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In The Shadow of Citizenship:
The Elusive Promise Made to Foreign Domestic Workers

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In The Shadow of Citizenship: The Elusive Promise Made to Foreign Domestic Workers

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I. Introduction

Since Canada became a nation in 1867, thousands of women have immigrated to Canada as domestic workers.[1] Although the rules under which women have been eligible to immigrate as domestic workers have changed many times,[2] the persistence of programs in one form or another speaks to Canada's continuing need for domestic workers, which in turn speaks to Canada's inability to produce its own domestic workers, Canada's inability or unwillingness to make domestic work attractive to the Canadian labour force, and finally, Canada's wealth, relative to the countries from which foreign domestic workers emigrate. The changes to these programs speak to evolving social attitudes in Canada, from ideologies and official policies of exclusion and hierarchy to inclusion and equality, due in part to the advocacy that has been carried out by and on behalf of domestic workers. Over the last 25 years, they have been telling their stories, and community groups, scholars and journalists have chronicled and published them.[3] In an era that has benefited from the 1970s and 1980s second wave of feminism, the enactment of the *Canadian Charter of Rights and Freedoms* in 1982, and official celebrations of multiculturalism

[1] Statistics for the past five years are available online at Canada's Citizenship and Immigration website: http://www.cic.gc.ca/english/resources/statistics/facts2008/permanent/01.asp which shows an almost threefold increase in the number of live-in caregivers who have immigrated to Canada from 2004 to 2008, but which also show domestic workers to be a tiny fraction of overall immigration. In 2008, roughly 6,000 live-in caregivers became permanent residents out of 250,000 total immigrants. For numbers from earlier periods see TK.

[2] See generally, Stasiulis, Daiva K. and Abigail B. Bakan (eds.), *Not One of the Family; Foreign Domestic Workers in Canada,* University of Toronto Press, 1997; Chilton, Lois, *Agents of Empire; British Female Migration to Canada and Australia, 1860s-1930,* University of Toronto Press, 2007

[3] Non-governmental, community-based organizations have provided personal and political advocacy. Some prominent groups include INTERCEDE in Toronto, the West Coast Domestic Workers Association and the Philippine Women's Centre in Vancouver. Scholarly works include books listed in fn. 2; also Stasiulis, Daiva K. and Abigail B. Bakan, *Negotiating Citizenship* TK. Scholar Geraldine Pratt has worked for many years with the Philippine Women's Centre and has described many of the problems foreign domestic workers face, such as losing skills as they carry out domestic chores. She describes some of her own doubts about her role as a feminist scholar studying domestic workers while being a parent who seeks the best child care available to her. See Pratt, Geraldine, "Stereotypes and Ambivalence: the construction of domestic workers in Vancouver, British Columbia" *Gender, Place and Culture,* vol. 4, no. 2 pp. 159-177, 1997. The popular media have carried many articles on the plight of domestic workers. Good examples are Daniel Wood's "The Nanny Diaries," *Vancouver Magazine,* Jan/Feb 2008, pp. 90-98 and Zosia Bielski's "Family Factotums" in the Globe and Mail, Friday, May 15, 2009. A personal account is found in Crisanta Sampang's Maid in Singapore TK.

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and diversity, people have become aware of the situation of domestic workers, the exploitation and abuse that they are vulnerable to, and many have come to empathize with their sacrifices and admire their courage. The plainly discriminatory treatment of foreign domestic workers that was once the norm is no longer possible and should have been, we hope, dismantled as Canadian governments have responded to documented problems and attempted to develop solutions which balance the need for foreign domestic workers with Canadian immigration objectives, while respecting the equality and fundamental justice rights promised to all people in Canada and Canadians' desire to have a fair and just society.

However, despite the significant and sustained theoretical, political and practical work of feminist scholars, activists, and lawyers and improvements in immigration, employment and human rights law, and the development of a general commitment to equality, foreign domestic workers in Canada continue to have problems achieving the full measure of citizenship that is held out to them when they come to Canada, and it is clear that major structural problems still exist in the way the system works, or more accurately perhaps, does not work. While much has been done to show that a fundamental feature of our current program, the long period of temporary status that domestic workers must endure, is a product of racism and intersecting gender bias, that feature is still central and, indeed, complicit in setting some domestic workers up for failure.

My initial intention in this paper was to focus on the judicial interpretation of a very narrow aspect of recently created immigration law that can have very harsh consequences for foreign domestic workers, as well as other immigrants to Canada, effectively creating a second-class kind of citizenship for them, if not defeating their claims to citizenship altogether and which affects domestic workers disproportionately, as a result of the race and gender biases that underpin our current program. While the interpretation of this law may not affect many domestic workers, [4] when it does its effect is devastating. It presents the domestic worker with an impossible choice: abandon Canada or abandon your spouse or child. However, as I embarked on this foray into principles of statutory interpretation, I began to wonder whether there is in Canada (or elsewhere) a constitutional protection for people's choices of their life partners and their desires to have children. This in turn led me to wonder about the meaning of citizenship and its relationship to concepts of liberty, and whether these include, or should include, the freedom to love another person, the freedom to live together and have and raise children, as that is what the subjects of my study stand to lose through the operation of this particular law. I wondered if we have constructed such freedoms as rights and as important elements of Canadian constitutionally protected rights, or as elements of citizenship and liberty and the emancipation of women generally.

I have found that significant progress has been made in developing meaningful conceptions of liberty and the protection of personal autonomy in Canadian constitutional jurisprudence. For

[4] It is impossible to estimate how many immigrants or how many domestic workers might be caught by this provision, and it has not been my goal to try to find out. It is also difficult to say with any degree of certainty that domestic workers are more likely to be affected by s. 117(9)(d) than any other immigrant. Nevertheless, there are structural reasons why domestic workers are likely to have problems with this section, and these I will discuss later.

example, the Supreme Court of Canada has recognized that the choice of where one wants to live is comprehended by the constitutional right to liberty, that liberty interests are engaged where one's psychological integrity is at risk as a result of state action, and that at least some measure of reproductive autonomy is an essential component of our rights and freedoms.[5] It has also been judicially recognized that people must have the freedom to choose their life partners, and whether to have children.[6]

However, I also found that when this jurisprudence has been applied to the situation of foreign domestic workers caught by this new provision, it has failed utterly to provide them with any help. I argue that a contextual approach to their application will show that this new provision does violate constitutionally protected rights, specifically equality rights and rights to liberty and that substantive equality rights must be combined with the right to liberty. I suggest that the argument to support this claim needs significant development. In the process, I welcome a larger feminist and critical investigation into the meaning of fundamental rights and freedoms.[7]

Implicit in my argument is the view that engaging with the law is not hopeless; indeed, when the source of a rights violation is found in law, clearly the law is inescapable. Moreover, in Canada's current political climate, the law holds more promise for progress towards social justice and the elimination of race and gender bias than the political arena. I am buoyed in this belief by the role that the courts have played in advancing some aspects of equality since the advent of the *Canadian Charter* and by the work that has been done by legal scholars and feminists particularly through the Women's Legal Education and Action Fund.[8] On the other hand, it must be recognized that the courts, especially the judges at the Supreme Court of Canada level, are re-evaluating their role, and do not want to usurp the legislative function.

One of the welcome positions that the courts have taken is to look at the legal and social context of a constitutional problem.[9] Thus, I will start by laying out the background of the existing legal regime, look briefly at how women participate in the program, how this problem occurs, and how the history of domestic worker immigration programs have contributed to the problems

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[5] *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844. See also *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307; E. (Mrs.) v. Eve**,** [1986] 2 S.C.R. 388, , but contrast *R.v. Morgentaler*, [1988] 1 SCR 30, in which while striking down the law prohibiting abortions, the court declined to base its decision on a right to reproductive freedom.

[6] *A.B. v. The College of Physicians & Surgeons of Prince Edward Island*, [2001] P.E.I.J. No. 89

[7] Relevant to explorations of women's autonomy in a legal sense is the body of social theory that investigates this area. For example, see Mackenzie, Catriona and Natalie Stoljar (eds.) *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self,* (New York: Oxford University Press, 2000) and Bakhurst, David and Christine Sypnowich (eds.) *The Social Self***,** (London: Sage, 1995).

[8] Women's Legal Education and Action Fund, *Equality and the Charter: Ten Years of Feminist Advocacy Before the Supreme Court of Canada,* (Toronto: Emond Montgomery, 1996)

[9] *Winnipeg Child and Family Services v. K.L.W.,* 2000 SCC 48.

experienced by domestic workers today. I will conclude with a quick summary of arguments that might be brought to bear to develop this analysis further.

II. Policy and law: the legal context

According to Kelley and Trebilcock, Canadian immigration policy has been driven by three competing forces: one, the desire to have immigration in order to stimulate population growth and economic development; two, protectionism, which has tried to reduce immigration to keep wages high; and three, selectivity, which has cared little about how many people immigrate as who immigrates, and which has most often operated on grounds of perceived racial, ethnic and cultural differences.[10] They note the ease with which discrimination has occurred in Canadian immigration law, and point to explicit methods, such as the infamous head tax that was imposed on Chinese people who sought to immigrate after they were no long required for the arduous work of railway building, and less explicit methods such as the requirement that immigrants arrive as a result of a "continuous journey" which effectively precluded people from India from coming to Canada.[11] A consistent problem in early and even more recent times has been the amount of unstructured discretion that immigration officials could exercise, usually against people who were perceived as different.[12]

Canada's modern immigration law has three main objectives: population and economic growth, family reunification and humanitarian assistance. Domestic workers fall into the category of live-in caregivers and are able to immigrate to Canada under the population and economic growth objective. Domestic workers may bring family members to Canada as part of family reunification, and while humanitarian assistance is mainly focused on protection of refugees, generally speaking, the law allows for exceptions to be made for humanitarian and compassionate reasons, which are not defined in the law.

Canada's immigration law is contained in federal legislation, now the *Immigration and Refugee Protection Act* (IRPA),[13] which came into force in 2002. This Act is known as "framework legislation" which means that the Act contains only the outline of the regulatory scheme, and it is only this framework that is explained and debated in Parliament. The bulk of the law is made by the executive branch of government according to broad delegations of power contained in the Act. While these rules are tabled in Parliament and receive some scrutiny this scrutiny occurs

[10] Kelley, Ninette and Michael Trebilcock, *The Making of the Mosaic: A History of Canadian Immigration Policy* University of Toronto Press, 1998, at pp. 13-15.

[11] The requirement did not necessarily stop people from coming, as much as not letting them in. The story of the Komagatu Maru.

[12] See generally, TK.

[13] *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

after they become law. According to the Minister responsible for the new bill, its objectives were to "modernize and streamline" Canada's immigration system to assure its ability to attract skilled workers to Canada, to encourage their settlement here with the family reunification program and to provide haven to those in "genuine need of assistance."[14] The new law would also "establish a new class of inadmissibility for those who commit[ted] fraud or misrepresentation on immigration applications. It [would] create a new offence for those caught helping anyone to gain status in Canada through fraud or misrepresentation."[15]

The Act contains the factors that make people "inadmissible to Canada" regardless of the category. These include being convicted of serious criminal offences or responsible for human rights violations, having health issues that might pose a danger to Canadians or are likely to be a serious drain on Canadian resources, having no means of support and misrepresenting important matters to obtain a visa or other status. It is useful to note here that people convicted of a criminal offence, while inadmissible for a period of time, will be deemed to be rehabilitated and can once again be admitted to Canada.

The classes of immigrants are set out in the Act and the Regulations and they include skilled workers, refugees, investors, entrepreneurs, and family class members. Foreign domestic workers become eligible to be immigrants (or permanent residents) after two years of working in Canada under the Live-in Caregiver Program(LCP).[16]

III. The evolution of the Canadian Live-in Caregiver Program

Historically, immigration law and policy in relation to domestic workers has been driven by both the demand for domestic workers and, perhaps more than any other group of immigrants, selectivity. Protectionism has not been a major factor in domestic worker immigration: the wages for domestic workers have probably been too low and so low consistently that those already established in Canada were not concerned about wages being driven any lower. Moreover, the people competing for domestic worker jobs would never have been organized, nor would they have political clout. [17]

Selectivity, on the other hand, has traditionally been a very significant factor in all domestic worker immigration programs. The first "programs" were managed in the 19th and early 20th

[14] Honorable Elinor Caplin, Second reading, Bill C-11, *Hansard* 021, 37th Parliament, 1st Session, Monday, February 26, 2001, p. 1520

[15] Ibid.

[16] The LCP criteria are found in the Canadian *Immigration and Refugee Protection Regulations* (IRPR), Can. Reg. 2002-227, ss. 110-115, made pursuant to the federal *Immigration and Refugee Protection Act* (IRPA), S.C. 2001, c. 27

[17] The head tax on men from China who might have immigrated to Canada to take up domestic work ensured that the labour market place was open for British women. *Agents of Empire,* p. 66

century by private British organizations, most of which were run by middle and upper class women, often styled as philanthropists. These women held the view and were well-supported in it, that domestic "help" should be drawn from among better-educated, single, British women, thus providing important civilizing influences on the rough new Dominion of Canada.[18] Organizers were clear that they should keep the "Swedes, Norwegians, Germans and Americans out."[19] Not only would these women be able to transmit the values dear to the British Empire through nurturing their charges, these women would become wives and mothers, and be able to ensure the "racial regeneration"[20] of British civilization.

As governments, first imperial and then colonial, took over control of immigration after World War I, similar policies continued. However, it became increasingly more difficult to get British women to come to Canada in the first half of the 1900s, and the source of immigration shifted to European countries. Along with the shift, a corresponding increase in the requirements imposed on these women occurred. While domestic workers would still be given "landed immigrant" status on their arrival in Canada, the women from European countries were required to provide live-in service for one year, twice as long as their British predecessors .[21]

After World War II European domestic workers were in short supply, and pressures grew to allow women from the Caribbean to come to Canada as domestic workers. The first women of colour did not arrive as domestic workers until well into the 1950s, and while they too initially received landed status on arrival, special arrangements were made with their sending countries, Jamaica and Barbados, that should these women prove "unsuitable for domestic work"[22] they would be removable back to their home countries at the sending countries' expense. This reflected fears that women from the Caribbean would be unlikely to live in the Canadian climate, and that they were sexually licentious,[23] reflecting concerns that Canada's population would be adversely affected. Another important aspect of these early immigration policies involved preventing or discouraging those who were perceived to be less desirable from bringing spouses or establishing families in Canada.[24] Indeed, the programs of the 1950s and 60s expressly prevented married women and women with children from coming to Canada as domestic workers.[25]

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[18] Ibid.

[19] Ibid. p. 67

[20] Ibid. p. 69.

[21] Stasiulis and Bakan, 1997, p. 32. Research report—blue copy [TK]

[22] Ibid.

[23] Ibid.

[24] The Chinese head tax.

[25] Stasiulis, Daiva K. and Abigail B. Bakan, *Negotiating Citizenship, Migrant Women in Canada and the Global System,* University of Toronto Press, 2005, p. 144.

By the time that women of colour had become the norm for immigrating domestic workers, in the early 1970s, the technique of the "temporary work authorization" had been developed in Canada's immigration policy, in response to the new patterns of immigration.[26] Suddenly, domestic workers coming to Canada were given only provisional status on their arrival in Canada instead of the more permanent status of landing and they were subject to removal when their work authorizations expired, or if they lost their jobs. Moreover, their applications had to be filed abroad and they thus depended on the existence of the local Canadian consulate and its willingness to process applications. Thus began the truly tenuous status of today's domestic worker.

In 1981, the Foreign Domestic Movement program (FDM) was created. The FDM was, arguably, an improvement on the temporary visa program of the previous eight years, in that although under the FDM, domestic workers continued to come on temporary visas, these workers would at least be considered for more permanent status, once they had completed a period of now two years live-in work. However, the decision whether a domestic worker should be given permanent resident status was a highly discretionary one made by front-line immigration officers. These officers were to decide whether an applicant was likely to settle "successfully" in Canada.[27] Typically, immigration officers would look at whether applicants had "upgraded their skills" while working as domestic workers, whether their language abilities were sufficient and whether they were likely to be integrated or assimilated into Canada. This assessment put domestic workers into a difficult situation, as their opportunities for integration and skill development were few. First, they were prohibited from pursuing formal courses of study; secondly, they could only work for their named employers, thirdly, they were required to live with those employers, and finally, the whole point of live-in domestic work was that these workers would be available to their employers at all hours of the day and every day. For many years live-in domestic workers were specifically excluded from employment standards legislation which would ensure that domestic workers were paid extra for over time, and were allowed holidays.[28]

The degree of discretion accorded to immigration officers under the FDM also provided the optimum conditions for discrimination, and indeed, decisions show that discrimination occurred on the basis of women's family status, their countries of origin, their relative poverty, and even on the basis that they would be subject to discrimination in Canada anyways.[29] According to Stasiulis and Bakan, immigration officers would typically find women with dependents unlikely to settle successfully because, given their low wages as domestic workers, they would not be able to support their families' successful settlement in Canada.[30] The paternalistic concern that

[26] This occurred in 1973.

[27] Summary of FDM

[28] Colin Gableman episode—WDWA brief.

[29] The suppression of overt racism for a more subtle form has also been observed in relation to immigration from China during a similar period. Chiang, Frances, p. 131-135.

[30] Ibid.

women from warmer climates would not be able to make the adjustment to Canada's cold temperatures continued, although this was likely no more than another thinly disguised form of racism. [31] Also, some officers reasoned that women of colour would have less chance of success in Canada, simply by virtue of their difference. It is more than ironic that the existence of racism in Canadian society might be a justification for the exercise of further racism in the decisions of ostensibly neutral government officials. Stasiulis and Bakan note further that immigration authorities continued to purposefully prevent the settlement and reproduction of families of colour. The significance of these decisions is that they were communicated to other women, and even after immigration officers no longer had the power to discriminate on the basis of family status, the belief that women with husbands and children would not be able to immigrate to Canada persisted and was held by many women who were trying to immigrate to Canada as domestic workers, as well as by the foreign agencies that arranged their employment. Of course, just because the rules changed, it was not necessarily true that the practice changed. *Baker v. MCI*[32] was a case in point. This was a famous case where an immigration officer was clearly disturbed by the family status of an illegal domestic worker, among other things, and ordered her deportation. The decision-making was clearly discriminatory, and the decision was ultimately overturned. Other kinds of discrimination also occurred, even after the FDM was changed, as in *Mitra v. MCI*[33] where a removal order was made because a domestic worker was uppity enough to engage legal counsel. This decision was also overturned, but one can only wonder how often indefensible decisions were made, but the domestic worker did not pursue a remedy.

The Live-in Caregiver Program (LCP)[34] of 1992 was a clear improvement from the FDM in several ways: although women still arrived with temporary work permits for specific employers and had to spend at least two years in live-in service, it became easier to change jobs and get new temporary work permits. More importantly, the discretionary decisions as to whether foreign domestic workers could settle successfully were replaced by the simple requirements that applicants meet the general standards of admissibility, and specific to the LCP, that applicants complete two years of properly authorized live-in caregiver work within three years of arriving in Canada, and that they apply for permanent resident status within those three years. Women also had to have English or French language skills, the equivalent of a Canadian Grade 12 and either have completed at least six months of training or have one year's experience in a field related to the kind of care for which they were being hired.

Another new provision of the LCP provided that domestic workers would be eligible to sponsor their dependents at the same time as they apply for their own permanent resident status. Thus, domestic workers do not have to wait to obtain their own landing, and they do not have to meet the fairly rigorous financial evaluations to prove that they will be able to support their

[31] Stasiulis, Daiva K. and Abigail B. Bakan, *Not One of the Family…..TK*

[32] *Baker v. Canada (MIC),* [1999] 2 S.C.R. 817

[33] *Mitra v. Canada (MIC),* [1996], IMM 3253-95, FCTD

[34] The LCP criteria are found in the Canadian *Immigration and Refugee Protection Regulations* (IRPR), Can. Reg. 2002-227, ss. 110-115, made pursuant to the federal *Immigration and Refugee Protection Act* (IRPA), S.C. 2001, c. 27

dependents, once they arrive in Canada. This speeds up the process of family reunification, one of the goals of Canada's immigration policy.

So by many standards the LCP program might seem quite reasonable. While women enter Canada on temporary work permits and must comply with quite strict rules about the kind of work they can do—it must be caregiving and it must be live-in, it can only be for one employer and the position must be approved by another government department,--women are eligible for permanent resident status after two years of working in Canada, and when they apply they can also apply to sponsor their spouses and children. Domestic workers can go on to obtain citizenship within two years of completion of the requirements of the LCP. The ordinary requirement is three years living in Canada, but time spent on the LCP counts as half.

However, domestic workers continue to have to document their every move and obtain a new work permit if they change jobs. There is a $150 fee that must be paid for a new work permit. They also must be sure to do 24 months of work within a three year period. While a policy of "implied status" now allows a woman to start work as soon as she has applied for a work permit but before she actually obtains a new work authorization, any period of unemployment is dangerous. Also, the new rules do not mean that domestic workers live on temporary status for only two years. Even those who are able to stay with one employer and obtain their 24 months of work, directly upon coming to Canada, must still wait while their papers are processed and while their dependents are examined for medical or criminal inadmissibility, and this will easily take a year or more, especially if there are any problems in obtaining the necessary certificates, or any questions about the admissibility of dependents. If all goes well, one eventually receives "approval in principle" and an "open work permit" which allows the domestic worker to engage in any kind of work while waiting to receive her permanent resident status. Then there is a further waiting period before a woman is called in for a final in-person examination, at which she will receive her resident status if she successfully passes.[35]

IV. Live-in Caregivers

Most of the women who have come to Canada on the LCP in the last four or five years have been from the Philippines, consistent with trends since the 1980s.[36] Many women leave the Philippines and take up domestic work all over the world; they are actively supported and encouraged by the Philippines government to do so. [37] For the most part they leave in order to find work and earn better wages. Women from the Philippines who get work overseas remit significant amounts of money to parents, children, brothers, sisters and other family members

[35] The cases reveal the lengths of time that people have waited for processing. In *Preclaro v. Canada(MIC),* 2005 FC 1063, Ms. Preclaro arrived in Canada in 1986 under the Foreign Domestic Movement. She received her permanent resident status seven years later. She applied to sponsor her son in 2001, was accepted as a sponsor in 2002, but then because of the operation of s. 117(9)(d), he was refused, but not until 2003!

[36] TK

[37] TK

who remain behind in the Philippines. Although they generally receive "minimum wage" less board and room in Canada, they pay for education, business ventures and homes in the Philippines with their earnings as domestic workers.

Women learn about jobs in Canada through friends and relatives and employment agencies in the Philippines. Many of the women who emigrate have more skills than required by the LCP—they are often nurses, midwives and teachers. It has been documented that their participation in the LCP actually causes them to lose their skills.[38] They came to Canada as nurses, but they are unlikely to attain that occupation again in Canada.

Women do not necessarily choose the country they will go to—it depends on what is available. Some countries have rules that women cannot enter as caregivers if they are married or have children. [39] Many of the women who immigrate to Canada have spouses and children and the women will sponsor their dependents to come to Canada.

V. The impugned provision

The provision that was the starting point for my paper is, like the provisions related to the LCP, in the Regulations, and it is s. 117(9)(d). The provision states:

s. 117 (9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if

> (*d*) … the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.

This means that a foreign domestic worker will not be able to sponsor family members if their existence was not disclosed at the time when she became a permanent resident. The section applies to anyone, not just domestic workers. However, it is my contention that domestic workers are more likely to run afoul of this provision because of the length of time that it takes them to become permanent residents, which effectively requires them to put their lives on hold; to do otherwise is to start the process from the beginning again. The reason that it takes them longer than most is because of the length of time they are on temporary work permits and because of the length of time it takes to process applications. The reason for the temporary work permit lies in the suspicion that was generated over the women of colour, as they began to immigrate to Canada as domestic workers.

[38] TK

[39] TK

VI. The case law *dela Fuente* and *Tallon*

The cases in which this provision has been interpreted show that sometimes people do not disclose their dependents when they make their first application, sometimes their status changes between the time when they initially apply and the time they receive their status, and they simply do not inform the authorities.

The leading case is *dela Fuente v. Canada (MCI)*[40] and it involves a woman who was sponsored to Canada as a member of her mother's family class and thus had to be unmarried. Although dela Fuente was not a domestic worker, she shares three things in common with domestic workers, one, she was anxious to be admitted to Canada, two, she was probably worried about leaving her fiancé behind, and three, she probably did not understand the rules. The decision from Federal Court explains:

> If only Cleotilde dela Fuente had waited two more weeks before marrying. She, husband Errick and son Clloyd, would be living happily together in Winnipeg. As it is, Cleotilde and Clloyd are in Winnipeg while Errick is halfway around the world, in Manila. Cleotilde's application to sponsor Errick as her spouse was rejected because when she landed in Canada as a permanent resident in 1992, she failed to disclose she had been married 11 days earlier.

Had dela Fuente told the truth about being married when she arrived in Canada, she would not have been given permanent resident status, according to the requirements for her mother sponsoring her.

The decision continues:

> Cleotilde says that since she had her visa she assumed it was alright for her to marry. She and her mother arrived in Vancouver 23 October 1992. It must have come as a surprise to Cleotilde that she had to fill in a landing card. The form comprised a series of numbered boxes. Box 13 is titled "Accompanying Family Members". She properly filled in the name of her mother. There is a sub-box "Have you any dependents other than those listed above". She said "no". That question is somewhat confusing. Within the meaning of the law at the time, a dependent was a person you might be able to sponsor as a family member. A dependent did not mean someone who was financially dependent upon you.
>
> Be that as it may, she panicked when she filled in Box 9, Marital Status. She said she was single, and certified that that statement was true and correct. Although she was single the day she obtained her visa, she was not single the day she signed the landing card.
>
> She made enquiries within the community as to her status. She was told, correctly so, that her own status was in jeopardy. She ran the risk of being removed from Canada. So she kept quiet.

[40] *dela Fuente v. Canada(MCI),* 2006 FCA 186, overturning 2005 FC 992.

> She and Errick have carried on a long distance relationship but have managed to get together from time to time. She gave birth to Clloyd in 1994.

dela Fuente finally tried to sponsor her husband, in early 2002, and it came out that she had lied at the port of entry. This was just before s. 117(9)(d) was created. Although she could have been stripped of her own status then, for having lied about her husband, the immigration officials were willing to let her sponsor him, and they told her so in late January 2002. She was also told that they would have two years in which to complete the application. However, before the application, including medical certificate, criminal record check and fee could be filed, s. 117(9)(d) came into force. Of course, dela Fuente and her husband were not aware of it; they filed the completed application form in July, and in January 2003 received the refusal on the basis of s. 117(9)(d)—her husband had not been examined when she applied.

dela Fuente appealed the decision, lost, and took the case to Federal Court, where she was successful. The Minister appealed however, and ultimately she lost in the Federal Court of Appeal. She was denied leave to appeal to the Supreme Court of Canada.

At the Federal Court level, the judge saw that when dela Fuente had made her first application for a visa to come to Canada, she had been single, and he appreciated her failure to understand that she had not yet received her status. With respect to the sponsorship application he gave the benefit of the protracted delay to the applicant, and noted that the application "should have been processed by then" and thus, it was hardly fair to visit these consequences on her. At the Federal Court of Appeal, however, the court ruled that her initial "application" process was not over until she had received her status; that if the spouse was not declared, he was simply not to be treated as a family member and thus he could not be sponsored as family class. Ironically, the court relied on its interpretation of the French version of the provision, and what it perceived as the object of the provision, family reunification. It also suggested that the provision was to benefit applicants for permanent residents. The court stated:

> In order to achieve this objective [family reunification], the scheme requires that a prospective immigrant's family members be identified so that the family unit may be assessed as a whole as well as the eligibility of each member. Reading the phrase "at the time of that application" as referring to the life of the application allows foreign nationals to define their family unit and make appropriate changes right up to the moment when they seek to enter Canada, which in turn, facilitates the admission of disclosed family members who may seek to come to Canada in the future. This is how family unification is achieved under the IRPA.

It was considered immaterial that the husband would have been admissible, had he been declared.

Tallon v. Canada (MIC) involved a woman who came to Canada on the Live-in Caregiver Program.[41] Tallon arrived in Canada in 1997, completed her two years and applied for her permanent resident status as a single person. She received approval in principle and an open

[41] *Tallon v. Canada (MIC*), 2005 FC 1039

permit on December 17, 2001. She returned to the Philippines and got married on February 9, 2002. She returned to Canada and received her permanent resident status on February 28, 2002. Although the case report does not provide the details, she was probably summoned for an interview, asked a few cursory questions, did not reveal the change in her marital status, but was not asked about it.[42] A short time later she applied to sponsor her husband and was refused on the basis of s. 117(9)(d). The decision does not discuss her reasons for not explaining the change in her status, as the jurisprudence has consistently held that her reasons are irrelevant.[43] The significant difference is that had she declared her marriage, the only consequence would have been that her processing time would have been delayed. There was no indication in the case that her husband was inadmissible.

An important component in the jurisprudence is that it does not matter why the dependent is not examined. [44]A case where this rule was most clearly applied was one in which a man was unable to sponsor a child that he had been unaware of when he came to Canada.[45]

VII. Cases involving Charter arguments

Charter arguments have been raised against s. 117(9)(d) in many cases.[46] The leading case is *De Guzman v. Canada (MIC),* 2005 FCA 436 which dealt with circumstances similar to those in *dela Fuente*. Here, the applicant, Josephine de Guzman had come to Canada as a member of her mother's family class. In this category, she would only be able to immigrate if she were unmarried. Thus although she was married and had three children, she claimed she was single, and while she admitted to having one child, she did not disclose the others. She was admitted to Canada, and after many years eventually tried to sponsor her other children. Her application was refused on the basis of s. 117(9)(d). Of course, this brought to light the fact that she had lied on the application form, and this made her removable on the basis of misrepresentation. Discretion was exercised in her favour, given that she had been in Canada for over 10 years by that time.

The Federal Court of Appeal in *De Guzman* heard several arguments challenging the validity of s. 117(9)(d) in relation to Charter rights. [47] The relevant point was argued that the provision deprived her of the right to liberty because her right to make fundamental personal choices was

[42] It has been consistently held that there is no obligation on immigration officers to explain the importance of reporting a change in marital status.

[43] *Chen TK*

[44] Another section has been added to s. 117 to make an exception for cases where dependents were not examined because immigration authorities had ruled that it was unnecessary,

[45] *Adjani v. Canada (MIC)*, 2008 FC 32

[46] TK

[47] One might wonder if the jurisprudence on the application of the Charter has not been complicated by the prolix arguments that have been raised about s. 117(9)(d). These have included improper delegation and *ultra vires*.

restricted and that she was also deprived of the right to security of her person by subjecting her to the psychological stress of being separated from close family members.

The court rejected the Charter argument, saying:

> Ms. de Guzman established permanent residence in Canada, and subsequently acquired Canadian citizenship, on the basis of a material misrepresentation. Having come to Canada without her sons to seek a better life for herself and her daughter, she applied to sponsor them some eight years after leaving them in the Philippines with their father. She provided no evidence of any special hardship or psychological stress that she is suffering as a result of the separation. She has visited her sons from time to time in the Philippines, where she could reunite with them on a permanent basis. She is not a refugee, nor a person in need of protection.

The court essentially pointed to Ms. Guzman as the author of her own misfortune:

> [Section] 117(9)(d) is not the cause of the now twelve years' separation of Ms. de Guzman from two of her children. She left them voluntarily, albeit to move to a country where she thought that her life prospects were better than in the Philippines. There is thus no sufficient nexus between the state action impugned (paragraph 117(9)(d)) and the separation of Ms. de Guzman from her sons.

Thus, it was not the law but her actions that put her in this predicament.

VIII. The provisions of the *Canadian Charter of Rights and Freedoms*

Time, space and deadlines do not permit me to engage in a full analysis of the *Charter* provisions that are engaged or should be engaged by this law, although it is my hope to continue to work on this, and that others will take up these questions, because they are crucial questions for the women directly affected, and they are important for women in general. It is important that rights be interpreted with substantive equality in mind, with attention to context and the unique vulnerabilities that are produced by racism, gender bias and class distinctions. It is also timely that these questions be taken up now as although many of these decisions have been appealed to the Supreme Court of Canada, thus far the court has declined to hear them. (One cannot really speculate on the court's reluctance to hear them, but it may well be that the court itself recognizes that these issues have not been sufficiently debated and that the cases do not present strong facts for a proper analysis.)

The *Charter* of course provides limited protection to people. It does not guarantee untrammelled rights or the freedom to go about entirely as people please. The rights and freedoms it guarantees are subject to "reasonable limitations" that can be "demonstrably justified in a free and democratic country." Thus, by establishing that Charter rights are involved in the application of

s. 117(9)(d) we have engaged the question of whether the law is demonstrably justified in a free and democratic society. This in turns leads us to wonder and ask why s. 117(9)(d) exists, and why it exists in the form that it is in? Is it too broad? Does it catch too many people? Would its purpose be equally served by a less draconian provisions?

The two main provisions of the Charter that can be brought to bear against s. 117(9)(d) are sections 15 and 7. Section 15 says:

> 15. (1) 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.[48]

Section 7 says:

> 7. Everyone has 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.

These sections have been interpreted to contain inner limits to the rights guaranteed by them. The discrimination prohibited by s. 15, for example, must be one that produces adverse consequences for the person who is the object of discriminatory treatment, and the discrimination must be as a result of the person's membership in a group that has suffered disadvantage. Women who come from foreign countries to work as live-in caregivers might well be one such group. Section 15 is also capable of understanding discrimination that is based on intersecting kinds of discrimination. Section 15 has also been interpreted to look beyond formal equality to substantive equality and to an equality analysis that is based on the dignity of the person who is claiming s. 15 protection.[49] Where a provision produces an unequal hardship on a group, it will violate s. 15.[50]The argument here then would be that women who immigrate to Canada to work

[48] It is significant that the prohibited grounds of discrimination in s. 15 are not delimited. Thus, Canadian courts have interpreted the section to find that it is violated by restricting membership in law societies to Canadian citizens (*Andrews v. Law Society of BC.,* [1989] 1 S.C.R. 143), by human rights code that failed to protect gays and lesbians from discrimination (*Vriend v. Alberta*, [1998] 3 S.C.R. 493), and discrimination on the basis of pregnancy (*Brooks v. Canada Safeway Ltd.,* [1989] 1 S.C.R. 1219. The test is whether the discrimination is adverse, whether it is based on an immutable personal characteristic, or an equivalent "constructed" characteristic, such as religion, and whether the trait has been historically used to discriminate or draw stereotypical views of its holder. Whether family and marital status are analogous grounds will depend on the purpose of the provision creating the distinction. Some purposes, such as deciding who has obligations to pay spousal maintenance, may allow for discrimination on the basis of marital status, without violating s. 15.

[49] See generally McLachlin, Beverly, "Racism and the Law: The Canadian Experience" (2002) 1 *University of Toronto Journal of Law and Equality* 7 – 24 and *Law* v. *Canada (MEI),* [1999] 1 S.C.R. 497

[50] *Andrews v. Law Society of BC*, [1989] 1 SCR 143.

as domestic workers comprise a group who have typically suffered disadvantage. The legacy of that disadvantage continues to play a role in their experiences with s. 117(9)(d) with the result that because of that disadvantage they are more likely to come into contact with s. 117(9)(d).

The Charter does not contain a specific right to family, or freedom to love whomever one wishes. It does not have a specific article that reflects the right contained in Article 16 of the *Universal Declaration of Human Rights:*

Article 16

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

2. Marriage shall be entered into only with the free and full consent of the intending spouses.

3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

However, as discussed above there is ample jurisprudence to support the argument that s. 7 protects a person's right to choose a spouse and raise their children. [51] Of course, s. 7 provides that one's rights to life, liberty and the security of the person can be taken away, provided that the principles of fundamental justice are adhered to. The courts have ruled that the substance of the law, as well as its procedures must comply with fundamental justice. For example, in the criminal context a provision that provided for imprisonment for driving without a licence whether or not a person knew that their licence had been revoked was found to breach this section.[52] Fundamental justice has been described as including those aspects of a legal system that we have traditionally respected.[53] These it can be argued in relation to s. 117(9)(d) must include at least three things:

[51] See fn. 5.

[52] *Reference re s. 94(2) of the BC Motor Vehicle Act*, [1985] 2 S.C.R. 486

[53] From *R. v. Malmo-Levine,* [2003] 3 SCR 571: "For a rule or principle to constitute a principle of fundamental justice for the purposes of s. 7, it must be a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person."

1) A prohibition on retroactivity,[54]

2) A measure of proportionality between the harm caused and the consequences or punishment imposed for it.[55]

3) A requirement that an applicant's knowledge or state of mind as to their disclosure or non-disclosure be relevant to whether a provision should apply. [56]

One of the reasons given by the Federal Court of Appeal in holding that s. 7 rights are not involved is that there is no nexus between the impugned law and the possible loss of one's liberty interests. However, the logic that it is the claimant's actions that trigger the loss of liberty not the law that imposes the consequence is contrary to the intent of the Charter which is to protect people from the application of objectionable laws.[57] The analogy in criminal law would be to say that it is not the law that imposes a loss of liberty, but the offender's actions in committing a crime. While the courts often comment that there is no punishment involved in s. 117(9)(d), the court recognized in *De Guzman* that s. 117(9)(d) represented a sanction with punitive consequences.

IX. The context

Although it has been deemed to be irrelevant in the jurisprudence in the Federal Court, this investigation begs the question why do domestic workers fail to disclose their dependents? Of course there are many reasons, and I suggest that they are important, given the value of treating intentional acts differently from negligent acts. To date, most of the cases where these issues have been canvassed have involved women who intentionally misled officials. But there are degrees of intention, and the law should recognize them. As noted in *dela Fuente*, some women lie because they don't understand the rules, they don't understand the meaning of the word "dependent", or they don't understand the consequences. As in *dela Fuente*, some may feel caught between a rock and a hard place—suddenly confronted with questions they don't expect, they fear that the truthful answer will preclude them from participating in the program, even though they may not know. As in *dela Fuente*, they panic. In the cases of domestic workers, their fears may be fuelled by stories from the days when domestic workers were not allowed to have any dependents. In her somewhat fictionalized memoir, domestic worker and community-based worker Crisanta Sampang describes in her book, how living in the Philippines and having

[54] In *Medovarski v. Canada (MIC),* 2005 SCC 51, the SCC ruled that a new law that took away an automatic stay, provided under the regime that had been replaced did not violate s. 7 because deportation alone does not trigger a "life, liberty or security of the person."

[55] TK

[56] TK

[57] *R. v. Oakes,* [1986] 1 SCR 103

separated from an unreliable husband, she lined up for hours at an placement agency to get a job overseas, only to see that her husband's permission was required. The easiest thing to do, of course, was to simply say she was single—and it would not have felt like a lie. In the case report of her decision, Linda Preclaro reports that when she came to Canada in 1986 she was advised by an immigration consultant in Singapore not to reveal her family.[58]

In those cases where domestic workers married between the time of their initial application for permanent resident status and the time they received their status, one can only imagine the overpowering urge to stay silent, particularly if one does not understand the importance of disclosure. One could compare this with the long distance runner who sees the finish line looming. Are they about to turn back for something that to them cannot possibly be important?

X. The consequences

There is a small ray of hope for a reprieve from this section. The dependent, i.e. the spouse or the child, not the sponsor, can apply for relief under s. 25 of the IRPA. This section gives the Minister of Immigration (or a delegate) the power to grant permanent resident status to a foreign national in or outside of Canada on the basis of "humanitarian and compassionate grounds." The section directs the Minister to take public policy or the best interests of children who might be affected by the application into account. However, this section has been recently amended to make the power a purely discretionary one, if the foreign national is outside of Canada when the application for "H&C" consideration is made. The Minister is under no obligation to even consider an application where the dependent is outside of Canada.

While it is true that domestic workers can abandon their goal of immigrating to Canada and return home to be reunited with their families, this consequence is disproportionate, unnecessary and unjustifiable. Immigration lawyers liken deportation to capital punishment, and this would be akin to deportation. For the women who have sacrificed sometimes 10 years of their lives, and often the best part of their procreative lives to looking after other people's children, seen their skills disintegrate and sometimes mortgaged all their assets in order to be able to immigrate to Canada, the suggestion that they can go home is simply cruel.

XI. Conclusion

Much has been written about the perilous and sometimes tragic lives of foreign domestic workers while in the state of indentured servant and much has been done to improve the conditions under which they live and work. However, the system remains fundamentally flawed, and the promise of citizenship is altogether too uncertain. It is part of my argument that the immigration history of domestic workers makes them more vulnerable to having problems with this provision than they otherwise would. It is apparent that under present law, unless the Constitution can be invoked, and in particular, the *Canadian Charter of Rights and Freedoms,* the women who come to Canada as domestic workers who run afoul of this provision stand to experience irrevocable

[58] *Preclaro v. Canada (MIC*), 2005 FC 1063

losses. Part of my project has been to give some recognition to the losses that these women face, as they are all too often seen in very simple terms.

While there is significant jurisprudence in Canada that suggests that the *Charter* is not available to help these women, I argue that the analysis to date has failed to consider the role of race, gender and class in producing the problem, both in the way the law has developed, and the reasons why women might not be forthcoming about their spouses or dependents, and that Canadian courts have not had the opportunity to hear that analysis.

I thank the organizers of this conference and its attendees for the opportunity to explore these ideas with you. I welcome your participation in the debate, with the hope that foreign domestic workers in Canada and everywhere can experience equality and fairness, and that the wrongs of the past cannot be allowed to perpetuate similar wrongs today.