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ACCESS TO HEALTH CARE AND WORKERS' COMPENSATION FOR PRECARIOUS MIGRANTS IN QUÉBEC, ONTARIO AND NEW BRUNSWICK

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Immigration status is a key criterion on the basis of which an individual will be deemed eligible for receipt of insured public health services. Immigration statuses assigned to individuals who are not citizens or permanent residents may be considered particularly "precarious" in that these individuals enjoy less certainty about their ability to remain in Canada and partake in the benefits of Canadian society. In this paper we investigate the relationship between being an individual with

Le statut d'immigration est un élément clé pour déterminer si un individu est admissible aux services de santé couverts par l'assurance publique. Les statuts d'immigration assignés aux personnes qui ne sont ni immigrants reçus ni citoyens peuvent être considérés comme particulièrement « précaires » puisque ces individus bénéficient de moins de certitude quant à leur possibilité de rester au Canada et de participer aux bénéfices de la société canadienne.

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"precarious" immigration status and access to insured health services. The study was conducted using Ontario, Québec, and New Brunswick as sites, looking at access to health services through federal and provincial health insurance schemes and workers' compensation systems through legislation and case law.

The most vulnerable group identified with respect to both health and workers' compensation coverage were those without legal status in Canada. Given that they are not entitled to any provincial health insurance benefits, their status with respect to workers' compensation benefits is unclear, and legality issues prevent them from accessing services to which they may be entitled. Particularly with respect to provincial health insurance coverage, other gaps shown were for coverage of temporary migrants working on permits where no specific employer is named and of those in Canada awaiting sponsorship or other permanent residency application results. Immigration status has less bearing on access to workers' compensation benefits, but coverage of injured migrant workers without status was still found to be an issue. The legitimacy of the employment contract has some bearing on coverage of injuries, particularly in Québec, and thus the lack of immigration status may, and has sometimes been used to, call the employment relationship into question.

Given the broad range of individuals who are precarious migrants and the gaps identified in coverage, both between statuses and between provinces, governments need to address these iniquities if access to health care for all people living in Canada is to be ensured.

Dans cet article, nous examinons la relation entre le fait d'être un individu au statut d'immigration « précaire » et l'accès aux soins de santé assuré par le régime public. L'étude porte sur les régimes d'assurance maladie et d'indemnisation pour les accidents du travail et les maladies professionnelles fédéraux et provinciaux applicables en Ontario, au Québec et au Nouveau-Brunswick, et ce, par le biais de la législation et de la jurisprudence.

Le groupe le plus vulnérable, en ce qui concerne l'accès aux régimes de santé et d'indemnisation pour les lésions professionnelles, est celui des personnes sans statut légal au Canada. Puisqu'elles n'ont pas droit aux prestations d'une assurance maladie provinciale, leur accès aux régimes d'indemnisation est incertain et des enjeux légaux les empêchent d'accéder à certains services auxquels elles pourraient avoir droit. En ce qui concerne particulièrement l'accès à l'assurance maladie provinciale, d'autres lacunes ont été observées quant à la couverture des travailleurs migrants qui détiennent des permis de travail temporaire sans mention d'un employeur particulier et pour ceux qui sont en attente de parrainage ou d'autres réponses relatives à une demande de résidence permanente. Le statut d'immigration a moins d'influence en ce qui concerne l'accès aux régimes d'indemnisation pour les lésions professionnelles, sauf pour les personnes sans statut légal leur permettant de travailler. La légitimité du contrat de travail a un certain effet sur l'obtention d'une indemnisation, particulièrement au Québec, et l'absence de statut d'immigration peut être utilisée, et a parfois été utilisée, pour remettre une relation de travail en question.

Devant la grande étendue de personnes qui ont un statut de migrant précaire et les lacunes identifiées quant à leur protection, à la fois en raison de leurs différents statuts et de régimes distincts entre provinces, les gouvernements doivent se pencher sur ces iniquités afin d'assurer l'accès aux services de santé pour toutes les personnes vivant au Canada.

Introduction

In Canada there are numerous ways in which individuals may access health care without personally paying for the services. They may be covered under provincial health insurance by virtue of their residency in a province;[1] be eligible for coverage through private health insurance plans provided by their employers; receive subsidized care for injuries sustained at work through provincial workers' compensation schemes;[2] or receive coverage for injuries sustained through automobile accidents.[3] Whether or not they can access these subsidies depends both on their province of residency and the circumstances under which the illness or injury was sustained. The equation becomes more complicated when an individual is not a citizen or permanent resident of Canada.

International conventions suggest that states should ensure universal access to health care and social services. The International Covenant on Economic, Social and Cultural Rights (ICESC) recognizes "the right of everyone to the enjoyment of the highest attainable standard of mental and physical health."[4] The *International Convention on the Elimination of All Forms of Racial Discrimination* obligates states to guarantee to everyone, without distinction as to national or ethnic origin, the "right to public health, medical care, social security and social services."[5] Most notably, the *Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, in force since July 2003 but to which Canada is not a signatory, enshrines human rights protections – including health care – specifically for migrant workers.

However, research in Canada indicates that migrants do not benefit from equitable access to health care services. For instance, when accessing the health care system, research has shown a significant proportion of migrants

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1 *Canada Health Act*, RSC 1985 c C-6, s 10 [*CHA*]. A list of acronyms appears in Annex A.

2 *Canadian Workers' Compensation 101*, online: Association of Workers' Compensation Boards <www.awcbc.org/en/canadianworkerscompensation 101.asp>.

3 See for example *Automobile Insurance Act*, RSQ c A-25.

4 *International Covenant on Economic, Social and Cultural Rights*, GA Res 2200A (XXI), UNGAOR, 1966.

5 *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195 at art 5(e)(iv), Can TS 1970 No 28.

experience delays, complications, or denial of medically necessary treatment.[6] This is particularly true of those with "precarious immigration status" – that is, those who are denied the permanent right to remain in Canada or whose status depends on a third party such as a spouse or employer.[7] In addition, those with precarious immigration status experience more barriers to accessing health care and, as a result, experience long-term health concerns and unrecognized morbidity.[8]

Canadian immigration law allocates immigration "statuses" to individuals, which determine access to employment, health insurance, and other benefits in accordance with those statuses. Individuals may be eligible for entry into Canada through a variety of programs, and may choose a path because it simply seems be the swiftest and most efficient. However, some government-sponsored insurance programs place considerable weight on this status, according particular benefits and rights in conjunction with those categories. In this paper we discuss the distribution of these benefits in relation to access to health care in Canada.

After a review of the literature on access to health care and workers' compensation for migrants, we identify immigration statuses that may be considered "precarious", in that they provide little security of residency. We then investigate the relationship between these statuses and an individual's legal entitlement to (a) provincial health insurance, in both emergency and non-emergency situations, and (b) health benefits provided through workers' compensation schemes. This paper does not address practical barriers that precarious-status migrants may face in accessing health care, such as linguistic, cultural, and economic barriers.[9] It relies specifically on legal analysis undertaken

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[6] P Caulford & Y Vali, "Providing Health Care to Medically Uninsured Immigrants and Refugees" (2006) 174:9 Can Med Assoc J 1253; Sonia ter Kuile et al, "The Universality of the Canadian Health Care System in Question: Barriers to Services for Immigrants and Refugees" (2007) 3 International Journal of Migration, Health and Social Care 15.

[7] J Hanley & E Shragge, "Economic Security for Women with Precarious Immigration Status: Enforcing Labour Rights for All" in J Pulkingham & M Griffin Cohen, eds, *Imagining Public Policy to Meet Women's Economic Security Needs* (Toronto: University of Toronto Press, 2009).

[8] Kuile et al, *supra* note 6.

[9] Some of these issues have been examined by others: Anita Gagnon, "Responsiveness of the Canadian Health Care System Towards Newcomers" in Pierre-Gerlier-Forest et al, eds, *Changing Health Care in Canada: The Romanow papers Volume II* (Toronto: University of Toronto Press, 2004) at 349 and J Oxman-Martinez et

during the first phase of a study that is currently investigating those broader questions.[10] Because the empirical study is based in Québec, the policy component that is the subject of this article examines Québec legislation. We have chosen as comparators Ontario and New Brunswick, two neighbouring provinces with which Québec policy makers have sometimes identified a need to harmonize health policy so as to avoid what is popularly termed "health tourism."

I. Background

A. Barriers to Health

With the exception of those recently arrived, immigrants to Canada report poorer health status than their non-immigrant counterparts.[11] Research, further advanced in the United States than in Canada, has begun to show that this may be exacerbated by categories of precarious immigration status. For instance, migrant farm workers in the U.S. have higher incidence of undetected infectious diseases and adverse chronic health indicators.[12] Similarly, research has suggested that undocumented migrants have a disproportionate incidence of communicable diseases and frequently lack basic preventive care such as immunizations.[13] Poorer health is also connected to precarious employment, low earnings, few benefits, and high levels of uncertainty regarding terms and conditions of work and future earnings – categories into which many individuals

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al, "Intersection of Canadian Policy Parameters Affecting Women with Precarious Immigration Status: A Baseline for Understanding Barriers to Health" (2005) 7:4 Journal of Immigrant Health 247. Studies on difficulties in accessing workers' compensation will be found at 211-213, below.

[10] The *Right to Health for Precarious Status Migrants: Medicare and CSST* project (SSHRC, 2008-2011) combines quantitative and qualitative methods to explore precarious status migrants' experiences in accessing Medicare and CSST in Québec, their strategies to overcome barriers and the implications of access problems in their personal lives. Team members are: J Hanley, L-F Dagenais, S Gravel, K Lippel, S Premji, E Shragge. Student researchers include: MA Boutin-Clermont, S Gal, J Koo, V Lavigne and A Sikka.

[11] B Newbold, "Health Status and Health Care of Immigrants in Canada: A Longitudinal Analysis" (2005) 10 Journal of Health Services Research & Policy 77 at 81.

[12] DD Villarejo, "The Health of US Hired Farm Workers" (2003) 24 Annual Review of Public Health 175.

[13] Jeffrey T Kullgren, "Restrictions on Undocumented Immigrants' Access to Health Services: The Public Health Implications of Welfare Reform" (2003) 93:10 American Journal of Public Health 1630 at 1630.

with precarious status fall.[14] As a result of such findings, researchers have concluded that the "healthy immigrant effect" – so named to describe the lower utilization of health services amongst immigrants – is possibly due to immigration criteria that eliminate individuals in ill-health upon application.[15]

Barriers to health services, such as immigration status, increase the likelihood of the absence of needed health care or inappropriate treatment. For example, policies surrounding the provision of public health insurance, including the exclusion of immigrants from health services for the initial three months of their residency in certain provinces, act as a serious impediment to equitable health care.[16] Kuile et al interviewed health service providers in Québec and found that many, if not most, individuals with precarious immigration status who are experiencing acute health crises had delayed seeking care due to a misunderstanding of the system.[17] Immigrants in Canada receive fewer screenings for diseases[18] and have less information about disease transmission,[19] and health promotion.[20] For those individuals with precarious immigration status, who often lack full medical health coverage, the consequences of such health issues are magnified. This has been well-documented by researchers in the United States, who have shown that a lack of medical insurance results in, among other things, longer waiting times, less access to some preventive tests, and increased likelihood of presenting with late-stage cancer.[21] Not surprising-

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[14] W Lewchuk et al, "From Job Strain to Employment Strain: Health Effects of Precarious Employment" (2003) 3 Just Labour 23.

[15] Jiagjian Chen, Edward Ng & Russell Wilkins, "The Health of Canada's Immigrants in 1994-95" (1996) 7:4 Health Reports 33 at 44.

[16] Gagnon, *supra* note 9 at 359-360. Oxman-Martinez et al, *supra* note 9.

[17] Kuile et al, *supra* note 6.

[18] Joanne Bryant et al, "Access to Health Care: Social Determinants of Preventive Cancer Screening Use in Northern British Columbia" (2002) 60 Social Indicators Research 243 at 256.

[19] N Gibson et al, "Socio-cultural Factors Influencing Prevention and Treatment of Tuberculosis in Immigrant and Aboriginal Communities in Canada" (2005) 61 Social Science & Medicine 931.

[20] Margareth S Zanchetta & Iraj M Poureslami, "Health Literacy Within the Reality of Immigrants' Culture and Language" (2006) 97:2 Canadian Journal of Public Health S26.

[21] O Carrasquillo & S Pati, "The Role of Health Insurance on Pap Smear and Mammography Utilization by Immigrants Living in the United States" (2004) 39 Preventive Medicine 943; Steven S Coughlin et al, "Breast cancer screening practices among women in the United States, 2000" (2004) 15; C Steven S Coughlin et al,

ly, those without medical insurance often have longer stays in hospitals and experience higher death rates.[22] A lack of health coverage for children also compromises their care content, quality, and satisfaction.[23]

American researchers have found that uninsured, undocumented migrants are less likely to have a regular health care provider than their counterparts with documents.[24] This American experience may become all-too-common in Canada as the proportion of migrants with precarious status increases. Clearly, without addressing the barriers to health and social services for those with precarious immigration status, these individuals are at greater risk of problems and are more likely to need intensive long-term intervention. Complex issues that arise due to obstacles to care may result in an inability to work and insurmountable debt from medical treatment.

B. Work-Related Health Care

Precarious migrants who work, like all workers in Canada, may well be able to access health care through channels other than public health insurance, depending on whether or not the services required relate to an employment injury. The nature of that coverage may be more complete, and the timeframe during which free care is available may be different, if the health problem relates to a compensable injury or illness. Workers' compensation was the first social program to provide free access to health care in Canadian provinces. Québec legislation first guaranteed the right to free treatment by a physician of the injured worker's choice in 1928, and costs of hospitalization and medication were insured in this context long before the development of public health

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"Breast Cancer Screening Practices Among Women in the United States, 2000" (2004) 15 Cancer Causes and Control 159; J Swan et al, "Progress in Cancer Screening Practices in the United States: Results from the 2000 National Health Interview survey" (2003) 97 Cancer 1528. For a Canadian study see J Bryant et al, *supra* note 18.

[22] Jack Hadley, "Sicker and Poorer–the Consequences of Being Uninsured: A Review of the Research on the Relationship between Health Insurance, Medical Care Use, Health, Work, and Income" (2003) 60:2 Medical Care Research and Review 3S.

[23] YM Fry-Johnson et al, "Being uninsured: Impact on Children's Healthcare and Health" (2005) 17 Current Opinion in Pediatrics 753.

[24] Khiya J Marshall et al, "Health Status and Access to Health Care of Documented and Undocumented Immigrant Latino Women" (2005) 26 Health Care for Women International 916.

care.[25] All workers' compensation costs are financed by employers, who, in exchange, are protected from lawsuits related to work-related injury or illness.[26] As we shall see, workers' compensation only provides for health care in those cases covered by the scheme: the need for health care must be in relation to a compensable injury or illness incurred by a "worker" as defined in the relevant legislation.

In recent years some analysts have compared the workers' compensation model of health care delivery to the public health system. The increased reliance on private health services for injured workers, prevalent in some provinces, has drawn criticism from scholars[27] while being praised by its proponents.[28] This is not an issue that is specific to precarious migrants, and it is beyond the purview of this article to explore the relative advantages and disadvantages of health care coverage under workers' compensation as compared to other systems. However, health services provided through workers' compensation are relevant, given that many precarious migrants work in Canada and may thus be injured at work. This is especially true of temporary foreign workers,[29] but it is also true of refugee claimants, undocumented migrants, and others.

Few studies have explored the rights of immigrant workers to workers' compensation, and fewer still have provided a legal analysis of the rights of those workers. Some Canadian studies have found that eligibility for workers' compensation is unclear for certain categories of migrant workers,[30] while bar-

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[25] See generally K Lippel, "Droit des travailleurs québécois en matière de santé, 1885-1981" (1981-1982) 16 RJT 329.

[26] TG Ison, *Workers' Compensation in Canada* (Toronto: Butterworths, 1989); B Cliche & M Gravel, *Les accidents du travail et les maladies professionnelles: Indemnisation et financement* (Cowansville: Yvon Blais, 1997).

[27] Notably those private sector service providers who benefit from the business of those workers' compensation boards, like Alberta, that employ this model. See J Hurley et al, "Parallel Payers and Preferred Access: How Canada's Workers' Compensation Boards Expedite Care for Injured and Ill Workers" (2008) 8:3 Healthcare Papers 6.

[28] Arif Bhimji, "Reduced Suffering and Increased Productivity – The Workers' Compensation Model" (2008) 8:3 Healthcare Papers 30.

[29] M Sargeant & E Tucker, "Layers of Vulnerability in Occupational Safety and Health for Migrant Workers: Case Studies from Canada and the UK" (2009) 7:2 Policy and Practice in Health and Safety 51.

[30] Stephanie Bernstein, Katherine Lippel & Lucie Lamarche, *Women and Homework: The Canadian Legislative Framework* (Ottawa: Status of Women Canada, 2001); Stephanie Bernstein, "Au carrefour des ordres publics: l'application des lois du

riers to accessing workers' compensation for immigrant workers have been documented.[31] Sargeant and Tucker[32] explored the legal protection of workers employed under the Temporary Foreign Worker Program, targeting occupational health and safety law in particular, but also providing information on workers' compensation. While concluding that workers' compensation law was applicable to this category of precarious migrants, they underlined obstacles limiting access to compensation, including workers' reluctance to claim because of fear of reprisals, and intimidation strategies by employers seeking to avoid increases in premiums. More generally, Premji and colleagues found that language issues were an obstacle to immigrant workers exercising their rights relating to occupational health and safety protection in Québec.[33] Gravel and colleagues have studied obstacles faced by immigrant workers' compensation claimants, but precarious migrants were not targeted in those studies.[34] Other research has found that immigrant workers are more likely to be exposed to occupational hazards than Canadian-born labour market participants,[35] and

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travail aux travailleuses et travailleurs ne détenant pas de permis de travail valide en vertu de la *Loi sur l'immigration et la protection des réfugiés*" in Barreau du Québec ed, *Développements récents en droit du travail 2009* (Cowansville: Yvon Blais, 2009) 237.

[31] S Gravel et al, "Incompréhension des travailleurs immigrants victimes de lésions professionnelles de leurs difficultés d'accéder à l'indemnisation" (2007) 131:2 Migration et santé 1; L Patry et al, *Accès à l'indemnisation des travailleurs et travailleuses immigrant(e)s victimes de lésions musculo-squelettiques d'origine professionnelle* (Montréal: Direction de la santé publique de Montréal, FQRSC, 2005); Sylvie Gravel et al, "Ethics and the Compensation of Immigrant Workers for Work-Related Injuries and Illnesses" (2010) 12 J Immigrant Minority Health 707 [Gravel, "Immigrant Workers"]; Charlene M Gannagé, "The Health and Safety Concerns of Immigrant Women Workers in the Toronto Sportswear Industry" (1999) 29:2 International Journal of Health Services 409.

[32] M Sargeant & E Tucker, *supra* note 29. They refer in particular to a field study by Tanya Basok, "Post-national Citizenship, Social Exclusion and Migrant Rights: Mexican Seasonal Workers in Canada" (2004) 8:1 Citizenship Studies 47.

[33] Stéphanie Premji, Karen Messing & Katherine Lippel, "Broken English, Broken Bones? Mechanisms Linking Language Proficiency and Occupational Health in a Montreal Garment Factory" (2008) 38:1 International Journal of Health Services 1. See also Basok, *ibid* at 50, 57.

[34] Gravel et al, *supra* note 31; Patry, *supra* note 31; Gravel, "Immigrant Workers" *supra* note 31.

[35] Peter M Smith & Cameron A Mustard, "The Unequal Distribution Of Occupational Health and Safety Risks Among Immigrants to Canada compared to Canadian-born Labour Market Participants: 1993–2005" (2010) 48:10 Safety Science 1296.

that refugees and those with poor language proficiency in English and French were more likely to be found in physically demanding jobs.[36] However, these studies were based on census data and not on workers' compensation data. American studies have documented significant under-reporting of work injuries among the migrant population, particularly among precarious migrants.[37]

In Australia, temporary foreign workers were found to have legal entitlement but limited access to workers' compensation because of obstacles that included misinformation, intimidation, and fear of job loss and deportation. Furthermore, even when compensation is granted, legal rules requiring workers to mitigate their damages by seeking other suitable employment are difficult to comply with when visa requirements are linked to a specific employer. Vulnerability attributable to visa requirements was found to facilitate reprisals by employers who would normally be held liable for terminating an injured worker.[38] A previous study of undocumented workers found similar problems, exacerbated because the right to coverage for these workers was found to be ambiguous and uncertain.[39]

The focus of the present article, targeting issues related to access to healthcare for precarious migrants under workers' compensation in the Canadian context, is unique.

II. Methodology

It is-well established that immigration will be of increasing importance to Canadian society[40] and that this increase in diversity is essential to consider if

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[36] P Smith, C Chen & C Mustard, "Differential Risk of Employment in More Physically Demanding Jobs Among a Recent Cohort of Immigrants to Canada" (2009) 15:4 Injury Prevention 252.

[37] Lenore S Azaroff et al, "Wounding the Messenger: The New Economy Makes Occupational Health Indicators Too Good to be True" (2004) 34:2 International Journal of Health Services 271.

[38] Stefanie Toh & Michael Quinlan, "Safeguarding the Global Contingent Workforce? Guestworkers in Australia" (2009) 30:5 International Journal of Manpower 453 at 457-458.

[39] Robert Guthrie & Michael Quinlan, "The Occupational Safety and Health Rights and Workers' Compensation Entitlement of Illegal Immigrants: An Emerging Challenge" (2005) 3:2 Policy and Practice in Health and Safety 69.

[40] Statistics Canada Housing, Family and Social Statistics Division, *Longitudinal Survey of Immigrants to Canada: Process, Progress and Prospects*, (Ottawa: Ministry of Industry, 2003)

we aim to promote equity in access to health and social services.[41] Our methodology for the overall research project draws upon a conceptual framework that assumes that migrants have the right to health and social services, as laid out in numerous international human and social rights conventions, and that social factors such as gender and race intersect with immigration status to influence access to the right to health and social services. A second important concept is that any barriers in access to the right to health and social services can have a negative impact on not only migrants' health and well-being but also their very sense of agency and personal power. The third guiding concept of this project is that migrants are not passive subjects of legal and socio-economic barriers but rather may resist these barriers through individual, family, and collective strategies. In this article, we present the results of the first phase of our study, which involved documenting the intersection between officially-designated immigration statuses and legal entitlement to publicly-insured health benefits, through both publicly funded health insurance and workers' compensation.

A review of the literature regarding the connection between immigration status and access to health care was undertaken, including both academic literature and "grey" literature, using legal literature databases and internet searches. The literature was reviewed with regard to the legal obligation to treat patients, public health requirements, eligibility requirements for health insurance and workers' compensation, the Interim Federal Health Program, immigration policies governing documentation of migrants, immigration status, and eligibility for insured services. Next, a study was conducted of the legal framework surrounding health insurance in the three provinces, the definition of "insured" and specific provisions or policies relating to immigration status. A similar study was conducted with respect to workers' compensation, but it included, in addition to reviewing the legislative framework and compensation board policies, a survey of administrative tribunal decisions.

III. Immigration Statuses

Immigration "statuses" are particular categories within the *Immigration and Refugee Protection Act*[42] and its regulations. Individuals who are not Canadian citizens are allowed to enter and remain in Canada on certain conditions depending upon the status accorded to them under *IRPA*. With each of these categories are specified accompanying benefits. Aside from the category

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[41] Jaqueline Oxman-Martinez & Jill Hanley, *Health and Social Services for Canada's Multicultural Population: Challenges for Equity* (Ottawa: Heritage Canada, 2005).

[42] *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

of "permanent resident,"[43] all statuses accorded under *IRPA* either place restrictions on the length of time an individual can stay in Canada,[44] or on activities that an individual can undertake while in the country.[45] Furthermore, a person's immigration status sometimes depends on a third party (for example, an employer or sponsoring spouse). Persons without citizenship or permanent residence are also subject to removal from the country for various reasons.[46] These statuses may thus be considered "precarious" in that the individuals enjoy less certainty about their ability to remain in Canada and partake in the benefits of Canadian society. Given these parameters, several types of immigration statuses were identified as "precarious".

First, persons claiming refugee status[47] – under which migrants claim to be in need of protection because their home state is unable or unwilling to protect them from persecution on the basis of a protected ground or for other reasons[48] – may be termed "asylum seekers." They are subject to different regulations and are accorded different benefits depending upon the stage to which their application has progressed. Those who await determination as to whether their claim will be deemed eligible to be heard by the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB)[49] are treated differently than those awaiting a hearing by the RPD, those whose claims have been rejected but are awaiting a "pre-removal risk assessment"[50] (PRRA) to determine whether they still may be allowed to remain in Canada, and those whose removal orders have been stayed due to a moratorium upon returning people to conflict-ridden or otherwise dangerous countries.

A second category of persons with precarious status are "Temporary Foreign Workers" (TFWs).[51] In Canada increasing numbers of individuals are

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[43] *Ibid*, s 2(1).

[44] See eg *ibid*, s 29(2).

[45] See eg *ibid*, s 30.

[46] See eg *ibid*, ss 35(1), 36(2), 38(1), 39, 41(a), 42. Permanent residents are subject to removal under certain circumstances as well but they are fewer and additional legal procedures are required for such removal: see eg *ibid*, s 36(1) and s 55 on arrest and detention.

[47] *Ibid*, s 96.

[48] *Ibid*, s 97.

[49] *Ibid*, s 100(1).

[50] *Ibid*, s 112(1).

[51] These persons are generally referred to as "migrant workers": workers who have migrated to another country to take up work but who currently do not have a per-

granted authorization to work temporarily in the country provided certain conditions are met.[52] TFWs include those persons working under the "Live-In Caregiver Program" (LCP), the "Seasonal Agricultural Workers Program" (SAWP), those on the "Pilot Project for Occupations Requiring Lower Levels of Formal Training" program (PPORLLFT) and others who obtain "high skill" or professional temporary working permits through individual employment contracts.

Individuals authorized to work in Canada under the LCP are the only low-skill TFWs eligible to apply for permanent residency upon successful completion of their program.[53] However, prior to their application for permanent residency, they are subject to conditions similar to other TFWs, are tied to a single employer unless they obtain authorization for a change, and may be removed for reasons similar to other foreign nationals. Furthermore, the potential for gaining permanent residence may in fact increase their vulnerability to abuse by their employer prior to the according of that status, as it may be held over their head as an opportunity that can be lost if they do not comply with the employers wishes.[54]

SAWP workers are recruited through a bilateral agreement with the worker's home country, either Mexico or one of the designated Caribbean countries,[55] and are subject to particular constraints on employment, living arrangements, travel, as well as length of stay. An employer may also terminate a contract early should the work be completed. While in these cases employees are entitled to standard notice or pay in lieu of notice, it does not require full payment of the contract initially bargained and still results in the employee's removal from Canada.[56] While entitled to the same labour protections as permanent residents or citizens, studies have shown that many are reluctant to as-

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manent status in the receiving country. See Sargeant & Tucker, *supra* note 29 at 52.

[52] *Ibid* at 51.

[53] See Citizenship and Immigration Canada, *Working temporarily in Canada: The Live-In Caregiver Program*, online: CIC <www.cic.gc.ca/english/work/caregiver/index.asp>.

[54] Sergeant & Tucker, *supra* note 29 at 53.

[55] Human Resources and Development Canada, *Temporary Foreign Worker Program: Hiring Foreign Agricultural Workers in Canada*, online: HRSDC <www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/sawp.shtml>.

[56] Human Resources and Development Canada, *Seasonal Agricultural Worker Program*, online: HRSDC <www.hrsdc.gc.ca/eng/workplaceskills/foreign_ workers/ei_tfw/sawp_tfw.shtml>.

sert their rights in the fear of being sent home or not brought back for the following season.[57]

For all other jobs employers may apply for authorization to hire foreign nationals to fill vacancies that cannot be filled by Canadian workers. Until 2002 only specific, high-skill occupations could be filled through this program.[58] However, now under the PPORLLFT, some "low-skill" occupations are eligible. Workers arriving through the general TFW program (or the PPORLLFT) are tied to employment with the specific employer named on their visa, and are limited as to the length of time they are allowed to remain in Canada.[59] They are subject to removal for several reasons and require authorization to change employers.[60]

In addition, some individuals are allocated "Temporary Residency Permits,"[61] (TRP – commonly referred to as "humanitarian visas") under circumstances where otherwise the person would be inadmissible as a resident in Canada.[62] They are entitled to apply for permanent residency, subject to the conditions on their visa, after having lived continuously in Canada for a minimum of three to five years depending upon the reason for their inadmissibility.[63]

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[57] Sergeant & Tucker, *supra* note 29 at 57.

[58] Human Resources and Development Canada, *Temporary Foreign Worker Program*, online: HRSDC <www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/lowskill.shtml>.

[59] *Immigration and Refugee Protection Regulations*, SOR/2002-227, ss 6, 7 [*IRPA Regulations*].

[60] Sergeant & Tucker, *supra* note 29 at 57.

[61] *IRPA*, *supra* note 42, s 24.

[62] *Ibid*, ss 29, 30. See definition of "foreign national" in *IRPA*, *ibid*, s 2(1). See also conditions imposed on temporary residents in *IRPA Regulations*, *supra* note 59 ss 183, 185.

[63] Citizenship and Immigration Canada, *Application for Permanent Residence: Temporary Resident Permit Holder*, online: CIC <www.cic.gc.ca/english/information/applications/permit.asp>. Particular types of TRPs are allocated to individuals who are identified as having been victims of trafficking in persons. They have specific conditions for entry into and residence in Canada, as well as renewal provisions and employment authorization. However, generally the conditions for removal and application for permanent residence are the same as for other TRPs. See Citizenship and Immigration Canada, *Inland Pro-*

Individuals designated as "tourists" are in a particularly vulnerable situation, as they are entitled to remain only for designated lengths of time, are ineligible to work or study without further authorization, and may be removed for a variety of reasons.[64] Individuals sometimes enter Canada through a tourist visa if unable to qualify immediately as permanent or temporary immigrants. In some cases, spouses come to Canada on tourist visas in anticipation of being sponsored through the "In-Canada Spouse" class of immigrants.[65] However, where an application is subsequently withdrawn or where a spousal relationship is no longer viable, the spouse who had been anticipating receiving permanent residency may be put in the even more difficult situation of having to find other means by which to stay in Canada, under threat of removal. Once an individual remains in Canada beyond the length of time stated on their tourist visa, they are considered to be undocumented.

Individuals who enter Canada without appropriate authorization from Canadian authorities or those who entered Canada through some legal means but remained in Canada past their date of authorization or otherwise violate their visa conditions may be considered "undocumented" or "illegal." They may be subject to arrest, detention, and removal from Canada.[66]

IV. Part One – Access to Insured Health Services

A. Eligibility for Insured Health Services

The federal government is involved in the provision of health insurance through partial funding of provincial programs, and through the administration of the Interim Federal Health Program (IFHP). This Program provides coverage for some individuals residing in Canada (mostly refugee claimants) who are not covered under provincial legislation.[67] Provincial governments receive an allocation from the federal government each year – the federal Canada Health Transfer (CHT) – if they comply with particular terms and conditions

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cessing 1: Temporary Residency Permits, online: CIC <www.cic.gc.ca/english/resources/manuals/ip/ip01-eng.pdf> at 23-30.

[64] See eg *IRPA*, *supra* note 42, ss 29, 30.

[65] For instance on a tourist or student visa. *IRPA Regulations*, *supra* note 59, ss 72(1), 72(2)(b).

[66] *IRPA*, *supra* note 42, s 29(2), *IRPA Regulations*, *supra* note 59.

[67] Sandra Elgersma, *Immigration Status and Legal Entitlement to Insured Health Services* (Ottawa: Parliamentary Information and Research Service, 2008), online: PIRS <www.parl.gc.ca/information/library/PRBpubs/prb0828-e.pdf> at 3.

with respect to the provision of insured services.[68] The provinces and territories then administer and deliver all other health care services and provincial public health insurance programs. This responsibility includes creating and managing provincial legislation that regulates eligibility and determines services covered. An individual's ability to access insurance programs to cover costs sustained at the "point of service" (i.e. the hospital, doctor's office, testing laboratory) will then vary depending on the specific provincial legislation. For those who are unable to access provincial health insurance, private insurance is available for purchase in Canada, although the price is prohibitive for many and not all are eligible.

1. Overview of Coverage for Public Health Insurance

Residency and immigration statuses are key criteria in the determination of eligibility under provincial health insurance schemes. Generally, immigrants who obtain permanent residence status are eligible for the same benefits as citizens, provided they can prove they are "resident" in a particular province or territory for the time specified in each jurisdiction's legislation. Areas of concern include waiting periods prior to acquiring residency status in a province, and delays in determining refugee claimants' eligibility status. The *IRPA* allows three days for a claim to be deemed eligible or ineligible for a RPD hearing[69] but in practice it may take significantly longer, also delaying potential coverage under the IFHP.[70] Other concerns include lack of coverage for spouses of temporary foreign workers who reside in Canada with "open" work permits,[71] individuals anticipating sponsorship who reside in Canada on tourist visas, and individuals formerly on programs such as those on the LCP who have applied for permanent residency and are awaiting a decision. The most vulnerable group identified were undocumented individuals who are not entitled to provincial health insurance benefits of any kind in any province studied.

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[68] Health Canada, *Canada Health Act Annual Report 2007-2008*, online: Health Canada <www.hc-sc.gc.ca/hcs-sss/alt_formats/hpb-dgps/pdf/pubs/chaar-ralcs-0708/2008-cha-lcs-eng.pdf> at 1. The *CHA* establishes the criteria the provinces are expected to follow in order to receive their full cash contribution from the federal government.

[69] *IRPA*, *supra* note 42, s 100(1).

[70] Gagnon, *supra* note 9 at 360.

[71] Permits that entitle an individual to work for any employer of their choosing.

a. The Interim Federal Health Program

The IFHP is a Citizenship and Immigration Canada (CIC) program that provides temporary essential and emergency health care for certain individuals who are unable to access provincial health insurance and who cannot afford private insurance. According to CIC, the program is in place for "humanitarian reasons to allow refugee claimants, PRRA applicants, protected persons, persons in need of protection, humanitarian classes and others under immigration control to receive essential health care. It is not meant to replace provincial health plans."[72] Currently, persons claiming protection (including refugee claimants deemed eligible to have their claims determined by the RPD, and their in-Canada dependent children), those waiting for PRRAs, those detained by CIC, and those holding temporary residency permits as victims of trafficking are eligible for coverage through the program.[73]

The authority for the program comes from the 1957 Order-in-Council PC 157-11/848. The program was formerly run by Health Canada, but since 1995 it has fallen under the responsibility of CIC.[74] Claims are administered by a private firm, presently Medavie Blue Cross.[75] The program is designed to cover essential health services for the treatment and prevention of serious medical/dental conditions (including immunizations and other vital preventative medical care), essential prescription medications, contraception, prenatal and obstetrical care, and the immigration medical examination.[76]

i. Asylum Seekers

The program primarily covers individuals claiming asylum. However, entitlement to benefits may vary at different stages of an individual's asylum application. When an individual initially makes a refugee claim, they go through a determination process as to their eligibility for a hearing by the RPD. If they are found eligible, the CIC officer determines whether the claimant is unable to pay for private insurance, and if so, a document attesting eligibility for IFHP is

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[72] Citizenship and Immigration Canada, *PP1: Processing Claims for Refugee Protection in Canada*, (Ottawa: Citizenship and Immigration, 2010), online: CIC <www.cic.gc.ca/english/resources/manuals/pp/pp01-eng.pdf> [*PP1*] at 16.14.

[73] *Ibid*.

[74] *Ibid.*

[75] Citizenship and Immigration Canada, *Information Bulletin: The Interim Federal Health Program (IFHP) Transition*, online: CIC <www.cic.gc.ca/english/refugees/outside/ifhp-bulletin.asp>

[76] *PP1*, *supra* note 72 at 16.14.

provided. CIC officers can issue IFHP coverage effective until the eligibility hearing.[77] Once an asylum seeker receives this document, he or she can take it to a doctor or hospital as proof of eligibility for IFHP. The health care provider then bills Medavie Blue Cross.

If the claim is found to be ineligible for determination by the RPD on the basis of criminality or other exclusions, the claimant will be ineligible for the IFHP. However, if an individual expresses fear of return to the home country, he or she may seek a PRRA prior to removal from Canada. If a PRRA is granted, the claimant can apply for IFHP coverage. The coverage continues during a stay of removal pending a PRRA, or a PRRA determination that a person should not be returned.[78] However, unlike the case of asylum seekers, coverage is not automatically granted; the claimant must apply individually and show that he or she is unable to pay for private insurance and is ineligible for publicly funded insurance.[79] If the claimant is eligible, the claimant's in-Canada dependent spouse and children are also eligible.[80]

Where an individual is eligible for an RPD hearing, coverage under the IFHP begins immediately. Where an accepted refugee becomes eligible for provincial health insurance coverage, IFHP benefits extend to cover the "waiting period" that some provinces impose before a person can receive insured services. They will also cover some additional benefits such as emergency dental, vision, and prescription medication coverage if the provinces do not offer these services.[81]

ii. Temporary Residency Permits (TRPs)

Being issued a TRP on the basis that one is deemed a victim of trafficking in persons (VoT) also triggers eligibility for the IFHP. In these cases, additional benefits such as counselling and other specialized medical services are ex-

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[77] Gagnon, *supra* note 9 at 360. Concerns have been expressed that not all officers are issuing these documents.

[78] *PP1*, *supra* note 72 at 16.14

[79] *Ibid*, s 10.1.

[80] *Ibid.*

[81] For asylum-seeking claimants, initially the period of time that the IFHP will run is 12 months but it may be less as determined by the interviewing officer. Claimants may apply to renew the IFHP coverage for additional 12-month periods where claims are still being processed. *Ibid*.

tended as they are considered "urgent and essential".[82] When CIC identifies a potential victim of trafficking, a TRP may be issued for up to 180 days as a "reflection period" and IFHP coverage will be limited to the length of the permit.[83] VoTs must renounce benefits once they qualify for provincial medical coverage.[84] Once the "reflection period" is over, victims of trafficking may apply for a longer-term residency permit that would allow them to regularize their status until they are eligible for permanent residency; however no IFHP coverage seems to attach to this permit. In practice, so few TRPs have been issued for victims of trafficking that their eligibility for long-term IFHP benefits has yet to become an issue of concern.[85]

iii. Other Groups

CIC guidelines only provide explicit coverage under the IFHP for the groups noted above. However, this restriction has no particular basis in law and one could argue that IFHP coverage should extend to all immigrants and temporary migrants excluded from access to provincial health insurance programs. The 1957 Order-in-Council does not specify which groups are to receive benefits through this program – it specifies only that the Department of National Health and Welfare (now Health Canada) "be authorized to pay the costs of medical and dental care, hospitalization, and any expenses incidental thereto" for the following people:

> a) an immigrant, after being arrived at a port of entry and prior to his arrival at destination, or while receiving care and maintenance pending placement in employment, and
>
> b) a person who at any time is subject to Immigration jurisdiction or for whom the Immigration authorities feel responsible and who has been referred for examination and/or treatment by an authorized Immigration officer,
>
> c) in cases where the immigrant or such a person lacks the financial resources to pay these expenses, chargeable to funds

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[82] Citizenship and Immigration Canada, *IP01: Temporary Resident Permits*, online: CIC <www.cic.gc.ca/english/resources/manuals/ip/ip01-eng.pdf> at s 16.5 [*CIC IP01*].

[83] *Ibid.*

[84] *Ibid*.

[85] Robin Pike & Alison Clancey, "BC's Office to Combat Trafficking in Persons" (2009) online: <socialwork.uvic.ca/docs/humantrafficking.ppt> at 20.

> provided annually by Parliament for the Immigration Medical Services of the Department of National Health and Welfare.

Thus, the decision to cover asylum-seekers and not those seeking, for example, humanitarian and compassionate stays,[86] may be subject to challenge. In *Toussaint v Canada (AG)*,[87] Nell Toussaint applied for judicial review of the decision to exclude her from IFHP coverage on the basis of the arbitrariness of the decision. She did not have legal status in Canada, and had developed significant medical issues related to diabetes during her nine-year residency in the country. Given these medical issues, she could not work, and consequently became unable to pay for required medical services In 2008, she was denied a number of medical services due to her inability to pay. [88] One hospital agreed to perform one of the necessary procedures but she was subsequently billed $9,385, which she could not pay. That same year, Ms. Toussaint submitted an application for permanent residency in Canada based on humanitarian and compassionate considerations under section 25 of *IRPA*. She was unable to pay the required $500 charge for the application and requested a waiver of the fee, which she was denied in 2009. In 2009, she was also denied coverage through the Ontario Health Insurance Plan (OHIP) and through the IFHP. She subsequently brought a claim before the Ontario Human Rights Commission regarding the OHIP denial, and sought judicial review of the decisions denying the waiver of the application fees and IFHP coverage.[89]

In *Toussaint,* the applicant challenged the finding by CIC that she did not fit within the categories accepted for IFHP coverage and thus "cannot be approved."[90] She was informed by letter that only "refugee claimants; resettled refugees; persons detained under the *Immigration and Refugee Protection Act* (*IRPA*); and victims of Trafficking in Persons" were eligible for coverage under the IFHP and that she did not fall into any of those categories. She was also

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[86] *IRPA*, *supra* note 42, s 25.

[87] 2010 FC 810, 323 DLR (4th) 338 [*Toussaint*].

[88] In June 2008 she was denied a surgery by the Women's College Hospital to remove uterine fibroids which were causing her pain and in November 2008 she was denied tests for the cause of her kidney disorder by St. Michael's Hospital (*Toussaint*, *ibid* at paras 7-8).

[89] The decision on IFHP coverage (*ibid*) addresses both administrative aspects of the denial of health care to certain migrant categories (dealt with here), and constitutional aspects of the right to health care more generally (dealt with in more detail in the constitutional section below). Toussaint's Ontario human rights case, as it relates to equality provisions, will also be addressed in the constitutional section.

[90] *Toussaint v Canada (AG)*, 2010 FC 926 (Factum of the Applicant at para 81).

informed that she had no active immigration application.[91] Since she had requested and had been denied a waiver of the fee for processing her humanitarian and compassionate application, there were no active files in process with CIC at the time.

Ms. Toussaint argued that the decision requiring her to fall within one of the categories was a mechanical application of the categories without reference to the wording of the Order-in-Council or her particular situation, that the categories unnecessarily fetter the discretion of CIC decision-makers and provide arbitrary boundaries, and that the decision was a misinterpretation of the federal authority to provide benefits under the law, particularly the 1957 Order-in-Council.[92] With respect to the law, she argued that as an individual who has submitted several applications to CIC regarding her status, she qualified as someone "subject to immigration jurisdiction,"[93] under paragraph (b) of the Order-in-Council.

The Federal Court found that although relying solely on the categories put forward by CIC and not on the law was a reviewable error, if the decision-maker had considered the appropriate law, the result would still have been the same. Thus the error was immaterial.[94] With respect to Ms. Toussaint's argument that she was "subject to immigration jurisdiction", Justice Zinn found at paragraph 49 that

> Persons temporarily under the jurisdiction of the Immigration authorities who are not immigrants would be those persons who are passing through a port of entry and thus subject to the jurisdiction of the Immigration authorities, those persons whose status in Canada is being processed by the Immigration authorities, and those persons under detention and in the custody of the Immigration authorities. Persons temporarily under the jurisdiction of the Immigration authorities would also include refugee claimants since refugee claimants are subject to a removal order that is unenforceable pending determination of their eligibility to make a claim, adjudication of that claim, and any subsequent application for judicial review of a negative decision by the Immigration and Refugee Board.

The Court found that she did not fall within any of those categories and that she did not meet the second part of the criteria in paragraph (b), which re-

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[91] *Toussaint*, *supra* note 87 at para 19.

[92] *Ibid* at para 53.

[93] *Ibid* at para 29.

[94] *Ibid* at para 62.

quired that she be "referred for examination and/or treatment by an authorized Immigration officer."[95] Given that Ms. Toussaint's application for humanitarian and compassionate consideration was not in process, the Court found that she was in Canada of her own volition (unlike a refugee or a victim of trafficking), and was without any legal status. The Court dismissed the application for review, upholding the initial decision denying her coverage under the IFHP.[96]

The Federal Court of Appeal upheld the trial court ruling, further clarifying the interpretation of the Order-in-Council.[97] Writing for a unanimous appellate bench, Justice Stratas noted that the appellant was not an immigrant as referred to in the Order since she was neither in transit from the port of entry to her destination nor receiving care "pending employment."[98] He further refined the interpretation of "immigrant" to include only persons seeking permanent residency before or upon arrival in Canada.[99] Thus visitors staying illegally in the country, only attempting to regularize their status after several years, were not found to be the intended beneficiaries of the Program. The Court commented that such a close reading of the Order was warranted, given the Minister of National Health and Welfare's rationale for it at that time.[100] Justice Stratas also

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[95] *Ibid* at para 50.

[96] *Ibid* at para 62.

[97] *Toussaint v Canada (AG)*, 2011 FCA 213 [*Toussaint Appeal*].

[98] *Ibid* at para 35.

[99] *Ibid* at para 24.

[100] *Ibid* at para 27 the Minister is quoted stating:

> THAT on occasion persons are referred for medical and hospital treatment during the time they are thought to be under the jurisdiction of the Immigration authorities but before it is possible to satisfactorily determine their status as immigrants …and because of the urgent nature of the disabling condition, treatment cannot be prudently postponed until their exact status has been completely established.
>
> THAT in other instances persons … who are temporarily under the jurisdiction of the Immigration authorities become urgently in need of medical care or hospital treatment, and at the time it is not humanely possible to defer medical action until the determination of who, if any third party, is financially responsible for such action;
>
> ...
>
> THAT both Departments undertake to administer this authority in such a way as to confine its use to those occasions only when circumstances render it the best course of action in the public interest, and only when humane interests more or less obligate the Departments to accept the responsibility

favoured a restrictive interpretation of the Order because there was no government-funded health insurance for even Canadian residents at the time.[101]

Ultimately the Court's approach is exemplified in paragraphs eight and nine of Justice Stratas comments early in the decision about public reaction to Ms. Toussaint's case:

> If the Federal Court accepted the appellant's request, the curiosity of some might be piqued: even though the appellant has disregarded Canada's immigration laws for the better part of a decade, she would be able to take one of Canada's immigration laws (the Order in Council), get a court to include her by extending the scope of that law, and then benefit from that extension while remaining in Canada contrary to Canada's immigration laws.
>
> But the Federal Court ... did not accept the appellant's request to extend the scope of the Order in Council. It rejected her submissions and dismissed the application for judicial review.

This final determination in *Toussaint* provides some clarity on the issue surrounding eligibility for the IFHP. Had Ms. Toussaint started her humanitarian and compassionate application prior to the dispensation of the case, a different outcome may have been warranted. However, this may be unlikely given the Court's commentary on the nature of the Order. There is still some question regarding the eligibility of those who have applications in progress, but who do not fit within the parameters of the current CIC categories.

However, eligibility for coverage may be only one hurdle for individuals to overcome when accessing insured health services through the IFHP. Studies show that accessing health care through the IFHP poses its own distinct problems and barriers. Anita Gagnon's study, *Responsiveness of the Canadian Health Care System Towards Newcomers,* undertaken in 2002, highlights some of the problems that newcomers face with respect to accessing services using the IFHP. These challenges include lack of willingness or knowledge on the part of health care providers on processing IFHP claims, difficulties in processing claims at the IFHP office, and an absence of dental care (although it is technically covered through the program).[102]

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[101] *Toussaint Appeal*, *supra* note 97 at para 44.

[102] Gagnon, *supra* note 9 at 361. It is unclear whether service providers misunderstood that dental coverage was to be included under the IFHP or whether the issue was with the requirement that the service be related to only "serious" dental issues.

b. Provincial Health Insurance

We will now consider the situation in the three provinces studied. An overview of eligibility can be found in Tables 1, 2, and 3. The three provinces are similar in their coverage of individuals with various immigration statuses. However some differences in criteria do arise, and these divergences can negatively impact particular groups of migrants.

In Ontario (Table 1) public health insurance is legislated through the *Health Insurance Act*.[103] Regulations[104] under the *ON HIA* set out the procedure for becoming an "insured person" who is entitled to access health insurance through OHIP.[105] Individuals access coverage by being deemed a *"resident*" of Ontario, as defined in *ON Regulation* section 1.1(1). People designated as protected persons are considered residents and thus are eligible for coverage, but those still seeking asylum are not.[106] All TFWs with contracts of over six months are eligible, as are their spouses and dependents, as long as they are legally entitled to stay in Canada.[107] "Tourists, transients and visitors are not eligible for OHIP coverage,"[108] including those in Canada on tourist visas after a sponsorship relationship has broken down.

The provision of payment for medical services in Québec (Table 2) is regulated by the *Health Insurance Act*.[109] "Insured persons" are those who are residents or temporary residents of Québec and are duly registered with the *Régie de l'assurance maladie du Québec* (RAMQ).[110] The majority of eligibility issues in Québec are dealt with by regulation.[111] "Residents" are identified in section 5 of the HIA as Canadian citizens, permanent residents, Indians registered under the *Indian Act*, persons with refugee status and other persons iden-

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[103] *Health Insurance Act*, RSO 1990, c H.6 [*ON HIA*].

[104] *General Regulation, Health Insurance Act*, RRO 1990, Reg 552 [*ON Regulation*].

[105] Ontario Ministry of Health and Long Term Care, *Ontario Health Insurance Plan*, online: <www.health.gov.on.ca/en/public/programs/ohip/>.

[106] *ON Regulation*, *supra* note 104 s 1.4(4).

[107] Ontario Ministry of Health and Long Term Care, *Ontario Health Insurance Plan, Questions and Answers*, online: <www.health.gov.on.ca/en/public/programs/ohip/ohipfaq_dt.aspx#4>.

[108] *Ibid.*

[109] *Health Insurance Act*, RSQ c A-29 [*QC HIA*].

[110] *Ibid*, s 1(g.1).

[111] *Regulation respecting eligibility and registration of persons in respect of the Régie de l'assurance maladie du Québec*, c A-29, r 0.01 [*QC Regulation*].

tified in regulations. "Temporary Residents" include foreign nationals who have been employed in Québec for 3 months and whose employment authorization entitles them to work for more than 6 months for a particular employer, SAWP employees, foreign students under official Québec scholarship programs, and any spouse or dependant who is entitled to stay in Canada with a temporary resident who is engaged to be in Canada for more than 6 months.[112]

Insurance for health services in New Brunswick (Table 3) is governed by the *Hospital Services Act* and the *Medical Services Payment Act.*[113] To be entitled to insured hospital or physician services, individuals must establish "residency" in New Brunswick.[114] In both the *MSPA* and *HSA Regulations* "resident" is defined as someone who is legally entitled to remain in Canada and who makes his home and is ordinarily present in New Brunswick, but does not include a tourist, transient or visitor.[115] The term "ordinarily present" is not defined, nor does the New Brunswick legislation lists specific immigration statuses that are entitled to insured services. Instead, immigrants who, in the opinion of the minister or director, will become permanent residents and will establish residency in the province[116] and "visitors ... who have obtained authorization to enter Canada for the purposes of engaging in employment"[117] and their dependents will be entitled to receive insured services.[118]

Table 1: Eligibility for public health insurance in Ontario

Status	**Eligibility**	**Waiting Period**[119]
Permanent Residents	Yes	3 months
Protected Persons		
Refugees	Yes	None
Refugee claimants	No (covered by IFHP)	-

[112] *Ibid*, s 3.

[113] *Hospital Services Act*, RSNB 1973, c H-9 [*HAS*]; *Medical Services Payment Act*, RSNB 1973, c M-7 [*MSPA*].

[114] *General Regulation - Hospital Services Act*, NB Reg 84-167, s 2 [*Gen Reg HSA*]; *General Regulation - Medical Services Payment Act*, NB Reg 84-20, s 3(2) [*Gen Reg MSPA*].

[115] *MSPA*, *supra* note 113 s 1; *Gen Reg HSA*, *ibid.*

[116] *Gen Reg MSPA*, *supra* note 114, s 4(5); *Gen Reg HSA*, *ibid*, s 6(1)(e)(i).

[117] *Gen Reg HSA*, *ibid*, s 6(1)(e)(iii); Gen Reg MSPA, *ibid*, s 2.

[118] *Gen Reg MSPA*, *ibid*; *Gen Reg HSA*, *ibid*, s 6(2).

[119] *ON Regulation*, *supra* note 104, ss 5-6.

Failed claimants, Awaiting PRRA, Moratorium	No (coverage for emergency services through IFHP)	-
Awaiting eligibility determination for hearing	No (potentially covered by IFHP if delay in hearing)	-
TFW		
Live in Caregivers	Yes	3 months (employers required to provide health insurance)[120]
Seasonal Agricultural Workers	Yes	3 months (employers required to provide health insurance)[121]
PPORLLFT	Yes, if holding permit for 6 months or more	3 months (employers required to provide health insurance)[122]
General TFW	Yes, if holding permit for 6 months or more	3 months
Other Statuses		
Temporary Residency Permit Holders (Incl. VoT's)	Yes if inadmissible[123] (VoT's covered by IFHP)	3 months
Tourists (incl. those awaiting sponsorship decisions or after sponsorship breakdown)	No	-
Undocumented	No	-

[120] Human Resources and Skills Development Canada, *Temporary Foreign Worker Program: Changes to the Live-in Caregiver Program*, online: HRSDC <www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/communications/lcpnewchanges.shtml>.

[121] SAWP, *supra* note 56.

[122] *Ibid*; Human Resources and Skills Development Canada, *Pilot Project for Occupations Requiring Lower Levels of Formal Training*, online: HRSDC <www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/lowskill.shtml>.

[123] *ON Regulation*, *supra* note 104, s 1.4(10) states that the term "resident" includes persons: "Having a valid "temporary resident permit" under the *Immigration and Refugee Protection Act* (Canada), if the permit is for a member of an "inadmissible class", with a "case type" of 86, 87, 88, 89, 90, 91, 92, 93, 94 or 95".

Table 2: Eligibility for public health insurance in Québec

Status	Eligibility	Waiting Period[124]
Permanent Residents	Yes	3 months
Protected Persons		
Refugees	Yes	None
Refugee claimants	No (covered by IFHP)	-
Failed claimants, Awaiting PRRA, Moratorium	No (coverage for emergency services through IFHP)	-
Awaiting eligibility determination for hearing	No (potentially covered by IFHP if delay in hearing)	-
Temporary Foreign Workers		
Live in Caregivers	Yes, if holding permit of 6 months or more	3 months (employers require private health insurance)
Seasonal Agricultural Workers	Yes	None
PPORLLFT	Yes, if holding permit of 6 months or more	3 months (employers required to provide health insurance)
General TFW	Yes, if holding permit of 6 months or more	3 months
Other Statuses		
Temporary Residency Permit Holders (Incl. VoT's)	No (potentially covered by IFHP)	-
Tourists (incl. those awaiting sponsorship decisions or after sponsorship breakdown)	No	-
Undocumented	No	-

Table 3: Eligibility for public health insurance in New Brunswick

Status	Eligibility	Waiting Period[125]
Permanent Residents	Yes	none

[124] *QC Regulation*, *supra* note 111, s 4.

[125] *Gen Reg HSA*, *supra* note 107, s 4.1; *Gen Reg MSPA*, *supra* note 107, s 3(1).

Protected Persons		
Refugees	Yes	none
Refugee claimants	No (covered by IFHP)	none
Failed claimants, Awaiting PRRA, Moratorium	No (covered by IFHP)	none
Awaiting eligibility determination for hearing	No (potential coverage through IFHP if delay in hearing)	-
Temporary Foreign Workers		
Live in Caregivers	Yes	3 months (employers required to provide health insurance)
Seasonal Agricultural Workers	Yes	3 months (employers required to provide health insurance)
PPORLLFT	Yes	3 months (employers required to provide health insurance)
General TFW	Yes	3 months
Other Statuses		
Temporary Residency Permit Holders (Incl.VoT)	? (potential coverage through IFHP)	-
Tourists (incl. those awaiting sponsorship decisions or after sponsorship breakdown)	No	-
Undocumented	No	-

As outlined in the tables, permanent residents and refugees are eligible for coverage in all three provinces. In Ontario and Québec, permanent residents are subjected to a three-month waiting period before coverage starts. New Brunswick exempts immigrants from its waiting period requirement. Refugees in all three provinces are exempt from such delays once they have acquired refugee status. Neither Ontario nor Québec covers refugee claimants and the New Brunswick statute only covers individuals who "will establish residency" in New Brunswick. Hence the need for the IFHP, which is designed to cover individuals at this stage of the refugee determination process and to fill these gaps where provincial insurance does not apply.

With respect to TFWs, all three provinces provide coverage for workers, with some stipulations. In Ontario a worker does not need to be specifically attached to an employer in order to receive coverage, as long as an employer attests that the worker is under a contract of employment for at least 6 months. However, this does not apply to LCP workers or SAWP workers. In Québec to receive insurance coverage a TFW must have a permit that designates a specific employer for at least 6 months. Thus "open" work permits that do not specify an employer do not entitle an individual to coverage through RAMQ. LCP workers who complete the requirements of their program and apply for permanent residency[126] are provided with open work permits, as are the spouses of some TFWs and would thus be affected by this gap in coverage. New Brunswick does not stipulate a required length of contract in its eligibility provisions.

With the exception of SAWP workers in Québec, there is a three-month waiting period before coverage begins for TFWs in all three provinces.[127] In order to fill this gap, HRSDC requires that employers of low-skill TFWs, including SAWP workers and those on PPORLLFT, provide medical insurance for their employees until they are eligible for provincial insurance.[128] As of April 1st, 2010, employers of live-in caregivers are also required to provide such insurance.[129] Up until that date, caregivers were particularly vulnerable during these first few months. Private insurance may be purchased during this initial period for those subject to the waiting period but the cost may be prohibitive for many.

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[126] In Ontario these individuals are also covered under the *ON Regulation*, *supra* note 104, s 1.4(5) through being found eligible to make Permanent Residency applications.

[127] The Québec government instituted the waiting period in order to harmonize its procedures with those of neighbouring Ontario and New Brunswick, and to deter "health tourism", though little evidence has been brought that such tourism exists. Some essential services such as services related to pregnancy, emergency services for victims of violence or infectious disease control may be covered during this period, but in general persons are encouraged to purchase private insurance. See Jill Hanley, *Newcomers in Health Care Limbo – Québec Groups Protest*, Canadian Women's Health Network, online: <www.cwhn.ca/en/node/39449>; Régie de l'assurance maladie du Québec, "Arriving in or returning to Québec", online: RAMQ <www.ramq.gouv.qc.ca/en/citoyens/assurancemaladie/arriver/ext_can.shtml>; Oxman-Martinez et al, *supra* note 9.

[128] Human Resources and Skills Development Canada, "Occupations Requiring Lower Levels of Formal Training", online: HRSDC <www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/ei_tfw/orllft_tfw.shtml>.

[129] HRSDC, *Changes to the Live-In Caregive Program*, *supra* note 120.

Tourists are not covered in any province and individuals with TRPs are covered only under specific circumstances.[130] Individuals waiting for determination of their in-Canada spousal application would be entitled to insurance coverage in Ontario[131] but not in the other two provinces. Undocumented persons are in the most vulnerable position, having no coverage[132] and being in the most precarious of immigration positions.

B. Obligation to Treat

As described above, some individuals with precarious immigration status are not entitled to health care insurance coverage through either the federal or provincial government schemes. The question then arises as to whether or not physicians are still required to treat these individuals, despite knowing that they may be unable to pay for services.

There is no overarching legal duty in Canada for physicians in clinics or hospitals to treat patients. However, physician codes of conduct and provisions in provincial legislation point to the existence of duties to treat some people under some circumstances. Additionally, a few court cases on issues of negligence have established some duty on physicians, in specific circumstances, to treat persons, even if they are indigent. This duty can be taken to provide some legal basis for requiring a hospital to treat those in need, including immigrants and undocumented persons who may not be otherwise covered for medical services.

1. Legislation

In the Ontario *Public Hospitals Act*,[133] section 21 states that "[n]othing in this Act requires any hospital to admit as an in-patient, (a) any person who is not a resident … unless by refusal of admission life would thereby be endangered." This provision suggests that such a duty exists,[134] but the obligation is

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[130] *ON Regulation*, *supra* note 104 s 1.4(10). In Québec, s 2 of the *HIA Regulation*, *supra* note 104, creates eligibility for insurance for individuals allocated CIC TRP "codes" 86 to 95 and who have a Québec selection certificate.

[131] *ON Regulation*, *ibid*, s 1.1(b)(5).

[132] *ON Regulation*, *ibid*, s 1.4; *QC Regulation*, *supra* note 111, s 3(1); *MSPA*, *supra* note 113, s 1; *Gen Reg HSA*, *supra* note 114, s 2.

[133] *Public Hospitals Act*, RSO 1990, c P-40.

[134] Anne Walker, "The Legal Duty of Physicians and Hospitals to Provide Emergency Care" (2002) 166:4 Can Med Assoc J 465.

framed as a negative and thus it is unclear what remedies could be taken against a hospital that refuses treatment.

Several legislative provisions in Québec point to a physician's duty to treat a patient, particularly where the person is in life-threatening circumstances. In the Québec *Charter of Human Rights and Freedoms,* there is a civil duty "to rescue."[135] A person entering a health care facility with a life-threatening condition would be entitled to aid under Québec's *Health and Social Services Act.*[136] Québec's *Code of ethics of physicians* also obliges a physician to "come to the assistance of a patient and provide the best possible care when he has reason to believe that the patient presents with a condition that could entail serious consequences if immediate medical attention is not given."[137] Thus, there is a generally accepted understanding that physicians in Québec are under a legal obligation to treat patients with life threatening illnesses.[138] A failure to do so engages physicians' civil liability, and potentially that of the hospital[139] in addition to leaving them open to sanctions under their Code of ethics.

The New Brunswick *Hospital Act* states that a regional health authority cannot refuse to admit someone whose life would be endangered if they didn't receive services.[140] However, if the person's life is not endangered by the refusal, a person can be refused admission if "the hospital services required by the person are not entitled services" under the *NB HA*.[141]

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[135] *Charter of Human Rights and Freedoms*, RSQ c C-12, s 2, provides that "[e]very person must come to the aid of anyone whose life is in peril, either personally or calling for aid, by giving him the necessary and immediate physical assistance, unless it involves danger to himself or a third person, or he has another valid reason."

[136] *An Act Respecting Health and Social Services*, RSQ c S-4.2 s 7 states that "[e]very person whose life or bodily integrity is endangered is entitled to receive the care required by his condition. Every institution shall, where requested, ensure that such care is provided."

[137] *Code of Ethics of Physicians*, RRQ 2011, c M-9, r 17, s 38.

[138] Walker, *supra* note 134 at 467. See also Pauline Lesage-Jarjoura & Suzanne Philips-Nootens, *Éléments de responsabilité civile médicale: Le droit dans le quotidien de la médecine*, 3d ed (Cowansville: YvonBlais, 2007) (the authors discuss Québec case law at 32).

[139] See Lesage-Jarjoura & Philips-Nootens, *ibid.*

[140] *Hospital Act*, SNB 1992, c H-6.1, s 20(1) [*NB HA*].

[141] *Ibid*, s 20(3).

2. Public Health[142]

In Québec, the *Public Health Act* mandates that any health or social services institution having the necessary resources must admit as an emergency patient anyone suffering or likely to be suffering from specifically listed diseases and requires physicians to treat the individual or direct them to another treatment facility.[143] Currently this list only includes tuberculosis.[144] It is thus clear that in Québec someone who is not covered by health insurance should receive medical care for tuberculosis, and in fact physicians are mandated to provide such treatment. Additionally, the physician who "suspects the presence of a threat to the health of the population"[145] must report it to the public health director. It is less clear with regard to those diseases whether a physician is additionally required to treat the individual with the suspected disease.

In Ontario under the *Health Protection and Promotion Act*[146] physicians are required to report if a patient suffers from an infectious disease listed in the regulations[147] and if a patient refuses to continue treatment of the disease.[148] In Ontario this duty to report only applies to patients who are already in the physician's care, whether inside or outside of a hospital, and does not clearly extend to persons who are not yet patients.

Legislation in New Brunswick is similar to that in Ontario in that a physician's duty is only to report the existence of communicable diseases.[149] It appears to be directed more at the protection of the public from persons who do not submit to treatment, and the underlying premise suggests that physicians and hospitals would treat such patients because of the potential danger to the

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[142]In this article we do not discuss inadmissibility to Canada based on health concerns, only access to treatment once someone is already present in the country. Serious equity issues that could be raised in this regard. See eg *Hilewitz v Canada (Minister of Citizenship & Immigration)*, 2005 SCC 57, [2005] 2 SCR 706.

[143]*Public Health Act*, RSQ c S-2.2, ss 83-88.

[144]*Minister's Regulation under the Public Health Act*, RRQ, c S-2.2, r 2, s 9 [*Minister's Regulation*].

[145] *Public Health Act*, *supra* note 136, s 93. The list of diseases that qualify as "a threat to the health of the population" is set out in the *Minister's Regulation*, *ibid*, and changes regularly.

[146]*Health Protection and Promotion Act*, RSO 1990, c H 7.

[147]*Ibid* ss 25-26.

[148]*Ibid* s 34.

[149]*Public Health Act*, SNB 1998, c P-22.4, s 27.

public. However, it is unclear in all three provinces whether an uninsured person could demand treatment for communicable diseases on the basis of public health (other than tuberculosis in Québec).

3. Negligence

While there appear to be no mechanisms to enforce the statutory duty to treat life threatening illnesses or individuals who are a danger to public health, insofar as a statutory duty exists, non-compliance may render physicians or institutions liable under the tort of negligence. Given that the purpose of both the Ontario and Québec public health statutes is to prevent the spread of disease,[150] and considering the duty of physicians under the Canadian Medical Association's (CMA) *Code of Ethics* to "[c]onsider the well-being of society in matters affecting health,"[151] a duty to treat patients could arise in tort. Additionally, because the statutes that mandate these duties are public health-oriented, doctors and institutions could be held liable not only for damage caused to the patient but also to the public at large for any infections that the patient passes on.

There is some common law interpretation of the physician's duty to treat as a branch of negligence, particularly in Ontario. Most frequently, negligence law applies to physicians and hospitals where physicians have misdiagnosed, mistreated or otherwise been derelict in their duties towards patients in their care. However, where a patient is not yet under the care of a specific physician or institution, some relationship must be established for a physician to have a duty to treat that person. A duty to a person would be owed if, in the reasonable contemplation of the physician, acts or omissions on his part would be likely to injure the person.[152] The injury becomes "foreseeable" when the person is at a "particular risk" of being injured more than other members of the public.[153] In the law of negligence this relationship is termed "proximity."[154]

One Canadian case states that a physician on duty in a hospital, who has knowledge that the patient may be suffering from a life-threatening condition,

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[150] *Supra note 146*, s 2; *supra* note 143 s 1.

[151] Canadian Medical Association, "Code of Ethics", online: CMA <policybase.cma.ca/PolicyPDF/PD04-06.pdf> at s 4.

[152] *Donoghue v Stevenson*, [1932] AC 562 HL (Eng).

[153] *Home Office v Dorset Yacht Co Ltd*, [1970] AC 1004 HL (Eng); *Healey v Lakeridge Health Corp*, 2010 ONSC 725, 72 CCLT (3d) 261.

[154] See eg *Cooper v Hobart*, 2001 SCC 79, 206 DLR (4th) 193.

is required to treat the individual.[155] This case does not speak to issues where a patient cannot afford treatment, but does speak to a general duty of physicians to treat persons who are not their patients. Additionally, the issue of whether or not the relationship is "proximate" enough to warrant a duty to treat may be established by some external legislative or administrative duty. The CMA's *Code of Ethics* requires physicians in Canada to "[p]rovide whatever appropriate assistance you can to any person with an urgent need for medical care."[156] Case law seems to suggest that a person who seeks treatment in an emergency room for a life-threatening illness has a sufficiently proximate relationship to the institution to create a duty of care since representatives of that institution would know that the patient exists and that their failure to treat may prove fatal.[157]

It thus seems that hospitals and physicians only become obligated to treat individuals with precarious immigration status who are ineligible for health insurance coverage where failure to do so could result in significant harm or death. In addition, even where an obligation to treat arises, the obligation does not prevent hospitals or physicians from subsequently charging and attempting to collect large sums of money to recoup the costs of services that were not insured. Nell Toussaint was charged over $9,000 for a procedure that would otherwise have been covered through provincial health insurance and there have been reports of other precarious migrants facing similar bills.[158] These costs can far exceed the means of precarious migrants, placing a further burden on an already financially-distressed family.

C. Access to Health Care as a Constitutional Right

There are also constitutional considerations that arise in the context of access to health care. There have been a number of decisions heard under the *Canadian Charter of Rights and Freedoms*[159] discussing potential rights to health care access under both security (section 7)[160] and non-discrimination

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[155] *Egedebo v Windermere District Hospital Assn*, [1991] BCJ No 2381.

[156] S*upra* note 151 at 18.

[157] In Québec see Lesage-Jarjoura & Philips-Nootens, *supra* note 138 at 33; see by analogy Ruderman et al, "On pandemics and the duty to care: whose duty? Who cares" (2006) 7:5 BMC Medical Ethics, online: doi 10.1186/1472-6939-7-5.

[158] Kuile et al, *supra* note 6.

[159] *Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[160] *Toussaint*, *supra* note 87; *Chaoulli*, *infra* note 164; *Gosselin*, *infra* note 163.

(section 15)[161] provisions. In *Toussaint*, Ms. Toussaint argued that both of these protections were applicable to her case, in addition to arguing the administrative issue with respect to the order-in-council discussed above.[162]

1. Section 7 – Life, Liberty and Security of the Person

With respect to the section 7 *Charter* right not to be deprived of life, liberty or security of the person, there has been significant debate on its applicability to health services. The main issue is whether or not section 7 protections can be triggered outside of the criminal sphere, or at least outside of cases in which the "administration of justice" comes into play.[163] In *Chaoulli v Québec*, although divided as to the result, the Supreme Court of Canada found that section 7 protections could apply to health care schemes under particular circumstances.[164] Mr. Chaoulli had argued that those on waiting lists for surgery in Québec were being deprived of their right to security of the person by not being able to purchase private health insurance. Justices McLachlin, Major, and Bastarache found that while there is no "freestanding constitutional right to health care,"[165] in this case "because patients may be denied timely health care for a condition that is clinically significant to their current and future health, s. 7 protection of security of the person is engaged. ... Where lack of timely health care can result in death, s. 7 protection of life itself is engaged."[166]

In *Toussaint* the applicant maintained that her situation violated her section 7 rights. She argued that her inability to afford private health insurance and the subsequent denial of access to the IFHP increased her possibility of life-threatening illness which, as stated in *Chaoulli*, may engage the protections of section 7 of the *Charter.* She argued that the decision to exclude her from coverage was not in accordance with the principles of fundamental justice because the finding of ineligibility was arbitrary. Justice Zinn noted that *Charter* protections apply to all persons physically present in Canada and because deportation proceedings had not been instigated against her, Ms. Toussaint was "physically present" and thus the *Charter* arguments had to be addressed.[167] He

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[161]*Lavoie v Canada*, 2002 SCC 23, [2002] 1 SCR 769 [*Lavoie*].

[162]*Toussaint*, *supra* note 87.

[163]See *Gosselin v Québec (AG)*, 2002 SCC 84, [2002] 4 SCR 429.

[164]*Chaoulli v Québec (AG)*, 2005 SCC 35, [2005] 1 SCR 79 [*Chaoulli*].

[165]*Ibid* at para 104.

[166]*Ibid* at para 123.

[167]*Toussaint*, *supra* note 87 at para 87. It is useful to note that in *Covarrubias v Canada (Minister of Citizenship & Immigration)*, 2006 FCA 365 the applicant argued

agreed that, relying on *Chaoulli,* since Ms. Toussaint was excluded from coverage under the IFHP she faced life-threatening risks due to government action and thus section 7 was engaged.[168]

However, the Court also found that the exclusion of illegal migrants from the IFHP was not arbitrary. Justice Zinn noted that Ms. Toussaint chose her illegal status by staying in the country and that the purpose of the IFHP as documented by ministerial letters and memoranda was to provide health care to "legal migrants." Where the IFHP covers illegal migrants there is a principled reason for doing so, for example in cases of trafficking, because those individuals are in Canada through "deceit and manipulation."[169] Ms. Toussaint was faced with neither of those circumstances and was in Canada of her own volition, hence the decision to exclude her from an existing program was not arbitrary. The violation of section 7 was thus saved by section 1 of the *Charter* as the activity conformed to the principles of fundamental justice.

On appeal,[170] the Federal Court of Appeal agreed with Zinn, J.'s determination of the case, confirming based on several recent cases[171] that the Charter does not confer a freestanding constitutional right to health care. Quoting Justice Linden from *Covarrubias v Canada (Minister of Citizenship and Immigration)*, Justice Stratas framed the appellant's argument as "seeking to expand the law so as to create a new human right to a minimum level of health care" and stated that "The law in Canada has not extended that far."[172] However, the Court also dispensed with Ms. Toussaint's argument on the basis that the IFHP is not the primary provider of health insurance, and thus was not the "operative

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in a PRRA application that he faced a risk to his life if he was deported to his home country where he would not be able to receive sufficient health coverage for end-stage renal failure. The court was clear in finding that lack of health care in one's home country is not sufficient to engage international protections unless the individual is being denied health care for persecutory reasons. The court did not address the s 7 *Charter* arguments in that case, although they were raised.

[168] *Toussaint*, *ibid* at para 91.

[169] *Ibid* at para 93.

[170] *Toussaint Appeal*, *supra* note 97.

[171] *Toussaint Appeal*, *ibid* at para 78 the Court specifically referred to *Auton (Guardian ad litem of) v British Columbia (AG)*, 2004 SCC 78, [2004] 3 SCR 657; *Ali v Canada*, 2008 FCA 190, 173 CRR (2d) 123; *Wynberg v Ontario* (2006), 82 OR (3d) 561 (CA); *Eliopoulos v Ontario* (2006), 82 OR (3d) 321 (CA); *Flora v Ontario Health Insurance Plan*, 2008 ONCA 538, 91 OR (3d) 412.

[172] *Toussaint Appeal*, *ibid* at para 79.

cause of the injury to her life and security of the person."[173] The Court found that if there were an operative cause, it lay in the fact that the provincial law did not go far enough to address Ms. Toussaint's medical needs.[174] The Court also found that even were a section 7 violation to have occurred, the provision of services only to legal migrants is not arbitrary and is in accordance with the principle of fundamental justice.[175]

However, this ruling left open arguments relating to the operation of health insurance schemes distinguishing between different legal migration statuses.

2. Section 15 – Equality

With respect to section 15 of the *Charter*, Chief Justice McLachlin noted in *Chaoulli* that "where the government puts in place a scheme to provide health care, that scheme must comply with the *Charter*."[176] Additionally, in *Lavoie* the Court stated that:

> [I]t is settled law that non-citizens suffer from political marginalization, stereotyping, and historical disadvantage. Indeed, the claimant in *Andrews*, who was himself a trained member of the legal profession, was held to be part of a class "lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated."[177]

In *Lavoie*, the preference for citizens over non-citizens for work in the federal public service was found to be a breach of the equality provisions of section 15, but was ultimately found to be justified as a means of promoting the unifying bond of citizenship.

In her case before the Federal Court, Ms. Toussaint argued that given the existence of the IFHP scheme, her exclusion based on citizenship was discriminatory and affected her disproportionately based on her disability. Justice Zinn found that the IFHP was an established program that was required to be administered in a non-discriminatory fashion in accordance with the *Charter*. However, he found that her disability was not the reason for the exclusion. He also noted that the denial was not based on citizenship, given that several non-citizens participate in the IFHP. Thus he dismissed her argument.

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[173] *Ibid* at para 67.

[174] *Ibid* at para 70.

[175] *Ibid* at para 82.

[176] *Chaoulli*, *supra* note 164 at para 104.

[177] *Lavoie*, *supra* note 161 at para 45.

However, interestingly, Justice Zinn notes in a footnote to the case that:

> The Supreme Court's decision in *Corbiere v. Canada (Minister of Indian & Northern Affairs)*, [1999] 2 S.C.R. 203 (S.C.C.) leaves open the possibility that "immigration status" may be considered an analogous ground in the future. In *Corbiere*, at para. 60, the Court recognized that in analyzing whether a characteristic is an analogous ground "[i]t is also central to the analysis if those defined by the characteristic are lacking in political power, disadvantaged, or vulnerable to becoming disadvantaged or having their interests overlooked." 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.[178]

On appeal, Ms. Toussaint argued that the denial was based on the intersecting grounds of immigration status (as an analogous ground to citizenship) and disability, stating that undocumented persons with disabilities suffer disproportionately because of the application of the Order-in-Council.[179] However, Justice Stratas, focusing on alternative sections of the *Corbiere* judgement, found that immigration status was not an analogous ground given that it is not an immutable characteristic "changeable only at unacceptable cost to personal identity."[180] With respect to the category of undocumented persons specifically, the Court noted that "the government has a real, valid and justified interest in expecting those present in Canada to have a legal right to be in Canada."[181] This finding under section 15 ostensibly closes the door to further equality arguments based on immigration status of all kinds.

While Ms. Toussaint did not seek to challenge the OHIP's failure to provide her with insured services on the basis of a section 15 Charter violation (as potentially suggested by the FCA), she did file a claim with the Ontario Human Rights Tribunal alleging that the denial of OHIP coverage constituted discrimination on the basis of citizenship, in contravention of the *Ontario Human Rights Code*.[182] In this case Ms Toussaint argued specifically that "the ground

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[178] *Toussaint*, *supra* note 87 at para 82 n 3.

[179] *Toussaint Appeal*, *supra* note 97 at para 98.

[180] *Ibid* at para 99.

[181] *Ibid* at para 99.

[182] *Toussaint v Ontario (Minisgter of Health and Long Term Care)*, 2010 HRTO 2102.

of citizenship includes discrimination between any subcategories of non-citizens, including between non-citizens with legal status in Canada and those without."[183] However, the Tribunal found that the distinction in the OHIP between various non-citizens was valid, interpreting the *Ontario Human Rights Code* as only requiring similar treatment of citizens and permanent residents:

> This reflects the principle of permitting preferences for Canadian citizens but recognizing that some non-citizens have a particular attachment to the country. It does not suggest, however, that the government must include all groups of non-citizens in a legal preference once it includes some.[184]

D. International Considerations and Future Directions

In *Toussaint,* Justice Zinn was clear in his reasoning that he finds no international legal right to migration,[185] and that although there may be an international right to health, this does not equate to a right to subsidized healthcare or specific health services,[186] nor is it clear whether or not this right places a positive obligation on states to provide health services to those illegally on its territory.[187] Most importantly, he noted that these various international rights have not been explicitly incorporated into domestic legislation and thus are not Canadian law.[188] On appeal, Justice Stratas' agreement with the Federal Court's finding further solidified the premise that there is no fundamental right to subsidized health care, particularly with respect to undocumented persons. The Federal Court in *Covarrubias v Canada* also found that a lack of health care in one's home country, even if it could result in death, does not bring about an obligation on Canada to halt deportation and to continue to provide health services.[189] However, as noted in *Baker v Canada* and *Suresh v Canada* these

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[183] *Ibid* at para 4.

[184] *Ibid* at para 19.

[185] *Toussaint*, *supra* note 87 at para 88.

[186] *Ibid* at para 67.

[187] *Ibid* at para 67.

[188] *Ibid* at para 63.

[189] *Covarrubias v Canada (Minister of Citizenship & Immigration)*, 2006 FCA 365, [2007] 3 FCR 169.

rights can be used to inform the meaning of provisions of the Canadian Constitution as evidence of principles of fundamental justice.[190]

While The Federal Court of Appeal stated that requiring legal residency as a precursor to health services is in accordance with principles of fundamental justice,[191] the door remains open to extending IFHP benefits to all persons legally on Canadian territory who are seeking permanent residency. There is also a possibility, given Justice Stratas' comments regarding section 7 rights to health care, that *Charter* challenges could be made to provincial health insurance systems for exclusion on the basis of legal immigration status.

Clarification is sorely needed through regulation to make the purpose and scope of the various provincial and federal programs evident. Program officials should ensure that service providers are aware of program components, including coverage and billing issues. Clarification is also needed with regard to the payment of fees for emergency health care administered to indigent precarious migrants without health insurance, since individuals are currently being charged fees after-the-fact. There are currently sufficient disagreements about the role of both provincial health insurance schemes and the IFHP to warrant some reform.

V. Part Two – Workers' Compensation

A. Overview of Workers' Compensation Systems

Workers' compensation systems provide compensation and health coverage for those who are injured at work or who contract an occupational disease. Workers are generally entitled to compensation regardless of fault. Employers pay premiums to the workers' compensation boards in their province and in return workers who are covered under the acts are entitled to compensation, but give up the right to sue employers directly.[192] Benefits and means of accessing benefits vary between provinces but are generally linked to the worker's previous income, as well as the type and seriousness of the injury. Premiums employers pay to the boards to finance the workers' compensation scheme are of-

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[190] *Baker v Canada (Minister of Citizenship & Immigration)*, [1999] 2 SCR 817 at para 70, 174 DLR (4th) 193; *Suresh v Canada (Minister of Citizenship & Immigration)*, 2002 SCC 1 at para 60, 208 DLR (4th) 1.

[191] See 244, below.

[192] See generally Ison, *supra* note 28; Cliche & Gravel, *supra* note 28.

ten linked to the industry's level of risk and the costs of benefits paid out over previous years to employees of the specific employer.[193]

Benefits provided to injured workers may include the provision of health care, wage replacement when someone is unable to work during work disability, access to rehabilitation services if the worker is unable to return to pre-injury employment and compensation for permanent disability. Thus, in addition to providing potential income benefits, workers' compensation schemes may provide an alternative route to health care coverage, even for individuals not entitled to provincial health insurance benefits. In these circumstances, access to health care is facilitated directly through the compensation boards, rather than being paid for by provincial health insurance.

Workers' compensation schemes have covered the cost of health care for injured workers since the early twentieth century, long before the introduction of universal health insurance coverage.[194] There is now concern that some workers' compensation insurers in Canada are actually promoting an increased use of private health care services as a by-pass around the administration of provincial coverage.[195] Hurley and colleagues report that workers covered by Workers' Compensation have been fast-tracked to medical services, sometimes outside Canada, in order to receive quicker treatment, thus reducing the time necessary for them to return to work and thereby reducing the costs of benefits paid. Alberta has adopted this strategy by having recourse to private medical services, [196] but it is less clear to what extent such practices are in place in the jurisdictions studied here.[197] Nonetheless, these developments un-

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[193] *JurisClasseur Québec: Droit du travail*, "Principes de financement", fasc 22, by Line Réginer & Pierre-Michel Lajeunesse.

[194]Lippel, *supra* note 25.

[195]Hurley et al, *supra* note 27.

[196]Bhimji, *supra* note 28.

[197] In Ontario and New Brunswick, Hurley provides illustrations of fast-tracking strategies that include services provided in Board-run rehabilitation centres. For Québec, the recent Camiré report makes recommendations for improving access of workers' compensation claimants in Québec to operating theatres in public hospitals by increasing the financing made available by the CSST to the hospitals for the care of injured workers, and by ensuring that the payments be made outside the current hospital budgets so as to avoid creating competition between CSST patients and those whose costs are covered by the public health system. Groupe de travail chargé de faire des recommandations concernant le régime québécois de santé et de sécurité du travail, *Rapport du président du groupe de travail* (Québec City: CSST, 2010).

derline that understanding coverage under workers' compensation is important in the analysis of access to health care in Canada.

In each case, workers' compensation decision-makers determine eligibility for benefits by asking first: whether the individual who was injured qualifies as a "worker" under the specific legislation; second whether or not the injury arose "out of" and/or "in the course of" employment; and third whether the injury is of the type that is considered to be compensable under the legislation. This article focuses on the first question.

B. Who is a Worker?

While immigration status is not explicitly mentioned in the legislative definitions of "worker" in the three provinces, the answer to this question may depend on specific legislative provisions that include or exclude individuals who are undertaking certain types of employment from the scope of the legislation. For example, in New Brunswick and Québec, domestic workers are excluded from coverage,[198] and thus individuals who are in Canada on the "Live-in Caregiver" visa working in those jurisdictions would not be eligible for workers' compensation.[199] Where the legislation is silent, in some cases policies created by the provincial workers' compensation boards outline different

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[198] In New Brunswick: *Workers' Compensation Act*, SNB c W-13, s 2(3)(d) [*WCA*]; in Québec: *IAOD*, *infra* note 244, s 2.

[199] The Québec Commission des droits de la personne et des droits de la jeunesse ruled that the Québec exclusion violated article 10 of Québec's *Charter of Human Rights and Freedoms* and consequentially recommended that it should be repealed. See Commission des droits de la personne et des droits de la jeunesse, *La Conformité de l'exclusion du domestique et du gardien de la protection automatique de la Loi sur les Accidents du Travail et les Maladies Professionnelles à la Charte des Droits et Libertés de la Personne, COM-540-5.1 (9 décembre 2008)*. The Québec Government tabled legislation, in first reading, in 2010 to address this issue: Bill 110, *An Act to amend the occupational health and safety plan to grant greater protection to certain domestics*, 1st Sess, 39th Leg, Québec, 2010, cls 1-3, 11; the bill has since been withdrawn following a critique by the Commission des droits de la personne et des droits de la jeunesse that the bill in fact perpetuated discrimination by excluding domestic workers who worked fewer than 24 hours a week and by providing fewer rights to domestic workers in the case of reprisals. Tommy Chouinard, "Aides domestiques: Québec retourne à la planche à dessin", *La Presse* (5 November 2010), online : Cyberpresse <www.cyberpresse.ca/actualites/Québec-canada/politiqueQuébecoise/201011/05/01-4339559-aides-domestiques-Québec-retourne-a-la-planche-a-dessin.php>.

types of work or immigration statuses that affect an individual's eligibility for compensation through the schemes.

Lastly, where legislation and policy are both silent on the issue, decisions of the workers' compensation tribunals shed light on who is considered "a worker" on the basis of immigration status. With respect to those with precarious immigration status, our research indicates that, for the most part, coverage is not related to status, with some exceptions. However, individuals who are undocumented are at risk of not being covered under some schemes, and live-in caregivers may also be denied coverage because of the work they do.

1. Legislation in Ontario, Québec and New Brunswick

a. Ontario

Ontario's *Workplace Safety and Insurance Act, 1997*[200] governs the workers' compensation scheme in the province. Only certain employers are required to participate; those not listed in the relevant legislation or policies are not covered.[201] According to the Association of Workers' Compensation Boards of Canada, only 72% of the Ontario workforce is covered under this scheme.[202]

Under the *WSIA*, a worker is defined as "a person who has entered into or is employed under a contract of service or apprenticeship"[203] and works for listed employers.[204] However, the legislation specifically excludes workers who are "of a casual nature and who are employed otherwise than for the purposes of the employer's industry,"[205] and "outworkers,"[206] defined as "persons to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished, repaired or adapted for sale in the person's own home or on other premises not under the control or management of the person

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[200] *Workplace Safety and Insurance Act, 1997*, SO 1997, c 16 [*WSIA*].

[201] *General*, O Reg 175/98, s 3-5.

[202] Association of Workers' Compensation Boards of Canada, *Scope of Coverage, Industries/Occupations*, online: AWCBC <www.awcbc.org/common/assets/assessment/industries_occupations_covered.pdf>.

[203] *WSIA*, *supra* note 200, s 2(1). See generally, Judy Fudge, Eric Tucker & Leah Vosko, *The Legal Concept of Employment: Marginalizing Workers* (Ottawa: Law Commission of Canada, 2002).

[204] *WSIA*, *ibid*, s 11(1).

[205] *Ibid*, s 11(1)(a).

[206] *Ibid*, s 11(1)(b).

who gave out the articles or materials."[207] Some of these considerations may differentially impact persons with precarious immigration statuses, as marginalised workers are disproportionately employed as casual labour or in the informal labour market.[208] The *Dean Report* addresses some of these issues, including within the concept of vulnerable workers in need of protection those working through labour brokers or temporary employment agencies, and the undocumented.[209]

i. Individuals with legal immigration statuses/work authorizations

There is nothing specific in the legislation or policy of the Workers' Safety and Insurance Board (WSIB) indicating whether or not refugee claimants would be covered as "workers" under the *WSIA*. Under prescribed circumstances[210] they are eligible for "open" work permits and there is no reason to believe that a documented worker would be denied eligibility for compensation for a workplace injury. In at least one case adjudicated by the Workers' Compensation Appeal Tribunal a refugee claimant was awarded compensation for a workplace injury.[211]

There is also nothing explicit in policy or legislation regarding eligibility of persons employed under a general TFW permit. Furthermore, given the policy on residency of workers,[212] there is nothing to suggest that a worker author-

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[207] *Ibid.* This topic has been extensively covered in Bernstein, Lippel & Lamarche, *supra* note 30, and does not directly relate to the issue of coverage of different types of precarious migrants under WSIA.

[208] Rachel Cox & Katherine Lippel, "Falling Through the Legal Cracks: The Pitfalls of Using Workers' Compensation Data as Indicators of Work-related Injuries and Illnesses" (2008) 6:2 Policy and Practice in Health and Safety 9.

[209] Expert Advisory Panel on Occupational Health and Safety, *Report and Recommendations to the Minister of Labour* (Toronto: Ontario Ministry of Labour, 2010) [*Dean Report*]. See our discussion, *infra* note 242.

[210] Citizenship and Immigration, *FW1 Foreign Worker Manual*, online: CIC <www.cic.gc.ca/english/resources/manuals/fw/fw01-eng.pdf> at 71.

[211] *Decision No 332/95* (20 September 1996), online: WSIAT <www.wsiat.on.ca>.

[212] Ontario Workplace Safety Insurance Board, *Policy 12-04-12: Non-resident Workers*, online: WSIB <www.wsib.on.ca/wsib/wopm.nsf/Public/120412>.

ized to work for an employer would be excluded if he has established a substantial working connection to Ontario.[213]

WSIB *Policy 12-04-08*: *Foreign Agricultural Workers*[214] is clear that SAWP workers have coverage under WSIA, and they would not be excluded as casuals by the very nature of their status which, as we have seen, presupposes non-casual employment for the duration of the visa.[215] The Policy states that:

> Coverage begins as soon as workers reach the agreed-upon point of departure in their homeland, and remains in place until they return to their country. While travelling in Ontario, these workers are covered when in transit from an airport in Ontario to the employer's premises and/or using a means of transportation authorized by the employer, and following a direct and uninterrupted route to or from the employer's premises.
>
> In addition to coverage while in the course of employment, workers are also covered during periods of leisure, meals, and while sleeping in employer-provided quarters.

Neither the legislation nor policy[216] indicates whether those working under the LCP are eligible for compensation and no cases reported by WSIAT specifically refer to foreign caregivers. However, generally individuals working full time as domestic workers are covered, and given the constraints of the LCP program, all participating individuals are considered to be working full time.

Tourists, including individuals waiting for previously submitted sponsorship applications, are not eligible to work in Canada without further authoriza-

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[213]See for example *Decision No 645/95* (20 September 1995), online: WSIAT <www.wsiat.on.ca>; *Decision No 612/92* (23 October 1992), online: WSIAT <www.wsiat.on.ca>.

[214]Ontario Workplace Safety Insurance Board, *Policy 12-04-08*: *Foreign Agricultural Workers*, online: WSIB <www.wsib.on.ca/en/community/WSIB/230/OPMDetail/24347?vgnextoid=d1d3fcea9bfc7210VgnVCM100000449c710aRCRD>

[215]SAWP, *supra* note 56.

[216]Ontario Workplace Safety Insurance Board, *Policy 12-04-14: Domestic Workers*, online: Workers Safety Insurance Board <www.wsib.on.ca/en/community/WSIB/230/OPMDetail/24347?vgnextoid=d3f3fcea9bfc7210VgnVCM100000449c710aRCRD>.

tion.[217] Thus, unless a tourist obtains work authorization by changing status, she would be considered undocumented.

ii. Undocumented Workers

Interviews collected previously through Bernstein, Lippel, and Lamarche's 2001 study of women and home work indicated that the Ontario WSIB would likely cover undocumented workers using the same criteria applicable to individuals legally entitled to work in Canada.[218] However, there is no specific legal or policy basis for this position.[219] The issue has yet to be fully adjudicated through the WSIAT but there are several legal considerations which, taken together, indicate that it is likely that they would be covered.

First, in several cases compensation has been awarded to individuals who, although currently in possession of work permits or residency status, were considered to be working "illegally" at the time of the injury. In *Decision No. 1895/04*, the worker was involved in several accidents subsequent to the initial injury, but some of the entitlement was based upon the original injury, incurred when he did not have legal status to work in Canada.[220] *Decision No. 665/00* awarded benefits to a worker who sustained a fall while working without a valid permit. He had not filed the claim until several months after the accident, due to both his lack of a work permit and the employer's conduct, and was thus awarded benefits for only part of the time he was disabled, but the benefit was based on an accident occuring during a period in which the worker did not have authorization to be working for that employer.[221]

Three Ontario decisions address the issue of undocumented workers' access to compensation (or their right to sue the employer) but were settled without having to adjudicate the point.[222] The most recent case on the issue, *Deci-*

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[217] *IRPA*, *supra* note 42, s 30.

[218] Bernstein, Lippel & Lamarche, *supra* note 30 at note 116.

[219] It is interesting to note that the *WSIA* explicitly includes coverage for minor workers who have been employed illegally, while sanctioning the employer who has violated rules regarding age requirements: *WSIA*, *supra* note 188, s 73; no other provision has been enacted with regard to other types of "illegalities".

[220] *Decision No 1895/04* (20 December 2004), at paras 11 and 65, online: WSIAT <www.wsiat.on.ca>.

[221] *Decision No 665/00* (17 March 2000), online: WSIAT <www.wsiat.on.ca>.

[222] *Decision No 1648/05I* (3 October 2005), online: WSIAT <www.wsiat.on.ca> was adjourned to allow further submissions on the status of an undocumented worker

sion 1921/06, was decided on other grounds, but made some direct reference to the question of status under WSIA:

> These reasons record Mr. Wolf's interesting argument that Boateng's status as an "illegal" immigrant disqualified him to occupy the status of "worker" under the Act, so that his survivors would be able to maintain their action in the courts. While this position has been raised in other Tribunal cases (see, for example, Tribunal *Decisions No. 42/06I* and *1648/05I*), it has not been adjudicated in terms which would assist this Panel and, as candidly noted by Mr. Wolf during his submissions, he was unable to find any authorities in support of this argument. In fact, the first of those earlier appeals was adjourned to obtain submissions on the "illegal" status argument, and the second to await the result of that earlier decision, but we are advised that both of those appeals were resolved without having to adjudicate on the position raised by Mr. Wolf in this application.[223]

The panel refers to this argument as "interesting," indicating that it is not an obvious assumption that an undocumented worker would automatically be excluded from coverage. A finding that an individual is a "worker" for purposes of the *WSIA* nullifies their right to sue in civil court, so that recognition of coverage in a given case is not necessarily a favourable outcome for the worker or his estate. In *Decision No 1921/06*, a family actually raised the issue of immigration status, seeking to exempt itself from the application of the *WSIA*, in order to maintain its right to sue in court.[224]

Second, policy and case law on residency seem to favour the possibility of finding undocumented individuals to be "workers" under the *WSIA*. *Policy 12-04-12: Non-Resident Workers* states that a "non-resident" worker must have a "substantial connection with Ontario in order to come within the scope of the Act."[225] A person's residency status is not discussed. Several cases have been

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under WSIA but the case was settled without further adjudication. *Decision No 42/06* (14 August 2006), online: WSIAT <www.wsiat.on.ca> did not adjudicate on the issue pending the outcome of *Decision No 1648/05I.*

[223]*Decision No 1921/06* (4 March 2008) at para 93, online: WSIAT <www.wsiat.on.ca>.

[224][2008] OWSIATD No 644 (QL). The WSIAT subsequently confirmed the worker status of the undocumented deceased workers and the corollary prohibition of law suits brought by their dependants in *Decision No 1921/06R* (19 June 2009), online: WSIAT <www.wsiat.on.ca>.

[225]Ontario Workplace Safety Insurance Board, *Policy 12-04-12: Non-Resident Workers*, online: Workers Safety Insurance Board

adjudicated involving US citizens who were required to travel into Canada to work and the injuries occurred while they were in Canada.[226] Panels indicated that where individuals had more than a transitory presence[227] in Ontario and participated in the commercial interests of Ontario,[228] they were to be considered workers. Citizenship or immigration status did not factor into the judgments.

Thirdly, although *Policy 12-01-01: Workers and Independent Operators*, does not refer to the validity of any employment contract as being a factor in determining "worker" status, case law supports a finding that the invalidity of a contract does not necessarily speak to the individual's status as "worker" under the legislation. In *Decision 256-90*, an injured party claimed that because the worker who caused the accident was acting recklessly he negated the contract of employment and was thus not to be considered a worker for purposes of the *WSIA*.[229] This would allow the injured person to sue the driver through civil litigation rather than being bound by the Workers' Compensation System. The tribunal found:

> The cases referred to by Mr. Schneiderman on this point support the proposition that a person who fulfills a contract for service by illegal means is not entitled to the protection of the contract. The definition of "worker" speaks of a contract of service and speaks of a contract "written or oral, express or implied." It seems clear that the definition of worker is intended by the Legislature *to have a very broad meaning*, and certainly, with respect, much broader than Mr. Schneiderman proposes. [emphasis added]

Thus it could be argued that if a person who is not entitled to work in Canada is injured, the fact that their contract may be unenforceable on the basis of illegality may not bear on their status as "worker" under the legislation. In another case, the fact that the worker was working illegally using false papers did not prevent his estate from being compensated after a fatal accident, and the con-

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<www.wsib.on.ca/en/community/WSIB/230/OPMDetail/24347?vgnextoid=d2e3fcea9bfc7210VgnVCM100000449c710aRCRD>

[226]See eg *Decision No 645/95*, *supra* note 201; *Decision No 612/92*, *supra* note 201.

[227]*British Airways v British Columbia (Workers' Compensation Board)* (1985), 17 DLR (4th) 36, 13 Admin LR 78 (BCCA).

[228]*Decision No 645/95*, *supra* note 201 at 7.

[229][1991] OWCATD No 378 (QL).

text of the appeal suggests that compensability problems because of his status were not even at issue.[230]

It is also worth noting that the WSIB has, in at least one case, fully covered medical bills for an individual who was ineligible for provincial health insurance because he was not a "landed immigrant."[231] It was not clear whether this individual was actually undocumented, or was for other reasons unable to receive benefits through the OHIP, but it remains that the coverage was provided where the lack of insurance was based on immigration status.

However, even if it were taken that undocumented workers were technically eligible for workers' compensation benefits, there are still several barriers to these workers actually accessing those benefits. In *Decision 665/00* non-emergency procedures had to be delayed due to the individual's lack of medical insurance, prior to the filing of his workers' compensation claim,[232] and, since lack of treatment may exacerbate conditions, failure to treat symptoms early in the life of the injury could have significant consequences with regard to the amounts and benefits subsequently awarded to the worker.[233] In Ontario, workers' lack of work permits has also been used as evidence to reduce the duration of benefits because they were not able to seek work to mitigate the amount of benefits to be paid. In *Decision 1637/07*[234] the worker had not returned to work since an accident in 1991 and the panel stated:

> The worker was not particularly forthcoming, during his testimony at the hearing, on the question of when his Canadian work permit expired, however he did eventually testify that he has not had a work permit for 7 to 8 years, since approximately 1999 or 2000. I find that the fact that the worker has not had a work permit for several years is very likely a significant reason that the worker has not worked for the past several years, since it would not be possible for him to work legally without a work permit. I am not prepared to conclude that the predominant rea-

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[230] *Decision No 519/91*, [1991] OWCATD No 1038 (QL).

[231] *Decision No 1131/99*, [1999] OWSIATD No 2839 at para 44.

[232] *Supra* note 221 ("Being without medical coverage, the medical staff at the Sunnybrook Health Science Centre, where the worker was treated, saw the need in the early part of 1997, to defer to a later date all medical treatment including the proposed surgeries of a non-emergency nature" at para 9).

[233] In Québec, see *Restaurants McDonald* (21 November 2006), 2006 CanLII 66333, (non-emergency procedures were not administered resulting in exacerbation of the worker's condition, leading the panel to award cost relief to the employer).

[234] [2007] OWSIAT No 1979 (QL).

> son that the worker has not worked since approximately 1999 or 2000 is due to the worker's compensable back strain.[235]

Similarly in *Decision 543/87*,[236] a worker noted that although his work permit had been due to expire shortly after his compensable injury, he had no reason to believe that he would not have been granted an extension had the accident not occurred. However, the panel took into account that "the worker did not apparently seek a renewal of his work permit until February 1985" as a factor in determining that the worker had not sufficiently pursued work that may have been available to him.[237] Similar limitations in benefits ensued when an injured agricultural worker returned to his home country. Although his claim was accepted, it was found that his earning ability was reduced because of the labour market in Jamaica and that if he had stayed in Ontario, he would have been capable of earning minimum wage after his employment injury.[238]

In *Decision No 42/06*[239] the worker had been granted loss-of-income benefits after an accident, even though she was working illegally at the time, but these benefits became time-limited because the Claims Adjuster in the case believed that had she been able to participate in Labour Market Reentry training, she would have been able to earn as much or more than her pre-accident earnings. It was argued that her lack of work authorization prevented her from engaging in training and hence she was no longer entitled to the income replacement benefits. While the Appeals Tribunal found that the worker was totally disabled and thus unable to return to work at all, thereby dispensing with the need to adjudicate on the Labour Market Reentry issue, this could be a potential barrier for undocumented individuals working in Canada.

Furthermore a number of cases point to individual's fear of reporting injuries due to their lack of work authorization. Where such claims are not made immediately, it has been difficult for them to prove the initial injury later if the condition worsens, if the individual gets residency and wishes to claim retroactively, or if a second accident occurs that exacerbates the harm caused by the initial injury. For example, in *Decision No 332/95* a worker's previous unreported injury was found irrelevant to the compensable injury, partly because no evidence could be appropriately brought forward about the initial inci-

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[235] *Ibid* at para 81.

[236] (10 September 1987) at 3, online: WSIAT <www.wsiat.on.ca>.

[237] *Ibid* at 4 (The panel assumed some responsibility on the part of the worker to mitigate his or her losses through seeking alternative work).

[238] *Decision No 334/03*, [2003] ONWSIAT 2383.

[239] (14 August 2006) at para 5, online: WSIAT <www.wsiat.on.ca>.

dent.[240] In *Decision No 1895/04* a worker was awarded compensation for an injury, not initially reported, that occurred when he had been working illegally.[241] However, given the lack of documentary evidence available because of the delayed claim, he received benefits for only one of the related medical issues and not for all of the issues claimed in relation to the accident.

A recent development of note in Ontario is the *Dean Report*,[242] that addresses issues related to the better protection of "vulnerable workers," a concept that includes recent immigrants, foreign workers hired to address temporary or seasonal shortages, as well as undocumented workers.[243] While the primary focus of the report is the protection of workers' health before they are injured, recommendation 48 addresses the need for better training of vulnerable workers regarding rights under both occupational health and safety and workers' compensation legislation. If any doubt remained as to coverage of undocumented and precarious migrants under *WSIA*, this report provides further reason to conclude that no category of precarious migrants in Ontario are excluded from coverage because of their migrant status, as long as they meet all the other requirements. This said, the pragmatic obstacles identified, as corroborated in part by the *Dean Report* with regard to fear of reprisals, still need to be addressed.

b. Québec

Québec's workers' compensation system is governed by the *Act Respecting Industrial Accidents and Occupational Diseases*.[244] It defines "worker" similarly to the other jurisdictions as "a natural person who does work for an employer for remuneration under a contract of employment or of apprenticeship."[245] In general, if an individual is entitled to work in Québec and works under a "contract of employment", she would be eligible for compensation if she suffers a workplace injury. The vast majority of workers in Québec are covered under the legislation, as only those who are explicitly excluded do not have coverage.[246] The legislation does not directly distinguish between coverage for various immigration statuses, although individuals working on the LCP

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[240][1996] OWCATD No 997 at para 11.

[241]*Supra* note 220 at para 11.

[242]*Report of the Expert Advisory Panel*, *supra* note 209.

[243]*Ibid* at 7 and 46.

[244]RSQ c A-3.001 [*IAOD*].

[245]*Ibid*, s 2.

[246]Cox & Lippel, *supra* note 208.

are excluded from coverage, as domestic workers are excluded from the definition of "worker." Most case law also points to the exclusion of undocumented workers from coverage.[247]

i. Individuals with legal immigration statuses/work authorizations

Asylum seekers would be eligible for workers' compensation coverage provided they have appropriate work authorizations. TFWs in possession of appropriate work authorizations would also be eligible for benefits under the *IAOD*,[248] although in one case an injured worker was found to have provided someone else's SAWP permit and was held to be ineligible for benefits given that the tribunal could not ascertain his identity.[249] In the *IAOD* there are some restrictions on the eligibility of individuals undertaking specific types of work and thus some TFWs would be affected. As we have seen, section 2 of the *IAOD* currently excludes "domestics" from the definition of "worker."[250] Individuals participating in the LCP would fall under the definition of "domestic" and are thus not eligible for coverage unless they register with the CSST and

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[247]For a detailed analysis and rebuttal of the reasoning behind exclusion of undocumented workers from legal protection under Québec labour law see Bernstein, *supra* note 32.

[248]A worker residing in Québec and working with a temporary work permit was held to be eligible for benefits even though the accident occurred outside Québec in *La Compagnie Marie Chouinard*, 2009 QCCLP 7319, confirmed in review at *La Compagnie Marie Chouinard*, 2010 QCCLP 7620. It is noteworthy that the CSST's objection to this interpretation of the legislation led them to file a petition for judicial review, which was denied. The position of the CSST was that only Canadian citizens and permanent residents can be considered to be "domiciled" in Québec. The CLP did not retain this restrictive interpretation of the *IAOD*. Workers under the SAWP are covered, and, like all seasonal workers in Québec, are subject to specific rules regarding calculation of benefits: *Sanchez-Castillo*, 2009 QCCLP 2485.

[249]*Château Taillefer Lafon*, 2009 QCCLP 2049, request for review rejected: *Château Taillefer Lafon*, 2010 QCCLP 678, online: CLP <www.clp.gouv.qc.ca>. It is of note that the initial decision refused compensation because it was impossible to confirm the identity of the person injured. In the review decision the CLP confirms that the person injured was indeed the person named in the permit, but refuses to overturn the initial decision as the worker failed to appear at the initial hearing without reasonable grounds that could justify his absence.

[250]*IAOD*, *supra* note 244.

agree to pay the contribution of their employer.[251] Considering the cost of premiums, there are few domestics who make this choice. In 2003, only thirteen domestics were insured under the program.[252] It is also of concern that if those working under the LCP become injured and are unable to continue work, there may be consequences for their eligibility for permanent residence.[253] The exclusion of domestic workers from the purview of the *IAOD* was deemed discriminatory on the basis of sex, ethnicity, race and social condition by the Commission des droits de la personne in December 2008,[254] and legislation to address the exclusion of these workers was tabled and then withdrawn in 2010.[255]

Students, TRP holders, and children of precarious status migrants would be eligible for workers' compensation coverage provided that they have work permits. Students are considered workers, including those undergoing a "training period" at their educational institution.[256] Tourists would not be eligible for work permits and thus would be considered "undocumented," including those individuals who remain in Canada in anticipation of a sponsorship determination or after sponsorship breakdown.

Aside from the legal rules governing coverage under the *IAOD*, it is also important to acknowledge difficulties in access to compensation for workers with precarious immigration status by reason of their situations. Those included in the concept of worker may nonetheless see their claims denied or recognition of their employment injury delayed because they: failed to consult a physician in a timely manner;[257] filed beyond the 6 month deadline for claim-

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[251] *Ibid*, s 18; *Boyer* (17 August 2000), online: CLP <www.clp.gouv.qc.ca>.

[252] Katherine Lippel, "La protection défaillante de la santé des travailleurs autonomes et des sous-traitants en droit québécois de la santé au travail" (2004) 3:2 Santé, Société, et Solidarité 101.

[253] Commission des droits de la personne, *supra* note 187 at 51. However, this risk is somewhat diminished with the introduction of the "Juana Tejada" law in April 2010 that exempts LCP workers from the medical exam when they apply for permanent residency, recognizing that they passed an exam for their initial work visa: Citizenship and Immigration Canada, "Operational Bulletin 232: Live-In Caregiver Program: Revised In-Canada Medical Examination Procedures", online: CIC <www.cic.gc.ca/english/resources/manuals/bulletins/2010/ob232.asp>.

[254] Commission des droits de la personne et des droits de la jeunesse, *supra* note 187.

[255] *Ibid*.

[256] *IAOD*, *supra* note 244, s 10.

[257] *Demba* (17 October 2005), online: CLP <www.clp.gouv.qc.ca>. In another case the worker could not pay for treatment, which led to a longer duration of his work dis-

ing;[258] have returned to their country of origin and are therefore unavailable for medical evaluation by a designated doctor in Québec;[259] are unable to participate in rehabilitation programs;[260] or are unable to testify in support of their claim in appeal.[261] They may also lose the opportunity to renew their work permits by reason of their temporary disability, thus placing them in an even more precarious situation.[262]

ii. Undocumented Workers

Up until recently, case law in Québec has tended towards the exclusion of undocumented workers from eligibility for coverage under the *IAOD*. Tribu-

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ability. The employer in *Restaurants McDonald*, *supra* note 221, obtained cost relief (partial transfer of costs of the claim to the general fund) because the delay in consultation by the worker increased the cost of the claim which was seen to be unfair to the employer.

[258] *Gouriev* (18 February 1999), online: CLP <www.clp.gouv.qc.ca>. Even if workers invoke language difficulties, this has sometimes been refused as a reason for late contestations: *Chatrenur et Grafikom*, 2007 QCCLP 869. By contrast, English-speaking workers have successfully invoked language difficulties to justify their failure to respect deadlines: *Jones et Pratt & Whitney* (14 July, 1999), online: CLP <www.clp.gouv.qc.ca>.

[259] The employer had asked the CSST to disallow the worker's claim for benefits for this reason after he returned to his country following the expiry of his visa but the CLP found in favour of the worker in *9008-1951 Québec Inc*, 2010 QCCLP 3664.

[260] The CLP suspended the benefits of an injured worker who could not be assigned light work because his work permit had expired since his accident, a situation found to adversely impact the employer: *Kharrat*, 2010 QCCLP 408. Benefits that would normally be payable during the period when the worker was seeking new work after an accident had been denied because the worker, who was injured while on the SAWP, didn't have a work permit during the period he was unable to work: *Olvera-Rivera* (5 October 2006) at 34, online: CLP <www.clp.gouv.qc.ca>.

[261] *St-Clair* (9 March 2004), online: CLP <www.clp.gouv.qc.ca>. In this case the Tribunal also found that the medical evaluations provided by the worker, submitted by doctors in the country of origin, were insufficient to support his claim. See however *Del Rio*, 2010 QCCLP 4073 [*Del Rio No 1*]; petition for new hearing granted: *Del Rio*, 2010 QCCLP 5820 [*Del Rio No 2*]. Request for a second review filed on the 22nd of August 2011: (CLP), 384378-71-0907-R2. The worker had been deported and was unable to attend the hearing, and this was held to be a valid reason to reconsider the *ex parte* decision of the CLP.

[262] *Olvera-Rivera*, *supra* note 260; *9008-1951 Québec*, *supra* note 259.

nals have almost unanimously rejected claims from undocumented workers[263] or confirmed that lack of a work permit justified the suspension of benefits,[264] on the basis of public order. Adjudicators conclude that workers without valid work permits cannot be considered "workers" for the purposes of the *IAOD* because employment contracts made with such individuals are in contravention of *IRPA* and thus invalid because they are against "public order."[265]

It is important to note that these cases primarily focused on individuals legally-entitled to reside in Canada but lacking work authorization. For example, in *Castillo*[266] and *Berisha*,[267] the individuals were waiting to receive renewed work permits when their injuries occurred. Both had been consistently in possession of work authorization until longer-than-normal administration delays led to their inability to promptly receive their renewals. In the *Gouriev*[268] and *Amira*[269] cases both workers' claims were initially accepted by the CSST but their compensation was withdrawn when their lack of work authorization was brought to light.[270] In all of these cases, claims were rejected because those with invalid contracts could not be considered "workers."

In 2006, *Henriquez et Aliments Mello*,[271] was decided in favour of an undocumented worker; however, several subsequent cases[272] failed to follow the rea-

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[263]See *Laur et Verger Jean-Marie Tardif Inc*, [1992] CALP 510; *Boulaajoul et Ferme M.S. Nadon Enr*, [1994] CALP 1540; *Zogaj et CSST* (14 June, 1999); *Castillo* (11 September, 2003); *Berisha* (25 May, 2004), online: CLP <www.clp.gouv.qc.ca>. See also *Salomon-Herrada*, 2008 QCCLP 4474; *Garcia et Services d'Entretien Advance Inc*, 2010 QCCLP 2995 (overturned on review at *Garcia et Services d'Entretien Advance inc*, *infra* note 282); *Del Rio No 1*, *supra* note 261, petition for new hearing granted, hearing pending: *Del Rio No 2*, supra note 261.

[264]*Kharrat*, *supra* note 260.

[265]*Salomon-Herrada*, *supra* note 263.

[266]*Sanchez-Castillo*, *supra* note 248.

[267]*Berisha*, *supra* note 263. *See also Garcia*, *supra* note 263, where the application for renewal of the work permit was pending at the time of the accident, awaiting payment of the application fees.

[268]*Gouriev*, *supra* note 258.

[269]*Amira* (21 October, 2005), 2005 CanLII 74821, online: CLP <www.clp.gouv.qc.ca>.

[270]In *Amira*, *ibid*, the CSST appears to have initiated the inquiry as to the validity of the work permit at the time of the accident.

[271](27 March, 2006), online: CLP <www.clp.gouv.qc.ca> [*Henriquez*].

[272]See two *ex parte* decisions rendered in the absence of the worker. *Salomon-Herrada*, *supra* note 263; *Del Rio No 1*, *supra* note 261 petition for new hearing

soning in that case. In *Henriquez*, the applicant was a refugee claimant but was not in possession of a work permit at the time of his injury. His employer had asked only for his social insurance number and had said that it was all he needed to fill in the paperwork necessary for employment. At the time of his injury, Mr. Henriquez had only been in Canada for a few months and his knowledge of the French language, as well as the laws of Canada and Québec, was limited; neither his employer nor his co-workers had mentioned his need for a work permit. After considering the specifics of the case and the applicant's argument based on *Still*,[273] which had similar facts to *Henriquez* but involved employment insurance rather than workers' compensation, the Tribunal found that Mr. Henriquez did, in fact, qualify as a worker. The Commission des lésions professionnelles (CLP) applied a less restrictive approach in *Henriquez*, than in the previous cases on this issue heard by the CLP and the CALP, concluding that the invalidity of a clause on the basis of public order does not necessarily nullify the entire contract.[274] The Commissioner also noted the importance of the worker's good faith.[275]

The Commissioner also compared the objectives of the *IRPA* and those of the *IAOD*, emphasizing that the *IAOD* is to be interpreted broadly, so that it may be applied to the greatest number of situations. The Commissioner found that, in light of the objectives of the *IRPA*, it would be unfair to punish recently immigrated workers in good faith who do not intend to defraud the Canadian government[276] and that rulings in this vein would, in fact, undermine the public interest rather than uphold it.[277]

Other types of "illegality," like undertaking construction work without a permit, or working "under the table,"[278] have not been held to invalidate the work contract. On the contrary, the Tribunal has held that renunciation by a

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granted, hearing pending: *Del Rio No 2*, *supra* note 261. The *Garcia* case, *supra* note 263, which also failed to apply *Henriquez*, was overturned in review, *infra* note 282.

[273] *Still v Minister of National Revenue* (1997), [1998] 1 FC 549, 154 DLR (4th) 229 (CA).

[274] *Henriquez*, *supra* note 272 at paras 88-90.

[275] *Ibid* at paras 90, 122-128.

[276] *Ibid* at para 135.

[277] *Ibid* at paras 144-148.

[278] See eg *Équipement location Masson-Viau* (2 March 2006), 2006 CanLII 68644 (QC CLP); *Larouche-Harvey* (18 April 2005); *Boudreau* (31 March 2000), online: CLP <www.clp.gouv.qc.ca>.

worker of his rights under the *IAOD* would be contrary to public order.[279] However, unlike the authorities in Ontario, the CSST and the CLP are generally restrictive in their interpretation of the concept of "worker" when it comes to undocumented workers.[280]

Even more disturbing than the restrictive approach of the CLP with regard to injuries sustained by undocumented workers is the case of *Kharrat*.[281] Mouadh Ben Abde Kharrat's work permit was valid when he was injured at work, so it was not possible to allege that he was not a "worker" under the *IAOD* and his claim was accepted. However, Mr. Kharrat's work permit expired the day after the accident. At the request of the employer, the CSST retroactively suspended Mr. Kharrat's benefits to the date the worker ceased doing his temporary assignment, invoking Mr. Kharrat's inability to legally complete the light work assigned to him under temporary assignment provisions. The CLP held that Mr. Kharrat's negligence in failing to apply for work permit renewal in a timely manner was equivalent to refusal to perform the duties that he had temporarily been assigned. It judged that the failure of the worker to renew his permit unfairly penalized the employer, who could not reduce his premiums by assigning light work to the worker, given the expiry of the permit. This case opens the door to a whole new category of denials targeting those who have been working legally but whose permits are not renewed subsequent to an accident.

However, the CLP may recently have taken a new direction, addressing the issue of undocumented workers with a fresh eye, while reiterating the importance of the *Henriquez* decision. In *Rodas Garcia et Services d'entretien Advance inc*,[282] the CLP reviewed an earlier decision denying compensation to a worker, who, believing that his newly-acquired citizenship absolved him of the obligation to renew his work permit, had failed to pay renewal fees. The petition for review was granted and the claimant's status as a worker was recognized. Three key points were made in the *Garcia Review*. First, most of the tribunal decisions declaring contracts of undocumented workers to be null and void were based on the old *Civil Code of Lower Canada*, which was repealed in 1993. Subsequent cases followed old case law without questioning the im-

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[279] *Bellemare* (11 June 2001), online: CLP <www.clp.gouv.qc.ca>.

[280] For an analysis of the usual interpretative approach of the CLP see K Lippel, "L'interprétation libérale des lois sociales: une pratique révolue?", in Stéphane Beaulac & Mathieu Devinat, eds, *Interpretatio non cessat : mélanges en l'honneur de/Essays in honour of Pierre-André Côté*, (Cowansville: Yvon Blais, 2011) 201.

[281] *Kharrat*, *supra* note 264.

[282] 2011 QCCLP 1350 [*Garcia Review*].

pact of the new *Civil Code of Québec* provisions that provide that a contract is valid until it is declared invalid – an issue that was underlined in *Henriquez* as justification for acceptance of the claim. No declaration having been made prior to the accident in the case of Mr. Garcia, or in any of the preceding cases, for that matter, the contract was held to be valid at the time of the accident. The decision in review also held that the first decision-maker had made an error in law when equating negligence with bad faith, an error that justified intervention in internal review, an exceptional procedure. Finally, the reviewing judge reiterated a quotation of Ontario jurisprudence found in *Henriquez*, that the denial of coverage of undocumented workers is bad public policy:

> Indeed, to deny the protections of the Act to employees who are not Canadian citizens or permanent residents would not only make them vulnerable to exploitation, but would, in effect, do far more to undermine those very provisions of the Immigration Act the Applicant is so concerned about, as it would make such persons the employees of choice for unscrupulous employers.[283]

The *Garcia Review* may well be a turning point in the bleak history of the application of workers' compensation legislation to undocumented workers in Québec. If *Henriquez* and *Garcia* are followed by the CSST and CLP, it could put an end to the current incentive to employers to employ and exploit the most vulnerable migrants.[284]

c. New Brunswick

There are two parts to the New Brunswick *Workers' Compensation Act.*[285] The first deals with "personal injury or death ... caused to a worker by accident arising out of and in the course of his employment in an industry within the scope of this Part."[286] The vast majority of industries and workers are covered by this part. The second Part deals with industries that are not covered in Part I and only covers cases in which the accident resulted from employer negligence

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[283]*Garcia Review*, *ibid* at para 39, quoting *Henriquez*, *supra* note 272 at para 147. *Henriquez* was in turn quoting *Apollo Real Estate (Re)*, [1994] OESAD No 28 (QL).

[284]In a recent CLP decision, the tribunal concluded the claimant, whose work permit had expired at the time of the accident, was a worker under the *IAOD*, following the reasoning in *Henriquez* : *Augustin et Résidence Rive-Soleil inc*, 2011 QCCLP 5413.

[285]*WCA*, *supra* note 198.

[286]*Ibid*, s 7(1).

or faulty equipment. Statistics from 2008 indicate that approximately 94% of New Brunswick's workforce is covered by the *WCA*.[287]

The definition of "worker" in Part I of the *WCA* is "a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise."[288] New Brunswick's *WCA* also excludes "persons whose employment is of a casual nature and otherwise than for the purposes of the industry"[289] and outworkers,[290] similar to Ontario. However, unlike the Ontario legislation, *WCA* Part I also specifically excludes "persons employed as domestic servants."[291] *Regulation 82-70* under the *WCA* also excludes "any [workplace] ... unless it has throughout its operations in the year at least three workers at the same time usually employed therein,"[292] as well as all undertakings in the fishing industry, unless there are twenty-five or more workers usually employed at the same time.[293]

Part II of the *WCA* applies to industries not covered in Part I, presumably referring to those industries in which less than three employees are usually employed, but still excludes "farm labourers, domestic or menial servants, or their employers or fishermen."[294] Benefits under this part are provided only where there is some fault attributable to the employer or the equipment used.

Since there is very little case law interpreting the relevant provisions of the *WCA*, it is difficult to determine whether or not immigration status plays a role in the determination of coverage under the *WCA*. In general, *Policy 21-010* notes at section 2.6 that

> An individual is considered a worker under the *WC Act*, provided the employer is assessed, or should be assessed. It is not necessary for the individual to work in New Brunswick at all times, since the *WC Act* does not prescribe a minimum time requirement regarding the amount of work that must be performed in New Brunswick.

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[287] *Association of Workers Compensation Boards of Canada*, *supra* note 202.

[288] *WCA*, *supra* note 198, s 1.

[289] *Ibid*, s 2(3)(a).

[290] *Ibid*, s 2(3)(b).

[291] *Ibid*, s 2(3)(d).

[292] *Exclusion of Workers Regulation*, NB Reg 82-79, s 3(1).

[293] *Ibid*, s 3(2).

[294] *WCA*, *supra* note 198, s 86.

It is not clear whether a worker's place of habitual residency, immigration status, and nationality are factors in determining coverage under the *WCA*.

i. Individuals with legal immigration statuses/work authorizations

There is nothing in the New Brunswick legislation that specifically excludes or includes asylum seekers from compensation under the *WCA*: their rights are the same as other workers, provided they have work authorisation. Nor does the legislation specifically address TFWs. However, there may be issues related to the type of work engaged in by SAWP workers. Part II of the *WCA* states that it is applicable to industries not covered in Part I but does not apply to "farm labourers, domestic or menial servants, or their employers or fishermen."[295] The implication is that these industries are not covered by Part I and are excluded from the limited coverage available under Part II. However, farm labourers are not explicitly listed as excluded under Part I, and WHSIAT has awarded a number of farm labourers benefits under the Act.[296]

While farm labourers appear to be covered by the general part of the *WCA*, domestic workers would be ineligible for benefits in New Brunswick based on the type of work performed, rather than their immigration status. Students' eligibility for coverage similarly depends on their work authorization and the type of work engaged in, but nothing specifically excludes students based on immigration status. Tourists, including visitors awaiting sponsorship decisions, are not entitled to work and are therefore considered undocumented.

ii. Undocumented Workers

There are no cases addressing the coverage of undocumented workers under the *WCA*. *Policy 21-010* does not refer to the validity of employment contracts as being a factor in determining "worker" status, nor does it discuss a worker's status under other statutes. However, in *Decision No 20053860*, the appellant argued that, since he was a young boy and had been hired to undertake work contrary to Employment Standards legislation, his contract was void and his right to sue was not taken away; the panel stated:

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[295] *Ibid*, s 86.

[296] *Decision No 20085107* (3 November 2008), online: NB WHSCC <www.worksafenb.ca/docs/app/20085107.pdf>; *Decision No 20054048* (4 October 2005), online: NB WHSCC <www.worksafenb.ca/docs/app/20054048.pdf>.

> In effect, the violation by an employer of a provision in legislation to protect workers would void the whole of the protection scheme for workers intended under the workers' compensation legislation. This is particularly harsh considering that the consequence of not following the particular provisions does not, by the legislation creating it, render the employment contract illegal or void. ... Since neither the Act nor the ES Act provide that a violation of the ES Act voids an employment of a person under the age of 16, and given the intent of the legislated scheme under the Act as previously stated, the Appeals Tribunal cannot, in its view, conclude that this would have been the result intended by the Legislative Assembly of New Brunswick or indeed that it should be in the public interest to do so.[297]

While this case specifically refers to a breach of employment standards legislation, it stands generally for the proposition that, unlike in Québec, a person should not be excluded from worker status under the *WCA* by virtue of a breach of other statutory conditions governing the employment relationship. Were the issue to come before the Workplace Health, Safety and Compensation Commission Appeal Tribunal, this proposition could support a finding that a lack of authorization to work under the *IRPA* would not necessarily be relevant to a finding that an individual is a "worker" under the *WCA*.

Conclusion

Access to health care is key to the well-being of people in Canada, be they migrants with precarious immigration status or Canadian citizens. This paper has shown that access to medical services is unequal, varying between provinces and according to immigration status, and, at times, appears to be arbitrary. The obligation to treat, particularly in non-life threatening situations, is not codified or consistently applied. Furthermore, existing provisions governing public health place more emphasis on the protection of the public than on the necessity to treat individuals who are ill. Some studies have suggested that economic consequences of accessing uninsured services may expose patients to crippling debt that further compromises their ability to fully participate in Canadian society.[298] Additionally, in some cases, there may be systemic challenges that disproportionately affect women, as in the case of failed sponsor-

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[297] *Decision No 20053860* (2 May 2005), at 9, online: NB WHSCC <www.worksafenb.ca/docs/app/20053860.pdf>.

[298] See Kuile et al, *supra* note 6. The next steps in our study will allow us to explore the extent to which this is a reality in Québec.

ship of spouses or the exclusion of domestic workers from workers' compensation legislation in Québec and New Brunswick.

The provincial health insurance schemes focus far more closely on immigration and residency status than the workers' compensation schemes. However, in some cases, lack of access to health care through health insurance can jeopardize workers' compensation coverage, particularly if the worker fails to seek or follow up on treatment. Our results also show that access to health care is available sooner through workers' compensation programs than through the universal health care system, as there is no three-month hiatus preceding the right to access services where a work injury is involved.

Protection of undocumented individuals is of particular concern with respect to health insurance and workers' compensation coverage. In all provinces, provincial health insurance schemes specifically deny coverage to those without legal immigration status. Additionally, in most cases in Québec, at least until recently, working in contravention on the *IRPA* automatically lead to the conclusion that the work contract is contrary to the "public order", which leads to denial of the claim on the basis of the nullity of the work contract. Exclusion of these workers from the purview of the Québec workers' compensation legislation appears to be discriminatory, given that other types of "illegal" contracts do not preclude workers from accessing benefits. To date, no judgments have considered the discriminatory nature of the restrictive interpretation of the workers' compensation Act, the *IAOD*. Two very recent decisions found that workers whose permit had expired should benefit from coverage, but it is too early to conclude that the institutional approach to these cases has changed. Two Québec decisions recognizing coverage of undocumented workers reflect on the consequences of excluding workers from the purview of the *IAOD* and underline the fact that employers, who benefit from the labour of these undocumented workers, are protected from the economic consequences of workplace injury, which is often attributable to working conditions. Much of the jurisprudence in Québec provides clear incentive to employers to hire undocumented workers, as they are more easily and cheaply disposed of if they are injured. However, it is also possible that workers thus excluded may rely on the *CCQ* to launch proceedings under general rules of civil liability, as the exclusionary rules of the *IAOD* would be inapplicable. In Ontario and New Brunswick, violation of immigration law has not been taken as an automatic bar to compensation. The recent *Dean Report* acknowledges

that undocumented workers constitute a particularly vulnerable population in need of better protection and information concerning their rights.[299]

Canadian studies have shown that immigrant workers confront a variety of obstacles when exercising their rights to compensation[300] and their work situations may expose them to increased risk of workplace injury.[301] Studies conducted in other countries have found that migrant workers, particularly those with precarious immigration status, are exposed to increased hazards and difficulties in accessing social support. Elsewhere, access to workers' compensation by undocumented migrants is the subject of much controversy; full coverage is sometimes beyond the reach of migrant workers because of immigration rules.[302]

Aside from the need to acknowledge the rights of undocumented workers injured at work in Québec, there is a need in all three provinces to provide legal protection to precarious migrants who are injured so they feel that they can safely exercise their rights. Workers should be guaranteed the right to stay in Canada while their cases are pending and while they require health care as a result of a workplace injury. Those who choose to return to their home countries should be assured that their right to compensation for work related disability will not be compromised and that access to the medical evidence and care they require will be facilitated by the compensation system.

Training and improved protections from employer reprisals, as proposed by the *Dean Report*, would be a good first step in reducing systemic discrimination, but true protection for precarious migrants would also include immunity from prosecution or deportation for those injured at work – a recommendation that would address some of the ethical issues raised by exploitation of immigrant workers in Canada.[303]

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[299]Kuile et al, *supra* note 6.

[300]Gravel, "Immigrant Workers" *supra* note 31; Gravel & Brodeur *supra* note 31; Gannagé, *supra* note 31.

[301]Premji, Messing & Lippel, *supra* note 35; Stéphanie Premji et al, "Are Immigrants, Ethnic and Linguistic Minorities Over-Represented in Jobs with a High Level of Compensated Risk? Results from a Montréal, Canada Study Using Census and Workers' Compensation Data" (2010) 53:9 American Journal of Industrial Medicine, 875.

[302]Guthrie & Quinlan, *supra* note 39; Toh & Quinlan, *supra* note 38. Case law in Australia is contradictory, varying from one state to the next.

[303]Gravel, "Immigrant Workers", *supra* note 31.

Discrimination has been shown to have negative effects on the health of migrant workers, which are compounded when discriminatory policy jeopardizes their access to health care and social benefits.[304] Perhaps constitutional arguments will provide some redress for precarious-status individuals who suffer from lack of access to health care. Raising constitutional considerations may finally bring to light the seriousness of the impact this lack of access can have on an individual's bodily security and the differential impact it has on the disabled.

Improving access to health care for all precarious migrants, including undocumented and migrant workers, would constitute an important step in reducing these negative health effects and in increasing the overall well-being of migrants to Canada.

[304] Andrés Agudel-Suarez et al, "Discrimination, Work and Health in Immigrant Populations in Spain" (2009) 68 Social Science and Medicine 1866.

Annex A – List of Acronyms

CHA	*Canada Health Act*
CHT	Canada Health Transfer
CIC	Citizenship and Immigration Canada
CLP	Commission des lésions professionnelles
CMA	Canadian Medical Association
CSST	Commission de la Santé et de la Sécurité du Travail
CHT	Canada Federal Health Transfer
HA	New Brunswick *Hospital Act*
HIA	Québec *Health Insurance Act*
HIA Regulation	*Regulation Respecting Eligibility and Registration of Persons in Respect of the Régie de l'assurance maladie du Québec*
HSA	New Brunswick *Hospital Services Act*
HSA Regulations	Regulations to the *Hospital Services Act*
IAOD	*Act Respecting Industrial Accidents and Occupational Diseases*
IFHP	Interim Federal Health Program
IRB	Immigration and Refugee Board
IRPA	*Immigration and Refugee Protection Act*
LSPP	Low Skilled Pilot Program
LCP	Live-In Caregiver Program
MSPA	New Brunswick *Medical Services Payment Act*
OHIP	Ontario Health Insurance Plan
OHRC	Ontario Human Rights Code
OHRT	Ontario Human Rights Tribunal
ON HIA	Ontario *Health Insurance Act*

ON Regulation	Regulation 552 – *General Regulation – Health Insurance Act*
PPORLLFT	Pilot Project for Occupations Requiring Lower Levels of Education
PRRA	Pre-Removal Risk Assessment
RAMQ	Régie de l'assurance maladie du Québec
RPD	Refugee Protection Division
SAWP	Seasonal Agricultural Workers Program
TFW	Temporary Foreign Worker
TRP	Temporary Residency Permit
VoT	Victim of Trafficking
WCA	New Brunswick *Workers' Compensation Act*
WCAT	Ontario Workers' compensation appeal tribunal
WHSAT	Workplace Health, Safety and Compensation Commission Appeal Tribunal
WSIA	Ontario *Workplace Safety and Insurance Act, 1997*
WSIB	Workers' Safety and Insurance Board
WSIAT	Ontario Workplace Safety and Insurance Appeals Tribunal