

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

1. INTRODUCTION

International human rights principles are founded on the recognition of the inherent dignity of the human person. They therefore transcend national borders and articulate what we share with each other through our common humanity. This is why the principles of non-discrimination are prominent in all human rights instruments: a human right must by definition be the right of all humans.

Within Canadian law and policy, however, many rights are tied not to people's status as humans, but to their status within the country, such as citizen or permanent resident. As a result there are numerous areas where non-citizens in Canada find their fundamental human rights denied, despite Canada being a party to the International Covenant on Economic, Social and Cultural Rights (CESCR) as well as to other human rights instruments.

The problem of discrimination against non-citizens is caused by and compounded by the fact that most non-citizens whose rights are denied based on their lack of permanent immigration status are racialized persons. In the context of deep-seated societal racism, the denial of the basic rights of racialized non-citizens is considered normal by many in government and in society. Along with aboriginal peoples in Canada, who are also racialized, non-citizens are those whose economic, social and cultural rights are most frequently violated in Canada.

This submission highlights CESCR violations in three specific areas: the right to family reunification; the right to non-discrimination in the provision of government benefits and services and the rights of workers to organize and bargain collectively.

This submission highlights the rights violations; detailed information on each area is found in the background document, under the same headings.

2. THE RIGHT TO FAMILY REUNIFICATION

a) INTRODUCTION AND IDENTIFICATION OF KEY RIGHTS ENGAGED

CESCR Article 10(1) recognizes the importance of family unity and provides protection and assistance to the family, for its establishment and while responsible for the care and education of dependent children. This right is supported by articles 9(1) and 10(1) of the *Convention on the Rights of the Child* which provides that a child shall not be separated from his or her parents against their will and the specific obligation on states to treat applications for family reunification in a positive, humane and expeditious manner.

Unfortunately, eight specific immigration laws and practices documented here violate the special protection which should be afforded to children and their families, by either denying family reunification directly in legislative provisions or through practices which result in processing delays so significant that they violate these same rights to family reunification. Discrimination contrary to article 2(2) lies at the heart of all of these rights violations, as explained below.

The Canadian Council for Refugees has repeatedly expressed concern to the Canadian government about issues of family reunification, particularly for Convention Refugees. These concerns have been summarized in *More than a Nightmare: Delays in Family Reunification*, November 2004 and *Impacts on children of the Immigration and Refugee Protection Act*, November 2004.

b) FAMILY SEPARATION AS PUNISHMENT: THE IMPACT OF 117(9) (d)

Case Study

S. H. has been separated from her daughter since September 2001. On the death of her husband in Afghanistan her daughter was removed from her by a Taliban court and given to her in-laws. Because she had lost custody of her daughter, S.H. did not include her in her application to come to Canada as a sponsored refugee. In 2003, on the death of her mother-in-law, her daughter was returned to her family in Kabul, and S.H. has been trying to bring her to Canada since that time. Her application was refused pursuant to regulation 117(9) (d) of *IRPA* because the daughter had not been included on S.H.'s application, and was not examined by the visa officer.

The child in the meantime has suffered seriously: she has been handed from one caregiver to another, has lost weight, has refused to eat and been hospitalized on several occasions. She even refused to acknowledge her mother when she was able to visit last year. The daughter was three when she was taken from S.H. by a Taliban Court and five when her mother began the sponsorship process. She is now eight years old. To date the child remains at risk and separated from her mother, who is frantic with worry about her safety and security.

i) Brief Explanation of the Problem

In 2002, with the introduction of a new *Immigration and Refugee Protection Act, (IRPA)* Canada introduced Regulation 117(9) (d) designed to sanction immigrants who previously failed to disclose dependants, thereby preventing their examination by the visa officer. Appeal rights to the Immigration Appeal Division were also removed for these cases. Now, if a sponsor failed at any time to declare a family member on an application for immigration, and that person was not examined, the family member cannot be reunited through a sponsorship application. The section applies regardless of the circumstances which lead to the failure to disclose and without regard to the best interests of any children affected. There is no hearing to assess the underlying reasons nor is there any review of humanitarian and compassionate considerations. The sponsorship prohibition is forever, and there is no appeal.

The constitutionality of 117(9) (d) was appealed to the Federal Court of Appeal and domestic appeal rights are exhausted, unless the Supreme Court of Canada intervenes. In *De Guzman*, the Federal Court of Appeal determined the provision does not violate a right to security of the person, because of the possibility of an IRPA section 25(1) discretionary review by a visa officer, on humanitarian and compassionate grounds. Refugee and immigration advocates do not agree. The provision impacts directly on economic, social and cultural (ESC) rights and has a profound and devastating impact on families and children. The existence of a discretionary remedy is not a substitute for an acceptable review process. Applicants are mostly unaware of a section 25(1) process; no forms are available; fees apply; immigration officials do not counsel recourse to these applications and no guidelines exist for these cases to ensure adequate consideration of humanitarian and compassionate factors or the best interests of children.

ii) Who is Affected?

Persons who immigrated to Canada without having family members examined by a visa officer at the time, for whatever reason.

iii) How is the ESC Right Violated?

Families are denied family reunification and children are separated from their parents forever, without regard to their best interests.

iv) What is the Legislative or Policy Basis for the Rights Violation?

IRPA s. 65 and *IRPA* Regulation 117(9) (d)

v) What Does Canada Need to do to be in Compliance?

Repeal *IRPA* Regulations 117(9) (d).

Suggested questions

- 1. What steps has Canada made to ensure that vulnerable dependants and children are not harmed by 117(9) (d)?**
- 2. How does Canada ensure families refused under 117(9) (d) are aware of the s. 25 humanitarian and compassionate application process and can access it?**

c) FAMILY REUNIFICATION FOR PEOPLE WHO ARE POOR**Case Study**

M.M. is a single parent of five children, originally from Jamaica. As soon as she arrived in Canada in 1995, M.M. sponsored her eldest son, who had not been able to accompany her. At the time of this sponsorship she was in receipt of social assistance and she continued to rely on social assistance for about two years after the arrival of her sponsored son. In 1998 M.M. started to work full-time, but because she was supporting five children, 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 five children.

In October 2002 she married R.S. and they have a son who was born in June 2003. M.M. applied to sponsor her husband, but the application was denied because the son she had sponsored earlier had been included in her social assistance payments, making her in breach of a previous sponsorship undertaking.

M.M. 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. Ironically, the denial of family reunification in this case practically guarantees M.M. will not be able to repay the sponsorship debt for many years to come.

i) Brief Explanation of the Problem

Canada discriminates on the basis of social condition by denying family reunification rights to poor people under four circumstances:

1. Directly where they are on social assistance. *IRPA* Regulation 133(1)(k)
2. Where there is a risk the sponsored person will need social assistance. *IRPA* s.39
3. Where someone they have sponsored was on social assistance and they have not repaid the amount. *IRPA* Regulation 133(1) (g) and (h)
4. Indirectly through the imposition of cost recovery fees which are beyond the means of poor people. *IRPA* Regulation 175, 176, 295(1) (2).

The Ontario Court of Appeal has recognized that people on social assistance are a marginalized, vulnerable and excluded group who need the protection of their right to equality under section 15 of the *Charter*. The Court recognized in *Falkiner v Ministry of Community and Social Services* 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. People on social assistance need, and are entitled to, protection from discrimination, yet the *IRPA* specifically denies them the right to family reunification, on the basis of their need, or previous use by sponsored family, of social assistance. People need social assistance because they are vulnerable and disadvantaged already, which is what makes it particularly unacceptable to target this group for further rights violations.

While it is possible to appeal a denial on the basis of social assistance receipt to the Immigration Appeal Division on humanitarian and compassionate grounds, such appeals entail delays of a minimum of eighteen months, which in themselves violate guarantees of expeditious family reunification, particularly when added to already lengthy processing times.

Canada has mechanisms in place for the recovery of sponsorship debts, many of which were strengthened with the new *IRPA* in 2002. The denial of a right to family reunification because of an outstanding sponsorship debt represents an unconscionable restriction on the right to family reunification, in the interests of enforcing debt recovery. This is a cruel and calculated example of Canada placing its financial interests above the human rights of those people subject to its control.

Cost recovery fees are so high that they have an impact on people with low-income seeking to be reunited with their families, even those working full-time. Charitable organizations have helped some people in desperate situations, but Canada is unwilling to waive the fees, which are \$550 per adult and \$150 per child. In 2004, it is estimated the Canadian government collected in excess of \$4.25 million in immigration fees from refugees and their family members alone.

ii) Who is Affected?

People, who out of necessity, are forced to resort to social assistance cannot sponsor their children and dependants, and so are denied family reunification. Many refugees need social assistance while they overcome the effects of trauma or seek to integrate by learning new languages or market skills. Sole support parents, the vast majority of whom are women, are also affected, as they have a greater need for social assistance because of a lack of affordable childcare and unequal wages for women.

iii) How is the ESR Right Violated?

Denial of the right to family reunification on the basis of social condition is discriminatory contrary to CESCR articles 2 and 10.

iv) What Does Canada Need to do to be in Compliance?

Repeal *IRPA* s. 39 and *IRPA* Regulation 133(1) (g) and (k). Introduce fee waivers for low-income sponsors seeking family reunification.

Suggested questions

- 1. What steps has Canada taken to ensure overpayment debts and cost recovery fees do not violate rights of family reunification or the best interests of children?**
- 2. What steps has Canada taken to ensure the vulnerable on social assistance and their children are not denied the right to family reunification?**

d) FAMILY REUNIFICATION FOR LIVE-IN CAREGIVERS AND SEASONAL AGRICULTURAL WORKERS

i) Brief Explanation of the Problem

Canada treats 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 the 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.

ii) Who is Affected?

1. Live-in Caregivers

Under the Live-in Caregiver Program, Filipino caregivers and women from 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 subsequently sponsor family members. Processing delays prolong the wait. The National Alliance of Philippine Women in Canada reports that live-in caregivers routinely wait five to eight years to be reunited with their children, with serious consequences for family ties and the ability of children to adapt once they finally reach Canada.

2. Seasonal Agricultural Workers

Seasonal Agricultural Workers are granted only temporary status in Canada and have no access to family reunification processes. Under the Seasonal Agricultural Program, Mexican and Caribbean labourers spend 8 months a year, or even more, 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. Whole communities in Mexico are emptied of their male residents, leaving only women and children behind.

iii) How is the ESR Right Violated?

Live-in Caregivers are denied family reunification because they cannot bring their families with them to Canada when they come to work, and routinely wait three to five years to effect family reunification which only occurs after they are granted permanent resident status.

Canada favours applicants with families as Seasonal Agricultural Workers, since they are believed 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.

iv) What is the Legislative or Policy Basis for the Rights Violation?

The Seasonal Agricultural Workers Program is governed by memoranda of agreement between Canada and the sending countries. These memoranda of agreement set out terms and conditions which distinguish seasonal agricultural workers from high-end temporary workers. *IRPA* Regulations 194-209 govern temporary workers.

IRPA Regulations 110-115 govern Live-in Caregivers.

iv) What Does Canada Need to do to be in Compliance?

Correct the discrimination in the point system for independent immigrants to recognize the true value of work in the agricultural and caregiving fields. Allow these workers to access permanent resident status from the outset, and to bring family members with them when they immigrate to Canada.

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

Suggested question

- 1. What is Canada doing to ensure Seasonal Agricultural Workers and Live-in Caregivers enjoy family unity while employed in Canada?**

e) FAMILY REUNIFICATION FOR CHILDREN**Case Study**

D. T. is a mother from China who was forced to flee to Turkey leaving her one year old daughter with her parents in China. She was accepted as refugee in Turkey, but not permitted by the Turkish government to be reunited with her daughter. Because her daughter remained in danger in China, she sought visas for herself and her daughter and they travelled to Canada to make refugee claims. D.T. was refused because she already had refugee status in Turkey, but her daughter was accepted. Canadian law does not permit a child to include their parent on an application for permanent residence, and accordingly when the daughter tried to include her mother on her application for permanent residence, this was refused and leave to the Federal Court of on Judicial Review was also denied. D.T. has now made an application on humanitarian and compassionate grounds. However, as a result of an accident in Canada, D.T. now uses a wheelchair and is receiving social assistance disability payments, which means that she is likely to be found both medically and financially inadmissible.

i) Brief Explanation of the Problem

Refugee claims by separated children are a growing phenomenon worldwide. However, when these children are accepted as Convention refugees in Canada, they cannot include their parents or siblings 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” grounds and meet all other admissibility criteria. If they could be included as family members of the child, they would be exempt from medical admissibility due to excessive demand and financial inadmissibility.

Further, once a child has permanent residence, they still cannot be reunited with their parents in Canada, because only persons 18 years of age or older may sponsor family members.

ii) Who is Affected?

All separated children recognized as Convention refugees in Canada and their families, as well as children in Canada with their families, where they are recognized as refugees but their family members are not.

iii) How is the ESR Right Violated?

Children recognized as Convention Refugees are denied family reunification. This represents discrimination on the basis of age.

iv) What is the Legislative or Policy Basis for the Rights Violation?

IRPA Regulation 1(3) defines family member so as to exclude parents and siblings of a child and IRPA Regulation 176(1) limits who many be included in the permanent residence application of a refugee to “family members”.

v) What Does Canada Need to do to be in Compliance?

Allow Convention refugee children in Canada to include their parents and siblings on their application for permanent residence.

Suggested questions

- 1. What measures has Canada taken to ensure that separated children recognized as Convention refugees are reunited with their families expeditiously?**
- 2. Why has Canada failed to include parents and siblings of children in the definition of family member?**

f) FAMILY REUNIFICATION AND DNA TESTING REQUESTS**Case Study**

Originally from Ethiopia, Mr. X came to Canada 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 paternity, but he could not afford the costs of the testing (approximately \$2,000), because of his extremely low income as he struggled to become settled in Canada. When he sought some way around the problem, he was “advised” by Canadian immigration officials to remove his children from his application and they would grant his permanent residence, which occurred 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 is now permanent.

Case Study

MAO, originally from Somalia, applied to sponsor three children from his first marriage (the mother of the three children had died in childbirth). Although he provided a passport listing his three children, the Canadian visa officer asked for DNA tests to prove they were his biological children. The tests showed that the youngest child was not his biological child, much to his dismay and personal grief. The two older children were granted visas, but the youngest child, then 11 years old, had to be left behind in the care of a guardian in Kenya.

Despite evidence of the on-going parent-child relationship, the Immigration Appeal Division refused MAO’s appeal on the grounds that there was no biological relationship. Since the boy was found not to be 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.

Further attempts to seek legal recourse have been unsuccessful. Adoption is not an option for MAO since he is Muslim and adoption is contrary to his religious beliefs. MAO finally went to Kenya to make other arrangements for the future of his son who by then was 17 years old and by all accounts, was terribly hurt and demoralized by what had happened.

i) Brief Explanation of the Problem

Canada's insistence upon identity documents and birth certificates is a continuing barrier to family reunification for Convention refugee families, particularly those from Tibet, Afghanistan and Somalia. While *IRPA* contains provisions for substitute identity documents, the lack of identity documents, or identity documents deemed unsatisfactory, often lead to requests for DNA testing for family members, to prove the biological relationship, which became the explicit basis for membership in the family under the new *IRPA*. The old *Immigration Act* specified that a son or daughter needed to be the "issue" of the parent, which arguably included legal and biological children.

DNA testing, which adds to delays and is extremely expensive, can result in the exclusion of children who may not be biologically related to both parents, but who have been part of the family all of their lives, and have no other family. For instance, children born to women who are legally married are the legal children of the couple. If a birth certificate were issued, it would be issued in the name of both parents. However, in some instances the child may not be the biological child of the father. Many of these children have been raised and cared for by their families; in ignorance of their biology. When DNA tests reveal false paternity, the effects for the child can be devastating.

Even where the children are biologically related to their parents, many families seeking reunification cannot afford the tests. In these cases, family reunification is denied or significantly delayed on the basis of the income level of the family.

Children who prove not to be the biological children of their parents cannot be reunited with their family, even if they and their parents consider them to be part of the family, and the children have no other family. Because only children who are biologically related are "members of the family class" for the purposes of appeal under *IRPA* section 65, there is no humanitarian and compassionate review of these decisions by the Immigration Appeal Division. Similarly, there is no venue to consider the best interests of the child.

It is important to emphasize that the problems caused by defining children according to biological connection do not affect everyone equally. Citizens of countries of the North, who are mostly white, rarely have to undergo DNA testing because they are able to provide birth certificates and other documents deemed satisfactory. As a result, the cases of false paternity are not discovered. On the other hand, most of those asked to do DNA testing are from the South and are people of colour.

ii) Who is Affected?

Convention refugees from many countries, including Tibetan refugees, have difficulty convincing Canadian immigration officers of their identity. In some cases these people are being asked for DNA testing to prove the biological relationship.

iii) How is the ESR Right Violated?

Denial of family reunification for children who are not biologically related, but are nonetheless members of the family, discriminates against these children on the basis of their status, and fails to consider their best interests.

Denial of family reunification for families who cannot afford DNA testing discriminates against poor families on the basis of their social status.

iv) What is the Legislative or Policy Basis for the Rights Violation?

Definition of dependant child under *IRPA* Regulation 2 which specifies that a dependent child is the “biological” child of the parent.

v) What Does Canada Need to do to be in Compliance?

Amend *IRPA* Regulation 2 to remove the requirement that a child be “biological” and thereby recognize a broader definition of “family”.

Suggested questions

- 3. What measures have been introduced to ensure DNA testing requests do not prevent family reunification for people with low-income?**
- 4. What measures have been introduced to ensure children excluded by DNA tests have their best interests considered?**

g) FAMILY REUNIFICATION AND LENGTHY PROCESSING DELAYS**Case Study**

H. was recognized as a refugee from Afghanistan in April 1998. She applied for permanent residence and included her husband and five children on her application. At the time her oldest child was ten and the youngest two years old. Over the next five years she received very little communication from immigration officials.

Finally in May 2003, H. was informed that her file was delayed because her husband was inadmissible. She was counselled that if she removed her husband from the application, she would soon be reunited with her children. In July 2003, she followed this advice, realizing that she would likely never see her husband again.

In September 2003, immigration officials called into question whether H. was in fact the mother of the five children and asked for DNA testing. She complied and testing was completed in February 2004 (at a cost to her of \$1800).

Finally, in August 2005, H.’s children arrived in Canada after eight years’ separation from their mother, more than seven years since she had been accepted as a refugee.

i) Brief Explanation of the Problem

People who flee repressive conditions to seek asylum in Canada often arrive, by force of circumstances, without their spouse or children. Once recognized as refugees in Canada, they can apply to bring their spouses and children, but it frequently takes an unacceptably long time for such applications to be processed by Canadian visa posts.

Some refugee families wait years to be reunited in Canada. According to statistics published by Citizenship and Immigration Canada for 2005, one in five dependants of refugees took more than 23 months. In Abidjan, the slowest visa post, which covers several countries including the Democratic Republic of Congo, half of the cases took more than 26 months, and one in five took more than 40 months. This time covers only the period beginning from the time that the family member's completed application is received in the visa post. The actual waiting time from the moment when the refugee in Canada submitted the application is several months longer. Issues of proof of identity and DNA testing requests contribute significantly to the delays.

The following tables shows the number of months it took in 2005 for certain visa posts, and by region, to process 50% and 80% of applications for permanent residence for family members of refugees. Unfortunately the most significant delays occur in those regions where typically, refugees are trying to process the applications for their families.

<i>Processing times by Selected Canadian visa post, 2005</i>	<i>Months to process 50% of cases</i>	<i>Months to process 80% of cases</i>
Abidjan (covering West and Central Africa)	26	40
Accra (covering West Africa)	15	25
Nairobi (covering East Africa)	16	26
Islamabad (covering Pakistan and Afghanistan)	21	40

<i>Regional Processing Times, 2005</i>	<i>Months to process 50% of cases</i>	<i>Months to process 80% of cases</i>
Africa and the Middle East	15	27
Asia and Pacific	11	24
Europe	6	15
Western Hemisphere	8	16
Source: http://www.cic.gc.ca/english/department/times-int/12-ref-dependants.html		

ii) Who is Affected?

Refugee families are affected, particularly those seeking reunification with family members in Africa.

iii) How is the ESR Right Violated?

Significant processing delays, while refugee families remain separated, violate the right of children not to be separated from their parents, and the right to family unity.

The problem of slow refugee family reunification persists despite repeated calls to Canada by the UN Committee on the Rights of the Child to expedite reunification.

iv) What is the Legislative or Policy Basis for the Rights Violation?

Canada does not permit family reunification to occur for refugee claimants or accepted refugees. Reunification only occurs when a refugee is granted permanent resident status, this means reunification must wait until all medical, security, criminality and other admissibility tests have been carried out on all family members.

v) What Does Canada Need to do to be in Compliance?

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.

Suggested questions

1. What measures has Canada put in place to expedite family reunification processing when refugee family members are in an unstable and conflict-affected region?
2. How does Canada explain the significant variation in processing times by mission?

3. THE RIGHT TO NON-DISCRIMINATORY ACCESS TO GOVERNMENT BENEFITS AND SERVICES

a) INTRODUCTION AND IDENTIFICATION OF KEY RIGHTS ENGAGED

Canada discriminates in the provision of safety-net benefits on the basis of immigration status, even where the benefits in question form part of contributory insurance schemes funded by payroll deductions. These benefits are designed to assist low-income families and individuals, and by their very nature they would make a substantial difference to the standard of living of the families who are denied. Many of the families denied the benefits are legally present in Canada, hold work permits, pay taxes, file income tax returns, and have children, including children who are Canadian citizens by birth.

The fact that these low-income families pay into the schemes, but are denied access to any of the benefits is discriminatory.

b) HOW ARE THE ESC RIGHTS VIOLATED?

On the basis of the status of the parents, children and their families are denied the benefit of significant income supplements which would raise their standard of living above abject poverty. The ESC right to an adequate standard of living under article 11(1); right to be free from hunger under article 11(2); special protection for children without discrimination and regardless of parentage and other conditions under article 10(2) and the right to the highest standard of physical and mental health under article 12 are all engaged.

c) NATIONAL CHILD BENEFIT SUPPLEMENT AND ENERGY COST BENEFIT**Case Study**

M.L. originally from Guatemala, is a single mother who has been living and working lawfully in Canada for a number of years. M.L. 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, M.L. has been waiting more than 6 years for her permanent status. Yet 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 forty-one percent of the Statistics Canada low-income cut-off income of \$37,791.00 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 M.L.'s lack of permanent residence.

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 M.M.'s annual family income, and protect them from the destabilizing costs of rising energy costs, bringing them closer to the minimum income a family of four needs to live in dignity in Canada.

i) Brief Explanation of the Problem

The National Child Tax Benefit is a program designed to raise a family's standard of living above absolute abject poverty. It is intended to assist children, but is denied to some children on the basis of their parent's immigration status.

ii) Who is Affected?

Low-income children whose parents are refugee claimants, nationals of countries on which the Canadian government has imposed a suspension of removals due to generalized risk, refused refugee claimants awaiting pre-removal risk assessments or awaiting removal, applicants awaiting humanitarian and compassionate decisions or permanent residence, and non-status workers.

iii) What is the Legislative or Policy Basis for the Rights Violation?

Energy Costs Assistance Act, Part I

The Income Tax Act s. 122.6(e)

iv) What Does Canada Need to do to be in Compliance?

Amend *Income Tax Act* section 122.6 to remove the requirement for permanent residence.

Suggested questions

- 1. Why are otherwise eligible children denied the National Child Tax Benefit and the Energy Cost Benefit on the basis of their parent's immigration status?**
- 2. Given the situation of child poverty in Canada, how does Canada justify the discriminatory denial of these benefits to poor children on the basis of a parent's immigration status?**

d) EMPLOYMENT INSURANCE FOR SEASONAL AGRICULTURAL WORKERS AND LIVE-IN CAREGIVERS.***i) Brief Explanation of the Problem***

Temporary workers, such as Seasonal Agricultural Workers and Live-in Caregivers, face significant barriers in 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 Seasonal Agricultural Workers to return home at the end of the season, by the time they are unemployed, they are 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.

Live-in Caregivers 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. 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 caregivers' chances of being able to gain permanent status in Canada. All of these barriers arise because caregiving work, performed predominantly by women, is not recognized as a valued occupation in the immigration point system. If it were to be properly recognized, caregivers would come like other immigrants as permanent residents from the outset.

ii) Who is Affected?

Seasonal Agricultural Workers and Live-in Caregivers.

iii) How is the ESR Right Violated?

The right to an adequate standard of living guaranteed under article 11.1 is violated by denial of access to EI benefits.

iv) What is the Legislative Basis for the Rights Violation?

Employment Insurance Act, Sections 18(a) and 37(b). Seasonal Agricultural Workers are required to return home at the end of their contract which effectively makes them ineligible to receive benefits because they will never be in Canada while they are unemployed.

IRPA Regulations 110-115 for Live-in Caregivers.

v) What Does Canada Need to do to be in Compliance?

Exempt such workers from paying EI premiums or allow them to pay a reduced rate in recognition of the limited access workers have to benefits under the EI scheme.

Admit Live-in Caregivers to Canada as permanent residents from the outset.

Suggested questions

1. **Is Canada prepared to end the discrimination against Seasonal Agricultural Workers by adjusting their EI premiums or by granting entitlement to benefits, even if they are not resident in Canada?**
2. **What steps is Canada taking to ensure Live-in Caregivers are not denied EI benefits due to employer misconduct?**

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

a) INTRODUCTION AND IDENTIFICATION OF KEY RIGHTS ENGAGED

CESCR article 8.1(a) provides for the right to form trade unions and to join the trade union of his or her choice in order to promote and protect person's social and economic interests. State governments are not permitted to restrict this right to unionize, unless strictly necessary in the interests of national security, public order or for the protection of the rights and freedoms of others.

i) Brief Explanation of the Problem

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. Canada argues that sending country consular officials are migrant workers' best representatives, yet 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 employer/grower-controlled administrative body FARMS/FERMES plays an increasing role in setting policy directions, while workers themselves have no voice in these negotiations.

In Ontario, which alone employs 80% of Seasonal Agricultural Workers, and in Alberta, workers do not enjoy the right to form or join a union, notwithstanding the Supreme Court of Canada decision in *Dunmore vs. Ontario*, which held that agricultural workers have the right to form associations and to organize "without intimidation, coercion or discrimination". The Ontario government has applied a minimalist approach in its interpretation of *Dunmore*, 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. Seasonal Agricultural Workers are excluded from the *Ontario Employment Standards Act* provisions relating to minimum hours of work, mandatory rest periods, holidays and overtime pay. In Ontario, the *Labour Relations Act* was amended to give domestic workers the right to form a union, however in order for domestic workers to effectively

exercise this right, the *Employment Standards Act* would need to be amended to allow single-employee bargaining units.

In Manitoba, Nova Scotia and PEI, domestic workers are excluded from minimum employment standards. In Quebec, live-in caregivers are covered by special provisions and do not have the same rights as other workers.

ii) Who is Affected?

Seasonal Agricultural Workers and Live-in Caregivers.

iii) How are the CESCR Rights Violated?

These workers, who perform vital functions in the Canadian economy at a low wage, are denied the right to organize and bargain collectively, and are discriminated against by different, lower employment standards.

iv) What is the Legislative or Policy Basis for the Rights Violation?

Employment Standards Act, (Ontario)

Agricultural Employees Protection Act (Ontario)

v) What Does Canada Need to do to be in Compliance?

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 in Ontario.

Suggested question

- 1. Are Canada and the provinces prepared to end the discrimination against Seasonal Agricultural Workers and Live-in Caregivers by granting them full unionization rights, including the right to bargain collectively?**

This submission was prepared with the particular assistance of the following members of the Canadian Council for Refugees: KAIROS: Canadian Ecumenical Justice Initiatives, South Ottawa Community Legal Services and Parkdale Community Legal Services.