THE RIGHTS OF MIGRANTS IN CANADA

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ABSTRACT

Migration is a complex phenomenon, which cannot be easily summarized. Many migrants are stripped from their social capital and rendered vulnerable to whoever has power over their life. Irregular migration comes in a multiplicity of patterns. This vulnerability is deepened by deterrence measures that and preventive policies, which are part, since 9/11, of the reinforced international security paradigm. Even if migrants have rights in theory, the practice of States is often to deny access to recourses in case of abuse, and migrants cannot really mobilize the local populations in favour of their cause. Whatever the migration policies adopted at federal or national level, it might be socially advantageous to consider all migrants, whether in a regular situation or not, as local citizens in order to make sure that they have access to the services they need (schooling of the children, health care for the family, etc.) and models exist which prove that, beyond political slogans, it is possible and beneficial.

提要

到加拿大的移民基本上享有加拿大人所享有的各种权利，包括医疗和其他社会福利。他们还享有和其他人相同的宪法权利，除了投票权和一些移动和少数民族语言教育权利。移民享有宗教、表达和结社的自由，以及在法律面前的平等权利，并享有法律的同等权益和保护。关于移动性，到加拿大的移民以及生活在加拿大的移民享有《加拿大权利和自由宪章》第6条款"移动权利条款"的部分宪法保护。在某种程度上，这也是国际法保证的反映。近30年来，该条款导致有限的判例法，主要涉及引渡和难民案件，在有些情况下则导致所谓的涉及加拿大境内移动的经济自由。移民同时还是联邦（和一些省）政府计划下以及私立机构主持下的各种公共和私人定居扶持项目的受益者。根据《加拿大权利和自由宪章》第27条款，移民保留和加强传统文化是受鼓励的。这促使加拿大多元文化政策以及各种多元文化法规的纷纷出台，其中就包括《加拿大多元文化法案》。2011年，加拿大将庆祝多元文化政策实施40周年。除了宪法和法规的保证，加拿大的多元文化政策还反映了加拿大正在变化中的人口现实

HISTORICAL RELATIONSHIP WITH IMMIGRANTS

Historically, Canada has had a love-hate relationship with immigrants. Our country has needed immigrants to help populate and build our nation. Yet, while we have consistently extended a welcome hand to people from some countries, such as the British Isles, we have been considerably less hospitable toward people from some other lands. Although our record in the treatment of people wanting to become Canadian citizens is certainly not perfect, our recent governments have tried to address the historical wrongs.

Chinese immigrants played a formative role in the building of our nation, including the construction of our national railway, an undertaking that served to unify the country. However, for decades in the late 1800s and early 1900s, Chinese immigrants were subject to the notorious head tax (i.e. a tax on all Chinese immigrants) and many prospective Chinese immigrants were simply denied entry. The Government of Canada formally apologized for this injustice in 2006. Ironically, today, a significant number of migrants to Canada originate from Asian nations.

There are other instances in which certain categories of immigrants were treated poorly in the past.

In 1939, immigration officials refused entry to the passengers on the St. Louis, a ship carrying Jews who were desperate to escape the Nazi regime. The ship was forced to return to Europe where the passengers were eventually forced into concentration camps and were murdered by the Nazis.

During the Second World War, Japanese Canadians had their property confiscated and were held in internment camps.

The Government of Canada has also attempted to redress these past wrongs.

Notwithstanding this early historical record, Canada is a welcoming nation that promotes immigration. In a public opinion poll released June of 2010, Canadians surveyed overwhelmingly felt that immigration is "a key positive feature of Canada as a country".

PROJECTIONS

After the Second World War, Canada's doors swung open, permitting a wave of immigration that continues today.

Projections by Statistics Canada show that by 2017, up to 23% of the Canadian population will be members of a visible minority and, by the year 2031, there will be twice as many individuals who are visible minorities than there are today.

This reflects the changing face of Canada with a population from diverse national, cultural, religious and ethnic backgrounds.

BACKLASH TO IMMIGRATION

Clearly, Canada is still a welcoming nation. And fortunately, Canada is not experiencing the backlash to immigrants now seen in parts of Europe and parts of the United States. For example, in France, the government is proposing a ban on Muslim women wearing a full-faced veil in public (either the niqab or the burqa). In the US state of Arizona, a new law directed at stemming illegal immigration permits officers to use racial profiling as a means to effect its enforcement.

LEGAL STATUS OF IMMIGRANTS IN CANADA

Although we have a welcoming tradition, the status of migrants to Canada is the subject of evolving legal and political dynamics. Through decided cases, the courts have contributed to the changing legal status of some aspects of the immigration process. It appears that under domestic (as well as international law), migrants are regarded as 'rights-holders', not simply persons subject to the discretionary power of government.

For example, in *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817, it was held that decisions of the Canadian government on whether to allow an illegal immigrant to remain in the country were subject to high standards of fair process and reasonable decision-making.

In *Suresh v. Canada (Minister of Citizenship and Immigration),* [2002] 1 S.C.R. 3, 2002 SCC 1, it was held that where there is a substantial risk of torture, there should be constitutional protection against the deportation of immigrants, even those subject to allegations of terrorist involvement.

In *Charkaoui v. Canada (Citizenship and Immigration),* [2007] 1 S.C.R. 350, 2007 SCC 9, the process of detaining and deporting permanent residents suspected of terrorist connections and activity was ruled unconstitutional on the basis of insufficient disclosure of the case against them.

Aside from court decisions, the status of migrants is currently undergoing some political and consequential legal evolution. Some changes are subtle and draw little public attention. For example, we have relaxed the standards for those seeking immigration who are already working or studying in Canada. There has been significant publicity recently in connection with the fast-tracking of skilled workers seeking admission to Canada. But, at the same time, the federal government has put a cap of 20,000 on the number of successful skilled worker visa applications over the next 12 months and has reduced their qualifying occupations. Because of the exploitative behaviour of some immigration consultants, the federal government is proposing the Cracking Down on Crooked Consultants Act.

REFUGEES

One matter that has received considerable attention relates to those seeking asylum in Canada. Canada is known as a refugee-friendly country and, in fact, we do have a comparatively liberal, expansive policy in relation to those claiming refugee status.

The Government of Canada has established various initiatives to assist refugees, including the Government-Assisted Refugee Program and the Private Sponsorship of Refuges Program. The Resettlement Assistance Program provides income support to government-assisted refugees

and offers other essential services such as housing and financial assistance.

Under the recently-enacted Balanced Refugee Reform Act, there will be some changes to our existing refugee policy. Some provisions are technical in nature and relate, for example, to hearings before the Immigration and Refugee Board.

More substantively, we have traditionally identified refugee-producing nations and have had a somewhat negative attitude toward those applying from elsewhere. Under the new legislation, Canada will more readily allow asylum-seekers to apply from designated safe countries of origin.

Another change relates to the timely removal of failed asylum-claimants who, until now, have managed to remain in Canada for years before their removal was effected.

SUBSEQUENT TO THE FORMAL IMMIGRATION PROCESS

Subsequent to the formal immigration process, migrants to Canada essentially have the full set of rights available to all Canadians, including access to social services, medicare and other benefits. They also enjoy the same constitutional rights available to all persons, with the exception of the right to vote and some mobility and minority language education rights. They do, however, possess the full rights enjoyed by all others with respect to the fundamental freedoms of religion, expression, assembly and association. They are also entitled to equality before and under the law and the equal benefit and protection of the law.

MOBILITY RIGHTS

Migrants to Canada and migrants living in Canada are afforded some constitutional protection with respect to mobility rights.

Mobility rights were not recognized, in and of themselves, until the adoption of the Canadian Charter of Rights and Freedoms in 1982. However, they were addressed in earlier jurisprudence dating back to the 1890s.

We had a number of pernicious and blatantly discriminatory laws at the provincial level, particularly in western Canada, directed at certain classes of immigrants.

For example, there were laws restricting Chinese immigrants from working in coal mines. In *Union Colliery Co. of British Columbia v. Bryden,* [1899] A.C. 580, this law was attacked on the basis of what the late Mr. Justice Tarnopolsky called the 'power allocation technique of protecting civil liberties', namely, that any law dealing with citizenship or alienage or an incident of citizenship such as the right to vote, were matters within federal jurisdiction and any provincial law that was based upon citizenship, alienage or an incident of citizenship was an interference with federal legislative authority under our constitutional division of powers in the Constitution Act of 1867.

The use of power allocation was also referred to in *Winner v. S.M.T. (Eastern) Ltd.,* [1951] S.C.R. 887, indicating that citizens of Canada were the holders of some inherent rights.

In *Canadian Egg Marketing Agency v. Richardson,* [1998] 3 S.C.R. 157 , the Supreme Court reiterated the difference between this earlier treatment of mobility and the present protection of mobility rights in section 6 of the Charter, the latter of which has now become a matter of human rights.

The notion of mobility as a human right was given a minor, quasi-constitutional recognition in section 2(a) of the Canadian Bill of Rights in 1960 which stated that no federal law could "authorize or effect the arbitrary ... exile of any person".

All this changed dramatically in 1982 when section 6 of the Charter was adopted and mobility became a constitutionally entrenched right.

To some extent, section 6 reflects the international protection of mobility rights contained in Article 12 of the International Covenant on Political and Civil Rights. Article 12 states as follows:

(1) Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
(2) Everyone shall be free to leave any country, including his own.
(3) The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
(4) No one shall be arbitrarily deprived of the right to enter his own country.

The UN Human Rights Committee has adopted a detailed commentary on the meaning of Article 12, including the exceptions to mobility contained in Article 12(3), in its General Comment #27(67) in relation to Freedom of Movement.

To a lesser extent, mobility is also referred to in section 13 of the Universal Declaration of Human Rights.

SECTION 6 OF THE CHARTER

With respect to mobility rights and Canada's domestic constitutional law, section 6 of the Canadian Charter, described by some in 1982, as the "sleeper section of the Charter", has been used extensively. For example, in the last four years, the section has been cited in some 376 reported cases.

This section consists of 4 subsections of which sections 6(1) and 6(2) are the most significant.

Section 6(1) states that every citizen of Canada has the right to enter, remain and leave Canada. All laws, regulations, policies and practices of government must conform to this right unless a violation of this section is held to be a reasonable limit under the *Oakes* interpretation of reasonability under section 1 of the Charter.

Essentially, the *Oakes* test requires that a law may violate a right in the Charter if that law is a rational, minimally intrusive and non-disproportionate means of achieving a pressing and substantial state objective. The majority of cases under section 6(1) relate to extradition from Canada. From *Rauca* to *Catroni,* these cases have almost universally upheld the extradition even though it would violate a Canadian citizen's right to remain in Canada under the *Oakes* test in section 1.

There have been other cases involving failed refugee cases but the courts have reiterated that section 6(1) makes a distinction between Canadians and non-Canadians with respect to the right to remain in Canada.

In one case, *Idahosa v. Canada (Minister of Public Safety and Emergency Preparedness) (F.C.A.), 2008 FCA 418, [2009] 4 F.C.R. 293,* a failed refugee claimant, a Nigerian woman, argued that deportation would effectively affect her Canadian-born children's right to remain in Canada. It was held that a non-Canadian immigrant has no constitutional status to remain in Canada.

There have been certain cases involving Canadian citizens serving time in foreign prisons, wishing to enter Canada in order to serve their sentences in Canada. In each case, the denial of the right to enter Canada was justified under a section 1 determination. (See, for example, *France v. Ouzghar,* 2009 ONCA 69 and *Getkate v. Canada (Minister of Public Safety and Emergency Preparedness)* (F.C.), 2008 FC 965, [2009] 3 F.C.R. 26).

Section 6(2) has been referred to as an economic mobility right. This section has two parts, namely, the right to move and take up residence in any province and the right to the gaining of a livelihood in any province.

Originally, it was thought that the section conferred three rights: the right to move to any province, the right to move for the purpose of gaining a livelihood in any province and the right to gain a livelihood. However, in both *Law Society of Upper Canada v. Skapinker,* [1984] 1 S.C.R. 357 and *Black v. Law Society of Alberta,* [1989] 1 S.C.R. 591 it was held that the right to a livelihood is not, in and of itself, a matter envisaged within the scope of the section.

For example, in the case of *Rombaut v. New Brunswick (Minister of Health and Community Services),* [2000] N.B.J. No. 243, 2001 N.B.C.A. 75 (C.A.), the province of New Brunswick designated where in the province any new doctor may practice medicine. A non-resident physician argued that the New Brunswick law violated his right to gain a livelihood. However, the court held that the law did not actually prevent a non-resident of New Brunswick from moving to that province for the purpose of the gaining of a livelihood as a physician, even though there may be some geographical restriction on where in that province he or she may practice medicine.

The Charter does specifically provide for some restrictions on mobility under sections 6(3)(a) and 6(3)(b). Under section 6(3)(a), a law or practice of general application is permissible. For example, a province may enact a law setting out the qualifications required to engage in a particular profession. Under section 6(3)(b) a province may enact a law requiring reasonable residency in order for a person to receive publicly provided social services.

The province of Quebec has a separate immigration system from the rest of Canada and can pick and choose whom the province wishes to admit as migrants to that province. However, under section 6(2) of the Charter, migrants to Quebec, once admitted, are then free to move and take up residence in any other province.

SETTLEMENT

For successful immigrants who have attained the status of permanent residents, Canadian institutions have provided resources to assist in their settlement.

For example, over the past 85 years, many immigrants have benefitted from the work of JIAS, the Jewish Immigration and Aid Service. In Edmonton, the Mennonite Centre for Newcomers has provided settlement support to immigrants from diverse backgrounds. In Manitoba, an interfaith organization provides settlement assistance. In Ottawa, assistance is provided by the Catholic Immigration Centre.

In the public sector, Citizenship and Immigration Canada has established an Immigration Settlement and Adaptation program and has plans to enhance its settlement support program for refugees.

ACCREDITATION OF FOREIGN CREDENTIALS

One persistent concern in the settlement process relates to the problem of the formal accreditation of persons with foreign credentials, particularly those with professional training. Many foreign-trained doctors, for example, have had to confront a cumbersome, frustrating and often unsuccessful process that leaves them unable to practice in their fields.

There are many cases of foreign-trained professionals who are denied employment in their chosen professions and instead work in jobs where they do not use the skills and knowledge they possess. This matter is made more complicated given that the accreditation of foreign training

is a matter of provincial jurisdiction and the federal government can play only a limited role with respect to this aspect of settlement.

However, the Government of Canada has recently announced that it is taking measures through Canada's Economic Action Plan to work with the provinces and territories in developing a common approach to recognition of foreign credentials.

MULTICULTURALISM IN CANADA AND SOME RECENT CHANGES TO OUR MULTICULTURALISM POLICY

Canada is a nation based upon certain principles recognized in our constitution. One of these important principles is multiculturalism.

Under Canadian law and policy, Canada strives to assist migrants in the settlement and integration process while, at the same time, encouraging migrant communities to preserve their cultural heritage

In 2011, Canada will mark the 40th anniversary of our official multiculturalism policy. In 1971, Canada became the first nation in the world to adopt multiculturalism as an official state policy.

Despite the long-standing official commitment to multiculturalism, the present government is undertaking a shift in policy direction. Recently, the Government of Canada merged its policies and programs related to multiculturalism with its responsibility over immigration through the newly designated portfolio responsible for citizenship, immigration and multiculturalism. In the past, multicultural grants in the community were made by the Department of Canadian Heritage.

More substantively, the government's new policy in relation to multiculturalism has three components. In terms of the specific objectives of the newly approved multiculturalism program these components are as follows:

1. Building an integrated, socially cohesive society by:
   - building bridges to promote intercultural understanding;
   - fostering citizenship, civic memory, civic pride and respect for core democratic values grounded in our history; and
   - promoting equal opportunity for individuals of all origins.
2. Improving the responsiveness of institutions to the needs of a diverse population by:
   - assisting federal and public institutions to become more responsive to diversity by integrating multiculturalism into their policy and program development and service delivery.
3. Actively engaging in discussions on multiculturalism and diversity at the international level by:
   - promoting Canadian approaches to diversity as a successful model while contributing to an international policy dialogue on issues related to multiculturalism (Funding for this objective will primarily be for activities that take place in Canada).

The new policy has resulted in changes to Canada's ethnocultural funding. Now, there are limited or no funds available for specific ethnoculture programs, unless those activities include an intercultural component.

Specifically, under the Multiculturalism Grants and Contributions Program, the federal government will provide funding for initiatives that relate to its three new multicultural objectives as set out above.

The new funding arrangements will focus upon what is described as Inter-Action Projects and Inter-Action Events.

The key component is that of integration. Integration does not mean assimilation, but rather, it connotes greater participation by members of ethnocultural minority groups in the mainstream political and social life of the country.

Aside from multiculturalism grants and institutions, the Government of Canada also conducts a Community Historical Recognition Program (CHRP).

MULTICULTURALISM & JURISPRUDENCE

Another more subtle but significant development has occurred in our courts. Section 27 of the Canadian Charter of Rights and Freedoms provides that the Charter be interpreted in a manner that preserves and enhances the multicultural heritage of Canadians. This constitutionally entrenched provision requires that the courts, when considering the rights and freedoms in the Charter, do so in a way that takes into account the multicultural nature of Canada.

When reviewing the first 28 years of Charter experience, we can see the following:

1. In the first decade of Charter jurisprudence, the courts employed section 27 in many significant cases.
2. During the second decade of Charter litigation, section 27 was used sparingly and with little or no impact.
3. As the third decade of Charter cases comes to an end, we see very little significance attached to section 27.

For example, in *Multani v. Commission scolaire Marguerite Bourgeoys,* [2006] 1 S.C.R. 256, 2006 SCC 6, an important freedom of religion decision, the Supreme Court of Canada upheld the right of a Sikh student to carry his kirpan or ceremonial sword to school when the school board had prohibited him from doing so. The prohibition was held to be an infringement of the student's freedom of religion under section 2(a) of the Charter. But the Court, although briefly mentioning section 27, did not use that section in support of the student's freedom of religion

assertion. This is in marked contrast to *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 and other freedom of religion cases during the period from 1982 to 1992.

Why is that so? It could be because section 27 does not confer any multicultural rights in and of itself. It is an adjectival section modifying rights contained elsewhere in the Charter. But it has always been so. One can only speculate that the courts or the lawyers arguing recent cases have placed less emphasis on multiculturalism as a significant component of our constitutionally protected rights.

In many countries around the world, culture and religion are inextricably woven together whereby culture is religion and religion is culture. This is not the case in Canada. Although some ethnocultural groups are centred around particular religious ideologies, the interrelationship between religion and culture is not a dominant characteristic of Canadian society.

CITIZENSHIP

So we have come full circle, from prospective migrants to Canada, to settled immigrants. For some, the circle becomes complete on the day they acquire Canadian citizenship.

But there are also changes proposed with respect to citizenship. Up to now, there have been some people who have immigrated to Canada and have lived their lives within their cultural communities, never becoming proficient in either French or English. The minister responsible for citizenship and immigration (and now also responsible for multiculturalism) has recently required that certain categories of permanent residents must demonstrate, through formal testing, a degree of proficiency in one of our two official languages. In addition, most future citizens must demonstrate "adequate ability to communicate in either English or French" (http://www.cic.gc.ca/english/citizenship/cit-test.asp).

The government has also recently introduced Bill C-37 which, in part, streamlines the process for revoking fraudulently-gained citizenship and removing ineligible individuals from Canada.

On becoming citizens of Canada, migrants are reminded that they enjoy a set of constitutionally entrenched rights and values. It is hoped that the status of migrants to Canada will continue to be informed by and reflect these core principles that define Canada and Canadians.