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SPECIFIC QUESTIONS RELATED TO THE *INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES*

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INTRODUCTION

The *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* (ICMW) is one of the ten core international human rights instruments. It came into force in July 2003, and there are currently 47 Parties, none of which are from Europe or North America (except for Mexico and the Balkan states of Bosnia and Herzegovina, Montenegro and Serbia). A brief overview of the ICMW provided by the United Nations Educational, Scientific and Cultural Organization (UNESCO) states:

> The Convention is not proposing new human rights for migrant workers. Part III of the Convention is a reiteration of the basic rights which are enshrined in the Universal Declaration of Human Rights and elaborated in the international human rights treaties adopted by most nations.[1]

As a Royal prerogative, Canada has the right to conduct foreign affairs and sign internationally binding treaties.[2] However, the implementation of these treaties in domestic law may be problematic if they touch on competencies that belong to provincial legislatures, such as labour, health, social assistance and education. Many rights addressed by the ICMW are matters of provincial jurisdiction.

The constitutional division of treaty-implementation power is illustrated by the *Labour Conventions Case*, summed up by Professor Currie:

> The matter was resolved in 1937 in a decision by the Privy Council that has been much debated and criticized. The issue in the so called *Labour Conventions Case* was the authority of the Canadian Parliament to enact three statutes implementing conventions adopted by the International Labour Organization in 1919, 1921 and 1928, and ratified by the Canadian government in 1935. The conventions obligated state parties to protect the welfare of workers in member states. Ontario, New Brunswick and British Columbia challenged the federal legislation, contending it was *ultra vires* Parliament and trespassed upon provincial jurisdiction under 92 of the *Constitution Act, 1867*.
>
> The Supreme Court divided evenly on this issue, but on appeal to the Privy Council, Lord Atkin found that the legislation was indeed *ultra vires* Parliament.[…][3]

This paper will clarify the ICMW and the Canadian labour context for migrant workers, by addressing the specific questions raised in your request.

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1 United Nations Educational, Scientific and Cultural Organization (UNESCO), Social and Human Sciences, International Migration, *International Migration Convention*.

2 John H. Currie, "Reception of International Law in Domestic Law," Chapter 6 in *Public International Law*, 2nd ed., Irwin Law Inc., Toronto, Ont., 2008, p.236.

3 Ibid., pp. 241–242.

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SPECIFIC QUESTIONS

A. Which aspects of the Convention are incompatible with Canadian law?

The Convention generally tries, in an effort to improve migrant workers' human rights, to promote equality between migrant workers (including workers without legal immigration status) and the domestic labour force. In Canadian law, temporary foreign workers (TFWs) and the domestic labour force have equal protections in some areas (for example, employment and housing standards). However, differential rights are part of the temporary foreign worker program design – for instance, some TFWs are issued employer-specific work permits that limit their labour market flexibility. Contracts for seasonal agricultural workers and for live-in caregivers stipulate employers must provide adequate housing, meaning that these temporary foreign workers do not have their choice of residence like domestic workers. Please see section D below for an overview of other rights that the Convention would grant migrant workers that are not envisaged in the Canadian TFW program.

B. Does the Convention define "migrant worker" in Article 2?

The term "migrant worker" in Article 2 (1) is very broad and does not differentiate between foreign workers who have acquired the right to work in Canada and those who may be illegally working in Canada. This interpretation comes from reading Article 2 as a whole, and finding by contrast a subcategory of "migrant worker" that has a requirement to leave at the expiration of "his or her authorized period of stay"("specified-employment worker" at subparagraph 2(2)(g) (iii)). The *Immigration and Refugee Protection Act* stipulates at section 30(1) that a foreign national may not work in Canada unless authorized to do so.

Please note that Article 2 (1) that defines "migrant worker" for the purpose of the Convention does not have any wording that suggests the need for legal status:

> The term "migrant worker" refers to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.[4]

C. Are migrant workers in Canada under the Temporary Foreign Worker Program (TFWP) defined in Article 2 (2)(*g*)?

Foreigners enter Canada to work on a temporary basis through one of many avenues.[5] Some (approximately 30% of temporary foreign workers present in Canada in 2013) required a labour market assessment prior to obtaining a work permit in Canada.[6] The remainder of temporary foreign workers

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4 *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* (ICMW), Article 2 (1).

5 For a description of these differences, see Employment and Social Development Canada (ESDC), *Overhauling the Temporary Foreign Worker Program: Putting Canadians First*, 20 June 2014. This document also explains the changes to the temporary foreign worker program the government announced in June 2014.

6 Author's calculation based on data provided in ESDC, p. 4-5.

are authorized to work in Canada without a labour market test, under the authorization of a trade agreement, as the result of a reciprocal agreement with another country or because the Canadian government deems that they will provide a social, cultural, or economic benefit to Canada. Different conditions are attached to different work permits. For instance, while most temporary foreign workers may only stay in Canada for a maximum period of four years, those whose work is pursuant to an international agreement are not subject to this limit.[7]

Only subparagraph 2(2)(g)(iii) of the ICMW includes “authorized stay” as part of its definition of a migrant worker, which as stated above, is a requirement for the Canadian temporary foreign worker program. Further, the description of work in this section is “transitory or brief” which may apply to a segment of TFWs in Canada, but not all.

Article 2(2)(*g*) defines the “specified-employment worker.”:

> (g) The term "specified-employment worker" refers to a migrant worker:
>
> (i) Who has been sent by his or her employer for a restricted and defined period of time to a State of employment to undertake a specific assignment or duty; or
>
> (ii) Who engages for a restricted and defined period of time in work that requires professional, commercial, technical or other highly specialized skill; or
>
> (iii) Who, upon the request of his or her employer in the State of employment, engages for a restricted and defined period of time in work whose nature is transitory or brief; and who is required to depart from the State of employment either at the expiration of his or her authorized period of stay, or earlier if he or she no longer undertakes that specific assignment or duty or engages in that work;

D. Does the Convention require that TFWs be granted the same rights as Canadian citizens? Provide articles.

The Convention does require that migrant workers be granted the same rights as Canadian citizens, as provided in the following articles.

- Article 39 would allow workers to choose where they live, which contravenes the purpose of the Live-in Caregiver temporary foreign worker program that is founded on workers residing where they must perform their care-giving duties.
- Articles 43 and 45 would see migrant workers and their families study without the need for a study permit, whereas the *Immigration and Refugee Protection Act* provides at section 30(1) that all foreign nationals need a study permit except for children of documented workers who may go to school (from kindergarten to secondary).[8]
- Article 44 provides for family reunification for migrant workers. Family reunification rights in the Canadian program are more limited: spouses of higher-skilled workers are eligible to apply for open

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7 *Immigration and Refugee Protection Regulations*, s. 200(3)(*g*).

8 *The Immigration and Refugee Protection Act* provides at section 30(2): “ Every minor child in Canada, other than a child of a temporary resident not authorized to work or study, is authorized to study at the pre-school, primary and secondary level.”

work permits that will allow them to work with any employer at any location in Canada without a pre-existing job offer. Spouses of lower-skilled workers must secure an employment contract with a Canadian employer before arrival in Canada and apply for a restricted work permit. After fulfilling their employment requirements, live-in caregivers are eligible to apply for permanent resident status and, once that is obtained, they may sponsor their family members.

- Article 54 would give migrant workers access to "public work schemes intended to combat unemployment." The reformed TFW program will not allow employers to hire temporary foreign workers in areas of high unemployment to encourage the hiring and training of nationals.

> **Article 39**
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> 1. Migrant workers and members of their families shall have the right to liberty of movement in the territory of the State of employment and freedom to choose their residence there.
>
> 2. The rights mentioned in paragraph 1 of the present article shall not be subject to any restrictions except those that are provided by law, are necessary to protect national security, public order (ordre public), public health or morals, or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.
>
> **Article 43**
>
> 1. Migrant workers shall enjoy equality of treatment with nationals of the State of employment in relation to:
>
> (a) Access to educational institutions and services subject to the admission requirements and other regulations of the institutions and services concerned;
>
> (b) Access to vocational guidance and placement services;
>
> (c) Access to vocational training and retraining facilities and institutions;
>
> (d) Access to housing, including social housing schemes, and protection against exploitation in respect of rents;
>
> (e) Access to social and health services, provided that the requirements for participation in the respective schemes are met;
>
> (f) Access to co-operatives and self-managed enterprises, which shall not imply a change of their migration status and shall be subject to the rules and regulations of the bodies concerned;
>
> (g) Access to and participation in cultural life.
>
> 2. States Parties shall promote conditions to ensure effective equality of treatment to enable migrant workers to enjoy the rights mentioned in paragraph 1 of the present article whenever the terms of their stay, as authorized by the State of employment, meet the appropriate requirements.
>
> 3. States of employment shall not prevent an employer of migrant workers from establishing housing or social or cultural facilities for them. Subject to

article 70 of the present Convention, a State of employment may make the establishment of such facilities subject to the requirements generally applied in that State concerning their installation.

Article 44

1. States Parties, recognizing that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, shall take appropriate measures to ensure the protection of the unity of the families of migrant workers.

2. States Parties shall take measures that they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers with their spouses or persons who have with the migrant worker a relationship that, according to applicable law, produces effects equivalent to marriage, as well as with their minor dependent unmarried children.

3. States of employment, on humanitarian grounds, shall favourably consider granting equal treatment, as set forth in paragraph 2 of the present article, to other family members of migrant workers.

Article 45

1. Members of the families of migrant workers shall, in the State of employment, enjoy equality of treatment with nationals of that State in relation to:

(a) Access to educational institutions and services, subject to the admission requirements and other regulations of the institutions and services concerned;

(b) Access to vocational guidance and training institutions and services, provided that requirements for participation are met;

(c) Access to social and health services, provided that requirements for participation in the respective schemes are met;

(d) Access to and participation in cultural life.

2. States of employment shall pursue a policy, where appropriate in collaboration with the States of origin, aimed at facilitating the integration of children of migrant workers in the local school system, particularly in respect of teaching them the local language.

3. States of employment shall endeavour to facilitate for the children of migrant workers the teaching of their mother tongue and culture and, in this regard, States of origin shall collaborate whenever appropriate.

4. States of employment may provide special schemes of education in the mother tongue of children of migrant workers, if necessary in collaboration with the States of origin.

Article 54

1. Without prejudice to the terms of their authorization of residence or their permission to work and the rights provided for in articles 25 and 27 of the present Convention, migrant workers shall enjoy equality of treatment with nationals of the State of employment in respect of:

(a) Protection against dismissal;

(b) Unemployment benefits;

(c) Access to public work schemes intended to combat unemployment;

(d) Access to alternative employment in the event of loss of work or termination of other remunerated activity, subject to article 52 of the present Convention.

2. If a migrant worker claims that the terms of his or her work contract have been violated by his or her employer, he or she shall have the right to address his or her case to the competent authorities of the State of employment, on terms provided for in article 18, paragraph 1, of the present Convention.

E. Unlimited access to the Canadian labour market and article 52 of the Convention

Article 52 must be read as a whole. The first paragraph states that a migrant worker can choose his or her paid activity (complete access to the labour market), subject to restrictions in paragraphs 2 through 4. These paragraphs allow the State to impose certain restrictions on migrant workers, such as specifying categories of employment, imposing credential recognition requirements, or authorizing work for a limited time period. However, the restrictions permitted for migrant workers whose permission to work is time-limited (article 52(3)) have to be lifted after a period of time to comply with the ICMW. Subparagraph 52(3)(*a*) sets a general rule that workers can choose their occupation after a period of time that is less than two years and subparagraph 52(3)(*b*) allows a State, by law, to limit occupations workers can freely choose and grant “priority to nationals or to persons who are assimilated to them” for a period of time of less than five years.

In the Canadian program, temporary foreign workers are subject to the conditions of their work permit, such as working for one designated employer or a fixed time period. Workers may apply for their work permit to be renewed, but as indicated above, most temporary foreign workers are subject to a four-year cap on their cumulative duration in Canada. After the cap has been reached, such workers may not work on a temporary basis in Canada again until four more years have passed.