-removal order for her Canadian children and an order for custody to remain with her. The father, who has access to the children but has never had custody, was also seeking that the children not be removed from Canada. Mr. Justice Brownstone agreed that the children should not be removed from Canada, but found that if the Government was determined to deport her, he would grant custody to the father, or place the children into foster care.

*As discussed by international human rights bodies*

*Inter-American Commission on Human Rights: Report on Canada* February 2000, on issue of Respect for Family Life and the Rights of the Child under the American Declaration: OAE/Ser/L/V/II.106 Doc 40.

....Since the Commission has been monitoring the situation of human rights in Canada, it has received extensive and detailed information concerning the rights at issue and the procedures available in cases involving the removal of alien parents, including but not limited to refused refugee claimants, of Canadian-born children. The core concern reflected in the vast majority of the submissions received prior to mid-1999 was that the Canadian judicial system provided no mechanism to ensure that the rights and interests of such children were taken into account in removal proceedings which would obviously have a dramatic impact on their welfare and development. Judicial authorities confirmed to the Commission during its on-site visit that the jurisprudence indicated that the decision to remove was deemed to relate solely to the situation of the parent or parents, who had the responsibility to make the decision as to what course of action would be in the best interests of their Canadian citizen child. It was up to the parent or parents to elect whether to take the child with them to their country of origin or place him or her in foster care in Canada, potentially involving a choice between the love and care of a parent in circumstances of poverty and hardship, or the health, education and welfare benefits available to citizens resident in Canada absent parental support.

Given Canada's obligations under the American Declaration, interpreted with reference to the Convention on the Rights of the Child, the absence of any procedural opportunity for the best interests of the child to be considered in proceedings involving the removal of a parent or parents raised serious concerns.

Accordingly, the Commission views the recent decision in *Baker v. The Minister of Citizenship and Immigration* as a welcome and positive step toward compliance with these obligations.

160. In that case, the Supreme Court held that, while provisions such as those of the Convention on the Rights of the Child had not been implemented by Parliament (and were thus not directly applicable under Canadian law), because the legislature is presumed to respect principles of customary and conventional international law, interpretations reflecting the values of human rights law are preferred. International human rights law provides "a critical influence on the

interpretation of the scope of the rights contained in the [Canadian] Charter.” The Court indicated that the Convention on the Rights of the Child and other applicable provisions place special importance on the protection of children and their interests, and “help show the values that are central in determining whether” the immigration officer’s decision was a reasonable exercise of discretion under the humanitarian and compassionate review process. The Court also looked to the objectives of the Immigration Act and the applicable guidelines to support the finding that the interests of affected children should be taken into account in such proceedings. Partly on the basis of a reasonable apprehension of bias on the part of the immigration officer who had rejected the humanitarian application, and partly on the basis of his failure to take the interests of the affected children into account, the Court ruled that the appeal should be allowed, and the matter returned for re-determination by a different officer.

161. In its observations, the State indicated that the Supreme Court’s decision in the Baker case had “affirmed the importance of considering family-related interests in H&C applications.” It noted that, in reaching this decision, the Court had looked to: the applicable legislative provisions; the purposes of the Immigration Act, particularly with respect to family reunification; international law standards such as the Convention on the Rights of the Child; and the applicable guidelines for decision-makers. “In ruling ... the Supreme Court indicated that the guidelines in place for decision-makers at that time provided sufficient guidance to officers on the importance of taking family interests into account.” Finally, the State noted that those guidelines had been replaced just prior to the issuance of the Baker decision, with additional emphasis placed on family-related interests and applicable international norms.

162. The provisions of the American Declaration, pursuant to ratification of the OAS Charter, the UN Convention on the Rights of the Child and other human rights instruments applicable to Canada, constitute freely undertaken obligations requiring appropriate measures to ensure their implementation. In this regard, the Commission finds it pertinent to offer a few observations about what is required in terms of the rights of the child and to family life. Within the inter-American system, Article V of the American Declaration recognizes that every person has the right to protection against abusive attacks on his or her family life. Pursuant to Article VI of the Declaration, every person has the right to establish a family, the basic element of society, and to receive protection therefore. These provisions thus prohibit arbitrary or illegal interference with family life.

Article VII of the American Declaration provides that minor children are entitled to measures of special protection by virtue of their status. Within the regional human rights system, as within the universal system, the rights of children have been accorded special priority and protection, because the youth of our hemisphere represent our future possibility to create “a system of personal liberty and social justice based on respect for the essential rights of man.” It is for this reason that Article VII establishes special measures of protection for children corresponding to their vulnerability as minors, and the implementation of this obligation must be accorded special importance. Respect for this duty of special protection necessarily requires that the interests of the child be taken into account in State decision-making which affects him or her, and that such decisions look to the protection of the best interests of the child.

164. In accordance with the principle of effectiveness, the implementation of Article VII may require the adoption of specific measures aimed at the protection of children. The recognition of

a duty of special protection for children is based on the need to protect the full range of their interests -- in the social, economic, civil and political spheres. As the UN Human Rights Committee has indicated with respect to the duty of States Parties under the ICCPR, the duty to take special measures is most fundamentally aimed at ensuring the rights set forth in the instrument itself, but may also include economic, social and cultural measures as required.

165. The Convention on the Rights of the Child provides more specific guidance to be taken into account in interpreting and applying the Declaration, indicating in Article 3 that the best interests of the child shall be a primary consideration in all State-sponsored action involving children. Article 9 indicates that measures involving the separation of parent and child must be extremely exceptional, involving situations of abuse or neglect, or parents living in different locations where a decision as to the child's place of residence must be made, and must be made pursuant to judicial review. Article 12 further provides that, where a child is capable of forming his or her own views, those should be given due weight, in particular in any judicial proceedings affecting him or her. In conducting its review of Canada's initial report under that Convention, the UN Committee on the Rights of the Child cautioned that the best interests of the child are not always taken into account in national legislation and policy-making – including within the administrative processes concerning refugees and immigrants. The Committee concluded that Canadian legislation and jurisprudence did not reflect respect for that essential principle. Further, the Committee expressly recommended that measures be taken to avoid expulsions causing the separation of families.

166. In view of the foregoing principles, it may be observed that, while the state undoubtedly has the right and duty to maintain public order through the control of entry, residence and expulsion of removable aliens, that right must be balanced against the harm that may result to the rights of the individuals concerned in the particular case. In this regard, the Commission has also received submissions alleging that the right to family life is not sufficiently taken into account in removal proceedings, particularly where the removal of long term permanent residents is at issue. Given the nature of Articles V, VI and VII of the American Declaration, interpreted in relation to Canada's obligations under the Convention on the Rights of the Child, where decision-making involves the potential separation of a family, the resulting interference with family life may only be justified where necessary to meet a pressing need to protect public order, and where the means are proportional to that end. The application of these criteria by various human rights supervisory bodies indicate that this balancing must be made on a case by case basis, and that the reasons justifying interference with family life must be very serious indeed.

*Committee on the Rights of the Child: Report on Canada, October 3, 2003*

Concerning "Best Interests of the Child" the Committee stated:

"...However, the Committee remains concerned that the principle of primary consideration for the best interests of the child is still not adequately defined and reflected in some legislation, court decisions and policies affecting certain children especially those facing situations of divorce, custody, deportation as well as aboriginal children. Furthermore, the Committee is concerned that there is insufficient research and training for professionals in this respect...."

*Policy recommendations*

That the Canadian government, through its immigration enforcement officers and

its legal counsel in the federal Department of Justice, protect, to the extent possible, the relationship between parents and children by delaying or deferring any removal of a parent from Canada which could result in the separation of the child from the parent or the uprooting of the child from his or her home in Canada, until any pending application by the parent for permanent residence on humanitarian and compassionate grounds has been determined

### **e) DNA testing requests**

Refugees and immigrants from some countries have difficulty obtaining birth certificates, school documents or other proof of their relationship to their children to satisfy the requirement in the law that their dependent child is their biological child or their adopted child under section 2 of the Regulations. Although Citizenship and Immigration Canada policy states that DNA testing is only to be requested if there is no satisfactory documentary evidence of the parentage, it has been the experience of NGOs working with refugees and immigrants that DNA testing is often required for refugees or sponsors seeking to bring dependent children, particularly from Africa and Asia. DNA testing is very expensive, costing at least \$900, and it can be difficult to arrange. It thus constitutes an added burden to refugees seeking to reunify their families and to the community groups in Canada attempting to assist them with successful settlement.

Furthermore, DNA testing can result in irreparable harm in situations when DNA testing reveals that a child is not the biological child of the person who has always acted as the child's parent and believes himself to be the biological parent.

In many countries, adoption is an informal matter and there is no paperwork involved. The child may or may not know of the adoption but the requirement of DNA testing or formal proof of adoption means that the child may be separated permanently from the only family he or she knows and from the family members willing to care for the child. The cost of a formal adoption in Canada after the child arrives can also be prohibitive for refugees attempting to resettle in Canada, about \$12,000 per child.

#### *Case examples*

➤ The case of *MAO v. Canada*, [2003] F.C. No. 1406, December 2, 2003 (Federal Court) is a good illustration of this problem. MAO is a Somali man who had immigrated to Canada and was attempting to sponsor three children of his first marriage (his wife had died after the birth of the third child and the children had all been cared for after his wife's death by the man's older married sister with financial support from MAO who was working outside of Somalia). Although he obtained a Somali passport with his three children listed in the passport, he did not have any other documents as the family papers had all been destroyed during the civil war that erupted in Somalia in 1991. The Canadian visa officer asked for DNA tests to prove that the three children were his biological children. The man paid for the tests and the youngest child was found not to be his biological child, much to his dismay and personal grief. He was granted immigrant visas for the two older children but the youngest child who was 11 years old, was not issued a visa. He was left behind in the care of a guardian in Kenya.

MAO appealed to the Immigration Appeal Division of the Immigration and Refugee Board and the appeal was refused on grounds that despite evidence of the on-going parent-child relationship

between this father and his youngest son who has his father's name and was born within his marriage to the boy's mother, the lack of biological connection was all that was needed to determine that this child was not the sponsor's child. Since the Board found he was not the child of the sponsor, the Board had no jurisdiction to consider humanitarian and compassionate factors as to why the child should be permitted to join his family in Canada.

The father sought judicial review of the decision and the Federal Court found that the visa officer had only given the father the option of DNA testing to establish the relationship; the visa officer had indicated that the application to sponsor the children would be refused unless DNA testing was done. According to the Federal Court, DNA testing is "qualitatively different" from providing documentary evidence of relationship. The Court stated: "The intrusion into an individual's privacy that occurs with DNA testing means that it is a tool that must be carefully and selectively utilized [Para. 84]."

The Federal Court judge then set aside the DNA evidence and ordered that the father's sponsorship appeal be heard again at the IAD without the DNA evidence so the father would have the opportunity to show his relationship to his son by other means.

Unfortunately the second IAD appeal, heard on July 7, 2004, five years after the original application to sponsor his son had been refused, was also unsuccessful because the Board found that the father had not shown the Board enough evidence of a parent-child relationship and could not prove that he was with his wife during the period when the child was conceived. In fact, the father had been supporting the child since birth and continued to do so while the boy remained in the care of the guardian in Kenya. He had only been able to arrange a few visits with his son, although he had exactly the same relationship with his two biological children who were permitted to join him in Canada.

Unfortunately adoption was not an option for this man since he is Muslim and adoption is contrary to his religious beliefs. The legal proceedings took six years and the father essentially gave up on Canadian legal procedures to reunify with his son after the failure of the second IAD appeal. He went to Kenya to make other arrangements for the future of his son who by then was 17 years old and by all accounts, terribly hurt and demoralized by what had happened.

This case has been described in some detail in articles published in the *Canadian Family Law Quarterly*. See "Second Class: Law Meets Family in the Immigration Context" CFLQ, Volume 21, 2003 and "Biology not Destiny? O.(M.A.) V. Canada (M.C.I.) And the Recognition of Relationship" CFLQ, Volume 22, 2004, by Lene Madsen. See also "DNA tests add a risky delay, refugees say," *Globe and Mail*, Toronto, June 21, 2005.

➤ Mr. X came to Canada from Ethiopia in 1993 and was granted Convention Refugee status in 1994. When he applied for permanent residence in 1994 he included his 3 children. The visa office in Nairobi demanded DNA tests to prove that they are his children, but he could not afford to pay the costs of testing, because of his extremely low income as he struggled to become settled in Canada. DNA testing for a family of four would have cost him approximately \$2,000.00. When he sought some way around the problem, he was "advised" by Canada Immigration to remove his children from his application and they would grant him permanent residence. He did this and became a permanent resident in 2003.

Unfortunately, Mr. X will now never be able to sponsor his children, even if he can raise the money for the DNA tests as they are now too old to be sponsored. Mr. X has been separated from his children for thirteen years, and because of their age, this separation is now permanent.

➤ SD is a Tibetan who was living in exile in India. In the early 1990s he began a common law relationship with a Tibetan woman and they had two children, a son T, born in 1993, and a daughter Y, born in 1995. A few months after their daughter's birth, his wife died and in 1998 SD married his second wife and they had one child, a daughter born in 1999. The older children had been in the care of their maternal grandmother but when she died, SD placed them in the care of his brother as he was working to support the family. In December 2001, SD fled to Canada and claimed refugee status. His claim was granted in July 2002 and he applied for permanent residence for himself, his wife and his three children. In July 2003, SD was asked to provide DNA evidence that T and Y are his children, although he had provided their birth certificates showing that he is their father. He did the DNA testing at considerable expense and discovered that the two children are not his biological children. However, his former wife had never told him of any other father and he is the only person the children know as their father. He continues to provide support to them and has requested that they be allowed to join him and his current wife and child in Canada as his *de facto* family members on humanitarian grounds, offering to adopt them in Canada when they arrive in Canada. The children, now 13 and 11, have been in the Tibetan Children's boarding school in India since SD left for Canada. JM cared for these three children since they were aged 3, 7 and 11 respectively, and for her grandson who was born in 1998 until she left for Canada in 2002. Although this second process began in May 2005, there is still no reply from the Canadian Visa Office and SD is very worried about the cost of the adoption which is about \$12,000.

➤ JM is a survivor of the Rwandan genocide. She came to Canada in December 2002 and was granted Convention refugee status in May 2003. She applied for permanent residence in December 2003, and included her five children and one grandson left behind in Rwanda. A charitable organization in Toronto paid the cost of the immigration application fees (almost \$2000). In July 2005 she was asked to provide DNA evidence of her relationship to her children. At that point she advised Citizenship and Immigration Canada that only the two older children are her biological children, but that she had cared for the three younger children, who are the biological children of her husband and her husband's second wife who both died in the genocide. JM has cared for these three girls aged of 11, 7 and 3, and for her grandson who was born in 1998, until she left for Canada in 2002 placing them in the care of her sister. Now she is afraid that she will not be able to help any of these children and their situation is increasingly dangerous in Rwanda.

#### *Relevant legislative provisions*

*IRPA* Regulation section. 2. Defines "child" as biological or legally adopted child.

#### *Policy recommendations*

Particularly in the situation of refugees from countries of great civil upheaval and conflict, the government should specifically provide for declarations of parentage in lieu of acceptable birth certificates and DNA testing. On the same basis that many refugees cannot obtain identity documents, they cannot obtain satisfactory birth certificate evidence. Family reunification should

not be delayed and children should not be placed in jeopardy due to a requirement for confirmation of biological relationship or formal adoption. Since it is not necessary to prove biological relationship for children who have satisfactory birth certificates, it is discriminatory to require this in the case of refugees who cannot provide such documents.

Government should prepare a policy guideline for including, as *de facto* family members for the purpose of sponsorship and family reunification, children who have been raised as members of the refugee's family and who would otherwise be left without a guardian.

### **f) Processing delays for Refugee family reunification**

The CCR has prepared two detailed documents which canvas these issues. *More than a nightmare: Delays in Family Reunification*, November 2004 and *Impacts on children of the Immigration and Refugee Protection Act*, November 2004. These documents can be downloaded from <http://www.web.ca/ccr/nightmare.pdf> and <http://www.web.ca/ccr/children.pdf>.

#### *Case examples*

- In July 2000, M and S fled persecution in Algeria. They were accompanied by only two of their children and had to leave two other daughters behind. In June of 2001 they were granted refugee status in Montreal. This began a whole series of delays and repeated requests for information. The children were required to undergo medical clearances, which were done. While they were waiting for the security clearance, the medical clearances expired and had to be redone. By November 2004, after more than four years separation, and three years after their application for landing, only one security clearance had been received and the two girls were still waiting in Algeria. As Convention Refugees, their parents would not be able to travel anywhere to see them, and certainly not to Algeria, where they fear persecution.
  
- R came to Canada from Sri Lanka in April 1998 with her two daughters, leaving three other children and her husband behind in India. She was accepted as a refugee in Canada in March 2000 and immediately applied for permanent status for herself and her family. They finally received their permanent residence in June 2004, after four years, but the security clearance for the family members in India was still pending by November 2004. By that time R had been separated from her family for more than six years.

#### *Relevant legislative provision*

*IRPA* section 3(1) (d) Objective of the Act is to see that families are reunited in Canada.

- (f) To support the self-sufficiency and the social and economic well-being of refugees by facilitating reunification with their family members in Canada

#### *Policy Recommendation*

Allow all family members of protected persons to come to Canada immediately on the granting of Convention refugee status, by granting entry permits to family members and completing any processing in Canada.



### **g) Limbo due to moratoria country list, security clearance**

Under IRPA certain groups cannot be reunited with their families, because they are in “limbo” situations. These groups include individuals who are not removed because Canada has temporarily suspended removals to their country of origin, due to a situation of generalized risk (such countries are popularly known as moratoria countries). Other persons, included refugees, are in limbo because they are waiting for security and other clearances. Despite the fact that these people can sometimes be present in Canada for many years, they are not permitted any form of family reunification.

The CCR has described the situation of people from moratoria countries in a report, *Lives on Hold*, July 2005, available at <http://www.web.ca/ccr/livesonhold.pdf>.

#### *Relevant legislative provision*

##### *IRPA section 130(1)*

Sponsor-Subject to subsection (2), a sponsor, for the purpose of sponsoring a foreign national who makes an application for a permanent resident visa as a member of the family class or an application to remain in Canada as a member of the spouse or common-law partner in Canada class under subsection 13(1) of the Act, must be a Canadian citizen or a permanent resident who is at least 18 years of age.

### **h) Acceptable identity documents**

Some refugees cannot produce passports and other acceptable identification documents because of the situation in the country from which they have fled or because of their lack of status in their country of habitual residence. This issue has been the focus of concern and criticism and has resulted in several Federal Court cases prior to the passage of the *Immigration and Refugee Protection Act* of 2001. It was a particularly serious problem for Somali and Afghan refugees and resulted in litigation that culminated in an agreement that in such cases, the refugee could satisfy the identity document requirement with statutory declarations by themselves and by people who knew them before they came to Canada or by reputable community organizations in Canada. This is set out in section 178 of the *Immigration and Refugee Protection Regulations*. Yet, despite the fact that the refugee’s identity and nationality must be established at their hearing before the Refugee Protection Division of the Immigration and Refugee Board before they can be determined to be Convention refugees, the granting of permanent residence is still often delayed due to questions relating to identity documents. One of the communities affected is the Tibetan community.

It is well-documented that Tibetans living in exile in India and Nepal can very rarely obtain Indian or Nepalese citizenship because they are considered “foreigners” even if born in those countries or after many years of residence. They have great difficulty obtaining any kind of identity documents from India and Nepal. The Tibetan refugees who reach Canada have often travelled with false Indian or Nepalese passports which are destroyed upon reaching Canada or turned over to Canadian authorities upon arrival. At their refugee hearings, Tibetan refugees provide evidence of their identity as Tibetans in exile including their Tibetan Rangzen or “Green

Book”. When they are granted refugee status, this same information is provided to Immigration authorities with their application for permanent residence. Often, additional statutory declarations by Canadian Tibetans who knew them personally before they came to Canada are also provided to establish identity. Yet in some cases, inconsistently and inexplicably, Citizenship and Immigration Canada refuses to accept the identity determination of the Immigration and Refugee Board and pursues long-drawn-out inquiries as to whether or not a particular Tibetan refugee has acquired Nepalese or Indian citizenship. This leads to serious delays in landing and tragically long family separations.

The government blames the delay on backlogs in offices where these cases are being dealt with.

*Case example*

➤ A recent press report on the case of TDA describes the hardship experienced by refugees who cannot reunite with their families for years, despite having been granted Convention refugee status in Canada. *Trying to find a home: Tibetans face years caught up in the system, awaiting landed immigrant status* by Nicholas Keung, Toronto Star, July 4, 2005. TDA, a Tibetan woman from Nepal, came to Canada in 1998 with her sister and both were granted Convention refugee status. Although her sister was soon granted permanent residence, T’s application has been delayed for six years and she has been unable to bring her husband and four children to join her in Canada because of this. Through access to information requests by her legal counsel, it was learned that CIC officials suspected that the false Indian passport T used to reach Canada might be genuine and they have been making inquiries in this regard to Canadian visa officers abroad. When T travelled with a refugee travel document to visit her family in Nepal last February, her younger children treated her as a stranger, having grown up without their mother. T has been sending half of her monthly income from a factory job to support her family since her arrival in Canada.

*Relevant legislative provision*

IRPA Regulations section 178.

*Policy recommendation*

Allow family members of protected persons to come to Canada immediately on Temporary Resident Permits and complete processing in Canada. Often further delays are due to the difficulty of obtaining travel documents in the country where the refugee family is residing so Canada should provide travel documents to allow refugee family members to travel without passports.

## **4. THE RIGHT TO NON-DISCRIMINATORY ACCESS TO GOVERNMENT BENEFITS AND SERVICES**

### **a) National Child Tax Benefit Supplement, Energy Cost Benefit**

Low income families with children are denied access to benefits designed to assist with the costs of raising children and a one time grant of \$250 to compensate for rising energy costs on the basis of the immigration status of the parents. Many of these families are legally present in Canada, hold work permits, file income tax returns, pay taxes and have children, including children who are Canadian citizens by birth.

Those affected by denial of the benefits include all low-income families and their children who are:

1. Refugee claimants;
2. Members of the Moratoria Countries where a stay of removal has been issued by the Minister pursuant to IRPA reg. 230(1) presently from the countries of Afghanistan, Burundi, Democratic Republic of Congo, Haiti, Iraq, Liberia, Rwanda and Zimbabwe;
3. Refused refugee claimants awaiting PRRA decisions or removal;
4. Applicants awaiting decisions on H&C applications in Canada;
5. Applicants who have been approved in principle on H&C grounds and who are awaiting permanent residence;
6. Non-status workers and their children.

#### *Statistics*

“Lives on Hold: National Moratoria Countries Living in Limbo” CCR July 2005.

<http://www.web.net/~ccr/livesonhold.pdf>. The CCR estimates upwards of four thousand individuals from moratoria countries.

The IRB processed approximately 40,000 claims per year for the past several years, Approximately 20,000 claims per year were rejected by the IRB each year.

[http://www.tbs-sct.gc.ca/rma/dpr1/04-05/IRB-CISR/IRB-CISRd4505\\_e.asp#rp](http://www.tbs-sct.gc.ca/rma/dpr1/04-05/IRB-CISR/IRB-CISRd4505_e.asp#rp)

Given average processing times from arrival to removal of 24 to 36 months, there are potentially 80,000 individuals affected.

#### *Case examples*

➤ ML, originally from Guatemala, is a single mother who has been living and working lawfully in Canada for a number of years. ML works as a housekeeper in Toronto and supports her three dependent children, two of whom are Canadian citizens. While having been approved in principle by Canadian immigration officials in February 2000 to receive permanent residence, ML has been waiting more than 6 years for this status. In the meantime, she resides in Canada lawfully, works pursuant to a valid work authorization, pays taxes and has children to care for.

In 2004, her family's net income was \$15,600. As a single mother with three dependent children, her family's net income amounts to about 41% of the Statistics Canada low-income cut-off income of \$37,791 for a family of four as of February 2006. This family's income level

would make them eligible for the National Child Tax Benefit Supplement, in the amount of \$721.41 per month or \$8,656 per year, in addition to the one-time Energy Cost Benefit of \$250 as of right, but for ML's lack of formal immigration status.

This family is denied financial benefits available to other low-income Canadian families, which are calculated based on family income, the number of dependants and the age of the dependants concerned. These benefits would significantly increase ML's annual family income and protect her and her family from the destabilizing effects of rising energy costs, bringing them closer to the minimum income a family of four needs to live in dignity in Canada.

➤ DS has been living in Canada since 1986 and she has two children born in Canada: A born in 1991 and N. born in 1998. She applied to regularize her status in Canada on humanitarian and compassionate grounds and her application was granted approval in principle in December 2003. Since then she has had a work permit and has been working steadily and paying taxes. She works as a personal support worker at a nursing home earning \$15,000 a year. Although she has quickly responded to all Citizenship and Immigration Canada requests for documentation (security checks, medical examinations, etc.) she has still not received her permanent residence. Meanwhile, she is ineligible for the National Child Tax Benefit Supplement. She and her children are thus forced to survive on her meager earnings. The Supplement and the one-time energy benefit would be a tremendous boost, increasing her annual income by \$5,916.00 per year.

➤ CR came to Canada as a refugee claimant from Sri Lanka in September 1992. Her refugee claim was refused but in 1994 she married a Sri Lankan man in Canada whose refugee claim was granted. They had three children born respectively in 1994, 1996 and 1999. Since her husband was a Convention refugee, while they were living together, they were eligible to receive, and did receive the National Child Tax Benefit Supplement. However in 2000, CR had to separate from her husband due to his physical abuse and she then made an application to be landed on H&C grounds as she continued to care for the children. Her application was granted approval in principle in August 2002. She then got a work permit and was working legally and paying taxes. She was finally landed in June 2004. However, she was assessed with an overpayment of the National Child Tax Benefit Supplement in the total amount of \$12,199.98 because she continued to receive the Supplement after leaving her abusive husband and before she became a permanent resident. So although she continued to be the sole caregiver of her three children, since she was not living with her Convention refugee spouse she was not eligible for Supplement and this money had to be repaid. When in June 2004 she finally became a permanent resident, she became eligible in her own right for the National Child Tax Benefit Supplement. However, the entire amount was deducted each month to repay the \$12,000 overpayment. She negotiated a reduced repayment amount of 10% of the monthly Supplement but when she filed her income tax in 2005, the entire \$1,300 repayment she was due to receive was applied to the overpayment. CR and her three children thus are continuing to suffer from the denial of these benefits due to her status.

*Relevant legislative provision*

*An Act to Authorize Payments to Provide Assistance in Relation to Energy Costs, housing Energy Consumption and Public Transit Infrastructure, and to make consequential amendments to certain Acts- Bill C-66 (Royal Assent, Chapter 49, November 25, 2005.)*

*Energy Costs Assistance Act, Part 1*  
*Income Tax Act, R.S.C.1985, c.1 (5<sup>th</sup> Supp.) Part I, 122.6 (e)*

*Relevant jurisprudence*  
*Kwawukumety v. The Queen* 2001-07-25 TCC 2001-714-IT-I

*Policy recommendation*  
Amend *Income Tax Act*, section 122.6 to remove requirement for permanent residence, making anyone eligible who has paid taxes during the previous year

## **b) Access to Employment Insurance benefits**

Temporary workers, such as seasonal agricultural workers and live-in caregivers, experience serious barriers to accessing government programs and benefits. A particularly striking example of discrimination relates to access to Employment Insurance benefits.

Like Canadian workers, seasonal agricultural workers are subject to mandatory deductions for Employment Insurance (EI). Unlike Canadian workers, however, they are ineligible for most benefits. EI benefits can only be paid out to laid-off workers living in Canada. Since the terms of their contract oblige temporary farm workers to return home at the end of the season, by the time they are unemployed, they are also automatically ineligible for benefits. The result is that seasonal agricultural workers contribute \$11 million a year to a program which does little to meet their needs (statistic from the United Food and Commercial Workers).

Live-in caregivers may also experience difficulties accessing EI benefits. Many applications for benefits are refused. Participants in a national consultation shared that employers often fail to remit tax and other statutory deductions to government agencies. This causes hardship and delay for domestic workers when they seek access to benefits such as EI. Furthermore, the Live-in Caregiver Program is structured in such a manner as to deter participants from seeking access to EI benefits. Caregivers must complete 24 months of live-in service within a three-year period in order to be able to apply for permanent residence status. Any time spent collecting EI benefits reduces the caregiver's chances of gaining permanent resident status in Canada.

Seasonal agricultural workers may theoretically collect sickness and parental benefits under the EI Act but collection of these benefits is rare. The filing process is complicated and regional offices of Human Resources and Social Development receive these claims with varying degrees of resistance and reluctance. The UFCW Migrant Agricultural Worker Support Centres and other advocates have more recently experienced some success in helping temporary workers to file for and to claim parental benefits.

The already low wages of seasonal agricultural workers are subject to a myriad of deductions. In addition to the deductions Canadian workers incur, temporary workers are subject to deductions that reimburse employers for partial travel expenses. Workers from Mexico and certain Caribbean states have deductions for non-employment related insurance coverage. Caribbean workers must contribute 25% of their wages as part of the compulsory savings program. A portion of these savings is returned to the worker once they return home, while a portion is

retained for liaison office administration costs. Thus EI deductions form part of a much larger picture of low wages that are heavily deducted. In the case of the EI deduction, workers are obliged to pay into a program from which they receive little or no benefit.

In addition to the barriers to accessing EI, live-in caregivers experience discrimination in trying to access a whole series of benefits and social programs, including workers' compensation, legal aid, social housing, welfare and the child tax benefit. The predominant reason given by government agencies for denying access to benefits was that domestic workers are not permanent residents in Canada. While most live-in caregivers eventually become permanent residents, program participants are treated only as visitors in Canada, with restricted access to benefits.

#### *Relevant jurisprudence*

*Employment Insurance Act*, S.C. 1996, c. 23, section 18(a), 37(b). [Hereinafter EI]  
UFCW Canada has initiated a challenge under the Canadian Charter of Rights and Freedoms on behalf of temporary workers with regards to the inequitable application of EI legislation and regulations.

#### *Policy recommendations*

That seasonal agricultural workers be exempt from paying EI premiums or pay a reduced rate in recognition of the limited access workers have to benefits under the EI scheme.

That live-in caregivers be admitted to Canada as permanent residents from the outset.

## **5. THE RIGHT OF SEASONAL AGRICULTURAL WORKERS AND LIVE-IN CAREGIVERS TO ORGANIZE AND BARGAIN COLLECTIVELY**

Temporary workers, in particular seasonal agricultural workers and live-in caregivers, lack a union to represent their interests and advocate for their rights. The federal government plays a proactive role in establishing temporary migration programs and elaborating standard employment agreements, but fails to adequately monitor these agreements. This opens up opportunities for exploitation and abuse.

Provincial labour laws are uneven in their protection of the rights of live-in caregivers and seasonal agricultural workers. Avenues for complaint are few and underused by workers who justifiably fear losing both their employment and their right to remain in Canada. The Canadian government argues that consular officials from the countries sending workers are the workers' best representatives. However, caregivers and farm workers alike have expressed dissatisfaction with the representation of consular staff, who are seen to be more interested in protecting the program and the remittances it generates than in defending the rights of workers. In the case of the Seasonal Agricultural Workers Program, the grower-controlled administrative body FARMS/FERMES plays an increasing role in setting policy directions, while workers themselves have no voice in these negotiations.

**Live-in Caregiver Program (LCP):** A common problem for domestic workers is their weak bargaining position and lack of access to grievance procedures. In Canada, some steps have been

taken to establish collective bargaining mechanisms. In Ontario, the Labour Relations Act was amended to give domestic workers the right to form a union. In order for domestic workers to effectively exercise that right, however, the Employment Standards Act has to be changed to allow single-employee bargaining units.

Live-in Caregivers have limited rights in Canada and few channels through which to defend those rights or seek improved working conditions. In Manitoba, Nova Scotia and PEI, domestic workers are excluded from minimum employment standards. In Quebec, live-in domestic workers are covered under special provisions and do not have the same rights as other workers. Working conditions are inadequately monitored. The embassies of the workers' countries of origin play a dual role as protector of workers' rights and protector of the program and the remittances it generates. Many caregivers feel that their interests are a secondary consideration.

Under the LCP, foreign domestic workers must complete 24 months of live-in work over a period of 3 years in order to be eligible to apply for landed status. This live-in arrangement, together with temporary status, makes many caregivers vulnerable to abuse. Caregivers commonly experience excessive hours of work, less than minimum wage rates, non-payment or under-payment for overtime work, added responsibilities that were not part of the employment agreement, degrading treatment, and sexual harassment. Many are too fearful to complain, not wanting to lose or leave their jobs, jeopardizing their chances of completing their two years of service within the required time period.

**Seasonal Agricultural Worker Program:** In Alberta and Ontario, agricultural workers are not allowed to form or join a union. More than 80% of seasonal agricultural workers are in Ontario.

Seasonal agricultural workers have limited rights in Canada and few channels through which to defend those rights or seek improved working conditions. The Ontario Employment Standards Act excludes agricultural workers from provisions relating to minimum hours of work, daily and weekly/bi-weekly rest periods, statutory holidays and premium overtime pay. The Mexican Employment Agreement provides some standards for rest periods but this agreement is inadequately monitored. Since remittances play a major role in the Mexican economy, consular officials have a vested interest in protecting the program, sometimes at the expense of workers.

Seasonal agricultural workers face a variety of problems with regards to their working and living conditions, often in violation of their employment agreement. For example, the employment agreement stipulates that seasonal agricultural workers are to be paid at the same rate as their Canadian counterparts. Yet they often receive less than their due. According to Statistics Canada, the 2004 general farm labour average wage for Canadian residents was \$9/hr. Yet seasonal agricultural workers in Ontario were paid on average \$7.85/hr (UFCW, 2004). Like live-in caregivers, seasonal agricultural workers are often fearful to complain, since workers can and have been repatriated for expressing discontent.

#### *More information*

1. "The Mexican and Caribbean Seasonal Agricultural Workers Program". Veena Verma, Prepared for the North-South Institute, 2003.
2. "UFCW Canada National Report on the Status of Migrant Farm Workers in Canada", 2004.

3. “Farmworkers from afar – Results from an international study of seasonal farmworkers from Mexico and the Caribbean working on Ontario farms”, North-South Institute, February 2006.

*Relevant legislative provision*

*Employment Standards Act, 2000, S.O. 2000, c.4 (Ontario)*

*Agricultural Employees Protection Act, 2002, S.O. 2002, c.16 (Ontario)*

*Relevant jurisprudence*

In *Dunmore vs. Ontario (A.G.)* [2001] 3 SCR No. 1016, the Supreme Court held that agricultural workers have the right to form employee associations and to protective legislation that would allow workers to organize “without intimidation, coercion or discrimination.” However, the Ontario government has applied a minimalist approach in its interpretation of the decision, allowing workers to participate in “associations” and make representations to their employers but not to bargain collectively. Therefore, the decision has had little impact on working conditions or a meaningful right to unionize. UFCW Canada is currently challenging the Ontario government’s assertion that its Agricultural Employees Protection Act complies with the Supreme Court decision that agricultural workers have freedom of association.

*As discussed by international human rights bodies*

ILO Convention 143 (not ratified by Canada)

Article 10: Each Member for which the Convention is in force undertakes to declare and pursue a national policy designed to promote and to guarantee, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory.

International Covenant on the Protection of the Rights of all Migrant Workers and Members of their Families (not ratified by Canada)

Article 26.1: States Parties recognize the right of migrant workers and members of their families:

- a) to take part in meetings and activities of trade unions and of any other associations established in accordance with law, with a view to protecting their economic, social, cultural and other interests, subject only to the rules of the organization concerned

- b) To join freely any trade union and any such association as aforesaid, subject only to the rules of the organization concerned

- c) To seek the aid and assistance of any trade union and of any such association as aforesaid.

*Policy recommendations*

Comply with the ruling of the Supreme Court of Canada in *Dunmore vs. Ontario*. Grant agricultural workers full unionization rights, including the right to collective bargaining.

Eliminate the live-in requirement for foreign domestic workers, in recognition of the way in which this blurs employer-employee relations and gives employers undue power. Amend the Employment Standards Act to allow for single-employee bargaining units.