WHO BELONGS?

Rights, Benefits, Obligations and Immigration Status:

A DISCUSSION PAPER

CANADIAN CIVIL LIBERTIES ASSOCIATION
ASSOCIATION CANADIENNE DES LIBERTES CIVILES

WHO BELONGS?
Rights, Benefits, Obligations and Immigration Status

The Canadian Civil Liberties Association (CCLA) is a national not-for-profit organization that promotes respect for and observance of fundamental human rights and civil liberties. The CCLA's work, which includes research, public education and advocacy, aims to defend and ensure the protection and full exercise of those rights and liberties.

Through its anti-discrimination program, the CCLA, with the help of funding sponsors including the Maytree Foundation, has initiated a project to examine the discrimination experienced by individuals in Canada based on their citizenship and immigration status and its linkage to racial and ethnic discrimination. This project aims to critically examine how this status impacts the rights, benefits, and obligations that are accorded to individuals in Canadian society. This discussion paper is designed to provoke thought and discussion. Send your comments to discrimination@ccla.org or Discrimination and Immigration Project, Canadian Civil Liberties Association, 360 Bloor Street West, Suite 506, Toronto, Ontario, M5S 1X1.

> "If I hadn't come to Canada, I would never have learned about the huge, invisible distinction between 'us' and them'… As an immigrant, I belong to the most fragile category of people."
>
> Goran Simic, *Letter to a fellow refugee,* Extracts, Globe & Mail August 21 2010.

Contents

INTRODUCTION

A. OVERVIEW

Canada likes to describe itself as a rich multicultural mosaic, offering a home and new opportunities to tens of thousands of immigrants each year. Although many immigrants may find opportunities in Canada, others experience many struggles to obtain employment or housing. Indeed, there continue to be many barriers to accessing a wide range of opportunities. Some of the barriers are linked to their status as immigrants. This is the focus of this project: if our laws establish distinctions on the basis of immigration status, if they are allocating rights, obligations and benefits differently depending on whether a person is a permanent resident, a citizen, a temporary worker or has an unclear immigrant status, how can we be certain that this allocation is appropriate, fair, and not discriminatory? How can we know whether distinctions and categories that are used in our law to distinguish between people on the basis of their immigration status are compatible with human rights values, support the goals of the immigration policies and do not reproduce racist or xenophobic stereotypes? Are distinctions on the basis of immigration status simple proxies for racial, ethnic or religious discrimination? How can we be sure that they are not?

Indeed, while this discussion paper focuses on "immigration status", the reality is that in many cases this concept cannot be usefully separated from race or ethnicity. It is beyond the scope of this paper to engage in an in-depth exploration of the crucial connection between race, racialization, and immigration status and policy, however, in each case where a distinction is drawn based on immigration status, it is worth considering the role that race and ethnicity have to play in how that distinction is drawn, who it affects, and how it operates.

Canada has been home to waves of immigrants from all over the world for centuries. Over time, the country has also seen fundamental shifts in the purposes of and policies underlying Canadian immigration policy. Moreover, although there are clearly defined categories of immigrants set out in law, the process involved may take many years and multiple steps to complete, creating subclasses of individuals who are awaiting approval or confirmation of their status, are appealing a decision that denied them their desired status, or are resisting attempts to remove them from the country. Thus, Canadian immigration policy has become increasingly complex over the years, with the number of categories of status multiplying significantly.

After setting out some definitions, this discussion paper explores the various categories of immigration status and considers some of the benefits, rights and obligations that flow from these categories. This exercise allows us not only to consider the complexity of the Canadian immigration system, but also to critically examine how rights and benefits are allocated within that complex system. After looking at the existing allocation of rights, benefits and responsibilities, we must also consider whether the way things are is the way that things ought to be. Probing the rationale for the current allocation of benefits and responsibilities is crucial if Canada is to live up to its core principles of liberty, democracy, equality and fundamental justice and fairness for all. This requires looking at both the formal distinctions between categories of immigrants that are made by the law, and the informal distinctions and differences in treatment that also exist on the ground. It requires probing whether the distinctions that are drawn are truly based on immigration status, or whether issues of race and racism are in reality what lurks beneath. It also requires thinking about when certain distinctions continue to be justified in the XXIst century. Once this work is done, we can begin to sketch out a framework for analyzing how and when immigration status should be used to determine rights, privileges and responsibilities in our society. Ultimately, this framework will be the foundation for future law reform efforts. Canada's commitment to a diverse, vibrant and multicultural society is explicitly recognized in the *Canadian Charter of Rights and Freedoms*. Section 27 of the Charter provides that the *Charter* "shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."

If we wish to develop a political culture that recognizes the way in which immigrant communities' contributions and participation enrich Canadian society, we must address citizenship and immigration issues more consistently and coherently. We must also come to terms with the reality that both historically and currently, xenophobia and racism exist in Canadian society and must be addressed head on. A more transparent framework, and a better understanding of the reasons behind distinctions drawn on the basis of immigration status, will enhance our understanding of the concept of citizenship, facilitate consistent policy making and the consistent application of the law, and help move toward a more equal and just society.

NOTES FROM THE FIELD

Notwithstanding that Canada has relatively low requirements in order to attain citizenship, the reality on the ground is that, for some groups, citizenship is increasingly difficult to attain. The most vulnerable of immigrants, including refugees, often face significant barriers in meeting the requirements to become a citizen. For example, the language requirement may be particularly difficult to meet. For individuals who have suffered from years of persecution and remain traumatized by their experiences, learning a new language may be an insurmountable obstacle.

B. DEFINITIONS

Before attempting to examine the nature of discrimination based on immigration status, it is helpful to define some key terms. For the purposes of this discussion paper, the term "immigrant" means an individual who was not born in Canada, but who resides for an extended period of time in Canada. While the term "citizen" has a number of meanings that are discussed further in Section II, this paper focuses on citizenship as a legally determined immigration status. Citizens are people who were born in Canada, or to Canadian born parents, or were born outside of Canada but became Canadian citizens in accordance with the law.

Another important term to define is "discrimination". The *Canadian Charter of Rights and Freedoms* provides in s. 15(1) that "Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."[1] The grounds of discrimination that are listed in this section are referred to as "enumerated" or "listed" grounds. In addition, courts have accepted that this provision of the *Charter* also prohibits discrimination on other grounds that are similar to those listed in the *Charter* (referred to as "analogous grounds").

In the first Supreme Court of Canada case that considered s. 15(1) of the *Charter*, discrimination was described by one judge as

> a distinction…based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.[2]

The Court has made clear in many of its equality decisions that not all distinctions will necessarily amount to discrimination. Rather, the Court has decided that the markers of discrimination are: (1) pre-existing disadvantage; and (2) stereotyping. Thus, in a recent case decided under s. 15(1) the Court has said that "… the focus is on *preventing* governments from making distinctions based on the enumerated or analogous grounds that: have the effect of perpetuating group disadvantage and prejudice; or impose disadvantage on the basis of stereotyping."[3]

In addition, this *Charter* right, like all rights in the *Charter*, is subject to reasonable limits under section 1, which provides that the rights guaranteed in the *Charter* are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Thus, while it may sound counter-intuitive, constitutional law actually could allow for some discrimination where it passes the test that the courts have established for determining when the breach of a *Charter* right is reasonable under section 1. The Constitution established the minimum guarantees that a government cannot undermine. However, governments can always provide more rights than are provided in the Constitution.

Federal, provincial and territorial human rights codes also prohibit certain defined discriminatory practices on various listed grounds. While the Canadian *Charter* protections only protect individuals from discrimination by the government or state actors, the human rights codes are not confined in this way and provide for remedies where discrimination takes place at the hands of certain private actors. For example, under the *Canadian Human Rights Act* it is considered a discriminatory practice to refuse to employ or continue to employ an individual on a prohibited ground of discrimination.[4] The *Act* also sets out what constitutes a discriminatory practice in a variety of other areas including the provision of goods, services and accommodation.

> " …non-citizens are an example without parallel of a group of persons who are relatively powerless politically, and whose interests are likely to be compromised by legislative decisions. History reveals that Canada did not for many years resist the temptation of enacting legislation the animating rationale of which was to limit the number of persons entering into certain employment. Discrimination on the basis of nationality has from early times been an inseparable companion of discrimination on the basis of race and national or ethnic origin, which are listed in s. 15…."
>
> Justice La Forest in *Andrews v. Law Society of British Columbia,* p. 195

discussion points

- Is there a need to take a closer look at the way in which the law distinguishes between individuals based on their immigration status?
- How do issues of race and ethnicity impact on the distinctions drawn between and amongst immigrant communities?

[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 15 (emphasis added). International conventions also recognize the right to be free from discrimination. For example, Article 26 of the *International Covenant on Civil and Political Rights* states that "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

[2] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 174, per McIntyre J.

[3] *R. v. Kapp*, [2008] 2 S.C.R. 483, at para. 25.

[4] *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 7(a). The prohibited grounds of discrimination are set out in s. 3(1) and are: race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.

EVERY INDIVIDUAL IS EQUAL BEFORE AND UNDER THE LAW AND HAS THE RIGHT TO EQUAL PROTECTION AND EQUAL BENEFIT OF THE LAW WITHOUT DISCRIMINATION

AND, IN PARTICULAR, WITHOUT DISCRIMINATION BASED ON RACE, NATIONAL OR ETHNIC ORIGIN, COLOUR, RELIGION, SEX, AGE OR MENTAL OR PHYSICAL DISABILITY.

Canadian Charter of Rights and Freedoms, section 15(1).

2

IMMIGRATION STATUS

A. CATEGORIES OF IMMIGRANTS

The *Immigration and Refugee Protection Act* and the Regulations under that Act define several categories of immigration status, and further distinctions can easily be drawn within those categories. For example, permanent residents may have been granted that status because of their familial relationships with persons already in Canada, because of the economic contribution that they can make to Canada or because they are considered refugees within the meaning of the *United Nations Convention Relating to the Status of Refugees*. Although all of these individuals may eventually attain permanent resident status, the process that they must follow in order to get into Canada may differ significantly.

Individuals also come to Canada on a temporary basis, as students or temporary workers, for example, or as persons identified as in need of urgent and temporary residence for protective purposes. For temporary workers, their temporary status may be a way to earn money to send home, to gain experience in Canada that can be returned to one's home country or used elsewhere, or may be a first step towards becoming a permanent Canadian resident. In Canada, the Live-In-Caregiver Program, the Seasonal Agricultural Workers Program, and certain professions covered under the North American Free Trade Agreement, are among the most common examples of temporary workers. The rights, benefits and obligations of those in the temporary programs are complicated by the nature of the work involved and the temporary nature of that work. Some of the issues faced by temporary agricultural workers are discussed later in this paper.

In addition to the various classes of both temporary and permanent Canadian residents, rights, benefits and responsibilities may be parceled out differently depending on where in the *process* of attaining status an individual finds him or herself. A person who has just made a refugee claim may be granted different rights and benefits than someone whose refugee claim has been accepted and will also differ from someone whose application has been denied but is under review before the courts.

Finally, some individuals in Canada do not have a legal immigration status. These might include individuals who enter Canada illegally (e.g. via smuggling). It may also include individuals who enter Canada as visitors, students or workers but then remain in the country after their visas have expired. It may also include individuals who are found to be inadmissible to the country after entry but who do not report for removal when requested to do so by Canadian authorities. These individuals will be extremely vulnerable within the Canadian system and may not feel comfortable attempting to access basic services, including healthcare, or contacting the police if they are victims of crime. Indeed, although Ontario law states clearly that the absence of legal immigration status is not the basis for refusing admission to a public school, a recent study found that many schools refuse to enrol a student without legal status.[5]

The term "refugee" is defined as someone who: "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it. In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national."

United Nations Convention Relating to the Status of Refugees
and United Nations Protocol Relating to the Status of Refugees

[5] *See Social Planning Toronto, Policy without Practice: Barriers to Enrollment for Non-Status Immigrants in Toronto's Catholic Schools*, available online at: http://socialplanningtoronto.org/wp-content/uploads/2010/07/Policy-Without-Practice-Social-Planning-Toronto-July-2010.pdf.

IMMIGRATION NARRATIVES:

Ahmed is a permanent resident from Algeria. He resides in Toronto and has lived in Canada since he was two years old. Ahmed regularly attends religious services at his local mosque. While Ahmed is apolitical, he knows that some members of his mosque are very involved in politics. Ahmed is contacted by the Canadian Border Services Agency (CBSA) for an interview. He meets with them and is subsequently detained on a security certificate. Ahmed retains a lawyer and learns that the Canadian government's evidence against Ahmed came from Syrian intelligence. Ahmed has never been to Syria and knows of no reason why he would be considered a threat to national security. As a result of the detention, Ahmed has been detained for 8 months and has lost his job. He faces deportation to Algeria, a place he has not visited in over ten years.**

ACCORDING TO THE 2006 CENSUS:

- 85.1% of eligible foreign-born people were Canadian citizens
- 2.8% of the population reported another citizenship in addition to Canadian citizenship

Individuals without status are often seen as having no legal rights despite the fact that most *Charter* protections apply to everyone present in Canada. Distinctions drawn on the basis of immigration status, including those drawn between those with and those without legal status, merit close scrutiny in order to develop a consistent framework that treats immigrants fairly, that does not discriminate and that complies with the *Canadian Charter of Rights and Freedoms*.

B. IMMIGRATION STATUS AS A PROXY FOR RACE AND ETHNICITY

Issues of discrimination on the basis of immigration status cannot be usefully or properly examined without also considering the impact that race and ethnicity may have on the way in which an individual is treated and the rights, benefits and obligations he or she is accorded. As Canada has seen increasing diversity in the countries of origin of immigrants in recent decades, the racial and ethnic composition of Canada's population has changed significantly.

The Supreme Court of Canada has recognized that citizenship is closely connected to one's race, ethnicity and national origin. In the *Andrews* case, Justice La Forest wrote that "Discrimination on the basis of nationality has from early times been an inseparable companion of discrimination on the basis of race and national or ethnic origin."[6] In many cases, it will be very difficult to know whether an individual is being subjected to discrimination because of his or her immigration status or because of his or her race or ethnicity. Although some have suggested that certain immigrant groups face barriers or suffer from income disparities due to lower levels of educational attainment and/or lack of experience in the Canadian workforce, this rationale may itself be based on discriminatory and stereotypical notions of the experiences of the foreign-born. Moreover, it does not explain why many immigrants with high levels of education, including professional degrees, face obstacles and discriminatory treatment in Canada. Indeed, research in a number of areas suggests that certain groups of visible minorities face the same barriers, obstacles and discrimination regardless of whether they are Canadian-born or immigrants. There are also wide variations in the experiences of different visible minority groups, thus requiring a more in-depth examination of the differences and similarities among these groups, and the role that immigration status has to play in their treatment. Certainly, since the September 11, 2001 attacks in the United States, many members of Canada's Arab and Muslim communities (and those who are thought to "look Muslim") have experienced discrimination, stereotyping and profiling–regardless of whether they are Canadian citizens or have another status. The increasing use of security certificates as a means of finding some immigrants inadmissible to Canada is but one important example.

Drawing distinctions based on immigration status as a proxy for race or ethnicity is particularly troubling because, at least in some cases, immigration status is seen as something that individuals have a measure of control over. Permanent residents who "choose" not to naturalize as citizens may be seen as less justified in complaining about differential treatment. In reality, the choice of whether or not to become a citizen may not be a realistic one for individuals who will lose important rights, benefits or connections to their country of origin. Furthermore, characterizing immigration status as involving at least some measure of choice may fail to account for the reality of these choices and make it too easy for state actors to justify distinctions drawn on the basis of that status.

Thus, as we consider Canada's policies with respect to citizenship and immigration and the various forms of distinctions described throughout this paper, we must consider the impact of race and ethnicity on these issues and on how they are perceived by Canadian society. We must also probe whether the distinction that is being drawn is really about status, or whether status is in fact masking distinctions drawn in terms of race.

C. CITIZENSHIP

Canada's *Citizenship Act* sets out a number of criteria for citizenship, but at its most basic, a Canadian citizen is a person who was born in Canada (or whose parents were born in Canada) or a person who has come to Canada and naturalized by remaining in Canada for a period of time and meeting certain requirements. These requirements include adequate knowledge of one of Canada's official languages and adequate knowledge of Canada and of the responsibilities and privileges of citizenship. These individuals must also swear an oath of citizenship. Although some countries do not recognize dual or multiple citizenships, these are permitted and recognized in Canada.

This basic legal definition of "citizen" is a helpful starting point, but it does not help us in understanding why someone might seek to become a citizen or what citizenship means to an immigrant who is trying to attain it.

> " Citizenship is, I think, a privilege which is understood to carry with it commitments to promote the security and welfare of the country, and to protect the way of life in which Canadians have come to believe, which are not expected of a permanent resident, even a resident sworn to allegiance. A citizen is part of the country, a resident non-citizen never really more than an attachment to it."
>
> Justice McIntyre in *Andrews v. Law Society of British Columbia,* quoting trial judgment of Justice Taylor, p. 160.

[6] *Andrews, supra* note 2.

** Note: Immigration Narratives presented in this paper are fictional but are representative stories of common immigrant experiences and testimonies that the CCLA has received.

IS IT POSSIBLE TO DISTINGUISH BETWEEN DISCRIMINATION ON THE BASIS OF IMMIGRATION STATUS AND DISCRIMINATION BASED ON RACE OR ETHNICITY?

Citizenship might be considered a symbolic status that signifies "membership" or "belonging" in the Canadian "group". For some citizens the rights and benefits that attach to their status are less important than the status itself. Symbolically, citizenship creates a bond between country and individual. It becomes not only a way to determine who is on the "inside", but may also be used as a way to distinguish and separate "outsiders". However, some individuals do not pursue Canadian citizenship for a variety of personal reasons. For example, some will not seek out citizenship because their own country of origin does not permit dual or multiple citizenships. In these circumstances, becoming a Canadian citizen may mean giving up a valuable bundle of rights and benefits that their homeland's citizenship provides. Many First Nations do not regard themselves as citizens in the traditional sense conferred by Canadian law, but this certainly does not make it less vital to ensure their contribution to life in Canada.

In an age of globalization, one may wonder whether the concept of citizenship ought to continue to be used at all. There is a certain paradox that while the concept of national citizenship may become increasingly irrelevant emotionally, it becomes increasingly important legally. The world is smaller and more open than at any time in the past, and in many regions citizens of one country may move freely and easily into other states. Goods, services and communications flow through borders with ease and rapidity as well. However, concerns for national security have precipitated an increased attention to questions of legal status to remain in one country.

discussion points

- Is it possible to distinguish between discrimination on the basis of immigration status and discrimination based on race or ethnicity?
- How can immigration policies be modified to ensure that they do not put racialized communities at a disadvantage? Is the problem with policies or with the ways in which they are implemented?
- Are the requirements for becoming a Canadian citizen adequate? Is the process to acquire citizenship too restrictive or not restrictive enough?
- Should some of the rights and benefits accorded exclusively to citizens be extended to other groups?
- Is the legal definition or designation of citizenship still relevant in an era of increasing globalization?

3

IMMIGRATION STATUS AND RIGHTS, OBLIGATIONS AND BENEFITS

The law currently draws a long list of distinctions between various categories of immigrants depending on their status. Instead of attempting to catalogue this long list here, a few examples are described below.

Non-citizens are precluded from running for elected office and may even be barred from other positions of power. For example, in British Columbia non-citizens may not become commissioners, deputy commissioners, constables or employees of the provincial police force unless they are citizens.[7] By contrast, in Ontario, Canadian citizens or permanent residents may be appointed as police officers.[8]

Citizenship may also be a requirement for positions that are not closely related to government functions or to positions of power. For example, only Canadian citizens are eligible to serve on the Board of Trustees of a museum, pursuant to federal legislation.[9] These requirements exclude a large group of Canadian residents from important positions. Whether citizenship is a valid requirement for each must be probed further.

The issue of whether non-citizens should have the right to vote will be discussed in greater detail later in this paper. For the time being, however, it is worth noting that while citizens and permanent residents may make campaign contributions during an election, (and receive tax credits for doing so) only citizens are permitted to vote in elections. Interestingly, in some provinces or municipalities citizens who are not resident are allowed to vote if they own property there. Do these distinctions make sense? Are there valid and coherent reasons for denying permanent residents the right to vote while allowing certain non-resident citizens to vote? Are there good reasons for denying permanent residents the right to vote while allowing them to contribute financially in support of political campaigns?

Access to provincial health insurance schemes is another area where distinctions are drawn between different classes of immigrants. There are also variations among the provinces, so that an individual with one status in Ontario may have access to provincial health insurance that is more or less robust than the access given to that same individual in New Brunswick, for example. Many other benefit programs also differentiate between individuals based on their immigration status. For example, people who come to Canada as temporary workers are often excluded from benefit schemes including worker's compensation and workplace health and safety laws. Does denying these benefits to temporary foreign workers serve any purpose? What implications does this have on the temporary foreign worker program, on Canadian immigration and on Canadian society more generally?

[7] *Police Act*, R.S.B.C. 1996, c. 367.
[8] *Police Services Act*, R.S.O. 1990, c. P. 15.
[9] *Museums Act*, S.C. 1990, c. 3.

Legislation frequently distinguishes between categories of immigrants in granting certain benefits or rights and in imposing certain duties and obligations. Rights, benefits and obligations may also be afforded, however, outside of the confines of written laws. For example, in addition to being able to contribute to electoral campaigns, non-citizens may also participate in politics in other ways, by volunteering for political parties or campaigns, for example. Foreign students may run for office in student government and vote in student government and association elections.

Immigrants may also be subject to discriminatory practices by private actors. In obtaining housing, for example, many immigrants may be subject to questioning about their status and denied housing as a result. Although most provincial human rights codes prohibit discrimination in housing on the basis of race or ethnicity, and many include "citizenship" as a prohibited ground of discrimination, immigration status is usually not an explicitly prohibited ground.

While non-citizens do not necessarily have all of the rights and benefits granted to citizens, most immigrants work or go to school, buy property, own businesses, and pay taxes. Furthermore, regardless of one's immigration status, once someone has lived in Canada for an extended period of time, their connection to Canada becomes an undeniable social fact regardless of their legal status. While Canada encourages these newcomers to integrate in a variety of ways, it places some of the rights and benefits accorded to Canadian citizens out of their reach. There may be good reasons for extending many of these rights and responsibilities to non-citizens.

discussion points

- What are the arguments for or against confining some programs to Canadian citizens only?
- Are there any programs that should not be extended to all residents of a province or region?
- Should discrimination on the basis of immigration status be a prohibited ground of discrimination in Human Rights legislation?
- Which rights or benefits, if any, should be granted exclusively to citizens?
- Which duties and responsibilities, if any, should be imposed exclusively on citizens?

WHILE NON-CITIZENS DO NOT NECESSARILY HAVE ALL OF THE RIGHTS AND BENEFITS GRANTED TO CITIZENS, MOST IMMIGRANTS WORK OR GO TO SCHOOL, BUY PROPERTY, OWN BUSINESSES, AND PAY TAXES.

4

DISCRIMINATION ON THE BASIS OF CITIZENSHIP AND IMMIGRATION STATUS

A. DISCRIMINATION UNDER THE *CANADIAN CHARTER*

Immigrants who feel they have been subjected to unjust or discriminatory laws may choose to challenge those laws as being contrary to the *Canadian Charter of Rights and Freedoms*. Although a number of sections of the *Charter* might be used to raise a challenge, section 15, the *Charter's* equality guarantee, is the one that is most commonly relied upon.

As set out above, section 15(1) of the *Charter* provides that:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Immigration status is not listed as one of the prohibited grounds of discrimination in s. 15. In other words, immigration status is not considered an "enumerated" or listed ground under the *Charter*. However, national or ethnic origin is one of the listed grounds, demonstrating that the *Charter's* protection for equality rights is not confined to Canadian citizens. As described further below, the courts have considered claims related to immigration status and citizenship on a number of occasions and come to the conclusion that "citizenship" is also a prohibited ground of discrimination (i.e. an "analogous ground") since it is similar in many ways to those grounds that are explicitly listed in the section. While many immigrants are citizens, the courts have tended to treat "citizenship" and "immigration status" as two separate and distinct concepts. In other words, distinctions drawn between citizens and non-citizens are treated differently than those drawn between individuals based on a variety of immigration statuses.

While the courts have recognized that assigning rights and benefits on the basis of one's citizenship is problematic and discriminatory in some cases, they have also struggled to maintain a wide discretion for the federal government in defining and assigning benefits to Canadian citizens and some space in developing immigration laws and policies. Thus, in some cases, even though a law is found to discriminate against non-citizens, the Court may uphold the law on the basis that it is reasonable and demonstrably justified in accordance with s. 1 of the *Charter*. Section 1 allows governments to place limits on *Charter* rights and infringe those rights in cases where they can establish a compelling objective and that the law is proportional to and meets that objective.[10]

B. CHALLENGING DISTINCTIONS ON THE BASIS OF IMMIGRATION STATUS IN THE COURTS

The Supreme Court of Canada's first case under s. 15(1) of the Charter was a case where discrimination on the basis of citizenship was alleged. In *Andrews v. Law Society of British Columbia* (1989),[11] the Court considered a law that excluded

> " There is no question that citizenship may, in some circumstances, be properly used as a defining characteristic for certain types of legitimate government objectives. I am sensitive to the fact that citizenship is a very special status that not only incorporates rights and duties but serves a highly important symbolic function as a badge identifying people as members of the Canadian polity. Nonetheless, it is, in general, irrelevant to the legitimate work of government in all but a limited number of areas. By and large, the use in legislation of citizenship as a basis for distinguishing between persons, here for the purpose of conditioning access to the practice of a profession, harbours the potential for undermining the essential or underlying values of a free and democratic society that are embodied in s. 15. Our nation has throughout its history drawn strength from the flow of people to our shores."
>
> Justice La Forest in *Andrews v. Law Society of British Columbia, pp. 196-197*

[10] As set out above, section 1 provides that "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

[11] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

IMMIGRATION NARRATIVES:

Jason's parents arrived in Canada eighteen years ago on a visitor's visa and have stayed in Canada ever since. Jason was born in Canada and is therefore a Canadian citizen. He is now fifteen years old. His parents are now being deported back to their native China and Jason may either remain in Canada or go back to China with them. Jason has never been to China and only knows a few words in his parents' dialect. If he remains in Canada, he will become a ward of the state until he reaches the age of majority. Jason's aunt and uncle came to Canada at the same time as his parents; at the time, their daughter Li, Jason's cousin, was three months old. Li and her parents are now subject to deportation proceedings. Since Li was not born in Canada, she is likely to be deported with her parents.

non-citizens from the practice of law in B.C. In effect, the law drew a distinction between citizens, who could qualify for membership in the provincial law society provided all other requirements were met, and permanent residents, who were subject to a waiting period before they were eligible to apply for citizenship, and therefore eligible to become a member of the law society. The Court accepted that the restriction on membership in the law society was discriminatory and found that it could not be justified by the government under s. 1 of the *Charter*. A majority of the members of the Court accepted that, in principle, citizenship requirements for certain rights, benefits or privileges, were appropriate and would not be found unconstitutional. For example, the Court seemed to accept that the government would be justified in granting citizens the exclusive right to work in certain high level positions closely associated with the function of government. In *Andrews*, however, the Court rejected the idea that being a lawyer was very closely related to government processes and structures. In these circumstances, the citizenship requirement for membership in the law society was not necessary and, as a result, the Court struck down the law.

Andrews was a landmark decision in the area of equality and helped to develop a framework for considering discrimination claims made by non-citizens. In *Andrews*, the Court looked at the question of distinctions between citizens and permanent residents. The Court found that non-citizen permanent residents were a "discrete and insular minority" who were protected by the equality guarantee set out in s. 15(1). This finding was largely based on the fact that non-citizens do not have a lot of political power. Quoting John Hart Ely, Madam Justice Wilson characterized non-citizens as a group "whose needs and wishes elected officials have no apparent interest in attending"[12] and noted that their ineligibility to vote made them particularly vulnerable and disadvantaged.

Echoing and expanding upon some of his colleagues' comments, Justice La Forest made some powerful statements in *Andrews* about the role of distinctions based on citizenship. While he acknowledged that, in some circumstances, citizenship could be used as a defining characteristic for certain government objectives, he rejected the idea that citizenship status alone was a basis for differential treatment. He stated: "If we allow people to come to live in Canada, I cannot see why they should be treated differently from anyone else. Section 15 speaks of every individual. There will be exceptions no doubt, but these require the rigorous justification provided by s. 1."[13]

In other words, *Andrews* not only struck down the requirement that members of the B.C. law society be citizens, it also recognized non-citizen permanent resident status as a group to be protected from discrimination under section 15 of the *Charter*.

[12] J.H. Ely, *Democracy and Distrust* (1980) at p. 151.
[13] *Andrews v. Law Society of British Columbia,* [1989] 1 S.C.R. 143 at 201.

In *Lavoie v. Canada*,[14] the Supreme Court had to address the tension between defining citizenship and avoiding discrimination against non-citizens. This time the law being challenged gave preference to Canadian citizens for jobs in the federal public service. A majority of the Court (four judges) found that the preference for citizens violated the Charter's equality guarantee, but nevertheless found the law constitutional as a reasonable and justifiable limit on the right to equality (under section 1 of the *Charter*). The Court found that Parliament could define the benefits and rights afforded to citizens and that the preference for citizens was a reasonable attempt by the government to both enhance the value of citizenship and encourage non-citizens to naturalize. The Court considered these both to be laudable goals. Three judges dissented in the case, finding not only that the right to equality had been breached, but also deciding that the violation could not be justified. The dissenting judges refused to accept the notion that defining citizenship required that Parliament be allowed to discriminate against non-citizens, finding that the preference for citizens was "antithetical" to the goal of enhancing citizenship.[15] The dissenting judges stated:

> It is argued that a law giving citizens an advantage in connection with Public Service employment is rationally connected to the legislative objective of enhancing citizenship. With respect, we think this characterization misses the crucial point, which is that the impugned provision confers an advantage upon citizens by discriminating against non-citizens. Far from being rationally connected to the goal of enhancing citizenship, the impugned provision undermines this goal, by presenting Canadian citizenship as benefiting from, as nourished by, discrimination against non-citizens, a group which this Court has long recognized as a "discrete and insular minority" deserving of protection. It seems to us that such reasoning is incompatible with the view of Canadian citizenship as defined by "tolerance", "a belief in equality" and "respect for all individuals".[16]

Lavoie therefore demonstrates the tension and difficulties inherent in attempting to define citizenship without discriminating against non-citizens. The Court's split on the issue probably represents the dividing philosophies within Canadian society about what it means to be a citizen and how to foster Canada's inclusive and multicultural nature.

In addition to considering rights to remain in the country and rights to enter different professional/employment fields, cases before the courts have also challenged laws that deny immigrants' access to certain social services and benefits once they are residing in Canada. *In Irshad (Litigation Guardian of) v. Ontario (Minister of Health)*,[17] the Ontario Court of Appeal considered changes to Regulations under Ontario's *Health Insurance Act* which imposed a stricter definition of "residency", introduced a three-month waiting period for OHIP eligibility and shifted to a scheme of individual eligibility rather than the family-based eligibility that had previously been in place. A group of immigrants who were affected by these changes challenged the new regime but were unsuccessful.

In *Irshad* the Court considered the relationship between the *Charter's* equality guarantee under section 15, and the mobility rights contained in section 6 of the *Charter*, which specifically guarantees some rights only to citizens, and others to citizens and permanent residents. The Court acknowledged that section 6 allows for reasonable residency requirements as a qualification for the receipt of certain social services.

[14] 2002 SCC 23.
[15] *Ibid.,* at para. 14.
[16] *Ibid,* at para. 10 (citations omitted).
[17] (2001) 55. O.R. (3d) 43 (Ont. C.A.).

However, the Court rejected the idea that this meant all reasonable residency requirements could or would necessarily be upheld under section 15 of the *Charter*. In other words, some residency requirements may be found reasonable in the sense that they don't restrict mobility rights, but still considered discriminatory under the *Charter's* equality guarantee. As the Court found in *Irshad*:

> The reasonableness of a residency requirement for the purposes of s. 6(3)(b) will depend in large measure on the length of the waiting period established by the residency requirement. The s. 15 inquiry looks not to reasonableness, but to distinctions drawn between individuals or groups by the impugned legislation. Section 15 asks whether those distinctions are discriminatory and contrary to the equality right protected by s. 15.[18]

At the same time, the Court acknowledged that the rights set out in section 6 should be taken into account in developing a useful equality analysis under section 15. In the case of eligibility for OHIP, the Court found that the Regulations were drafted to try to ensure that OHIP was granted to those whose residence in the province had a certain level of permanence, or, at least, potential permanence. The Court found that this limit on OHIP eligibility was reasonable and did not infringe on the rights to equality of any particular group. The Court also found that a person's status as a permanent or non-permanent resident of a province was not an analogous (i.e. protected) ground of discrimination under section 15 of the *Charter*. The Court's decision was based in part on the fact that one's permanent residency status is not unchangeable in the way that race and gender may be, but rather is subject to change over time and may be a matter over which an individual has some level of control. In the circumstances, the changes to the OHIP Regulations were upheld.

It is interesting that the Court in *Irshad* found that permanent or non-permanent resident status in a province was not an analogous ground, while the Court in *Andrews* found that discrimination on the basis of citizenship status was prohibited by section 15. Similarly, in the Ontario Court of Appeal's decision in *R. v. Church of Scientology of Toronto*,[19] the Court considered a claim about the prohibition on non-citizens sitting on juries and confirmed that, according to *Andrews*, non-citizens who are permanent residents are indeed protected under s. 15 of the *Charter*. At one point in its reasoning the Court referred to "immigration status" as an analogous ground. In a recent decision rendered in the Federal Court, a Judge noted that the individual alleging a violation of her section 15(1) *Charter* rights had alleged discrimination on the basis of citizenship, not immigration status. Although not forming part of the reasoning underlying his decision in the case, the judge noted that "It may be fair to say that illegal migrants lack political power, are frequently disadvantaged, and are incredibly vulnerable to abuse; this, combined with the difficulty of changing one's illegal migrant status, might support an argument that such a characteristic is an analogous ground."[20]

Finally, another way in which the issue of distinctions on the basis of citizenship may arise is out of mobility cases. In *Canada v. Chiarelli*[21], Mr. Chiarelli who was a permanent resident challenged provisions of the *Immigration Act* that allowed for him to be deported because he was convicted of a criminal offence. Mr. Chiarelli argued that this violated a number of his constitutional rights. In examining Mr. Chiarelli's claims, Justice Sopinka, for a unanimous Supreme Court, held that

> The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country. At common law an alien has no right to enter or remain in the country…If it were otherwise, Canada could become a haven for criminals and others whom we legitimately do not wish to have among us. The distinction between citizens and non-citizens is recognized in the *Charter*. While permanent residents are given the right to move to, take up residence in, and pursue the gaining of a livelihood in any province in s. 6(2) [of the *Charter*], only citizens are accorded the right "to enter, remain in and leave Canada" in s. 6(1).[22]

The Court's reference to s. 6 of the *Charter* is worth considering. Section 6 provides for mobility rights but draws a clear and explicit distinction between citizens and permanent residents. Section 6 states:

(1) Every citizen of Canada has the right to enter, remain in and leave Canada.
(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
   a. to move to and take up residence in any province; and
   b. to pursue the gaining of a livelihood in any province.
(3) The rights specified in subsection (2) are subject to
   a. any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
   b. any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.
(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

discussion points

- Should governments use a different framework for analyzing claims of discrimination depending on whether the context is mobility, employment or social benefits?
- Is a claim of discrimination on the basis of citizenship the same as one based on immigration status? Should they be treated the same?

[18] *Ibid.,* at para. 96.
[19] (1996), 33 O.R. (3d) 65 (Ont. C.A.).
[20] *Nell Toussaint v. Attorney General of Canada,* 2010 FC 810, para. 82 and footnote 3.
[21] *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711.
[22] *Ibid.*

As discussed later in this section, this constitutional distinction between citizens and permanent residents, and the sanctioning of distinctions based on "reasonable residency requirements" plays an important role in many of the cases that go before the courts.

The *Chiarelli* case goes to the core of the issue of what it means to be a citizen and the distinctions drawn between citizens and "others". It challenges us to think critically about why certain rights and benefits are afforded to citizens exclusively. Further, in light of increasing globalization and international connections and cooperation, we should consider whether this sharp distinction between citizens and "others" can or should be maintained.

The Supreme Court of Canada has also considered and rejected claims that deporting non-citizens amounts to a breach of s. 7 of the *Charter*, which guarantees "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[23] In certain cases, as discussed below, the Court has found that the absence of meaningful procedural protections when an individual is subject to deportation or detention may result in a violation of the Charter's section 7 guarantee.

In the case of *Charkaoui v. Canada (Citizenship and Immigration)*,[24] the Court reviewed aspects of the security certificate regime under the *Immigration and Refugee Protection Act*. The security certificate regime allows permanent residents and foreign nationals to be detained and possibly deported where there is a belief that they pose a threat to national security. The government argued that, in some cases, disclosing the information that the government relied on to support the certificate might pose a further threat to security. The Supreme Court determined that the scheme violated s. 7 of the *Charter*, since it denied the person held on the certificate full knowledge of the case against him or her. The scheme also failed to use safeguards that would have allowed the government's information to be challenged without making full disclosure to the subject of the certificate. Absent a special mechanism to accomplish this goal, the Court found that the procedure lacked credibility and was unfair to the detainee.

The Court has therefore recognized that the *Charter* itself draws a distinction between the rights of citizens and non-citizens. Although the *Charter* merely provides the minimum rights and liberties to which individuals are entitled, the *Charter's* distinction between citizens and non-citizens has been used to support laws that grant citizens certain rights or responsibilities that are denied to non-citizens. The distinction also gives rise to the tension in trying to define citizenship and allocate benefits to citizens without discriminating against non-citizens.

C. EXAMPLES

Many categories of immigrants are excluded from participating in the most basic institutions of a democracy or receiving minimum services or protection. In some cases, this exclusion may be justified because, as a society, we expect a certain level of commitment from newcomers before allowing them to take part in collective decision-making or are concerned about fraud. In other instances, exclusions are arbitrary or based on an out-dated notion of what it means to be a citizen. Exclusions from statutory schemes may also have detrimental effects on the potential for integration and full participation in society. Regardless of whether these exclusions are justified or not, it is important to examine. In this section, we examine several examples of exclusions from statutory schemes, namely jury duty, voting rights, and labour protection.

Other examples, exclusion from health benefits or from access to educational opportunities could also be examined. *We invite the public to send us their inquiries, questions and stories about exclusions and discrimination based on immigration status.*

i. Jury Duty

Non-citizens are excluded from jury duty. This exclusion raises issues from two perspectives. First, a non-citizen who is excluded from jury eligibility may feel that this exclusion means he or she is less worthy of participation in one of Canada's most important democratic institutions. Ineligibility to serve on a jury may also result in non-citizens being more disconnected from the criminal justice system, even if they pay taxes to support it and may be touched by its processes, either as victim or offender. In addition, there is also the perspective of the criminally accused. An accused non-citizen, who may face deportation if convicted, may feel that the absence of non-citizens on the jury denies him/her of a truly representative jury and, as a result, leads to an unfair trial. From this perspective, the accused may be denied a jury that is truly representative of his/her peers and one where minority opinions are more likely to be expressed and contribute to the fact finding process.

This latter perspective was discussed in the case of *R. v. Church of Scientology of Toronto*,[25] where the Court considered whether the exclusion of non-citizens from jury rolls amounted to a breach of a *Charter* right. In that case, the accused was not a non-citizen however, and the issue was resolved on the question of the representativeness of the jury. In ultimately rejecting this argument, the Court said:

> Canadian citizens are of all races, nationalities, ethnic origin, colour, religion, sex, age and ability. Immigration status is simply not a relevant characteristic when regard is had to the rationale underlying the right to a representative pool. A jury pool selected from Canadian citizens represents the larger community for the purposes of trial by jury…
> …
> There was no evidence that non-citizens as a group share any common thread or basic similarity in attitude, ideas or experience that would not be brought to the jury process by citizens…I see no reason why this important aspect of self-government should not be reserved for citizens, where, as here, exclusion of non-citizens does not affect the representativeness of the jury roll.[26]

The issue of the exclusion of non-citizens from jury duty may be even more relevant today than when the case was decided in 1996. The issue should be debated in order to ensure that the criminal justice system fairly represents the community it must serve.

discussion points

- Do Canadian citizens make up a sufficiently diverse group to create a representative jury, or should non-citizens be placed on jury rolls?
- Is participation in a jury an important part of belonging in a society? Should this remain a right and duty that is exclusively conferred on citizens?
- What are the arguments against extending jury duty to non-citizens? Can any concerns be managed by the questions asked of potential jurors?

[23] See e.g. *Medovarski v. Canada (Minister of Citizenship and Immigration); Esteban v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51.
[24] 2007 SCC 9.
[25] (1996), 33 O.R. (3d) 65 (Ont. C.A.).
[26] *Ibid*.

> " By recognizing non-citizens as worthy of the local franchise in the democratic system, a political community sends a signal that non-citizens are not outsiders, but instead a group of potential citizens who should be treated with respect and as political equals. That act of recognition can lead to a greater sense of mutual respect, which is a key feature of a well-functioning and stable multicultural democracy."
>
> Daniel Munro, *Integration Through Participation: Non-Citizen Resident Voting Rights in an Era of Globalization,* Int. Migration & Integration (2008) 9:43-80 at p. 76

ii. Voting

Voting is both a right and responsibility that is fundamental to the functioning of a healthy and vibrant democracy. Voting rights is an area that demonstrates clearly the tension in trying to define the rights of citizens without discriminating against non-citizens. Can the right to vote be extended to permanent residents without altering the meaning of citizenship? Can it be extended to others resident in the province? There are strong reasons to believe it can. Should voting rights at different levels depend on status? For example, should we draw a distinction between who gets to vote at the federal, provincial and municipal level.

Section 3 of the *Charter*, which speaks to voting rights, explicitly mentions citizenship in stating that every Canadian citizen has "the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein". Section 3 does not prevent voting rights from being extended to other individuals, it merely ensures a minimum of democratic rights in Canadian society.

There seems to be good reasons to question the current prohibition on non-citizens from voting, particularly at the municipal level where decisions that most affect the daily lives of residents are frequently made. It is significant that while the *Charter* does codify the right to vote for citizens, it does not suggest that this right could not also be granted to non-citizens. There is nothing that stops the Canadian government from giving residents *more* rights than those minimum rights guaranteed to them by the *Charter*. The *Charter* is not a statement of all of the rights that governments may grant to the people. Rather, the *Charter* can be viewed as providing a minimum standard of protection and minimum level of rights which may be expanded.

From the perspective of the *Charter,* the section 15 right to equality and the commitment to multiculturalism in s. 27 might also be used in support of the right to vote for permanent residents in municipal elections. The Supreme Court of Canada has already found that citizenship is an analogous ground in a case where a specific right or benefit was denied to a non-citizen permanent resident. Given the importance of the right to vote and the extent to which the lack of such a right may result in political disenfranchisement and disempowerment, there are strong reasons to believe that denying the right to vote to permanent residents is a breach under section 15 of the *Charter*.

Those opposed to granting permanent residents the right to vote argue that voting is a "privilege of citizenship" or that granting this right will remove one of the incentives for residents to become citizens. However, it is worth considering the fact that the right to vote was historically restricted to males, over the age of 21, who owned property. The right to vote has subsequently been extended to other groups to reflect the changing demographics of the country and social transformations that the country has undergone. As Myer Siemiatycki has written

> One lesson to be drawn from this [historical] record of voter eligibility is that the rules in place at any time are probably too restrictive. Indeed, they may reflect prevailing, social prejudices about who is "fit" to have a say in municipal decision-making. The fact that for decades and decades, urban regimes presumed it was appropriate to bar women or non-wealthy males from voting should not make us today feel smug or superior. Rather it should lead us to ask: are we excluding anyone? Are we privileging anyone? The answers are discomforting and unacceptable for an inclusive society.[27]

There are many good reasons why non-citizens should be granted the right to vote in municipal elections. Residents, regardless of citizenship, pay taxes, send their children to school, use municipal services, utilities and infrastructure, and must abide by the by-laws passed by municipal councils. It stands to reason that these individuals should not be denied the opportunity to participate in the democratic process that is responsible for governing so many of their day-to-day activities. In addition, denying non-citizens the right to vote may mean that their needs and interests will be more easily ignored or marginalized. Policy makers have few incentives to please groups that don't have the ability to vote them in or keep them out of office. Some academics have suggested that granting non-citizens the right to vote may increase the speed at which they integrate into society and have an impact on their future participation in the democratic process. They also point out that as immigrants seek to integrate and learn about a country and its democratic ideals and norms, they are also excluded from having a say in how the laws and policies that affect them are developed. This might have an alienating effect on newcomers. In response to the argument that new immigrants are not yet knowledgeable about their adopted country or its legal and political traditions, some have suggested that those who are interested in becoming citizens are often more attentive to the events and environment around them than citizens are.[28]

Many people have commented favourably on extending the right to vote to permanent residents in municipal elections. The reasons in support of such a proposal include the fact that a very high proportion of Canadian permanent residents become citizens. Providing them with the right to vote may simply push up their voter eligibility status by a few years. Earlier civic engagement may lead to greater engagement or involvement in later years. Professor Siemiatycki has suggested that the compelling reasons for granting non-citizens the right to vote in municipal elections include the following:

- Giving a political voice and rights to hundreds of thousands of disenfranchised current residents and taxpayers
- Making local government more accountable to its residents
- Promoting the integration and attachment of newcomers into the city
- Preventing the marginalization and isolation of newcomers from civic institutions
- Promoting the importance of issues affecting newcomers– e.g. credential recognition, ESL learning opportunities, regularization of citizenship, etc.
- Promoting respect and recognition for immigrants in the city

[27] Myer Siemiatycki, *The Municipal Franchise and Social Inclusion in Toronto: Policy and Practice* (October 2006).

[28] Many of the ideas in this section draw on Daniel Munro, *Integration Through Participation: Non-Citizen Resident Voting Rights in an Era of Globalization,* Int. Migration & Integration (2008) 9: 43–80

From a comparative perspective, many countries grant non-citizens the right to vote, particularly at the local level. At least 26 countries permit non-citizens to vote in certain elections, including Austria, Germany, Ireland, Spain, Switzerland, the UK, Chile, Colombia, Venezuela, Barbados, Belize, Israel, the US, and New Zealand. In Canada, non-citizens have already had the right to vote in Saskatchewan and Nova Scotia. In Saskatchewan, the franchise is extended to all non-Canadian British subjects living in the province who had the right to vote in 1971. Until recently, Nova Scotia permitted non-Canadian British subjects from 54 different countries to vote in provincial elections.

An examination of what voting means also suggests that non-citizens should be granted the franchise. While the Supreme Court of Canada has made statements assuming that the right to vote extends only to citizens, its statements indicate the importance of voting and how it lends legitimacy to the power exercised by the government. In a case that considered whether a law denying prisoners the right to vote was constitutional, the Chief Justice, writing for a majority of the Court, stated:

> In a democracy such as ours, the power of lawmakers flows from the voting citizens, and lawmakers act as the citizens' proxies. This delegation from voters to legislators gives the law its legitimacy or force. Correlatively, the obligation to obey the law flows from the fact that the law is made by and on behalf of the citizens. In sum, the legitimacy of the law and the obligation to obey the law flow directly from the right of every citizen to vote. As a practical matter, we require all within our country's boundaries to obey its law, whether or not they vote. But this does not negate the vital symbolic, theoretical and practical connection between having a voice in making the law and being obliged to obey it. This connection, inherited from social contract theory and enshrined in the *Charter*, stands at the heart of our system of constitutional democracy.[29]

The Court has also stated that the purpose of the right to vote set out in s. 3 of the *Charter* is to establish a right to "effective representation". According to the Court, "Representation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative."[30] As already discussed, there are strong reasons to believe that having a voice in government deliberations and the ability to bring grievances and concerns to the government's attention should not be confined exclusively to citizens.

ACCORDING TO THE 2006 CENSUS:

- 40.4% of recent immigrants chose to settle in Toronto
- 14.9% of recent immigrants chose to settle in Montreal
- 13.7% of recent immigrants chose to settle in Vancouver
- Toronto has 16.2% of Canada's total population, but 37.5% of its total immigrant population and 40.4% of its recent immigrant population
- Montreal has 11.5% of Canada's total population, 12% of the total immigrant population and 14.9% of the recent immigrant population
- Vancouver has 6.7% of Canada's total population, 13.4% of the total immigrant population and 13.7% of the recent immigrant population

IMMIGRATION NARRATIVES:

Marta is a live-in caregiver who was sponsored by her employer to come to Canada. Within three months of her arrival in Canada, Alma's employer began to sexually harass her. He is pressuring her to engage in a sexual relationship with him. Alma is afraid that if she reports this treatment to the authorities, she will lose her opportunity to remain in Canada.

discussion points

- Is voting a right that should be given exclusively to citizens? Does this exclusive right make people more likely to become citizens?
- Is it reasonable to expect non-citizens to abide by laws, pay taxes, and accept government law and policy as legitimate when they are denied the right to participate in election of the government?
- Is there a good basis for distinguishing between voting rights at the municipal level, as opposed to the provincial or federal level?

[29] *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68 at para. 31.
[30] *Reference re: Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, at 183.

iii. Labour Law Protection

Canada has a large group of temporary workers who come to Canada to work in a variety of jobs and industries. These workers provide economic benefits to Canada. The Temporary Foreign Workers Program allows highly skilled workers to contribute to the Canadian economy that may require them and it does also prevent labour shortages in some sectors that are less well paid. Various questions have been raised about the foreign worker program and whether the focus on the economic benefits that these workers provide to Canada has overshadowed the need to ensure respect for basic human rights. The workers make a valuable contribution to Canadian society and often play important roles within the workplace. The denial of their rights both in and beyond the workplace is a particularly problematic issue.

One example of a concern that has been raised about temporary foreign workers relates to their ability to access employment insurance in the event that their employment ends earlier than anticipated. As a result of provisions under both the *Employment Insurance Act* and the *Immigration and Refugee Protection Act*, foreign temporary workers are required to pay employment insurance premiums but have difficulty collecting any EI benefits. This difficulty stems from the fact that, in order to collect EI benefits, an applicant must be "available for work". Workers who come to Canada under the temporary worker programs have work permits that are tied to a specific occupation with a specific employer. In many

VARIOUS QUESTIONS HAVE BEEN RAISED ABOUT THE FOREIGN WORKER PROGRAM AND WHETHER THE FOCUS ON THE ECONOMIC BENEFITS THAT THESE WORKERS PROVIDE TO CANADA HAS OVERSHADOWED THE NEED TO ENSURE RESPECT FOR

BASIC HUMAN RIGHTS.

cases, once their job comes to an end, they may have no legal right to work for another employer or even take a different occupation for the same employer. Thus, even if the worker is physically capable of working, willing to work and able to do so, he or she will be denied employment insurance benefits and denied the opportunity to obtain employment. It is worth noting, however, that the practices in granting or not granting EI benefits to temporary foreign workers may change depending on where the worker makes the claim. For example, one report states that, according to the Edmonton Community Legal Centre, applications by temporary foreign workers for EI benefits in Alberta are routinely accepted. Where they are not accepted, a template letter is sent asking that the decision be reconsidered. For this particular legal clinic, this has meant no appeals of decisions denying EI to these workers since 2008.[31] In the neighbouring province of B.C., applications for EI by temporary foreign workers are routinely denied. The practice has also been challenged in Ontario courts. This lack of consistent policy and legal application is problematic and highlights the need for a comprehensive framework to consider how to allocate rights, benefits and obligations, taking into account one's immigration status.

When it comes to other forms of employment benefits, temporary workers are usually subject to the laws and Regulations in place in the province where they are working. However, the enforcement of their rights may be difficult to obtain. Because temporary workers are often in Canada on a permit that is tied to a particular occupation, location and employer, they may be reluctant to complain or try to assert their rights even when the law offers them protection. Concerns about losing their employment and being deported often loom large in the minds of temporary workers.

discussion points

- Should temporary workers receive the same employment rights and benefits as Canadian workers?
- Are minimum residency requirements appropriate and, if so, what is an appropriate test or line to draw to judge residency?
- What does the denial of rights to temporary workers say about Canada's immigration policies overall?

[31] Delphine Nakache and Paula J. Kinoshita, *The Canadian Temporary Foreign Worker Program–Do Short-Term Economic Needs Prevail over Human Rights Concerns?* IRPP Study, No. 5, May 2010, at p. 21, available online at: http://www.irpp.org/pubs/IRPPstudy/IRPP_Study_no5.pdf.

5

A FRAMEWORK FOR REFORM

There is a large patchwork of laws and practices that draw distinctions between individuals on the basis of their citizenship and immigration status in a variety of ways. The laws and practices are inconsistent throughout Canada and, in many cases, result in discrimination and unfair treatment of non-citizens. If Canadian society wants to continue to welcome immigrants to the country and take advantage of the significant contributions they make to that society, it is crucial that we develop a framework for scrutinizing distinctions that are drawn on the basis of immigration status or that have a particularly harsh and disproportionate impact on immigrants.

A useful framework must recognize that international law generally allows sovereign countries such as Canada to determine who is allowed to enter and remain in the country, and imposes obligations for the treatment of refugees. At the same time, as stated by former Supreme Court Justice La Forest in the *Andrews* case, "If we allow people to come to live in Canada, I cannot see why they should be treated differently from anyone else." While Justice La Forest acknowledged that there would be exceptions where distinctions could and should be drawn, he called for rigorous justification in these instances.

There are a number of ways that a rigorous justification could be done depending on the type of distinction that is drawn and the right, benefit or obligation that is at issue. As a starting point, we need to think carefully about the purposes of immigration and the benefits that immigrants may bring to Canada including economic, cultural and humanitarian concerns. We must also think about what it means to be a citizen and whether, in an increasingly globalized world, national citizenship continues to be a relevant basis on which distinctions are drawn. In this vein, we should recognize that citizenship is frequently merely an accident of birth and that denying certain rights to some because of where they or their parents were born may be fundamentally unfair and discriminatory. Third, we must examine the role that race and ethnicity may play in various areas and consider whether distinctions drawn on the basis of immigration status are, in reality, simply masking the fact that the distinction is actually drawn on the basis of these characteristics. Finally, when a law or policy confers or denies a right, benefit or obligation based on citizenship or immigration status, it may be useful to analyse the issue by asking the following questions:

1. What is the purpose of granting this benefit/right or requiring this obligation of anyone?
2. Does that purpose "match" the group that has received the benefit/right or obligation (i.e. if the benefit is granted exclusively to one group, does this exclusivity serve this purpose or detract from it)?
3. Could the same purpose be achieved without drawing a distinction on the basis of immigration status?

If the purpose of the law or policy fails to "match" the group that is granted or denied the benefit, or if the "match" is only a loose one, the distinction may be discriminatory and probably should not be made. Similarly, if the same purpose could be achieved without drawing a distinction on the basis of status, the distinction should be removed. Fundamentally, distinctions that are drawn on the basis of immigration status should only continue to hold if they serve a valid and important purpose, are strongly connected to that purpose, and are necessary in order to serve that purpose. If the distinction that is drawn cannot pass this test, it should be eliminated.

Within this framework, objectives such as deterring fraud or efficiency of decision-making ought to be considered, but they ought to be balanced against the costs of maintaining distinctions that appear incoherent or ill-designed.

discussion points

- Should we critically evaluate the current distinctions made between immigrants and non-immigrants?
- Do you agree with the framework proposed here: that all distinctions be subject to an analysis that involves the following questions:
  - What is the purpose of granting this benefit/right or requiring this obligation of anyone?
  - Does that purpose "match" the group that has received the benefit/right or obligation (i.e. if the benefit is granted exclusively to one group, does this exclusivity serve this purpose or detract from it)?
  - Could the same purpose be achieved without drawing a distinction on the basis of immigration status?
- Should distinctions that cannot be justified under this analysis be eliminated?
- Are there other reasons why governments should be allowed to make distinctions between different categories of individuals based on their immigration status?

CONCLUSION

Examining and questioning distinctions that are drawn on the basis of immigration status helps determine where law reform efforts should be concentrated. Reforms aimed at ensuring that non-citizens receive appropriate rights and benefits and are protected from arbitrary and irrational discrimination could have positive effects in a number of areas. By eradicating discrimination on the basis of immigration status, we may also begin to tackle problems of racial, ethnic and religious discrimination in modern Canadian society. Eliminating irrational and arbitrary distinctions based on immigration status will allow us to adhere more closely to the principles and values of equality and multiculturalism that are codified in the *Canadian Charter of Rights and Freedoms*. It may also fulfill policy goals of ensuring access to prosperity for all.

WHO BELONGS?

Rights, Benefits, Obligations and Immigration Status

CANADIAN CIVIL LIBERTIES ASSOCIATION

ASSOCIATION CANADIENNE DES LIBERTES CIVILES

360 Bloor Street West, Suite 506
Toronto, Ontario M5S 1X1
416.363.0321
www.ccla.org

SEPTEMBER 2010