COMPATIBILITY *OF THE* 1954 CONVENTION

Relating To The Status Of Stateless Persons With Canada's Legal Framework And Its International Human Rights Obligations

Researched And Written For UNHCR By Gregg Erauw

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United Nations High Commissioner for Refugees
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EXECUTIVE SUMMARY

Canada has not acceded to the 1954 *Convention Relating to the Status of Stateless Persons* ("1954 Convention"). The decision not to accede to the 1954 Convention is based, in part, on Canada's belief that its legal framework provides sufficient protection for the rights of stateless persons and that accession is redundant and unnecessary. This report undertakes a systemic and independent assessment of Canada's position that the Canadian legal framework is in compliance with the 1954 Convention. In particular this report assesses Canada's constitutional law, legislation, regulations, policies, jurisprudence and common law principles relating to the federal government, and the provinces of Alberta, British Columbia, Ontario, and Quebec. In cases where the Canadian legal framework appears to be incompatible with the 1954 Convention, the report examines Canada's international human rights obligations in order to determine whether Canada is required under other international human rights instruments to meet or exceed the minimum standard of treatment in the 1954 Convention.

The report does not examine every article or every conceivable legal matter relevant to a stateless person's rights under the 1954 Convention. Instead, it focuses on the most significant articles that protect the legal and socio-economic rights of stateless persons. Considering the extent of the legal framework that could be assessed for this report, and the near infinite legal scenarios that could be analyzed with respect to stateless persons in Canada, this report serves more as an introductory assessment of the Canadian legal framework.

The report finds that much of Canada's legal framework is compatible with the rights articulated in the 1954 Convention. However, notable gaps are present and in some instances Canada has obligations under international human rights law to address such gaps. Specifically, there are gaps in Canada's legal framework with respect to the definition of stateless persons (Article 1); social housing (Article 21); public education (Article 22); healthcare and social assistance (Article 23); social security (Article 24); identity papers (Article 27); travel documents (Article 28); expulsion (Article 31); and naturalization (Article 32). With respect to some of these articles and the identified gaps, Canada has well-established human rights obligations under the *Convention on the Rights of the Child*, the *International Covenant on Economic, Social and Cultural Rights*, the *International Convention on the Elimination of All Forms of Racial Discrimination*, and the *International Covenant on Civil and Political Rights* which require Canada to either meet or surpass the standard of treatment for stateless persons under the 1954 Convention. Recommendations for addressing these gaps include reforms that would make the Canadian legal framework more inclusive to the legal challenges that stateless persons may experience in accessing social housing, free public education, social programs, travel documents, and pathways to citizenship.

Where there are no clear international human rights obligations that apply to gaps in the Canadian legal framework, recommendations attempt to facilitate the protection of stateless person's rights and assist in crafting appropriate policy options. Such recommendations include establishing a statelessness determination procedure and recognition of a "stateless persons status" similar to "protected person" status. Several recommendations also call for additional information from government departments and request that further research be conducted in

order to identify the practical obstacles stateless persons experience in exercising their rights under the 1954 Convention and Canadian law.

INTRODUCTION

This report is completed at the request of UNHCR in pursuit of its mandate with respect to preventing and reducing statelessness around the world, as well as to protect the rights of stateless people. As a State Party to the 1961 *Convention on the Reduction of Statelessness* ("1961 Convention"),[1] the Government of Canada has recognized UNHCR's role pursuant to Article 11 of the 1961 Convention to present stateless cases to the national authorities.

BACKGROUND TO THE REPORT

In 2003, the Government of Canada responded to the UNHCR's "Questionnaire on Statelessness Pursuant to the Agenda for Protection", which sought input from States on the steps they have taken to reduce statelessness and to meet the protection needs of stateless persons.[2] In response to the questionnaire, the Government of Canada outlined several reasons for not acceding to the 1954 *Convention Relating to the Status of Stateless Persons* ("1954 Convention").[3] The reasons include: the 1951 *Refugee Convention Relating to the Status of Refugees* ("1951 Convention") largely duplicates the 1954 Convention; Canadian law contains all the necessary safeguards to cover adequately the situation of stateless persons; and finally, accession to the 1954 Convention would be a pull-factor for stateless persons and would encourage those inside Canada to renounce their citizenship in order to remain in Canada.[4] In general, the Government of Canada's assessment is that Canada's refugee and immigration laws, as well as the *Canadian Charter of Rights and Freedoms* and other laws and regulations, currently provide the protection standards as outlined in the 1954 Convention.[5]

In light of the Government of Canada's response to the Questionnaire, UNHCR Canada commissioned a report by Andrew Brouwer titled, *Statelessness in the Canadian Context*.[6] The report was published in 2003 and updated in 2012. The report examined the context in which statelessness in Canada may arise, the international legal framework on statelessness, and how statelessness is addressed in Canadian law and practice. On the latter aspect, the report surveyed how Canadian law works in practice with respect to: avoiding statelessness; naturalization and immigration programs; providing travel documents to stateless persons; the inadequacy of

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[1] *Convention on the Reduction of Statelessness*, 30 August 1961, United Nations, Treaty Series, vol. 989, p. 175, available at: http://www.refworld.org/docid/3ae6b39620.html (entered into force 13 December 1975, accession by Canada 17 July 1978) [*1961 Convention*]

[2] UN High Commissioner for Refugees (UNHCR), *Final Report Concerning the Questionnaire on Statelessness Pursuant to the Agenda for Protection. Steps taken by States to Reduce Statelessness and to Meet the Protection Needs of Stateless Persons*, March 2004, available at: http://www.refworld.org/docid/405f09834.html [*UNHCR Questionnaire Report*]

[3] *Convention Relating to the Status of Stateless Persons*, 28 September 1954, United Nations, Treaty Series, vol. 360, p. 117, available at: http://www.refworld.org/docid/3ae6b3840.html [*1954 Convention*].

[4] See UN High Commissioner for Refugees (UNHCR), *Statelessness in the Canadian Context: An updated discussion paper*, March 2012, at p. 32, available at: http://www.refworld.org/docid/4facb7a62.html [*Statelessness in the Canadian Context*]; and Nicole LaViolette, "The Principal International Human Rights Instruments to Which Canada has not Acceded", (2006) 24 Windsor Y.B. Access Just. 267-324 at 278 [*LaViolette*].

[5] *LaViolette*, *ibid*.

[6] *Statelessness in the Canadian Context*, supra note 4.

refugee law and risk-based assessments in addressing statelessness; and, the detention and removal of stateless persons. In relation to these issues, Andrew Brouwer concluded that current federal legal mechanisms are insufficient to protect stateless persons in Canada.

THE PURPOSE OF THE REPORT

Andrew Brouwer's report did not examine all of the protection standards for stateless persons under the 1954 Convention. Therefore, this report will provide a further comparative assessment of the most important articles of the 1954 Convention and the Canadian legal framework as it relates to the treatment of stateless persons. In particular, this report will examine both federal and provincial legal frameworks that pertain to the main legal, economic and social rights of stateless persons.

By examining the current Canadian legal framework, the purpose of this report is to identify any incompatibility between the articles of the 1954 Convention and the Canadian legal framework. In undertaking this assessment, the report seeks to independently verify whether the Government of Canada's claim that "Canadian law contains all the necessary safeguards to cover adequately the situation of stateless persons" is well founded. As a result of this review, the report finds that gaps exist between the Canadian legal framework and the protection standards in the 1954 Convention. Incidentally, the report also inadvertently illustrates that Canada's contention that the 1951 Refugee Convention duplicates the rights in the 1954 Convention, is misguided and overly simplistic.[7] Furthermore, as an aside, the Government of Canada's argument that acceding to the 1954 Convention would be a "pull-factor" for stateless persons and would encourage those to renounce their citizenship in order to remain in Canada, is not supported by evidence from countries that are Party to the 1954 Convention.[8]

METHODOLOGY

This report provides a systematic and independent assessment of the Government of Canada's rationale for not acceding to the 1954 Convention. This is necessary in order to determine the

[7] The drafters of the 1954 Convention recognized that having a separate convention would fill a gap in international law because not all stateless persons meet the definition of "refugee" in the 1951 Refugee Convention. The preamble to the 1954 Convention makes clear that the purpose of the Convention is to protect those stateless persons who are not covered by the 1951 Refugee Convention. In taking the above position, Canada essentially assumes that refugees and stateless persons are the same. However, this position is not consistent with information on its own website concerning "Terms and definitions related to refugee protection". That information acknowledges that statelessness has a "genuine meaning under international law" and that "statelessness and refugee status are not identical" (See, Citizenship and Immigration, Citizenship and Immigration Canada, "Terms and definitions related to refugee protection" (25 February 2013), available at: http://tinyurl.com/poqw8et).

[8] UN High Commissioner for Refugees (UNHCR), *Statelessness determination procedures, Identifying and protecting stateless persons*, August 2014, at 8, available at: http://www.refworld.org/docid/5412a7be4.html; see also Chris Nash, "Still Stateless, still suffering: It's time for European leaders to take action" (29 August 2014), available at: http://tinyurl.com/nk88ja6, stating: "In those few European countries with well-established [statelessness determination] procedures (France, Hungary, Italy and Spain) the number of applications has remained manageable and generally consistent year on year."

accuracy of the Government of Canada's claim that its legal framework provides sufficient protection for stateless persons; and therefore, is compatible with the 1954 Convention.

The report compares the Canadian legal framework of the federal government and the provincial governments of Alberta, British Columbia, Ontario, and Quebec with the key provisions of the 1954 Convention. The Canadian legal framework reviewed for this report includes constitutional law, legislation, regulations, policies, jurisprudence and common law principles. Only Alberta, British Columbia, Ontario, and Quebec's legal framework is assessed due to time constraints and the fact that 86% of the population of Canada resides in these four provinces.[9] Future research may wish to focus on the legal framework in other Canadian provinces, since there can be slight variances among the provinces that impact the rights of stateless persons.

Where gaps are identified between the Canadian legal framework and the standard of treatment in the 1954 Convention, these are documented. Furthermore, where gaps are identified the report assesses whether Canada has existing obligations under international human rights law to meet or exceed the standard in the 1954 Convention.

Finally, in order to address documented gaps, the report provides many recommendations for future research, information gathering and policy reform.

LIMITATIONS OF THE REPORT

The report does not examine every article of the 1954 Convention. Instead, it focuses on the most significant articles that address the legal and socio-economic rights of stateless persons and for which Canada may have existing international human rights obligations. In addition, some articles of the 1954 Convention are unique to the Convention and are not buttressed by other international human rights standards. In such cases, the Canadian legal framework is still assessed in order to provide recommendations that may alleviate the precarious situation of stateless persons in Canada.

The report also takes a formalistic approach to examining how the Canadian legal framework considers stateless persons. In so doing, it does not consider the potentially infinite scenarios that stateless persons experience in attempting to exercise their rights in Canada. This means that in some cases the assessment of the Canadian legal framework appears compatible and neutral on its face in its treatment of stateless persons, there may be disproportionate and adverse impacts on stateless persons due to their often-precarious and marginalized existence.[10] For example, the legal framework does not provide stateless persons with a special status under Canadian law and assimilates stateless persons within the definition of foreign nationals. While this essentially ensures that stateless persons receive treatment at least as favourable as "aliens generally", it

[9] Statistics Canada, "Population by year, by province and territory", (26 September 2014), available at: http://tinyurl.com/acm88up.

[10] This report does not describe the stories of stateless persons in Canada and their daily circumstances. However, their precarious circumstances and marginalization has been well documented elsewhere. For a few Canadian examples see *Stateless in the Canadian Context*, *supra* note 4. For an international perspective on the consequences of statelessness see UN High Commissioner for Refugees (UNHCR), *Special Report: Ending Statelessness in 10 years*, July 2014, available at: http://www.unhcr.org/statelesscampaign2014/Stateless-Report_eng_final3.pdf.

masks their unique circumstances that may necessitate more affirmative treatment under Canadian law. That said, where practical obstacles to exercising rights in Canada are apparent, they are noted in the report.

The report also observes that there is little reliable research on stateless persons in Canada, their demographic profile, their status and their legal histories. Substantial quantitative and qualitative research is required to know more of their experiences and whether the Canadian legal framework is compatible with the 1954 Convention and Canada's international human rights obligations. In writing and researching this report, it is apparent that such information is essential. For example, knowing who is stateless in Canada and their legal status facilitates a greater understanding of the scope of a "statelessness problem" in Canada, as well as assists in determining how many stateless persons are within the scope of the 1954 Convention. On the latter issue, several articles of the 1954 Convention apply to stateless persons depending on whether they are "lawfully staying", "lawfully in", habitually resident, or physically present in Canada. However, Canada has not clearly articulated in its legal framework which permits and statuses under Canadian law constitute "lawfully staying" or "lawfully in" for the purposes of the 1954 Convention. This creates some uncertainty on the extent to which some Canadian legislation is, or is not, compatible with the 1954 Convention. Furthermore, there is little information on how many foreign nationals in Canada are identified as stateless, and how such determinations are made. Therefore, in order to create effective policy solutions on statelessness in Canada, reliable statistics on the number of stateless persons in Canada and the implementation of an effective statelessness determination procedure is required.

ARTICLES OF THE 1954 CONVENTION, CANADA'S LEGAL FRAMEWORK AND INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

CHAPTER I: GENERAL PROVISIONS

ARTICLE 1: DEFINITION OF THE TERM "STATELESS PERSON"

1. For the purpose of this Convention, the term "stateless person" means a person who is not considered as a national by any State under the operation of its law.

2. This Convention shall not apply:

(i) To persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance so long as they are receiving such protection or assistance;

(ii) To persons who are recognized by the competent authorities of the country in which they have taken residence as having the rights and obligations which are attached to the possession of the nationality of that country;

(iii) To persons with respect to whom there are serious reasons for considering that:

(a) They have committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes;

(b) They have committed a serious non-political crime outside the country of their residence prior to their admission to that country;

(c) They have been guilty of acts contrary to the purposes and principles of the United Nations.

I. Background & Commentary

The definition in Article 1(1) focuses on *de jure* stateless persons. This means persons who actually lack a nationality by virtue of the laws of any State, and such persons may include, but are not limited to, those who did not acquire a nationality by birth, or lost it by marriage.[11] In order to establish proof of a lack of nationality from "any State", the person has to provide proof from the country where they have a relevant link, such as country of origin, descent, marriage, habitual residence, adoption, etc.[12]

[11] Nehemiah Robinson, *Convention relating to the Status of Stateless Persons. Its History and Interpretation*, Institute of Jewish Affairs, World Jewish Congress, 1955, reprinted by the Division of International Protection of the United Nations High Commissioner for Refugees 1997, at 7, available at: http://www.refworld.org/docid/4785f03d2.html [*Robinson Commentary to the 1954 Convention*].

[12] UN High Commissioner for Refugees (UNHCR), *Handbook on Protection of Stateless Persons*, 30 June 2014, at para. 18, available at: http://www.refworld.org/docid/53b676aa4.html [*Handbook on Stateless Persons*]; and *Ibid.*, at 10.

Persons who do not have proof of their loss of nationality and cannot obtain such proof either by law or because the state in which they have a nationality refuses to assist them, are referred to as *de facto* stateless persons.[13] Although *de facto* stateless persons are in some cases in the same position as *de jure* stateless persons, they are not the same, as *de facto* stateless persons legally have a nationality, but receive no benefits or protection from the state of their nationality. Despite *de jure* stateless persons being the intended beneficiaries of the 1954 Convention, the Final Act encourages State Parties to grant *de facto* stateless persons "the treatment which the Convention accords to *de jure* stateless persons."[14]

The 1954 Convention does not permit reservations to Article 1(1) and does not prescribe the mechanism or procedure for determining who is stateless.[15] However, the establishment of such procedures, even in states that are not a party to the 1954 Convention, is important because statelessness is a "juridically relevant fact under international law."[16] Essentially, "recognition of statelessness plays an important role in enhancing respect for the human rights of stateless persons, particularly through access to a secure legal status and the enjoyment of rights afforded to stateless persons under the 1954 Convention."[17]

With respect to Article 1(2) of the 1954 Convention, these clauses are nearly identical to the exclusion clauses of Articles 1D, 1E and 1F of the 1951 Refugee Convention. In regard to Article 1(2)(iii) of the 1954 Convention, which mirrors Article 1F, persons who are "unworthy of protection…need not be proven to have been found guilty of actually having committed any act described…it suffices that there are serious reasons for considering that he did so."[18] The reasons that are to be considered "serious" are to be decided by the authorities of the stateless person's country of residence.[19]

II. The Canadian Legal Framework

a. Article 1(1)

Federal Immigration Legislation and Operational Bulletins

There is no definition of the term "stateless person" in Canadian legislation. This includes the key immigration and citizenship legislation of the *Immigration and Refugee Protection Act* ("*IRPA*"),[20] the *Immigration and Refugee Protection Regulations* ("*IRPR*"),[21] the *Citizenship*

[13] *Robinson Commentary to the 1954 Convention*, *supra* note 11 at 7-8.
[14] *Ibid.*, at 12.
[15] *1954 Convention*, *supra* note 3 at Art. 38(1).
[16] *Handbook on Stateless Persons*, *supra* note 12 at para. 9.
[17] *Ibid*.
[18] *Robinson Commentary to the 1954 Convention*, *supra* note 11 at 13.
[19] *Ibid*.
[20] *Immigration and Refugee Protection Act*, SC 2001, c 27, available at: http://laws-lois.justice.gc.ca/eng/acts/I-2.5/FullText.html [*IRPA*].
[21] *Immigration and Refugee Protection Regulations*, SOR/2002-227, available at: http://laws-lois.justice.gc.ca/eng/regulations/SOR-2002-227/FullText.html [*IRPR*].

Act,[22] and the *Citizenship Regulations*.[23] Where stateless persons are referred to in the *IRPA*, they are assimilated within the definition of "foreign nationals". The *IRPA* defines a "foreign national" as "a person who is not a Canadian citizen or a permanent resident, and includes a stateless person."[24]

There are two significant impacts of assimilating stateless persons with foreign nationals in Canadian legislation. First, by including stateless persons within the definition of foreign nationals, much of the Canadian legal framework that refers to foreign nationals automatically and equally applies to stateless persons. This ensures that the Canadian legal framework is *prima facie* compatible with some articles of the 1954 Convention that require stateless persons receive "treatment at least as favourable as aliens generally." Second, and conversely, because of their assimilation within the definition of foreign nationals, stateless persons have no special "stateless person status" under Canadian law. Without a specific "stateless person status" under Canadian law, grouping stateless persons with foreign nationals may simply obscure stateless persons' unique needs and circumstances. For example, in some instances where the Canadian legal framework is *prima facie* compatible with articles of the 1954 Convention, the legal framework may still produce disproportionate adverse effects on stateless persons. Some of these impacts are discussed further in this report.

Furthermore, since there is no "stateless person status" or formal statelessness determination procedure in Canada, there is little information on the extent of statelessness in Canada. This includes a lack of information on how many people are stateless, who is stateless, how foreign nationals are identified as stateless, and how government officials are trained to identify foreign nationals as stateless. For example, some foreign nationals may be identified as stateless on their immigration documents, but how this determination is made and on what evidence, leads one to question the accuracy of any statistics on stateless persons in Canada. Without reliable information on the extent of statelessness in Canada it is easy for Canada to ignore a potentially serious policy issue by dismissing it as irrelevant and insignificant.

Federal Citizenship Legislation

The *Citizenship Act* also does not define statelessness. This is despite a provision in the *Citizenship Act* that permits Canadian citizenship to be granted to a stateless child born abroad to a Canadian parent who was also born abroad.[25] It is only in a 2009 Operational Bulletin ("Operational Bulletin 133") issued by Citizenship and Immigration Canada to its Port-of-Entry Officers, that a definition of statelessness appears in policy documents. Operational Bulletin 133 provides that "[s]tatelessness refers to the status of an individual who is not recognized as a national by any state under its domestic law."[26] The purpose of Operational Bulletin 133 is to

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[22] *Citizenship Act*, RSC 1985, c C-29, available at: http://laws-lois.justice.gc.ca/eng/acts/c-29/FullText.html [*Citizenship Act*].
[23] *Citizenship Regulations*, SOR/93-246, available at: http://laws-lois.justice.gc.ca/eng/regulations/SOR-93-246/FullText.html [*Citizenship Regulations*].
[24] *IRPA*, *supra* note 20, at s. 2(1).
[25] *Citizenship Act*, *supra* note 22 at s. 5(5); and *Citizenship Regulations*, *supra* note 23 at s. 3.1(1).
[26] Citizenship and Immigration Canada, "First Generation Limit and Citizenship by Descent – Clarification for Port of Entry Officers" *Operational Bulletin 133* (17 July 2009), available at:

inform Port-of-Entry Officers on how to determine if a baby born outside Canada to a Canadian citizen parent is a Canadian citizen, but does not provide guidance to officers on how to make statelessness assessments or determinations. Operational Bulletin 189 also provides guidance to officers on the process for granting a temporary resident permit to persons seeking a grant of citizenship for a stateless child abroad to a Canadian parent who was also born abroad.[27] But it too does not provide information on making statelessness assessments or determinations.

Customary International Law, the Common Law and Jurisprudence

Even though there is no statutory inclusion of the Article 1(1) stateless persons definition into Canadian legislation, the International Law Commission has stated that the definition of "stateless persons" in Article 1(1) of the 1954 Convention "can no doubt be considered as having acquired customary nature" under international law.[28] This is significant for the Canadian legal framework because it operates under the doctrine of adoption with respect to matters of customary international law. Under the doctrine of adoption, customary norms form part of the Canadian common law, unless Canadian legislation explicitly states otherwise.[29] Furthermore, there is Federal Court of Canada jurisprudence acknowledging the 1954 Convention definition of a "stateless person" in relation to Canada's obligations under the 1961 Convention,[30] and there are also a number of social security agreements between the Government of Canada, the Government of Quebec and foreign states which accept the definition of a stateless person from the 1954 Convention for the purposes of those agreements.[31] Therefore, considering the doctrine of adoption, jurisprudence, and Canada being a State Party to the 1961 Convention, there is a strong argument that the definition of "stateless persons" in Article 1(1) is the definition under

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http://www.cic.gc.ca/english/resources/manuals/bulletins/2009/ob134.asp.

[27] Citizenship and Immigration Canada, "Access to Grant of Citizenship for Stateless Persons Impacted by Bill C-37" (9 April 2010), available at: http://www.cic.gc.ca/english/resources/manuals/bulletins/2010/ob189.asp.

[28] United Nations, *Draft Articles on Diplomatic Protection with commentaries*, 2006, at p. 49, available at: http://www.refworld.org/docid/525e7929d.html.

[29] See *R v. Hape*, 2007 SCC 26, at para. 39, available at: http://canlii.ca/t/1rq5n: "In my view, following the common law tradition, it appears that the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation. The automatic incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary. Parliamentary sovereignty dictates that a legislature may violate international law, but that it must do so expressly. Absent an express derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law." It should be noted that some authors have argued that the above statement in *Hape* has complicated the understanding of the "doctrine of adoption" in Canada [See John Currie, *Public International Law* (Toronto: Irwin Law, 2008) at 226-235]. However, Justice Louis LeBel of the Supreme Court of Canada clarified the above passage to address these criticisms and restates that the doctrine of adoption does apply in Canada. See Louis LeBel, "A Common Law of the World? The Reception of Customary International Law in the Canadian Common Law" (2014) 65 UNBLJ 3, at 14-15.

[30] See, *Van Vlymen v. Canada* (Solicitor General), 2004 FC 1054, at para. 20, available at: http://canlii.ca/t/1hvv2;

[31] For example, *Proclamation Giving Notice that the Interim Agreement on Social Security between Canada and Israel*, SI/2003-155, (Old Age Security Act) (entry into force on September 1, 2003); *Regulation respecting the implementation of an Understanding and an Administrative Arrangement on Social Security between the Gouvernement du Québec and the Government of the Republic of the Philippines*, CQLR c R-9, r 32, (Ministère de l'Emploi et de la Solidarité Sociale and the Commission des Partenaires du Marché du Travail, Tax Administration Act, Québec Pension Plan); *Proclamation Declaring the Agreement on Social Security Between Canada and the United States of America*, SI/82-105, (entry into force February 9, 1982, Old Age Security Act).

Canadian law regardless of the fact that Canada has not incorporated that definition into Canadian legislation.

b. Article 1(2)(ii)-(iii)

Federal Immigration Legislation

The exclusion provisions of Article 1(2)(ii)-(iii) parallel those from Articles 1E and 1F of the 1951 Refugee Convention, the latter of which are incorporated through section 98 of the *IRPA*. Although section 98 only addresses exclusion for the purposes of the 1951 Refugee Convention, a simple statutory amendment referencing Article 1(2)(ii)-(iii) could render the *IRPA* compatible with the 1954 Convention.

Even though section 98 is not immediately compatible, some of the criminal elements for exclusion under Article 1(2)(iii) of the 1954 Convention are mentioned elsewhere in the *IRPA* through its "inadmissibility" provisions. "Inadmissibility" under the *IRPA* refers to reasons why a foreign national is not admissible or able to enter Canada. Without assuming that the inadmissibility provisions of *IRPA* would meet specific evidentiary and procedural exclusion requirements under the 1954 Convention or international law, the inadmissibility provisions of *IRPA* do allow Canada to find foreign nationals (including stateless persons) inadmissible to Canada when there are reasonable grounds to believe that they have committed crimes on: security grounds, human or international rights violations, serious criminality, criminality and organized criminality grounds.[32] In light of these provisions, the *IRPA* currently contains language similar to Article 1(2)(iii) of the 1954 Convention and such inadmissibility provisions currently apply to stateless persons as foreign nationals.

III. Assessment

Although there is no explicit definition of a stateless person in the Canadian legal framework, the definition of stateless persons in Article 1(1) of the 1954 Convention is likely part of the Canadian law through the doctrine of adoption, jurisprudence and Canada's obligations under the 1961 Convention. At the very least, policy documents also reflect the definition from Article 1(1). Therefore, it appears that Canada's understanding of a "stateless person" conforms to the definition in Article 1(1).

However, since Canada has no legislated definition of a "stateless person", is not a State Party to the 1954 Convention, and does not provide for a "stateless person status", there continues to be a lack of clarity on the extent of statelessness in Canada. By establishing a statelessness determination procedure Canada could gain a better understanding of who is stateless in Canada, as well as properly identify stateless persons and ensure stateless persons have a secure legal status that grants them access to crucial protection rights under the 1954 Convention that they are not otherwise afforded under Canadian law.[33]

[32] *IRPA*, *supra* note 20 at ss. 34- 37.
[33] *Handbook on Stateless Persons*, *supra* note 12 at para. 135 & 137.

With regards to Article 1(2), Canada's legal framework is nearly compatible, since the *IRPA* already incorporates similar exclusion provisions from Articles 1E and 1F of the 1951 Refugee Convention. The inadmissibility provisions may also be compatible with the 1954 Convention, but these provisions may need to be adjusted in order to account for the unique circumstances of stateless persons and to provide sufficient procedural safeguards in accordance with international standards. On the latter point, it is noted that in the refugee context, exclusion is to be considered after there is a determination that the person meets the definition of a "refugee" under the 1951 Refugee Convention.[34] The current inadmissibility scheme in Canada does not comply with this requirement.

a. Canada's International Human Rights Obligations

Canada has commitments under international human rights law to "everyone" in its territory without discrimination, even non-citizens and stateless persons.[35] In this regard, the UNHCR "encourages states that are not yet party to the 1954 Convention relating to the Status of Stateless Persons to treat stateless persons lawfully residing on their territory in accordance with international human rights law; and to consider, as appropriate, facilitating the naturalization of habitually and lawfully residing stateless persons in accordance with national legislation."[36] One key step to addressing the human rights of stateless persons in States that are not party to the 1954 Convention is to establish statelessness determination procedures.

Nationality and statelessness determinations are necessary in a number of legal contexts. This includes removal proceedings, issuing a passport or identity documents, voting rights, military service, and accessing government services, etc. As a result, there is a great value in the establishment of statelessness determination procedures.[37] For example, an assessment of statelessness may be required when an individual seeks the application of the 1961 Convention to which Canada is a State Party.[38] In addition, without a rigorous application of the definition and the determination of stateless persons, there is a risk that there becomes generalized discrimination against stateless persons. By grouping stateless persons with all foreign nationals, there is a formalistic and non-substantive understanding of the discrimination and hardship stateless persons experience in Canada. Therefore, there needs to be proper identification of stateless persons in order to avoid discrimination in the enjoyment of rights under the 1954 Convention, but also rights under other international human rights treaties to which Canada is a party.

Finally, one could argue that by not recognizing stateless persons and leaving them in indefinite legal limbo, violates a stateless person's right to an effective remedy, their right to liberty and security of the person, their right not to be subjected to cruel, inhuman and degrading treatment

[34] UN High Commissioner for Refugees (UNHCR), *The Exclusion Clauses: Guidelines on their Application*, 2 December 1996, at paras. 8-9, available at: http://www.refworld.org/docid/3ae6b31d9f.html.
[35] *Handbook on Stateless Persons*, *supra* note 12 at para. 141.
[36] UN High Commissioner for Refugees (UNHCR), *Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons*, Conclusion No. 106 (LVII) - 2006 (6 October 2006), at 106(u), available at: http://www.unhcr.org/453497302.html [*EXCOM Conclusion No. 106*]
[37] *Handbook on Stateless Persons*, *supra* note 12 at paras. 9, 57 & 122.
[38] *Ibid.*, at para. 57.

under the *International Covenant on Civil and Political Rights* ("*ICCPR*").[39] In fact, since statelessness is a juridically relevant fact under international law, it is difficult to foresee how Canada can meet its international human rights obligations towards stateless persons without establishing a determination procedure or mechanism that identifies them.[40]

IV. Recommendations

1) Canada should incorporate the definition of "stateless persons" from Article 1(1) of the 1954 Convention into the *IRPA* and *Citizenship Act.*

2) Canada should establish a statelessness determination procedure for identifying stateless persons in Canada.

3) Citizenship and Immigration Canada, the Canada Border Services Agency, and the Immigration and Refugee Board should publically disclose all policy guidelines, if any, which its officers and Members use in assessing a person's statelessness. This includes how officers and Members gather and assess evidence of statelessness. Citizenship and Immigration Canada, the Canada Border Services Agency, and the Immigration and Refugee Board should also disclose how its officers and Members are trained in identifying persons as stateless.

4) Canada should implement a "stateless person status", similar to "protected person status". The "stateless person status" should allow persons identified as stateless to be eligible for work, social housing, education, public healthcare and social assistance, etc. In addition, such a status should provide stateless persons with expedited access to permanent resident status, and ultimately, Canadian citizenship.

5) Further research should be conducted on stateless persons in Canada. The research should survey stateless persons, legal practitioners, community workers and academics. In particular, the research should seek to gather information on stateless persons' demographic

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[39] *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, at Arts. 2(3), 7, 9(1), available at: http://www.refworld.org/docid/3ae6b3aa0.html (entered into force 23 March 1976, accession by Canada 19 May 1976) [*ICCPR*]. This point is made by analogy. The European Network on Statelessness makes the case that these rights, which are similarly enshrined in the *European Convention on Human Rights*, could be violated by the failure of State Parties to implement statelessness determination procedures. See, European Network on Statelessness (Caia Vlieks), *Strategic Litigation: An Obligation for Statelessness Determination under the European Convention on Human Rights* (September 2014), available at: http://tinyurl.com/ooblywd [*Obligation for Statelessness Determination under the ECHR*]. Furthermore, the Inter-American Court of Human Rights has issued an Advisory Opinion explaining that Member States of the Organization of American States (including Canada), and regardless of whether they have ratified the American Convention on Human Rights, have an obligation to establish statelessness determination procedures under the American Declaration of the Rights and Duties of Man. On this latter point see *Advisory Opinion OC-21/14 of August 19, 2014 requested by the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Oriental Republic of Uruguay: Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, OC-21/14, Inter-American Court of Human Rights (IACrtHR), 19 August 2014, at paras. 32 & 94-102 available at: http://www.refworld.org/docid/54206c744.html.

[40] *Obligation for Statelessness Determination under the ECHR*, *ibid*.

profile, their unique legal history while in Canada, as well as the "practical" obstacles stateless persons experience in exercising their rights under the Canadian legal framework and the 1954 Convention.

6) Develop a statelessness litigation strategy for Canada, similar to the European Network on Statelessness' *Strategic Litigation: An Obligation for Statelessness Determination under the European Convention on Human Rights*.

ARTICLE 3: NON-DISCRIMINATION

> The Contracting States shall apply the provisions of this Convention to stateless persons without discrimination as to race, religion or country of origin.

I. Background & Commentary

The Commentary on the 1954 Convention explains "that no state may discriminate among the different groups of stateless persons on the grounds stated in this Article, i.e., treat one more favourably than the other, within the *obligatory* provisions of the Convention."[41] However, beyond the minimum rights established, "states are free to grant any right they wish to any group they desire."[42]

Rights that were not yet in existence at the time the 1954 Convention entered into force, such as rights that would grant special rights to certain groups, are likely compatible with Article 3. This is because Article 3 only relates to the provisions of the 1954 Convention and not to "extra-Conventional rights."[43] Furthermore, despite Article 3, other articles of the 1954 Convention that relate to the length of stay of a stateless person, as well as the expression "in the same circumstances", makes differentiation of stateless persons in Articles 7(2)-(3), 13, 15, 17, 18, 19, 21, 22(2), and 26 not only permissible but explicit.[44]

II. Canadian Legal Framework

a. Canadian Constitutional Law

The *Canadian Charter of Rights and Freedoms*[45] ("*Charter*") is Canada's constitutional "Bill of Rights" and applies to all federal and provincial legislation and government action. Under the

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[41] *Robinson Commentary to the 1954 Convention*, *supra* note 11 at 17. Emphasis added.
[42] *Ibid*.
[43] *Ibid*. "Extra-Conventional rights" refers to rights provided for in treaties other than the 1954 Convention, including human rights treaties drafted after the 1954 Convention. Article 3 can be read with Article 5 of the 1954 Convention, which states: "[n]othing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to stateless persons apart from this Convention."
[44] *Ibid*.
[45] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11, available at: http://laws-lois.justice.gc.ca/eng/Const/page-15.html [*Charter*]. The *Canadian Charter of Rights and Freedoms* is not to be confused with Quebec's human rights legislation, the

Charter's equality provisions, "every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."[46] The Supreme Court of Canada has also recognized citizenship as an analogous ground under the equality rights provision of the *Charter*.[47] In recognizing citizenship as a ground of discrimination under section 15(1) of the *Charter*, Justice Wilson of the Supreme Court stated that "[r]elative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They are among 'those groups in society to whose needs and wishes elected officials have no apparent interest in attending.'"[48] This is not to say governments are unable to make legislative distinctions on the basis of citizenship status, but when legislation establishes limitations on the basis of citizenship, the *Charter* requires the discrimination be reasonable and demonstrably justified.[49] In addition, section 15(2) of the *Charter* allows governments to pro-actively "combat discrimination by developing programs aimed at helping disadvantaged groups improve their situation" even though such programs may discriminate on the enumerated or analogous grounds under section 15(1).[50]

b. Federal Human Rights Legislation

In addition to the *Charter* described above, both the federal government and provincial governments have human rights legislation that prohibits discrimination by public and private institutions in employment, the leasing and sale of property, accommodation, services and facilities, membership in labour unions and professional associations. Whether federal or provincial human rights legislation applies to a public or private institution depends on the institution's activities being within the legislative jurisdiction of the federal or provincial government.[51]

Charter of Human Rights and Freedoms, *infra* note 57, which is Quebec's provincial human rights legislation and applies with respect to matters within the legislative authority of the province of Quebec.

[46] *Ibid*., at s. 15(1).

[47] *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143, available at: http://canlii.ca/t/1ft8q [*Andrews*]; and *Lavoie v Canada*, 2002 SCC 23, available at: http://canlii.ca/t/51sx [*Lavoie*].

[48] *Andrews*, *ibid* at p. 152.

[49] *Charter supra* note 45 at s. 1. Section 1 provides that even though government legislation or action may be found to discriminate contrary to section 15(1) of the *Charter*, it may not be unconstitutional on the basis that the discrimination is a reasonable limit that can be demonstrably justified in a free and democratic society. The considerations under section 1 of the *Charter* are whether: 1) The objective of the law or provision is sufficiently pressing and important to warrant overriding the right in question; 2(a) The means chosen to realize the above objective is rationally connected to the objective; 2(b) The means impair the relevant rights as little as possible; 2(c) The harmful effects of the rights-limiting measure are proportional to the positive effects of the measure. See, *R. v. Oakes*, [1986] 1 SCR 103, available at: http://canlii.ca/t/1ftv6 [*Oakes*].

[50] *Charter supra* note 45 at s. 15(2); and *R. v. Kapp*, 2008 SCC 41, at para. 16, available at: http://canlii.ca/t/1z476.

[51] See, *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, at ss. 91-95, available at: http://laws-lois.justice.gc.ca/eng/Const/FullText.html. [*Constitution Act, 1867*]. Some jurisdictional responsibilities are shared, but for example federal jurisdiction includes: aliens and naturalization, trade and commerce, banking, unemployment insurance, telecommunications, shipping, broadcasting, postal service, inter-provincial and international transportation, crown corporations, inland fishing, First Nations reserves, intellectual property, marriage and divorce, criminal law, etc. The provinces jurisdiction includes: healthcare and social services, education, property and civil rights, matters of a merely local or private nature, the administration of justice in the province, natural resources, direct taxation, etc.

At the federal level, the *Canadian Human Rights Act* prohibits discrimination in the delivery of goods, services, accommodation, and employment on the grounds of race, national or ethnic origin and religion, among other grounds.[52] Since the *Canadian Human Rights Act* is a federal statute, it applies only to those public and private institutions that are within federal legislative jurisdiction.

c. Provincial Human Rights Legislation

Similar to the *Canadian Human Rights Act*, provincial human rights legislation applies to persons and institutions that provide goods, services, and employment contracts within provincial legislative jurisdiction.[53] In this respect the human rights legislation of Alberta,[54] British Columbia,[55] Ontario[56] and Quebec[57] prohibit discrimination on the basis of race, religion and place of origin, among other grounds.[58] Subject to some exemptions, Ontario's human rights legislation also prohibits discrimination on the ground of citizenship.[59]

Finally, it is important to note that all federal and provincial human rights legislation must also comply with the *Charter*.[60]

III. Assessment

In light of the constitutional and human rights framework described above, the Canadian legislative framework appears to ensure compatibility with Article 3 of the 1954 Convention. By prohibiting discrimination on the grounds of race, religion and country of origin, there is

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[52] *Canadian Human Rights Act*, RSC 1985, c H-6, at s. 3, available at: http://laws-lois.justice.gc.ca/eng/acts/h-6/FullText.html.
[53] *Constitution Act, 1867*, *supra* note 51 at ss. 91-92.
[54] *Alberta Human Rights Act*, RSA 2000, c A-25.5, at ss. 1-5, & 7-9, available at: http://canlii.ca/t/52fj4 [*Alberta Human Rights Act*]
[55] *Human Rights Code*, RSBC 1996, c 210, at ss. 7-14, available at: http://canlii.ca/t/jj1b [*BC Human Rights Code*]
[56] *Human Rights Code*, RSO 1990, c H.19, at ss. 1-3 & 5, available at: http://canlii.ca/t/51tsz [*Ontario Human Rights Code*]
[57] *Charter of Human Rights and Freedoms*, CQLR c C-12, at s. 10, available at: http://canlii.ca/t/hxt9 [*Charter of Human Rights and Freedoms*]
[58] *Alberta Human Rights Act*: race, religious beliefs, place of origin; *BC Human Rights Code*: race, place of origin, religion; *Ontario Human Rights Code*: race, place of origin, colour, ethnic origin, citizenship, creed; *Charter of Human Rights and Freedoms*: race, religion, ethnic or national origin.
[59] *Ontario Human Rights Code*, *supra* note 56 at 16. Section 16(1), the anti-discrimination right based on citizenship is not infringed where Canadian citizenship is a requirement, qualification or consideration imposed or authorized by law; 16(2) the right is not infringed where citizenship or lawful admission to Canada for permanent residence is a requirement, qualification or consideration adopted for the purpose of fostering and developing participation in cultural, educational, trade union or athletic activities by Canadian citizens or persons lawfully admitted to Canada for permanent residence; 16(3) the anti-discrimination right based on citizenship is not infringed where Canadian citizenship or domicile in Canada with the intention to obtain Canadian citizenship is a requirement, qualification or consideration adopted by an organization or enterprise for the holder of chief or senior executive positions.
[60] *Vriend v. Alberta*, [1998] 1 SCR 493, available at: http://canlii.ca/t/1fqt5. In *Vriend*, the Supreme Court of Canada found that the exclusion of sexual orientation as a prohibited ground of discrimination in Alberta's (former) human right's legislation was contrary to s. 15(1) of the *Charter*. As a remedy the Supreme Court read into the Act sexual orientation as a prohibited ground of discrimination.

constitutional and legislative protection to ensure that the rights afforded stateless persons under the articles of the 1954 Convention would not be applied in a discriminatory manner on Article 3 grounds.

ARTICLE 4: RELIGION

> The Contracting States shall accord to stateless persons within their territories treatment at least as favourable as that accorded to their nationals with respect to freedom to practise their religion and freedom as regards the religious education of their children.

I. Background & Commentary

Article 4 of the 1954 Convention is identical to the same provision of the 1951 Refugee Convention. Article 4 applies to all stateless persons within the territory of a State party, whether the person is in the Contracting State's territory legally or illegally.[61]

Article 4 requires a Contracting State to afford to stateless persons in its territory the same freedom of practicing their religion and teaching their children their religion as it provides its nationals of the same religion. However, in accordance with Article 3, there is the option for a Contracting State to differentiate treatment between the religions of stateless persons, if it makes the same differentiation amongst its own nationals.[62] In addition, with regard to religious education, the drafters note that Article 4 does not oblige the Contracting States to provide stateless persons with the material or financial means to exercise their religion, or with the material or financial means for the religious education of their children when such means are not provided for its nationals.[63]

II. Canadian Legal Framework

a. Freedom to Practise Religion

Section 2(a) of the *Charter* provides that "everyone" in Canada, including non-citizens, have the freedom of conscience and religion.[64] The Supreme Court of Canada has confirmed that freedom of conscience and religion includes the practice of religion.[65] The practice of religion can be subject to limitations in order to protect public safety, order, health, morals and the rights of

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[61] UN High Commissioner for Refugees (UNHCR), *The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis*, 1990, at 37, available at: http://www.refworld.org/docid/53e1dd114.html [*1951 Refugee Convention travaux préparatoires*].

[62] *Robinson Commentary to the 1954 Convention*, *supra* note 11 at 18.

[63] *1951 Refugee Convention travaux préparatoires*, *supra* note 61 at 37.

[64] *Charter*, *supra* note 45 at s. 2(a). "Everyone has the following fundamental freedoms: (*a*) freedom of conscience and religion…"

[65] *R. v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295, at paras. 94-95, available at: http://canlii.ca/t/1fv2b. "The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination."

others.[66]

b. Freedom in Religious Education of their Children

Subject to few exceptions, education is almost exclusively within the legislative powers of the provincial governments.[67] Each province has its own legislation regarding public and religious educational institutions; and therefore, education policy varies between the provinces of Alberta, British Columbia, Ontario and Quebec. Stateless persons are not prohibited from attending a religious educational institution of their choice, but as a foreign national they may require a study permit in order to attend the institution.[68]

Generally, religious education is delivered through private religious schools rather than publicly funded schools. The exception is Ontario, which provides full public funding for Roman Catholic schools, but no funding to any other religious schools.[69] In other provinces, such as Alberta, the government provides full public funding for Roman Catholic schools, but also provides partial funding for religious schools that are not Roman Catholic. In British Columbia and Quebec, the provincial government does not fully fund Roman Catholic education, but provides partial funding for faith-based schools.[70]

The UN Human Rights Committee has criticized Ontario and consistently recommended reform of its policy of only funding Roman Catholic religious education.[71] However, despite the Human Rights Committee's concern, the Supreme Court of Canada has ruled in favour of Ontario on this issue.[72] Specifically, the Supreme Court states that although Ontario's practice of only funding Roman Catholic education and no other religious schools is a violation of the freedom of religion and equality provisions of the *Charter*, section 93 of the *Constitution Act, 1867* requires Ontario to fund Roman Catholic schools. The Supreme Court notes that section 93 was constitutionally enshrined as a means to protect the religious right of minorities at the time of Canadian confederation. The Supreme Court also observed that one provision of the constitution (ie. s. 2(a) and/or s. 15 of the *Charter*) could not be used to invalidate another provision of the constitution (ie. s. 93 of the *Constitution Act, 1867*).

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[66] *R. v. D.J.W.*, 2011 BCCA 522, available at: http://canlii.ca/t/fpf37 (affirmed by SCC). This case involved a father accused of performing home circumcision on his son, which caused damage to his son. The father was unable to use s. 2(a) of Charter as a defence since s. 2(a) protects religious beliefs, but not necessarily religious practices when they impact on fundamental rights and freedoms of others.

[67] *Constitution Act, 1867*, *supra* note 51 at s. 93. The federal government is responsible for the education of registered Indians and provides some funding to the provinces for post-secondary education activities.

[68] *IRPR*, *supra* note 21 at ss. 9, 188-189.

[69] *Education Act*, RSO 1990, c E.2, at s. 21(1), available at: http://canlii.ca/t/52f6t [*Ontario Education Act*].

[70] See, Kerry Gillespie, "Families caught in religious schools funding controversy" (11 August 2007), available at: http://tinyurl.com/ppdeh2u; Canadian Secular Alliance, "Briefing note: Funding religious schools" (14 May 2014), available at: http://tinyurl.com/p8pj5gs; Jennifer Wilson, "Faith based schools" (17 September 2007), available at: http://www.cbc.ca/ontariovotes2007/features/features-faith.html.

[71] UN Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, 85th Sess., 20 April 2006, at para. 21, available at: http://tinyurl.com/o4w2ppe [*UNHRC Concluding Observations 2006*]. This observation is a direct result of failing to respond to the Human Rights Committee's decision in *Waldman v. Canada* (Communication No. 694/1996), available at: http://www.bayefsky.com//html/162_canada694vws.php.

[72] *Adler v. Ontario*, [1996] 3 SCR 609, available at: http://canlii.ca/t/1fr6t.

Although both the Human Rights Committee and the Supreme Court of Canada consider Ontario's policy discriminatory, it appears to be compatible with Article 4 of the 1954 Convention. This is because Ontario's policy allows stateless persons of the Roman Catholic faith the same freedom in the religious education of their children as Canadian nationals of the Roman Catholic faith. For more information on the ability of stateless persons to attend public schools, see the discussion of Article 22 of the 1954 Convention later in this report.

III. Assessment

Based on Canada's legal framework, it appears that stateless persons are not treated any less favourably than Canadian nationals in practising the same religion or in the religious education of their children in Alberta, British Columbia, Ontario or Quebec. Furthermore, although policies regarding religious education vary by province, these differences apply not only to stateless persons, but also to Canadian nationals.

Therefore, the Canadian legal framework is likely compatible with Article 4 of the 1954 Convention. Considering no gaps were found between the legal framework and the 1954 Convention, no international human rights instruments need to be assessed.

CHAPTER II: JURIDICAL STATUS

ARTICLE 12: PERSONAL STATUS

> 1. The personal status of a stateless person shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence.
>
> 2. Rights previously acquired by a stateless person and dependent on personal status, more particularly rights attaching to marriage, shall be respected by a Contracting State, subject to compliance, if this be necessary, with the formalities required by the law of that State, provided that the right in question is one which would have been recognized by the law of that State had he not become stateless.

I. Background & Commentary

"Personal status" of stateless persons concerns their legal capacity, such as the age of majority, their capacity to marry, divorce, adopt, power of parents over their children, the mutual rights of spouses to property, and their rights to succession and inheritance.[73] Article 12 deals with the law governing the personal status of stateless persons and not with the law governing the conclusion or dissolution of legal acts. For example, it refers to the capacity to contract a marriage, but does not deal with the celebration or dissolution of marriage, wills, etc. This is left to the law of the country where such acts are performed.[74]

[73] *Robinson Commentary to the 1954 Convention*, *supra* note 11 at 30.
[74] *Ibid.*, at 32.

The Commentary on the 1954 Convention explains that the Anglo-Saxon common law tradition helps to avoid the problems that foreigners without a nationality experience in establishing their personal status. This is due to the tradition in Anglo-Saxon countries that foreigners without a nationality are subject to the rules of their domicile, rather than the country of their "nationality."[75] As a rule though, each state decides in accordance with its own law, when a domicile exists and when it does not.[76]

Furthermore, the commentary on the 1954 Convention states that Article 12 provides that the law of the country of domicile is to be applied in the first instance and the law of the country of residence applied only if a stateless person's domicile was unknown, or if they have no domicile. This is because "residence" is often easier to establish than domicile.[77]

With respect to Article 12(2), the intention of this provision is to ensure Contracting States recognize certain acquired rights as valid, even though the rights were acquired under another law. The example provided is that of recognition of marriages concluded in another state. However, if the acquired right is not recognized by the Contracting State due to public order concerns, and not because the person has become stateless, then the acquired right need not be recognized.[78] The drafters of the 1954 Convention mention that the non-recognition of polygamous marriages is one such example.

II. Canadian Legal Framework

a. Article 12(1)

In accordance with the Anglo-Saxon tradition, in Canada "[q]uestions of personal status are generally determined under the law of a person's domicile."[79] In Quebec, the *Civil Code* similarly provides that the "status and capacity of a natural person are governed by the law of his domicile."[80]

A person's "domicile" is the place at which he or she permanently has his or her home. "Domicile" is distinguished from "residence" and the distinction is determined by examining an individual's circumstances and intention. Domicile generally implies a personal intent, while residence is a question of fact. A person may have more than one residence, but can have only one domicile, or permanent home. A person can change residence without changing domicile.[81]

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[75] *Ibid.*, at 30.
[76] *Ibid.*, at 31.
[77] *Ibid*.
[78] *Ibid.*, at 32.
[79] *Olney v. Rainville*, 2009 BCCA 380, at para. 33, available at: http://canlii.ca/t/25dwr.
[80] *Civil Code of Québec*, CQLR c C-1991, at § 3083, available at: http://canlii.ca/t/52bhc. Domicile is further defined under s. 75: "The domicile of a person, for the exercise of his civil rights, is at the place of his principal establishment." Residence on the other hand is defined at s. 77 as: "The residence of a person is the place where he ordinarily resides; if a person has more than one residence, his principal residence is considered in establishing his domicile." And s. 78 provides: "A person whose domicile cannot be determined with certainty is deemed to be domiciled at the place of his residence…A person who has no residence is deemed to be domiciled at the place where he lives or, if that is unknown, at the place of his last known domicile."
[81] Canadian Encyclopedic Digest, Conflict of Laws, Domicile – General Consideration, IV.1 (WestlawNext) at

Persons living in Canada have provincial domiciles, established by such factors as intention, residence and permanency.[82] Case law has established that an illegal immigrant in Canada who intends to make the jurisdiction his or her permanent home may acquire a new domicile in Canada, even though their illegality in Canada arises from a breach of immigration law.[83]

In the common law provinces, "residence" is usually modified by terms such as "ordinary" or "habitual" and the meaning of the word may be affected by whether it is used as a choice of law or jurisdiction concept.[84] "Residence" involves a settled and enduring connection between a person and a place, but residence implies that a person is living in a jurisdiction: eating, sleeping, and working in that place.[85] The term "residence" excludes tourists and casual visitors to a place.[86]

b. Article 12(2)

Using the example of marriage cited in Article 12(2), the *Civil Marriage Act* provides that for a marriage to be lawful in Canada the union must be between two persons, to the exclusion of all others,[87] and persons of the same sex can be married.[88] However, federal law prohibits marriage between persons related lineally by consanguinity or adoption, and between siblings, whether brother and sister by whole blood or half-blood, or by adoption.[89] In addition, under Canadian criminal law, polygamy is prohibited.[90] Although the federal government has jurisdiction for marriage, the provinces also have jurisdiction for the solemnization of marriage under the *Constitution Act, 1867*.[91] As a result, the provinces have legislated on such issues as the age of those who can marry, who can perform marriages, and licensing procedures, etc.[92]

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§121.
[82] *Ibid.*, at §123.
[83] *Jablonowski v. Jablonowski*, [1972] 3 OR 410, available at: http://canlii.ca/t/g186h [*Jablonowski*].
[84] James G. McLeod, *The Meaning of Ordinary Residence and Habitual Residence in the Common Law Provinces in a Family Law Context* (Ottawa: Department of Justice Canada, 2006), at 7-8, available at: http://tinyurl.com/ogmp3co [*McLeod*].
[85] *Ibid.*, at 7.
[86] *Ibid*.
[87] *Civil Marriage Act*, SC 2005, c 33, at s. 2, available at: http://laws-lois.justice.gc.ca/eng/acts/c-31.5/FullText.html [*Civil Marriage Act*].
[88] *Ibid.*, at s. 4.
[89] *Marriage (Prohibited Degrees) Act*, SC 1990, c 46, available at: http://laws-lois.justice.gc.ca/eng/acts/M-2.1/FullText.html.
[90] *Criminal Code*, RSC, 1985, c C-46, at s. 293, available at: http://laws-lois.justice.gc.ca/eng/acts/C-46/FullText.html. The issue of polygamy was specifically mentioned during the discussion of Article 12(2) of the 1954 Convention, in particular that it is the result of the generally accepted validity of "acquired [or vested] rights" which ought not be disturbed, except in specifically described cases where the acquired right of the stateless person would not have been recognized by the law of the given state if he had not become stateless. Such is the case where certain rights are contrary to the "public order" of the state where they are claimed; for example, rights resulting from polygamy invoked in a country where it is prohibited, divorce in countries in which divorces are not recognized, etc." See *Robinson Commentary to the 1954 Convention*, *supra* note 11 at 32.
[91] *Constitution Act, 1867*, *supra* note 51 at ss. 91(26) and 92(12).
[92] See *Marriage Act*, RSO 1990, c M.3, available at: http://canlii.ca/t/ldwr; *Marriage Act*, RSBC 1996, c 282, available at: http://canlii.ca/t/528th; *Marriage Act*, RSA 2000, c M-5, available at: http://canlii.ca/t/528fb; *Quebec Civil Code*, *supra* note 80 at ss. 365-400.

With respect to the recognition of marriages that take place outside Canada, and for the purposes of immigration to Canada, marriage means "a marriage that is valid both under the laws of the jurisdiction where it took place and under Canadian law."[93] Canadian legal prohibitions with respect to marriage apply for persons seeking a visa to enter Canada.[94] Therefore, a polygamous marriage entered into by stateless persons outside Canada would not be recognized under Canadian law. This would nonetheless comply with Article 12(2) of the 1954 Convention, as the non-recognition of polygamous marriages is permissible for reasons of public order, and furthermore, the non-recognition is not specific to whether or not the person is stateless.

For marriages between non-resident persons in Canada, a marriage "performed in Canada and that would be valid in Canada if the spouses were domiciled in Canada is valid for the purposes of Canadian law even though either or both of the spouses do not, at the time of the marriage, have the capacity to enter into it under the law of their respective state of domicile."[95] One such example is a marriage performed in Canada between same sex persons, when the marriage would not be recognized in the state of the couple's domicile.

III. Assessment

In light of the above legal principles pertaining to personal status and legislation regarding marriage, it appears that the Canadian legal framework is compatible with Article 12 of the 1954 Convention. However, since this section is not able to review the law relating to personal status on all matters identified in the Commentary, future research could assess and confirm whether the Canadian legal framework related to those legal aspects also comply with Article 12 of the 1954 Convention.

IV. Recommendations

7) Further research should be conducted on the following matters, in order to confirm that the Canadian legal framework concerning "personal status" is compatible with Article 12 of the 1954 Convention:
   - The age of majority
   - The rights of persons under age
   - Capacity of married women
   - The instances when a person may lose legal capacity
   - Divorce
   - Recognition and adoption of children
   - The powers of parents over their children and mutual rights to support,
   - The mutual rights of spouses to property
   - Who succeeds whom
   - What are the consequences of a will, and

[93] *IRPR*, *supra* note 21 at s. 2.
[94] See Citizenship and Immigration Canada, "OP 2 Processing Members of the Family Class", 14 November 2006, available at: http://tinyurl.com/cl4h8ry.
[95] *Civil Marriage Act*, *supra* note 87 at s. 5(1).

- Who is considered to have survived in case of unknown date of death

ARTICLE 13: MOVABLE AND IMMOVABLE PROPERTY

> The Contracting States shall accord to a stateless person treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property.

I. Background & Commentary

Article 13 addresses rights to acquire and rights pertaining to the acquisition of moveable and immovable property.[96] Rights pertaining to the acquisition of moveable and immoveable property include sale, exchange, mortgaging, pawning, administration, income, and leases and other contracts relating to such property.[97] Property includes tangible property but also securities, monies and bank accounts, etc. Article 13 does not include artistic and industrial property, which is covered by Article 14.[98]

To be within the scope of Article 13, it is not required that a stateless person have their domicile or residence in the country in which they wish to acquire property or elsewhere.[99] In this regard, Article 13 does not add much to the rights stateless persons enjoy under Art. 7(1) of the Convention, except that Article 13 recommends Parties give stateless persons better treatment in this respect than that accorded "aliens generally".[100] The standard of treatment to be accorded stateless persons of "treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances," is similar to Articles 18 (self-employment), 19 (liberal professions), 21 (housing) and 22(2) (education other than elementary education) of the 1954 Convention.[101]

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[96] *Robinson Commentary to the 1954 Convention*, *supra* note 11 at 33.
[97] *Ibid*.
[98] *1951 Refugee Convention travaux préparatoires*, *supra* note 61 at 85.
[99] *Robinson Commentary to the 1954 Convention*, *supra* note 11 at 33.
[100] *Ibid*. Regarding "aliens generally" under Art. 7(1), the Commentary states: "while it is generally recognized that a state may treat stateless persons at discretion, i.e., it need not afford them the rights which it grants aliens possessing a nationality, either on the basis of accepted international law or domestic legislation. In stipulating that stateless persons must be treated at least as favourably as aliens in general, the Convention confers upon them rights which, theoretically at least, they would not have enjoyed otherwise, although in practice these basic rights are hardly being denied them anywhere. But this provision is not intended to establish a uniform treatment of stateless persons in the various countries. On the contrary, it leaves it to the domestic law of the country, by legislating for aliens, to set the scope of the rights of stateless persons, except for more favourable provisions explicitly established in the Convention."
[101] Similar to the 1951 Refugee Convention, see *1951 Refugee Convention travaux préparatoires*, *supra* note 61 at 85.

II. Canadian Legal Framework

Considering the extent of the legal matters that could be discussed under Article 13, this section only briefly surveys the Canadian legal framework with respect to the ability of a stateless person to purchase residential property in Alberta, British Columbia, Ontario and Quebec.

Both the federal government and provincial governments have legislation relating to the ability of a foreign national to purchase real property.[102]

a. Federal Legislation

The *Citizenship Act* provides the general rule that non-citizens are able to acquire, hold and dispose of real and personal property of every description in the same manner and in all respects, as does a citizen.[103] Furthermore, non-citizens are able to derive through, from, or in succession a title to real and personal property of every description, in the same manner and in all respects, as does a citizen.[104]

However, subject to some restrictions, the *Citizenship Act* authorizes the provinces to prohibit, annul or restrict non-citizens from the taking, acquisition, or the succession to any interest in real property located in the province.[105] This includes corporations or associations that are controlled by non-citizens. The province may make regulations in this respect that determine: what transactions constitute a direct or an indirect taking or acquisition of any interest in real property located in the province; what constitutes effective control of a corporation or association by persons who are not citizens; and what constitutes an association.[106] The restrictions the *Citizenship Act* imposes on the provinces to establishing limitations on non-citizens are that the provinces cannot make any decision or take any action that:

- Prohibits, annuls or restricts the taking or acquisition directly or indirectly of, or the succession to, any interest in real property located in a province by a permanent resident;
- Conflicts with any legal obligation of Canada under any international law, custom or agreement;
- Discriminates between persons who are not citizens on the basis of their nationalities, except in so far as more favourable treatment is required by any legal obligation of Canada under any international law, custom or agreement;
- Hinders any foreign state in taking or acquiring real property located in a province for diplomatic or consular purposes; or
- Prohibits, annuls or restricts the taking or acquisition directly or indirectly of any interest in real property located in a province by any person in the course or as a result of an investment is likely to be of net benefit to Canada under the *Investment Canada Act*[107]

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[102] *Constitution Act, 1867*, *supra* note 51. The federal government legislates with respect to aliens and naturalization under s. 91(25), while the provincial governments legislate with respect to property and civil rights in their respective provinces under s. 92(13).
[103] *Citizenship Act*, *supra* note 22 at s. 34(a).
[104] *Ibid.*, at s. 34(b).
[105] *Ibid.*, at s. 35(1).
[106] *Ibid.*, at s. 35(2).
[107] *Ibid.*, at s. 35(3).

b. Provincial Legislation

Generally, Alberta, British Columbia, Ontario and Quebec allow non-citizens to acquire, hold and dispose of residential property the same as citizens and permanent residents.[108] However, some provinces have implemented limitations in certain circumstances.[109] For example, in Alberta there are limitations on non-Canadian and non-permanent residents in the number of parcels of land and the amount of acreage they can acquire of rural real estate in Alberta.[110] In addition, Alberta, British Columbia and Quebec place restrictions on non-citizens and non-residents in the acquisition of public lands.[111] Ontario and Quebec also implement higher taxes on non-citizens and non-permanent residents in respect of land transfer and property taxes.[112]

On a practical matter, all persons who purchase real estate will require a lawyer in order to register the transfer of real estate property. To complete this transaction, lawyers must confirm and verify the identity of their clients with valid government issued identification.[113] The "independent source documents" that are most often listed to verify a client's identity includes: a driver's licence; birth certificate; provincial or territorial health insurance card; passport; or similar record.[114]

III. Assessment

Based on the above review, it appears that the Canadian legal framework respecting the acquisition and disposal of real property in Alberta, British Columbia, Ontario and Quebec permits non-citizens, including stateless persons, the ability to acquire and dispose of residential property the same as citizens and permanent residents. While, some restrictions apply in certain circumstances to non-citizens in the purchase of rural land, public land, and transfer/property

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[108] For example, see *Property Law Act*, RSBC 1996, c 377, at s. 39, available at: http://canlii.ca/t/528hv: 39(1). A person who is not a Canadian citizen has the same capacity to acquire and dispose of land in British Columbia as if he or she were a citizen; (2) A person must not be disturbed in the possession or precluded from the recovery of land in British Columbia merely because of the citizenship or lack of citizenship of some person from or through whom he or she may derive title. And see, *Aliens' Real Property Act*, RSO 1990, c A.18, http://canlii.ca/t/g3. Aliens' powers as to real estate: 1. Every alien has the same capacity to take by gift, conveyance, descent, devise, or otherwise, and to hold, possess, enjoy, claim, recover, convey, devise, impart and transmit real estate in Ontario as a natural born or a naturalized subject of Her Majesty.

[109] Although not the focus of this report, the province of Prince Edward Island (P.E.I.) maintains some of the most significant restrictions on out-of-province residents in the acquisition of real estate, see *Lands Protection Act*, RSPEI 1988, c L-5, available at: http://canlii.ca/t/52cl0.

[110] *Foreign Ownership of Land Regulations*, Alta Reg 160/1979, available at: http://canlii.ca/t/km9v. The limit is two parcels and 20 acres of rural land. This regulation also includes additional restrictions not mentioned in this report.

[111] Xiaojing Qin, "Foreigners' Right to Acquire Land under International Economic Agreements" (2011) 8 Manchester J. Int'l Econ. L. 57 at 67 [*Qin*].

[112] *Ibid*.

[113] Law Society of Alberta, *The Rules of the Law Society of Alberta*, r. 118.6(1), available at: http://tinyurl.com/pzq3awc; Law Society of British Columbia, *Law Society Rules*, r. 3-95(1), available at: available at: http://tinyurl.com/p4o42s7; Law Society of Upper Canada, *By-Law 7.1*, at s. 23(7), available at: http://tinyurl.com/p5xkoqq; Barreau du Québec, *Regulation respecting accounting and standards of professional practice of advocates*, ss. 13-14, 20-27, available at: http://canlii.ca/t/526jh.

[114] *Ibid.*

taxes, stateless persons are not negatively impacted anymore than aliens generally. Therefore, the Canadian legal framework on the acquisition and disposal of residential property appears compatible with Article 13 of the 1954 Convention.

To the extent that stateless persons are unable to meet verification of identity requirements under a law society's rules, this is a potential concern. However, the list of documentation is non-exhaustive and in some circumstances an attestation of identity can be provided to the lawyer in order to verify identity. Further research would need to be conducted in order to determine whether this identification requirement is an obstacle for stateless persons in exercising their rights under Article 13 of the 1954 Convention.

IV. Recommendations

8) In support of Recommendation #5, further research should examine the practical obstacles that stateless persons experience in exercising their moveable and immoveable property rights under Article 13 of the 1954 Convention. Such research can include the ability of stateless persons to acquire and dispose of commercial property, open a bank account, deal in securities, sign leases and acquire a mortgage in order to purchase residential or commercial property.

ARTICLE 14: ARTISTIC RIGHTS AND INDUSTRIAL PROPERTY

> In respect of the protection of industrial property, such as inventions, designs or models, trade marks, trade names, and of rights in literary, artistic and scientific works, a stateless person shall be accorded in the country in which he has his habitual residence the same protection as is accorded to nationals of that country. In the territory of any other Contracting State, he shall be accorded the same protection as is accorded in that territory to nationals of the country in which he has his habitual residence.

I. Background & Commentary

This article differentiates between a stateless person's country of habitual residence in which they claim the rights of Article 14, and all other Contracting States to the 1954 Convention where they may claim the rights of Article 14.[115] In the stateless person's country of habitual residence, a stateless person is to be accorded the same protection as nationals of the country. In all other Contracting States to the 1954 Convention, a stateless person is to be granted the same rights that are accorded to nationals of the country of his habitual residence.[116] The scope of the rights enjoyed is dependent on domestic law or international conventions respecting artistic rights and industrial property.[117] Therefore, determining a stateless person's rights under Article 14 is a challenge given that the rights change depending on whether the person moves from one

[115] *Robinson Commentary to the 1954 Convention*, *supra* note 11 at 33.
[116] *Ibid*.
[117] *Ibid.*, at 34.

country to another, the country's domestic law, and its adherence to international conventions on artistic rights and industrial property.[118]

In order to have "habitual residence" for the purposes of Article 14 a stateless person does not need to have permanent residence, but only residence of sufficiently long duration to be considered locally connected with the country. A stateless person may also have several such residences, although such instances would be rather rare given their specific status.[119] The *Handbook on Protection of Stateless Persons* further summarizes:

> [T]he condition that a stateless person be "habitually resident" or "residing" indicates that the person resides in a State party on an on-going and stable basis. "Habitual residence" is to be understood as stable, factual residence. This covers those stateless persons who have been granted permanent residence, and also applies to individuals without a residence permit who are settled in a country, having been there for a number of years, who have an expectation of on-going residence there.[120]

However, "Article 14 nor the convention as a whole deals with the rights which a stateless person *illegally* in a Contracting State would enjoy under a provision requiring lawful stay or habitual residence."[121] Therefore, stateless persons without a lawful status or authorization would appear to only have the rights of Article 7(1) of the 1954 Convention.[122]

II. Canadian Legal Framework

Considering a stateless person's rights under Article 14 change depending on whether the person moves from one country to another, the country's domestic law, and its adherence to international conventions on artistic rights and industrial property, this section will focus its review on the terms of Canadian legislation on patents, industrial design, copyright and trademarks as they concern stateless persons habitually resident in Canada. It makes no judgment of whether Canadian legislation is in compliance with international conventions on patents, industrial design, trademarks and copyright. Another challenge in assessing the Canadian legal framework for this article is that it is not entirely clear whether a particular status or authorization in Canada is required for a stateless person to be considered "habitually resident" for the purposes of Article 14.

a. Patents

The *Patent Act* provides that an "applicant" for a patent "includes an inventor and the legal representatives of an applicant or inventor."[123] The *Patent Act* does not define "inventor", but case law defines an "inventor" as the one who has conceived or contributed to the inventive

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[118] *Ibid*.
[119] *Ibid*.
[120] *Handbook on Stateless Persons*, *supra* note 12 at para. 139.
[121] *Robinson Commentary to the 1954 Convention*, *supra* note 11 at 34. Emphasis added.
[122] *Ibid*.
[123] *Patent Act*, RSC 1985, c P-4, at s. 2, available at: http://canlii.ca/t/52f16 [*Patent Act*].

concept of the invention.[124] The *Patent Act* defines "legal representatives" as including "heirs, executors, administrators, guardians, curators, tutors, assigns and all other persons claiming through or under applicants for patents and patentees of inventions."[125]

Neither the *Patent Act* nor the *Patent Rules* require an applicant, inventor, legal representative, or patent agent to be a Canadian citizen, permanent resident of Canada, or have a particular legal status in order to apply for a patent. In section 29(1) of the *Patent Act* dealing with "non-resident applicants", there is a requirement that "[a]n applicant for a patent who does not appear to reside or carry on business at a specified address in Canada shall, on the filing date of the application, appoint as a representative a person or firm residing or carrying on business at a specified address in Canada."[126] While it has been noted that this is for the purposes of service proceedings,[127] it appears to at least imply that the applicant for a patent have a connection to someone who resides or carries on a business in Canada.

b. Industrial Design

The *Industrial Design Act* states that the proprietor of an industrial design may apply to register the design with the Minister by paying the prescribed fees and filing an application in the prescribed form.[128] Furthermore, an applicant for registration of an industrial design is a "person who is named as the proprietor of a design in an application or the person to whom a design has been assigned while the application is pending."[129] A "registered proprietor" in respect of an industrial design is defined as "the person whose name appears in the Register of Industrial Designs as the proprietor of the industrial design."[130] In view of this, the registration of an industrial design under the *Industrial Design Act* does not appear to require an applicant/proprietor of an industrial design to have a nationality, Canadian citizenship, Canadian permanent residence or reside in Canada. However, in order to receive any notice or on whom documents are to be served on behalf of the applicant, an applicant must have a "representative for service" with an address in Canada.[131]

The *Industrial Design Act* also provides that an application for the registration of an industrial design filed in Canada, by a person who has previously filed an application for registration of the same industrial design in a foreign country, has the same force and effect as the same application would have if filed in Canada. The *Industrial Design Act* defines "foreign country" as "a country that by treaty, convention or law affords a privilege to citizens of Canada that is similar to the privilege afforded with respect to the effective date of an application for the registration of an industrial design, and includes a World Trade Organization member."[132]

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[124] *Apotex Inc. v. Wellcome Foundation Ltd.*, 2002 SCC 77, at paras. 94-109, available at: http://canlii.ca/t/1kc
[125] *Patent Act*, *supra* note 123 at s. 2.
[126] *Ibid.*, at s. 29(1).
[127] *Sarnoff Corp. v. Canada* (Attorney General), 2008 FC 712, at paras. 9 & 13, available at: http://canlii.ca/t/1x5qd [*Sarnoff v. Canada*]
[128] *Industrial Design Act*, RSC 1985, c I-9, at s. 4(1), available at: http://canlii.ca/t/hzpm [*Industrial Design Act*]
[129] *Industrial Design Regulations*, SOR/99-460, at s. 1, available at: http://canlii.ca/t/52bs1 [*Industrial Design Regulations*]
[130] *Ibid.*, at s. 1.
[131] *Ibid.*, at ss. 1 & 9(2)(e).
[132] *Industrial Design Act*, *supra* note 128 at s. 29; and *Ibid.*, at s. 20.

c. Trademarks

The *Trade-marks Act* outlines the procedure and process for registering trademarks, as well as the enforcement of registered trademarks.[133] However, it is important to note that trademarks do not have to be registered for the rights to arise; it is the use of the trademark in Canada that creates the rights in the trademark.[134]

The *Trade-mark Regulations* define an "applicant" for the registration of a trademark as "a person who files an application for the registration of a trade-mark…"[135] Although there is no specific requirement of nationality or immigrant status, when applying to register a trademark the application must contain "the address of the applicant's principal office or place of business in Canada, if any, and if the applicant has no office or place of business in Canada, the address of his principal office or place of business abroad and the name and address in Canada of a person or firm to whom any notice in respect of the application or registration may be sent."[136] This latter requirement however, is removed once the recently passed *Economic Action Plan 2014 Act* comes into effect. This legislative amendment appears to no longer require that the content of the application to register a trademark include an address (unless this requirement is implemented through future regulations).[137]

Furthermore, when an applicant has previously registered a trademark in any country of the Union for the Protection of Industrial Property under the Paris Convention or any World Trade Organization member ("country of the Union"), and a subsequent application for registration is made in Canada by the same applicant, the date of filing of the application in the other country is deemed to be the date of filing the application in Canada.[138] The applicant is then entitled to

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[133] The *Trade-marks Act*, RSC 1985, c T-13, available at: http://canlii.ca/t/52dg3 [*Trade-marks Act*] will be amended and its name changed to *Trademarks Act* by Bill C-31, *Economic Action Plan 2014 Act, No. 1*, 2nd Sess., 41st Parl, 2014 (assented to 19 June 2014), available at: http://tinyurl.com/na72du9 [*Economic Action Plan 2014 Act*]. Bill C-31 will amend the *Trade-mark Act* to allow Canada to accede to the Madrid Protocol, Singapore Treaty and Nice Agreement treaties relating to trademarks. At the time of writing the amendments have yet to come into force.

[134] *Ciba-Geigy Canada Ltd. v. Apotex Inc.*, [1992] 3 SCR 120, available at: http://canlii.ca/t/1fg4b. The common law tort of "passing off" can be used to enforce the use of unregistered trade-marks.

[135] *Trade-marks Regulations*, SOR/96-195, at s. 2, available at: http://canlii.ca/t/527r2 [*Trade-marks Regulations*].

[136] *Trade-marks Act*, *supra* note 133 at s. 30(g).

[137] *Economic Action Plan 2014 Act, No. 1, supra* note 133 at cl. 339.
Section 30(1) now states: 30. (1) A person may file with the Registrar an application for the registration of a trademark in respect of goods or services if they are using or propose to use, and are entitled to use, the trademark in Canada in association with those goods or services.
(2) The application shall contain
(*a*) a statement in ordinary commercial terms of the goods or services in association with which the trademark is used or proposed to be used;
(*b*) in the case of a certification mark, particulars of the defined standard that the use of the certification mark is intended to indicate and a statement that the applicant is not engaged in the manufacture, sale, leasing or hiring of goods or the performance of services such as those in association with which the certification mark is used or proposed to be used;
(*c*) a representation or description, or both, that permits the trademark to be clearly defined and that complies with any prescribed requirements; and
(*d*) any prescribed information or statement.

[138] *Trade-marks Act*, *supra* note 133 at s. 34(1)(a). Wording of s. 34(1)(a) changes once the *Economic Action Plan 2014 Act* comes into effect, but does not substantially change the meaning of the provision for the purposes of this report.

priority in Canada if, among other things, the applicant was at the date of application a citizen or national, or domiciled in that country, or has a real and effective industrial or commercial establishment in the country of the Union.[139]

In light of the above legal provisions, it appears that no citizenship is required and that a stateless person as a resident of Canada is able to enjoy the rights of trademark under Article 14. For stateless persons outside Canada to register a trademark in Canada, the person must at least be domiciled or have a commercial establishment in accordance with applicable international conventions.

d. Copyright

Like trademarks, copyright arises when the works are created.[140] The conditions for the subsistence of copyright are contingent on whether the person is linked to a treaty country. In particular, section 5(1) of the *Copyright Act* provides that copyright applies to every original literary, dramatic, musical and artistic work, the author was, at the date of the making of the work, a citizen or subject of, or a person ordinarily resident in, Canada or some other treaty country.[141] Copyright also applies when a work is first published in a treaty country even if the author was not a citizen or subject of, or a person ordinarily resident in, Canada or some other treaty country.[142] Treaty country is defined under the *Copyright Act* as a Berne Convention country, Universal Copyright Convention country, WIPO Copyright Treaty country or World Trade Organization member.[143] The Minister may also extend protection to other countries that are not treaty countries by way of notice in the *Canada Gazette*.[144]

In order to register a copyright, this can be done "by or on behalf of the author of the work, the owner of the copyright in the work, an assignee of the copyright, or a person to whom an interest in the copyright has been granted by licence."[145] Based on the foregoing it appears as though stateless persons who publish a work in Canada, or are "ordinarily resident" in Canada would be able to exercise their entitlement to copyright for the purposes of Article 14.

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[139] *Ibid.*, at s. 34(1)(b). Once the *Economic Action Plan 2014 Act* comes into effect, s. 34(1)(b) becomes s. 34(1)(c): "when an applicant files an application for the registration of a trademark in Canada after the applicant or the applicant's predecessor in title has applied, in or for any country of the Union other than Canada, for the registration of the same or substantially the same trademark in association with the same kind of goods or services, the filing date of the application in or for the other country is deemed to be the filing date of the application in Canada and the applicant is entitled to priority in Canada accordingly despite any intervening use in Canada or making known in Canada or any intervening application or registration, if…(*b*) the applicant files a request for priority in the prescribed time and manner and informs the Registrar of the filing date and country or office of filing of the application on which the request is based;"

[140] Canadian Intellectual Property Office, "What is copyright?" (2 September 2014), available at: http://tinyurl.com/pghlz8l [*What is copyright?*].

[141] *Copyright Act*, RSC 1985, c C-42, at s. 5(1), available at: http://canlii.ca/t/52dfv [*Copyright Act*]; and see, Canadian Intellectual Property Office, *Copyright Guide* (30 April 2015), available at: http://tinyurl.com/opmnwam [*Copyright Guide*].

[142] *Copyright Act*, *ibid.*, at s. 5(1)(c).

[143] *Ibid.*, at s. 2.

[144] *Copyright Guide*, *supra* note 141.

[145] *Copyright Act*, *supra* note 141 at s. 55(1).

e. Definition of Residing in Canada

The *Patent Act*, the *Industrial Design Act*, the *Trade-marks Act*, and the *Copyright Act* do not provide a definition for what constitutes "resident" or "ordinarily resident." However, case law from the Federal Court of Canada, has defined "ordinarily resident" as "distinct and separate from the notion of "citizenship", "domicile" or "permanent residence" in that it essentially calls for a determination of the country where a person's general mode of life unfolds."[146] In particular, "[i]t is held to mean residence in the course of the customary mode of life of the person concerned and it is contrasted with special or occasional or casual residence. The general mode of life is, therefore, relevant to its application."[147]

In this sense, without any statutory or policy directive from Canadian authorities, "ordinarily resident" appears to be similar to the definition of "habitual residence" envisioned by the drafters of the 1954 Convention.

III. Assessment

Based on a review of the Canadian legal framework, it appears that stateless persons in Canada are able to exercise their rights in Canada in accordance with Article 14. This is because Canadian legislation does not require a foreign national to have a nationality, Canadian citizenship, Canadian permanent residence, or a particular immigration status in Canada. Moreover, where residence or "ordinarily resident" is a requirement, the definition of "ordinarily resident" in Canadian case law appears consistent with the definition of habitual residence envisioned by Article 14. Overall, the Canadian legal framework appears to be compatible with Article 14 of the 1954 Convention.

As a final note, even if there is a gap in the Canadian legal framework with respect to Article 14 of the 1954 Convention, there is limited protection of such rights under international human rights law. For example, Article 15(1)(c) of the *International Covenant on Economic, Social and Cultural Rights* ("*ICESCR*") provides that everyone has a right "to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author." However, the Committee on Economic, Social and Cultural Rights ("CESCR") states: "the scope of protection of the moral and material interests of the author provided for by article 15, paragraph 1 (c), does not necessarily coincide with what is referred to as intellectual property rights under national legislation or international agreements…It is therefore important not to equate intellectual property rights with the human right recognized in article 15, paragraph 1 (c)."[148]

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[146] *Fraser v. Janes Family Foods Ltd*., 2012 FCA 99, at para. 9, available at: http://canlii.ca/t/fqsbb.
[147] *Thomson v. Minister of National Revenue*, [1946] S.C.R. 209 at p. 224, available at: http://canlii.ca/t/1nmzk [*Thomson*], cited in *ibid.*, at para. 9.
[148] See UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author (Art. 15, Para. 1 (c) of the Covenant)*, 12 January 2006, E/C.12/GC/17, at paras. 2-3, available at: http://www.refworld.org/docid/441543594.html.

ARTICLE 15: RIGHT OF ASSOCIATION

As regards non-political and non-profit-making associations and trade unions the Contracting States shall accord to stateless persons lawfully staying in their territory treatment as favourable as possible, and in any event, not less favourable than that accorded to aliens generally in the same circumstances.

I. Background & Commentary

There is no generally recognized interpretation of "lawfully staying". However, based on the *travaux préparatoires* of the 1951 Refugee Convention there is some guidance on what it describes with respect to the 1954 Convention.[149] "Lawfully staying" refers to stateless persons either lawfully admitted or whose illegal entry was legalized. It is understood not to refer to persons who although legally admitted or legalized, have overstayed the period of their lawful admission or violated any other conditions attached to their admission or stay.[150] "Lawfully staying" is not meant to include individuals who are temporarily visiting for special reasons and for a specific period of time.[151] While the drafters did not discuss in detail what they consider to be "visiting for special reasons", the example provided was of a musician staying in a country for one or two nights in order to give concerts. Such a person would not be considered "lawfully staying" in the territory.[152]

The *Handbook on Protection of Stateless Persons* further clarifies and summarizes that "lawfully staying":

> [E]nvisages a greater duration of presence in a territory. However, this need not take the form of permanent residence. Shorter periods of stay authorised by the State may suffice so long as they are not transient visits. Stateless persons who have been granted a residence permit would fall within this category. It also covers individuals who have temporary permission to stay if this is for more than a few months. Individuals recognised as stateless following a determination procedure but to whom no residence permit has been issued will generally be "lawfully staying" in a State party by virtue of the length of time already spent in the country awaiting a determination.[153]

In other words, "lawfully staying," means a permitted, regularized stay of some duration.[154] "Lawfully staying" is also the condition required for protection rights described in Articles 17, 19, 21, 23, 24 and 28 of the 1954 Convention.

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[149] UN High Commissioner for Refugees, *"Lawfully Staying" – A Note on Interpretation* (3 May 1988), at para. 23, available at: http://www.unhcr.org/refworld/docid/42adk93304.html. [*Lawfully Staying Interpretive Note*]
[150] *Robinson Commentary to the 1954 Convention*, *supra* note 11 at 36. "Lawfully staying" replaced the term "lawfully in the country", which was the wording first used by the Ad Hoc Committee in drafting the 1951 Refugee Convention. It is believed by using "lawfully staying" in the 1954 Convention, the meaning is the same meaning as intended in the 1951 Refugee Convention. "Lawfully staying" is the English translation of French "résidant régulièrement" which formed the basis for understanding the scope of "lawful stay".
[151] *Ibid.*, at 39.
[152] *Lawfully Staying Interpretive Note*, *supra* note 149 at para. 6.
[153] *Handbook on Stateless Persons*, *supra* note 12 at para. 137.
[154] *Lawfully Staying Interpretive Note*, *supra* note 149 at para. 11.

It has been argued that although lawfulness is usually explicit and within the rights of states to prescribe by domestic law, an otherwise unlawful stay could become "implicitly lawful". Such cases could include persons who are subject to an indefinite stay of deportation because they are unable to be removed.[155] Stateless persons subject to a removal order, but without the ability to gain entry to another country, could be considered "implicitly lawfully staying" because they continue to stay and live in limbo. Without recognition of their implicit lawful stay though, stateless persons are unable to access rights under the 1954 Convention where lawful stay is a prerequisite. In these cases, determining whether a stay is "lawful" requires consideration be given to all the prevailing circumstances and the fact that the stay in question is known and not prohibited, i.e. tolerated, because of the precarious circumstances of the person.[156]

Finally, the term "treatment as favourable as possible" under Article 15 is granted only to stateless persons who live in the country on a more or less permanent basis (i.e., have some kind of residence, even if temporary). On the other hand, stateless persons who are on a brief stay in the country are only entitled to the rights under Art. 7(1).[157]

II. Canadian Legal Framework

a. Constitutional Legal Framework

The federal government legislates with regard to labour and employment matters for industries within its jurisdiction, while the provinces legislate labour and employment matters for industries within their jurisdiction.[158] Both federal and provincial labour legislation on the making of associations and trade unions must comply with section 2(d) of the *Charter*, which provides that "everyone has the…freedom of association."[159] "Everyone" means an individual, including non-citizens.

In 2015, the Supreme Court of Canada clarified the scope of the freedom of association under s. 2(d) by stating that "s. 2(d), viewed purposively, protects three classes of activities: (1) the right to join with others and form associations; (2) the right to join with others in the pursuit of other constitutional rights; and (3) the right to join with others to meet on more equal terms the power and strength of other groups or entities."[160] However, like all guaranteed rights and fundamental freedoms of the *Charter*, s. 2(d) may still be subject to such reasonable limits prescribed by law if they can be demonstrably justified in a free and democratic society.[161]

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[155] *Ibid.*, at paras. 13-17, 21, 23.
[156] *Ibid.*, at para. 23; see also *Handbook on Stateless Persons*, *supra* note 12 at fn 80.
[157] *Robinson Commentary to the 1954 Convention*, *supra* note 11 at 36.
[158] Federal industries include: banking, telecommunications, shipping, broadcasting, postal service, inter-provincial and international transportation, crown corporations, inland fishing, First Nations reserves, and the federal public service. Industries not covered by federal labour and employment jurisdiction are within the legislative authority of the provincial governments.
[159] *Charter*, *supra* note 45 at s. 2(d).
[160] *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, at para. 66, available at: http://canlii.ca/t/gfxx8.
[161] *Charter*, *supra* note 45 at s. 1; and *Oakes*, *supra* note 49.

b. Federal Legal Framework

Work Permits

Generally, in order for a foreign national to be able to work in Canada, he or she requires a valid work permit.[162] Furthermore, in most circumstances where a foreign national receives a work permit, they also receive temporary residence status.[163] However, in some cases foreign nationals are explicitly excluded from receiving temporary resident status even though they are granted a work permit.[164] In particular, this applies to foreign nationals who are granted a work permit because they are subject to an unenforceable removal order and require the permit in order to meet their basic needs.[165] This is a situation that stateless persons may find themselves, as there is no country to which they can return and they do not have access to social assistance. Such work permits may be renewed indefinitely while a stateless person is subject to an unenforceable removal order.

Unfortunately, the *IRPA* does not explicitly articulate which permits or status' result in a foreign national being considered "lawfully staying", "lawfully in" or "habitually resident" for the purposes of the 1954 Convention. However, for foreign nationals who are in possession of a valid work permit of a few months duration and receive temporary residence status, there is a strong case to be made that they meet the definition of "lawfully staying" discussed above. In the case of foreign nationals who obtain a work permit when they are subject to an unenforceable removal order and are unable to meet their basic needs, an argument could be made that due to their limbo status they should be considered "implicitly lawfully staying." Conversely though, since there is no clear articulation in the *IRPA*, an argument could also be made that those foreign nationals who receive a work permit while subject to an unenforceable removal order are only "authorized" to work in Canada, but not necessarily "lawfully staying" or "lawfully in" Canada for the purposes of the 1954 Convention.

Federal Labour Relations Legislation

Under the *Canada Labour Code*[166] and the *Public Service Labour Relations Act*,[167] those who are within the definition of "employees" are able to form associations and trade unions.[168] While there are restrictions on who is considered an "employee" under these statutes, such restrictions concern persons who occupy particular types of positions and provide certain services (ie.,

[162] *IRPA*, *supra* note 20 at s. 30(1). There are some limited exceptions under *IRPR*, *supra* note 21 at s. 186, where a work permit is not required.
[163] *IRPA*, *supra* note 20 at s. 22(1).
[164] *IRPR*, *supra* note 21 at s. 202.
[165] *IRPR*, *supra* note 21 at s. 206(1)(b).
[166] *Canada Labour Code*, RSC, 1985, c L-2, available at: http://laws-lois.justice.gc.ca/eng/acts/l-2/ [*Canada Labour Code*]. The preamble to the *Canada Labour Code* states that the Code is implementing legislation for Canada's obligations in ratifying the *Convention concerning Freedom of Association and Protection of the Right to Organise*, available at: http://tinyurl.com/nlcepm9 (entry into force 4 July 1950, ratification by Canada 23 March 1972) [*ILO Convention No. 87*]
[167] *Public Service Labour Relations Act*, SC 2003, c 22, at s. 2, available at: http://laws-lois.justice.gc.ca/eng/acts/P-33.3/FullText.html [*PSLRA*].
[168] *Canada Labour Code*, *supra* note 166 at s. 3(1) & 8(1); *Ibid.*, at ss. 2(1) & 5.

supervisory roles and specific professionals, etc.). In the federal public service, the government is able to prioritize the hiring of veterans, persons in receipt of a war pension, and Canadian citizens for externally posted job advertisements.[169] However, both the *Canada Labour Code* and the *Public Service Labour Relations Act* do not restrict the definition of "employee" for the purposes of joining a trade union on the basis of being a foreign national or a stateless person.

It is also noteworthy that federal labour relations legislation prohibits trade unions or persons working on behalf of a trade union from expelling, suspending, denying membership in the trade union, or imposing disciplinary standards to an employee in a manner that discriminates on the grounds identified in the *Canadian Human Rights Act*.[170] The grounds include race and national or ethnic origin.[171]

c. Provincial Legal Framework

With respect to provincial labour relations legislation, each province has legislation on the making and joining of associations and trade unions in private enterprise industries, as well as in the provincial public service. Similar to federal labour legislation identified above, labour relations legislation in Alberta,[172] British Columbia,[173] Ontario,[174] and Quebec[175] allow certain "employees" to form trade unions and associations. These provincial statutes do not exclude foreign nationals or stateless persons from becoming "employees" or being able to form or join an association or trade union.

Provincial labour legislation in Alberta, British Columbia, Ontario and Quebec also prohibit trade unions or persons working on behalf of a trade union from expelling, suspending, denying membership in the trade union, or imposing disciplinary standards in a manner that discriminates on the grounds identified in their respective provincial human rights legislation.[176]

III. Assessment

Stateless persons who are lawfully staying in Canada, and who are considered "employees"

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[169] *Public Service Employment Act*, SC 2003, c 22, ss 12, 13, at s. 39, available at: http://canlii.ca/t/52cjm.
[170] *Canada Labour Code*, *supra* note 166 at s. 95(g)-(h).
[171] *Canadian Human Rights Act*, *supra* note 52. See Article 3 above for further discussion.
[172] *Labour Relations Code*, RSA 2000, c L-1, at ss. 1(l), 4 & 21(1), available at: http://canlii.ca/t/52bwm [*Alberta Labour Relations Code*]; and *Public Service Employee Relations Act*, RSA 2000, c P-43, at ss. 1(l), 2, 9(1), 12, available at: http://canlii.ca/t/522rb [*Alberta Public Service Employee Relations Act*]
[173] *Labour Relations Code*, RSBC 1996, c 244, at ss. 1(1) & 4(1), available at: http://canlii.ca/t/520vh [*BC Labour Relations Code*]; *Public Service Labour Relations Act*, RSBC 1996, c 388, at s. 1(1) available at: http://canlii.ca/t/lgzd [*BC Public Service Labour Relations Act*]
[174] *Labour Relations Act*, RSO 1990, c L.2, at ss. 1(1), 3, 5, available at: http://canlii.ca/t/527xz [*Ontario Labour Relations Act*]; and *Crown Employees Collective Bargaining Act*, 1993, SO 1993, c 38, available at: http://canlii.ca/t/l0bl [*Crown Employees Collective Bargaining Act*].
[175] *Labour Code*, CQLR c C-27, at s. 1(1), 3, available at: http://canlii.ca/t/52bwh [*Quebec Labour Code*]; *Public Service Act*, CQLR c F-3.1.1, available at: http://canlii.ca/t/524tw [*Quebec Public Service Act*]
[176] *Alberta Labour Relations Code*, *supra* note 172 at ss. 152(1); *BC Labour Relations Code*, *supra* note 173 at s. 10(2)(a); *Ontario Labour Relations Act*, *supra* note 174 at ss. 51(2)(f) & 75; *Quebec Labour Code*, *supra* note 175 at s. 47.2.

under federal and provincial labour legislation, appear to be able to make and join associations and trade unions. Furthermore, stateless persons who would be within the definition of "employees" under federal and provincial labour legislation appear to be afforded protection at least as favourably as Canadian nationals. Therefore, based on a review of Canadian constitutional law and key federal and provincial labour laws, it appears that the Canadian legal framework is compatible with Article 15 of the 1954 Convention.

As a practical matter, stateless persons may not be in position to exercise their Article 15 rights. In particular, stateless persons who are in possession of a work permit because they are subject to an unenforceable removal order and are unable to meet their basic needs, and stateless persons who have their work permit connected to a specific employer, may be fearful of joining or forming a trade union due to their precarious circumstances and the potential repercussions from their employer.[177]

IV. Recommendations

9) In support of Recommendation #5, further research should examine the circumstances and the practical obstacles stateless persons experience in exercising their freedom of association rights enshrined in the Canadian legal framework and Article 15 of the 1954 Convention.

ARTICLE 16: ACCESS TO COURTS

1. A stateless person shall have free access to the courts of law on the territory of all Contracting States.

2. A stateless person shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatum solvi*.

3. A stateless person shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

I. Background & Commentary

Article 16 of the 1954 Convention replicates Article 16 of the 1951 Refugee Convention. At the time of drafting the 1954 Convention, it was common practice for States to grant foreigners the right to appear before courts of law as plaintiffs or defendants.[178] However, in order to avoid the

[177] Stateless persons who are in "precarious" situations may be disproportionately represented in occupations that do not have the same freedom of association rights as other workers, such as agricultural workers. However, this is a practical issue that could be studied in more detail in the future following appropriate surveys of stateless persons in Canada.

[178] *Robinson Commentary to the 1954 Convention*, *supra* note 11 at 37.

rare cases in which a State does not allow foreigners access, Article 16(1) is to apply to all stateless persons, even if they do not have a habitual residence anywhere.[179] In addition, the intended meaning of "free access to courts" under Article 16(1) does not mean that a stateless person is free from the payment of any fees or charges such as court fees, but only that the fees and charges not be higher than those levied on nationals.[180]

Under Article 16(2), stateless persons who are habitually resident in a Contracting State are to receive the same treatment as nationals in regard to access to the courts generally, *cautio judicatum solvi* (commonly known as "security for costs" in Canadian law) and legal assistance.[181] The drafters understood "habitual residence" to mean the same as that used for Article 14 of the 1954 Convention. "Habitual residence" is:

> [R]esidence of a certain duration, but it implies much less than permanent residence. Thus, to enjoy the rights…a stateless person need not have in the country a permanent residence but only a residence of sufficiently long duration to consider him as locally connected with the country. A stateless person may have several such residences (although such instances would be rather rare in view of their specific status).[182]

Article 16(3) on the other hand refers to stateless persons having the same rights as nationals of the country of their habitual residence in accessing courts in other States Parties to the 1954 Convention.[183]

II. Canadian Legal Framework

a. Article 16(1)

There is no requirement to be a Canadian citizen or permanent resident in order to bring a legal action, or defend against a legal action[184] at the Federal Court,[185] or the courts of Alberta,[186] British Columbia,[187] Ontario[188] and Quebec.[189] All that is relevant is that there be a valid cause of

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[179] *Ibid*.
[180] *1951 Convention travaux préparatoires*, *supra* note 61 at 97. Since the 1954 Convention literally follows the wording of the 1951 Refugee Convention, the meaning of the same terms which are not described in the 1954 Commentary are obtained by looking to the 1951 Convention *travaux préparatoires* and commentary.
[181] *Robinson Commentary to the 1954 Convention*, *supra* note 11 at 37.
[182] *Ibid.*, at 34. The Commentary on Article 16 states that the meaning of "habitual residence" is the same as that used for Article 14 of the 1954 Convention, as well as the definition used for the 1951 Refugee Convention.
[183] *Ibid.*, at 37.
[184] The *Citizenship Act*, *supra* note 22 at s. 39 provides "A person who is not a citizen is triable at law in the same manner as if the person were a citizen."
[185] *Federal Courts Act*, RSC, 1985, c F-7, available at: http://laws-lois.justice.gc.ca/eng/acts/F-7/FullText.html [*Federal Courts Act*]; and *Federal Courts Rules*, SOR/98-106, at s. 2, available at: http://laws-lois.justice.gc.ca/eng/regulations/sor-98-106/FullText.html [*Federal Courts Rules*]
[186] *Judicature Act*, RSA 2000, c J-2, available at: http://canlii.ca/t/52d89 [*Juridicature Act*]; and *Alberta Rules of Court*, Alta Reg 124/2010, at s. 1.1, available at: http://canlii.ca/t/52b1t [*Alberta Rules of Court*]
[187] *Court Rules Act*, RSBC 1996, c 80, available at: http://canlii.ca/t/527vv [*BC Court Rules Act*]; and *Supreme Court Civil Rules*, BC Reg 168/2009, available at: http://canlii.ca/t/529ps [*BC Court Civil Rules*]

action and that the respective court have jurisdiction to decide the legal issue. There is no difference in the fees or charges for Canadian citizens, permanent residents, or foreign nationals in Canada who wish to pursue or defend a cause of action.[190]

In criminal law matters, "everyone" in Canada has constitutionally protected access to court; this includes every human being who is physically present in Canada.[191] In addition, there is a right to an interpreter in criminal proceedings[192] and refugee proceedings[193] when the individual does not understand the language of the court. This is due to the nature of the rights at stake. With respect to the right to an interpreter in civil proceedings between private parties, this is not constitutionally protected and the case law indicates that if the litigant requires an interpreter, the litigant is responsible for the interpreter's fees.[194]

b. Article 16(2)

Legal Assistance

In regards to legal assistance, there is a constitutionally protected right to counsel in criminal law proceedings[195] and also a legislated right in immigration proceedings.[196] For a right to counsel in most civil matters however, the right to counsel depends on the circumstances of the case. The Supreme Court of Canada has held that where an individual's right to a fair trial requires counsel represent the individual, the judge can order state-funded counsel after considering: the seriousness of the interests at stake; the complexity of the proceedings; and the capacities of the appellant.[197] It is noteworthy that this latter principle was recognized in the context of a child protection proceeding brought by the state. The right to counsel, or the right to state-funded

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[188] *Courts of Justice Act*, RSO 1990, c C.43, at s. 1(1), available at: http://canlii.ca/t/52cmq [*Ontario Courts of Justice Act*]; and *Rules of Civil Procedure*, RRO 1990, Reg 194, s. 1.03(1), available at: http://canlii.ca/t/52f7j [*Ontario Rules of Civil Procedure*].

[189] *Code of Civil Procedure*, CQLR c C-25, at s. 55, available at: http://canlii.ca/t/52cw9 [*QC Code of Civil Procedure*].

[190] See *Alberta Rules of Court*, *supra* note 186 at Schedule B; *BC Court Civil Rules*, *supra* note 187 at Appendix C; *Superior Court of Justice and Court of Appeal - Fees*, O Reg 293/92, available at: http://canlii.ca/t/51wdb; *Tariff of Court Costs in Civil Matters and Court Office Fees*, CQLR c T-16, r 9, available at: http://canlii.ca/t/52dkn.

[191] *Charter*, *supra* note 45 at ss. 7 & 11; and *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, available at: http://canlii.ca/t/1fv22.

[192] *Charter*, *supra* note 45 at s. 14. See also, *R. v. Tran*, [1994] 2 S.C.R. 951, available at: http://canlii.ca/t/1frqw.

[193] *Mohammadian v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 191, at para. 20, available at: http://canlii.ca/t/4k29.

[194] *Marshall v. George Vale Golf Club* (1987), 39 D.L.R. (4th) 472 (BCSC); *Wyllie v. Wyllie*, (1987), 37 D.L.R. (4th) 376 (BCSC), available at: http://canlii.ca/t/23f9x.

[195] *Charter*, *supra* note 45 at s. 7, 10(b), & 11(d). Section 10 of the *Charter*: "Everyone has the right on arrest or detention…to retain and instruct counsel without delay and to be informed of that right…" Also, see *R.* v. *Rowbotham*, 1988 CanLII 147 (ONCA), at paras. 145, 169 & 170, available at: http://canlii.ca/t/1npn6, where the Ontario Court of Appeal interpreted s. 7 of the *Charter* to give judges the discretion to order state-funded counsel where necessary for a fair trial. The judge is to take into account the accused's financial situation, the complexity and length of the trial, the accused's lack of competence and the substantial possibility of lengthy imprisonment.

[196] *IRPA*, *supra* 20 at s. 167(1). There is a constitutionally protected right to counsel in detention review hearings: *Charter*, *ibid*.

[197] *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 SCR 46, at para. 75, available at: http://canlii.ca/t/1fqjw.

counsel, has not been recognized for civil proceedings between private parties, such as tort actions.

The provinces have jurisdiction over legal aid and the extent of coverage varies between provinces and depending on the legal issue. The determining factors for being eligible for legal aid in Alberta, British Columbia, Ontario and Quebec is the person's residence, whether the legal aid organization deals with the legal matter, and whether the individual meets financial means requirements.[198] In terms of the legal matters covered by legal aid organizations in Alberta, British Columbia, Ontario and Quebec, coverage includes family law, criminal law, and some immigration and refugee law matters.[199] Of particular importance to stateless persons is that for immigration and refugee matters, legal aid organizations conduct merit assessments of their case before approving legal aid representation.[200]

Security for Costs

In Canadian law, the same "security for costs" rules apply to stateless persons resident in Canada as any other person engaged in litigation in Canada. In particular, at federal, Alberta, British Columbia, Ontario and Quebec courts, security for costs is at the judge's discretion and is considered an exceptional measure.[201] Legislation on security for costs in federal courts, Alberta, Ontario and Quebec, allow a judge to consider as a factor in granting a motion on security for costs whether the defendant is a non-resident of Canada or a non-resident of the province in which the action is brought.[202] In British Columbia, where there is no legislative provision on security for costs, the common law provides that being a non-resident of Canada or the province is one factor that a judge can consider in granting a motion on security for costs.[203] In all Canadian jurisdictions the ability to pay costs is also a factor for the judge to consider.

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[198] See Legal Aid Alberta, "Eligibility", available at: http://www.legalaid.ab.ca/help/Pages/Eligibility.aspx; Legal Services Society, "Legal representation by a lawyer", available at: http://www.lss.bc.ca/legal_aid/legalRepresentation.php; Legal Aid Ontario, "Getting legal help", available at: http://www.legalaid.on.ca/en/getting/default.asp; Commission des services juridique, "Services", available at: http://www.csj.qc.ca/sitecomm/W2007English/Main_En_v4.asp

[199] *Ibid.*

[200] The merit assessment applies equally to anyone (usually a foreign national) who applies for legal aid in immigration and refugee matters. However, see *Statelessness in Canadian Context*, *supra* note 4 at 38-50. Based on Andrew Brouwer's assessment of the law and the inadequate legal mechanisms available to stateless persons in Canada to receive protection, regularize their status, and to become naturalized, it could be argued that stateless persons may be disproportionately impacted by merit assessments. If their case is seen as having little merit or no chance of success they could be denied legal assistance by legal aid. However, this would not prevent them from hiring a lawyer at their own expense.

[201] See *Federal Courts Rules*, *supra* note 185 at r. 415-418. The only exemption for security for costs in the *Federal Courts Rules* is for seamen bringing an action in Federal Court, per rule 499; *Alberta Rules of Court*, *supra* note 186 at ss. 4.22; *Ontario Rules of Civil Procedure*, *supra* note 188 at r. 56.01; *QC Code of Civil Procedure*, *supra* note 189 at ss. 65, 152-153. British Columbia does not include a similar rule in the *BC Civil Court Rules*, *supra* note 187. The ability to bring a motion for security for costs in British Columbia is maintained through the common law, see *Han v. Cho*, 2008 BCSC 1229, at paras. 12 & 27 available at: http://canlii.ca/t/20nv4.

[202] *Federal Court Rules, supra* note 185; *Ontario Rules of Civil Procedure*, *supra* note 188; and *QC Code of Civil Procedure*, *supra* note 189. In *Alberta Rules of Court*, *supra* note 186 at s. 4.22(e), it is not explicitly stated in the legislation, but a judge is given broad discretion to consider "any other matter the Court considers appropriate".

[203] *Han v. Cho*, *supra* note 201 at para. 27.

c. Article 16(3)

In considering Article 16(3), research conducted for this report did not indicate whether stateless persons habitually resident in Canada were treated any differently than Canadian citizens in accessing courts, security for costs matters and legal assistance in other State Parties to the 1954 Convention.

III. Assessment

While it is not clear what permit or status allows a foreign national or a stateless persons to be considered "habitually resident" for the purposes of Article 16, it appears that the Canadian legal framework requires some form of residence in order to have access to courts in Canada. If a stateless person is resident in Canada or a particular province, they appear to be in the same position as Canadian nationals. Therefore, based on a review of case law, court rules of procedure, and the provision of legal aid in Alberta, British Columbia, Ontario and Quebec, the Canadian legal framework appears to be compatible with Article 16 of the 1954 Convention.

IV. Recommendations

10) In support of Recommendation #5, further research should examine whether stateless persons have difficulty accessing legal assistance for immigration matters due to merit assessment criteria.

CHAPTER III: GAINFUL EMPLOYMENT

ARTICLE 17: WAGE-EARNING EMPLOYMENT

1. The Contracting States shall accord to stateless persons lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable that that accorded to aliens generally in the same circumstances, as regards the right to engage in wage-earning employment.

2. The Contracting States shall give sympathetic consideration to assimilating the rights of all stateless persons with regard to wage-earning employment to those of nationals, and in particular of those stateless persons who have entered their territory pursuant to programmes of labour recruitment or under immigration schemes.

I. Background & Commentary

The 1954 Convention does not define "wage-earning employment", but the Commentary explains that it "should be taken in its broadest sense."[204] It is to include every person having

[204] *Robinson Commentary to the 1954 Convention*, *supra* note 11 at 39.

paid employment, but those who are self-employed and/or having a liberal profession (such as doctors, lawyers, veterinarians, etc.), are addressed by Articles 18 and 19 of the 1954 Convention.[205]

Article 17(1) requires that a stateless person be "lawfully staying" in a country in order to enjoy a standard of treatment as favourable as possible, and in any event, not less favourable than that accorded to aliens generally in the same circumstances. This is the same standard of treatment as Article 15 of the 1954 Convention. Recall that "lawfully staying" refers to stateless persons either lawfully admitted or whose illegal entry was legalized. It is understood not to refer to stateless persons who although legally admitted or legalized, have overstayed the period of their lawful admission or violated any other conditions attached to their admission or stay.[206] Furthermore, shorter periods of stay authorised by the State may suffice so long as they are not transient visits. Stateless persons who have been granted a residence permit would fall within the category of "lawfully staying". Lawfully staying also covers individuals who have temporary permission to stay if this is for more than a few months.[207] As discussed at Article 15, there is also an argument that those who are granted a permit because they cannot be removed could be considered "implicitly lawfully staying".

With respect to the meaning of those "in the same circumstances" under Article 17(1), Article 6 of the 1954 Convention states that the term "implies that any requirements (including requirements as to length and conditions of sojourn or residence) which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a stateless person, must be fulfilled by him, with the exception of requirements which by their nature a stateless person is incapable of fulfilling."[208]

For the purposes of Article 17(2), "sympathetic consideration" means that the Contracting State has an obligation to deal with requests by stateless persons in regard to wage-earning employment and to not refuse them without proper reason. This obligation is despite the discretionary and non-mandatory nature of Article 17(2).[209]

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[205] *1951 Convention travaux préparatoires*, *supra* note 61 at 108.
[206] *Robinson Commentary to the 1954 Convention*, *supra* note 11 at 36.
[207] *Handbook on Stateless Persons*, *supra* note 12 at para. 137.
[208] *1954 Convention*, *supra* note 3 at Art. 6. See also *Robinson Commentary to the 1954 Convention*, *supra* note 11 at 19-20, which further explains: "The representatives of Great Britain and the Netherlands supported the inclusion of the article on the ground that, under the Convention, stateless persons, if placed on the same footing as other foreigners, would be obliged to fulfil certain requirements (for instance, produce evidence of nationality) which they could not fulfil…Stateless persons are treated under Art. 7 (1) and some other articles of the Convention in the same way as other foreigners or as nationals. The words "in the same circumstances" were introduced by the drafters of the Refugee Convention as a clarification of this "assimilation" because the treatment of foreigners or nationals need not necessarily be uniform but depends in many instances upon the special status of the person: the length of stay, the conditions of admission or the possession of certain documents by an alien, or certain qualifications of the national."
[209] *Robinson Commentary to the 1954 Convention*, *supra* note 11 at 30.

II. Canadian Legal Framework

a. Constitutional Law

Only Canadian citizens and persons with permanent resident status (the latter could include stateless persons with permanent resident status) have a constitutional right to pursue work in any Canadian province.[210]

b. Federal Legislation – Work Permits for Foreign Nationals

Generally, a foreign national (this includes a stateless person who is not a permanent resident) requires a valid work permit in order to be able to work in Canada.[211] In most cases, the foreign national must apply for a permit before entering Canada.[212] However, depending on the foreign national's country of origin, status in Canada, or their personal and family circumstances, they may be able to apply for a work permit upon entering Canada or after entering Canada.[213]

Stateless foreign nationals who are outside Canada and require a visa to enter Canada, and/or if they require a medical exam before coming to Canada, must apply for a work permit before entering Canada.[214] In limited cases, a stateless foreign national could apply for a work permit upon entering Canada.[215]

According to the *IRPR*, foreign nationals who may apply for a work permit after entering Canada, include:

- Foreign nationals with a work permit;
- Foreign nationals working in Canada under the authority of section 186 and are not a business visitor within the meaning of section 187;
- Foreign nationals with a study permit;
- Foreign nationals with a temporary resident permit (TRP) issued under subsection 24(1) of the *IRPA* and that is valid for at least six months;
- Foreign nationals who are a family member of a foreign national described in the four categories identified above (ie. person with a work permit; special reasons under s. 186;

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[210] *Charter*, *supra* note 45 at s. 6(2)(b): "Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right…to pursue the gaining of a livelihood in any province."

[211] *IRPA*, *supra* note 20 at s. 30(1); and *IRPR*, *supra* note 21 at s. 196. There are several exceptions to having to obtain a work permit in order to work in Canada, but these appear be limited to specific "special reasons", similar to the circumstances envisioned by the drafters of the 1954 Convention; see *IRPR*, *supra* note 21 at ss. 186. Examples of persons who may work in Canada without a work permit include: business visitors, foreign representatives, their dependents, students on campus, performing artists, and religious workers.

[212] *IRPA*, *supra* note 20 at s. 11(1).

[213] *Ibid.*, at s. 198-199.

[214] Citizenship and Immigration Canada, "Determine your eligibility – Work in Canada" (2 March 2015), available at: http://www.cic.gc.ca/english/work/apply-who-eligible.asp.

[215] *IRPR*, *supra* note 21 at s. 190 & 198. See, *ibid*: "You can ask to be allowed to work in Canada as you enter Canada but only if: you do not need a visa, you already hold a valid medical certificate (if you need it for your job), or are from a designated country, your employer has submitted a copy of a valid Labour Market Impact Assessment (LMIA) (if needed), and your employer has proof that they have paid an employer compliance fee and submitted an Offer of Employment form to Citizenship and Immigration Canada, if you do not need a LMIA and will be working for a specific employer."

person with a study permit; or person with a TRP)
- Foreign national who
    - Cannot support themselves without working, and
        - They made a refugee claim that has been referred to the Refugee Protection Division but has not been determined; or
        - Is subject to an unenforceable removal order.
    - Is a member of the live-in caregiver class;
    - Is a member of the spouse or common-law partner in Canada class;
    - Is a protected person recognized under s. 95(2) of the *IRPA*;
    - Has applied to become a permanent resident under humanitarian and compassionate grounds and the Minister has granted them an exemption; or
    - Is a family member of a person described in any of the four preceding categories (ie. live-in caregiver class; spouse or common-law partner in Canada class; protected person; exemption granted by the Minister for an application for permanent residence)
- Foreign national who applied for a work permit before entering Canada and the application was approved in writing but they have not been issued the permit;
- Foreign national who is applying as a trader or investor, intra-company transferee or professional
- Foreign national permitted to work at a foreign mission in Canada.[216]

Once a work permit is granted, the permit can be subject to several conditions, such as, the type of work you can do, the employer you can work for, where you can work, or how long you can work.[217] The fee for processing a work permit is between $100 and $155.[218] Permits vary in duration depending on the work, but can require renewal every 6 months to a year.

Of particular interest are stateless persons in Canada who are issued a work permit because they are the subject of an unenforceable removal order and require the permit in order to meet their basic needs.[219] This is a situation that stateless persons may find themselves, as there is no country to which they can return and they do not have access to social assistance. Such work permits may need to be renewed indefinitely while a stateless person is subject to an unenforceable removal order and in legal limbo.

c. Employment Standards Legislation

Once a valid work permit is obtained, federal and provincial legislation provides protection to foreign nationals in the workplace against discrimination in employment contracts as well as

[216] *IRPR*, *supra* note 21 at s. 199.
[217] *Ibid.*, at s. 185(b).
[218] *Ibid.*, at s. 299. The Citizenship and Immigration Canada website states that the fee for an "open work permit" (permit that is not tied to a particular employer) is $100. This fee or term is not found in the *IRPR*, but see, Citizenship and Immigration Canada, "Fee list", (3 March 2015) available at: http://www.cic.gc.ca/english/information/fees/fees.asp.
[219] *IRPR*, *supra* note 21 at s. 206(1)(b).

provides employment standards for all individuals.[220] Employment standards legislation of the federal,[221] Alberta,[222] British Columbia,[223] Ontario,[224] and Quebec[225] governments outlines minimum wages, and hours of work, etc. In addition, the rights in employment standards legislation are not constrained by whether an employee is a foreign national, or working under a work permit.

d. Lawful Status, "Lawfully Staying" in Canada, and Work Permits

Status

Unless a person is a Canadian citizen, permanent resident, temporary resident, or possesses a Temporary Resident Permit (TRP),[226] they do not have status in Canada.[227] Furthermore, even though Canadian citizens and permanent residents have a right to work anywhere in Canada, persons with temporary resident status and persons in possession of a TRP are not automatically authorized to work.[228] Moreover, simply because a foreign national acquires a work permit does not necessarily mean they also obtain temporary resident status.

Temporary residence status can be given to persons who seek to be visitors, foreign students, or temporary foreign workers. While most foreign nationals who possess a valid work permit will receive temporary resident status, visitors and foreign students with temporary residence status must subsequently apply for a work permit in order to be authorized to work in Canada. In addition, although persons with a TRP are authorized to be in Canada, they are not automatically authorized to work in Canada either. Foreign nationals with a TRP must also apply for a work

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[220] See *Canadian Human Rights Act*, *supra* note 52 at s. 3; *Alberta Human Rights Act*, *supra* note 54 at ss. 1-5, & 7-9; *BC Human Rights Code*, *supra* note 55, at ss. 7-14; *Ontario Human Rights Code*, *supra* note 56 at ss. 1-3 & 5; *Charter of Human Rights and Freedoms*, *supra* note 57 at s. 10.

[221] See *Canada Labour Code*, *supra* note 166.

[222] *Employment Standards Code*, RSA 2000, c E-9, available at: http://canlii.ca/t/52bwr [*Alberta Employment Standards Code*].

[223] *Employment Standards Act,* RSBC 1996, c 113*,* at s. 1(1), available at: http://canlii.ca/t/527vx [*BC Employment Standards Act*].

[224] *Employment Standards Act*, 2000, SO 2000, c 41, at s. 1(1), available at: http://canlii.ca/t/52dlc [*Ontario Employment Standards Act*]

[225] *An Act Respecting Labour Standards*, CQLR c N-1.1, at s. 1(10), available at: http://canlii.ca/t/52913 [*Quebec Labour Standards Act*].

[226] *IRPA*, *supra* note 20 at s. 24(1). Section 24(1) of the *IRPA* provides that if a foreign national is inadmissible or does not meet the requirements of the *IRPA*, they can apply to an officer outside or inside Canada for a temporary resident permit (TRP). If the officer is of the opinion that it is "justified in the circumstances" they may issue a temporary resident permit allowing the foreign national to enter or to remain in Canada for a specific period and grants them "temporary resident status." The TRP may be cancelled at any time. Upon cancellation or expiration of the TRP, the foreign national must leave Canada. The TRP and temporary resident status does not in itself authorize the foreign national to study or work in Canada. However, if the TRP is valid for at least six months, the foreign national may apply for a work and/or study permit, which would authorize them to study or work in Canada for a specific period of time and subject to conditions. The TRP is an exceptional mechanism and not a matter of routine for when compelling circumstances warrant a TRP.

[227] Lorne Waldman, *Immigration and Refugee Protection Act and Commentary* (Toronto: LexisNexis, 2005) at § 3.33 [*Waldman IRPA Commentary*]; also *IRPA*, *supra* note 20 at s. 21(1), 22(1), 29(1); *IRPR*, *supra* note 21 at s. 65.1(1)

[228] *Waldman IRPA Commentary*, *ibid.*, at § 14.11.

permit after receiving a TRP that is valid for at least 6 months. In some cases foreign nationals are explicitly excluded from receiving temporary resident status even though they are granted a work permit. This applies to foreign nationals who are granted a work permit because they are subject to an unenforceable removal order and require a work permit in order to meet their basic needs.[229]

"Lawfully Staying"

As discussed in Article 15, the *IRPA* does not explicitly state which permits or status' result in a foreign national being considered "lawfully staying", "lawfully in" or "habitually resident" for the purposes of the 1954 Convention, or for that matter the 1951 Refugee Convention, which contains similar language. The *IRPA* also does not clearly state whether "status" or "lawful status" is to be equated with "lawfully staying".[230] Nonetheless a review of the *IRPA* suggests that persons who have permanent residence status, or persons who have been granted a Temporary Resident Permit (TRP) under s. 24 of the *IRPA*, appear to be considered "lawfully staying" in Canada.[231] As for foreign nationals who are in possession of a valid work permit that provides them with temporary resident status of a few months duration, it appears that they too meet the definition of "lawfully staying" discussed in the "Background and Commentary".

In the case of foreign nationals who obtain a work permit when they are subject to an unenforceable removal order, but are excluded from temporary resident status, an argument could be made that due to their limbo status they should be considered "implicitly lawfully staying." Conversely though, since there is no clear articulation in the *IRPA* that such persons are "lawfully staying", then an argument could also be made that those foreign nationals who receive

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[229] *IRPR*, *supra* note 21 at s. 202.

[230] Section 159.5(a)-(d) of the *IRPR* implements *Canada-US Safe Third Country Agreement*, at Art. 4(2)(a), available at: http://www.cic.gc.ca/english/department/laws-policy/safe-third.asp (signed 5 December 2002). Article 4(2)(a) of the Safe Third Country Agreement provides that the State that receives at its port-of-entry a person who makes a refugee claim, and that person has in the territory of the receiving State a family member with "lawful status", the receiving State must hear the person's refugee claim. Without specifically using the words "lawful status", s. 159.5 of the *IRPR* lists the status or permits that the refugee claimant's family members must have in order to be considered to have "lawful status" for the purposes of Article 4(2)(a). Section 159.5 lists them as: Canadian citizen, protected person under s. 95(2) of the *IRPA*, a permanent resident, person whose removal order is stayed for H&C grounds or public policy considerations under s. 233 of *IRPR*; a refugee claimant over 18 years old who has had their refugee claim deferred by the IRB; a person over 18 years old who holds a study or work permit (except: work permits under 206(1)(b), work or study permits that have expired, 90 days after studies have been completed, if a removal order has become enforceable). In 2002, UNHCR stated that the list above may be too narrow and that the *IRPR* is not entirely clear, see UN High Commissioner for Refugees (UNHCR), "Comments on the Proposed Regulations Amending the Immigration and Refugee Regulation" (14 November 2002), available at: http://ccrweb.ca/sites/ccrweb.ca/files/static-files/regula_11.html

[231] This conclusion is reached by looking at s. 31.1 of the *IRPA*, which states: "a designated foreign national whose claim for refugee protection or application for protection is accepted is lawfully staying in Canada only if they become a permanent resident or are issued a temporary resident permit under section 24." Nowhere else in *IRPA* or the *IRPR* is the term "lawfully staying" used in connection with other statuses. In addition, Canada's reservations to Articles 23 and 24 of the 1951 Refugee Convention state for the purposes of those articles that "lawfully staying" means persons admitted for permanent residence and that persons admitted for temporary residence would be treated the same as visitors generally. This latter reference in respect of temporary residents being treated the same as visitors generally appears to be limited just to these two articles of the 1951 Refugee Convention.

a work permit while subject to an unenforceable removal order are only "authorized" to work in Canada, but not necessarily "lawfully staying" or "lawfully in" Canada for the purposes of the 1954 Convention.

III. Assessment

Since the *IRPA* subsumes stateless persons within the definition of foreign nationals, stateless persons appear to enjoy treatment at least as favourable as that accorded to aliens generally in the same circumstances with respect to the right to engage in wage-earning employment. Therefore, on the basis of a formalistic analysis, the Canadian legal framework appears to be compatible with Article 17 of the 1954 Convention.

However, stateless persons may be disproportionately and adversely affected by provisions that exclude them from temporary resident status when they are issued a work permit as a person subject to an unenforceable removal order and unable to meet their basic needs. Excluding stateless persons from acquiring temporary residence status, and from being considered "lawfully staying" or "lawfully in" may, as a consequence, deny them access to other protection rights in the 1954 Convention that require "lawfully staying" or "lawfully in" status. Such articles include 15 (right of association), 18 (self-employment), 19 (liberal professions), 21 (housing), 23 (public relief), 24 (labour legislation and social security), 26 (freedom of movement), 28 (travel documents), and 31 (expulsion). Furthermore, without the ability to acquire a secure legal status in Canada, some stateless persons remain in indefinite legal limbo, unable to be removed to any country where they have legal rights, but remain in Canada without an avenue to secure legal status or a secure right to engage in wage-earning employment. Their work permit is conditional on being unable to meet their basic needs and is subject to frequent renewal and processing fees. It is in light of these precarious circumstances that stateless persons subject to an unenforceable removal order should be considered "implicitly lawfully staying" in Canada, or that they be given "sympathetic consideration" to assimilate their rights with those of nationals under Article 17(2).

Some may argue that stateless persons who lack "status" are able, like all foreign nationals, to apply for permanent residence through a humanitarian and compassionate grounds application,[232] or apply for a TRP in order to obtain "lawfully staying" status. However, it has been observed elsewhere that the discretionary nature of these applications and the fact that statelessness alone is not sufficient for approval, indicates that Canada is not fully cognizant of stateless persons' unique legal and socio-economic circumstances. In order words, the Canadian legal framework does not recognize that stateless persons may not always be "in the same circumstances" as foreign nationals generally.[233]

To the extent that stateless persons are unable to obtain a valid work permit even when they are subject to an unenforceable removal order, but are still able to meet their basic needs, it is worth noting *General Comment No. 20* from the CESCR. *General Comment No. 20* states:

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[232] *IRPA*, *supra* note 20 at s. 25(1).
[233] For the critiques on this issue, see *Statelessness in the Canadian Context*, *supra* note 4.

> 5. The preamble, Articles 1, paragraph 3, and 55, of the Charter of the United Nations and article 2, paragraph 1, of the Universal Declaration of Human Rights prohibit discrimination in the enjoyment of economic, social and cultural rights. International treaties on racial discrimination, discrimination against women and the rights of refugees, stateless persons, children, migrant workers and members of their families, and persons with disabilities include the exercise of economic, social and cultural rights, while other treaties require the elimination of discrimination in specific fields, such as employment and education. In addition to the common provision on equality and non-discrimination in both the Covenant and the International Covenant on Civil and Political Rights, article 26 of the International Covenant on Civil and Political Rights contains an independent guarantee of equal and effective protection before and of the law.
>
> […]
>
> 30. The ground of nationality should not bar access to Covenant rights…The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.[234]

By not providing for special consideration for the circumstances of stateless persons in Canada, Canada may be indirectly discriminating against stateless persons on the basis of nationality in their ability to obtain wage-earning employment. This may be contrary to Canada's obligations under Article 6(1) of the *ICESCR* and "the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts."[235]

IV. Recommendations

11) Citizenship and Immigration Canada should clarify what status or authorization is required for a stateless person to be considered "lawfully staying" and "lawfully in" Canada.

12) In support of Recommendation #5, further research should be conducted on the practical obstacles stateless persons experience in order to engage in wage-earning employment in Canada.

13) Citizenship and Immigration Canada should provide the following information on work permits issued to stateless persons:
    - The number of stateless persons who apply for work permits, including applications for a work permit under section 206(1)(b) of the *IRPA*

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[234] UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, at para. 30, available at: http://www.refworld.org/docid/4a60961f2.html [*CESCR General comment No. 20*].

[235] *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, at Art. 6, available at: http://www.refworld.org/docid/3ae6b36c0.html (entered into force 3 January 1976, accession by Canada 19 May 1976) [*ICESCR*].

- The number of stateless persons granted work permits, including applications for a work permit under section 206(1)(b) of the *IRPA*
- The restrictions placed on open and closed work permits issued to stateless persons (average length of permit, number of renewals, number of employers, etc.)
- How many times stateless persons renew an open work permit while under an unenforceable removal order
- The average fee paid by stateless persons for an open and closed work permit
- How many stateless persons apply, but are unable to pay the processing fee
- How often the fee is waived for stateless persons, if at all
- The criteria used in determining work permit applications under s. 206(1)(b) of the *IRPA*

14) In support of Recommendation #4, Canada should recognize statelessness as a compelling factor that "justifies in the circumstances" the issuance of a temporary residence permit (TRP). Furthermore, if a TRP is issued to a stateless person, stateless persons should be permitted to work, study, access public healthcare and social assistance, as well as count time already spent in Canada toward permanent residence requirements and Canadian citizenship residency requirements. The TRP should be accessible not only to a stateless child born abroad to a Canadian parent born abroad, but to all stateless persons.

ARTICLE 18: SELF-EMPLOYMENT

> The Contracting States shall accord to a stateless person lawfully in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies.

I. Background & Commentary

Article 18 of the 1954 Convention contains the same language as Article 18 of the 1951 Refugee Convention. Article 18, along with Articles 26 and 31 of the 1954 Convention, provide the standard of treatment for stateless persons "lawfully in" the territory of a Contracting Party. "Lawfully in" encompasses a lower standard than "lawfully staying".[236] The Commentary to the 1954 Convention states:

> The expression "lawfully (in French "se trouvant régulièrement") in their country" cannot be only verbally different from "lawfully staying (in French "résidant régulièrement") in the country". It must mean in substance something else, viz., the mere fact of lawfully being in the territory, even without any intention of permanence, must suffice. In other words, wherever "lawful stay" is required, a stateless person just temporarily in the country would not enjoy the right granted under the condition of "lawfully staying", on the other hand, where "lawfully being" is sufficient, stateless persons temporarily in the country would enjoy the relevant rights. As explained by the Ad Hoc Committee, it was decided that in

[236] Recall that "lawfully staying" applies to Articles 15, 17, 19, 21, 23, 24 and 28.

> most instances the provision in question should apply to all refugees [stateless persons] whose presence in the territory was lawful, if it applied also to other aliens in the same circumstances. Wherever higher requirements were made the Committee used the expression "lawfully staying."[237]

For further clarity the *Handbook on Protection of Stateless Persons* states:

> For stateless persons to be "lawfully in" a State party, their presence in the country needs to be authorized by the State. The concept encompasses both presence which is explicitly sanctioned and also that which is known and not prohibited, taking into account all personal circumstances of the individual. The duration of presence can be temporary…As confirmed by the drafting history of the Convention, applicants for statelessness status who enter into a determination procedure are therefore "lawfully in" in the territory of a State party. By contrast, an individual who has no immigration status in the country and declines the opportunity to enter a statelessness determination procedure is not "lawfully in" the country.[238]

In sum, "lawfully in their territory" means those who are physically present in the territory, provided that their presence is not unlawful, and includes short-time visitors and even persons merely travelling through the country.[239]

Article 18 further requires that stateless persons fulfill the conditions necessary for the exercise of the self-employment activity in question, such as specific qualifications, licences or concessions.[240] For stateless persons not residing in the country in which they want to engage in self-employment, or where they wish to establish commercial or industrial companies, are not within the scope of Article 18, instead Article 7(1) of the 1954 Convention applies.[241]

II. Canadian Legal Framework

As discussed in Article 17, all foreign nationals require a valid work permit to work in Canada.[242] This also applies to foreign nationals who wish to be self-employed and establish their own business. For stateless persons in Canada wishing to establish their own business there are a few options to obtain authorization to work in Canada.

a. Economic Classes – Permanent Resident Status

Some programs allow a foreign national in Canada to apply for permanent residence status as

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[237] *Robinson Commentary to the 1954 Convention*, *supra* note 11 at 40.
[238] *Handbook on Protection of Stateless Persons*, *supra* note 12 at para. 135.
[239] UN High Commissioner for Refugees (UNHCR), *Commentary of the Refugee Convention 1951 (Articles 2-11, 13-37)*, October 1997, at 45, available at: http://www.refworld.org/docid/4785ee9d2.html [*Atle Grahl-Madsen 1951 Commentary*]
[240] *1951 Convention travaux préparatoires*, *supra* note 61 at 109; and *Robinson Commentary to the 1954 Convention*, *supra* note note 11 at 40.
[241] *Robinson Commentary to the 1954 Convention*, *ibid.*, at 39.
[242] *IRPR*, *supra* note 21 at s. 186.

part of an economic class of immigrants.[243] If the foreign national is accepted to one of these programs, they obtain permanent residence status, which allows them to either engage in employment with an established company or engage in self-employed work without requiring a work permit. Programs that a stateless person could apply for if eligible include: the Start-up Visa pilot project; the Express Entry Program (ie. Federal Skilled Workers, Federal Skilled Trades Program and the Canadian Experience Class); the Provincial Nominee Program; and the Spousal or Common-law Partner Class.[244]

If a foreign national is inadmissible to Canada, the application will be refused. However, in such cases the foreign national could apply for permanent residence in Canada and seek an exemption from the Minister.[245]

b. Open Work Permits – Temporary Resident Status

Most temporary workers in Canada must have a job offer or authorization from Employment and Social Development Canada (known as a Labour Market Impact Assessment, or LMIA) before being granted a work permit.[246] These are known as closed work permits. However, an open work permit is not tied to a specific job/employer and would allow a foreign national in Canada to establish his or her own business and be self-employed.[247] It is only in specific instances that a foreign national in Canada is eligible to apply for an open work permit. The instances include:

- Refugee claimants whose claims have been referred to the Immigration and Refugee Board (IRB) and to foreign nationals who are subject to an unenforceable removal order and they cannot otherwise support themselves (*IRPR*, s. 206(1)(a) or (b));
- Members of the live-in caregiver class who have met the requirements for permanent residence, or they are a family member of a member (*IRPR*, s. 207(a) or (e));
- Members of the spouse or common-law partner class, or they are a family member of a member (*IRPR*, s. 207(b) or (e));
- Persons upon whom protection has been conferred in accordance with s. 95(2) of the *IRPA* (Convention refugees, successful pre-removal risk assessment applicants, etc.), or they are a family member of such a person (*IRPR*, s. 207(c) or (e));
- Persons who have filed an application on humanitarian and compassionate grounds and the Minister has granted an exception, or they are a family member of such a person (*IRPR*, s. 207(d) or (e));
- Persons who hold a study permit and has become temporarily destitute through circumstances beyond their control (*IRPR*, s. 208(a));

[243] Citizenship and Immigration Canada, "Visa and immigration applications" (24 April 2015), available at: http://www.cic.gc.ca/english/information/applications/index.asp [*Visa and immigration applications*].
[244] *Ibid*. See also additional discussion of these programs under Article 32 below. There is also a "Self-Employed Persons Class", but a foreign national can only apply for it from outside Canada. The "self-employed class" has a specific meaning and is limited to persons who are self-employed in cultural activities, athletics, or the purchase and management of a farm.
[245] *IRPA*, *supra* note 20 at s. 25(1), 25(1.3), 25.1(1).
[246] Citizenship and Immigration Canada, "What is an open work permit?" (9 February 2015), available at: http://www.cic.gc.ca/english/helpcentre/answer.asp?q=176&t=17 [*What is an open work permit?*].
[247] *Ibid.*

- Persons who hold a temporary resident permit (TRP) under s. 24(1) of *IRPA* (*IRPR*, s. 208(b));
- Certain workers authorized to enter Canada on a reciprocal basis (Canada World Youth Program participants, certain international student and young worker exchange programs, family members of foreign representatives and of military personnel, professional athletes authorized to enter Canada, who require other work to support themselves while playing);
- Spouses of skilled workers, (*IRPR*, s. 205(c));
- Spouses of foreign students, (*IRPR*, s. 205(c));
- Qualifying foreign nationals currently in Canada who have submitted an application for permanent residence under the Federal Skilled Worker Program (FSWP), the Canadian experience class (CEC), the Provincial Nominee Program (PNP) or the Federal Skilled Trades Program (FSTP) and who meet program eligibility requirements;
- Qualifying foreign nationals who have submitted an application for permanent residence under the spouse or common-law partner in Canada (SCLPC) class.[248]

If there is information that an applicant is inadmissible, their application for an open work permit can be refused.[249] In many cases the foreign nationals listed above will already be considered a temporary resident in Canada before applying for an open work permit. This is because they either belong to a particular class of persons with a status, or because they have status as family members of persons within a particular class. Persons with temporary resident status are "lawfully in Canada" for the purposes of Article 18.

However, foreign nationals who are the subject of an unenforceable removal order and are unable to meet their basic needs, are not likely to have temporary residence or be "lawfully in" Canada before applying for an open work permit under s. 206(1)(b) of the *IRPR*. Such persons may have overstayed their initial period of authorized stay, be inadmissible, or have no country to which they can be admitted or have legal status. As discussed at Article 17, it is this situation in which some stateless persons find themselves and remain in legal limbo for years. Furthermore, unlike the other foreign nationals on the list above, individuals granted an open work permit under s. 206(1)(b) of the *IRPR* are specifically excluded from consideration as having temporary resident status.[250]

c. Foreign Nationals and Incorporation

Finally, for stateless persons who have a valid work permit and wish to establish their own business, it is important to be aware of some restrictions placed on foreign nationals establishing corporations. If a stateless person in Canada wishes to incorporate, there may be foreign ownership restrictions depending on the industrial sector. In addition, foreign nationals establishing corporations in Canada may be required to have a specific number of resident Canadian directors. In federal, Alberta and Ontario law, 25% of corporate directors must be

[248] Citizenship and Immigration Canada, "International Mobility Program: Open work permit" (22 December 2014), available at: http://www.cic.gc.ca/english/resources/tools/temp/work/admissibility/open.asp [*International Mobility Program: Open work permit*]
[249] *Ibid*.
[250] *IRPR*, *supra* note 21 at s. 202.

resident Canadians, but in British Columbia and Quebec there is no minimum requirement.[251] A stateless person in Canada could avoid the above obstacles by establishing a sole proprietorship, since it would not require establishing corporate organization.[252]

III. Assessment

Based on a review of legislation and programs above, it appears as though the Canadian legal framework is largely compatible with Article 18 of the 1954 Convention. This is because stateless persons lawfully in Canada are treated at least as favourably as foreign nationals generally in being eligible to apply to the economic classes for permanent residence, or for an open work permit. Furthermore, in limited cases the Canadian legal framework permits foreign nationals who are in Canada, but not "lawfully in" Canada, to obtain an open work permit when such persons are subject to an unenforceable removal order and cannot meet their basic needs.

It is noteworthy that although there are some programs that allow stateless persons to apply for an open work permit, or for permanent resident status, a stateless person's socio-economic status on the margins of society, as well as their frequent societal and familial isolation may prevent them from having the financial, educational or family links necessary to participate in these programs. In this sense, stateless persons may not be truly considered "in the same circumstances" as foreign nationals generally and the Canadian legal framework may have disproportionate and unfair impacts on stateless persons due to their unique circumstances. Although Canada may state that in such cases a stateless person should apply for permanent residence with a Minister's exemption on humanitarian and compassion considerations, this approach can be an ineffective remedy. As Andrew Brouwer states in *Statelessness in the Canadian Context*, even though a humanitarian and compassionate grounds application may be available for exemptions from various program requirements, statelessness alone is not considered a sufficient factor for approving an application. It is with these practical obstacles in mind that *General Comment 20* described in Article 17, is equally relevant to Article 18.

[251] "Resident-Canadian" generally means an individual who is: a Canadian citizen ordinarily resident in Canada, a Canadian citizen not ordinarily resident in Canada who is a member of a prescribed class of persons, or a permanent resident. *Canada Business Corporations Act*, RSC, 1985, c C-44, at ss. 2(1) and 105(3), available at: http://laws-lois.justice.gc.ca/eng/acts/C-44/FullText.html#h-20; *Business Corporations Act*, RSA 2000, c B-9at ss. 1(dd) and 105(3), available at: http://canlii.ca/t/52d7b, if there are fewer than 4 directors, the 25% requirement does not apply in Alberta; *Business Corporations Act*, SBC 2002, c 57, at available at: http://canlii.ca/t/52crq; *Business Corporations Act*, RSO 1990, c B.16, at s. 118(3), available at: http://canlii.ca/t/ldxj; *Business Corporations Act*, CQLR c S-31.1, available at: http://canlii.ca/t/523d9.

[252] J. Anthony VanDuzer, *The Law of Partnerships & Corporations*, 3d ed. (Toronto: Irwin Law, 2009) at 7.

ARTICLE 19: LIBERAL PROFESSIONS

> Each Contracting State shall accord to stateless persons lawfully staying in their territory who hold diplomas recognized by the competent authorities of that State, and who are desirous of practising a liberal profession, treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

I. Background & Commentary

Article 19 of the 1954 Convention is identical to Article 19(1) of the 1951 Refugee Convention. Like Article 17 of the 1954 Convention, Article 19 requires stateless persons to be "lawfully staying". However, Article 19 also contains a condition that a stateless person's diploma must meet the requirements established by a state's competent authorities in order to practice a specific profession.[253]

With respect to what qualifies as a "liberal profession", the commentary on the 1954 Convention states:

> The term "liberal profession" is not quite precise. It usually embraces physicians, dentists, veterinarians, pharmacists, lawyers, teachers, self-employed engineers, architects, artists…The local authorities will decide in each case whether a person falls under the rubric "liberal profession" or any other heading.[254]

II. Canadian Legal Framework

The provinces are responsible for regulating liberal professions within its jurisdiction. Typically, the provinces enact legislation that establishes a regulatory body to govern the profession.[255] The legislation outlines the general organizational framework and structure for the regulatory body, and then the regulatory body formulates additional rules and by-laws to govern the profession and its members in the province. Both the legislation and the regulatory body itself establish the requirements to obtain a license to practice the profession within the province.[256]

Generally, licensing requirements can include: the possession of a specific university degree/diploma, writing licensing exams, and/or the completion of an apprenticeship with someone licensed in the profession, etc. These requirements apply equally to Canadian citizens, permanent residents and foreign nationals. There is no restriction on the basis of one's immigration status. For individuals who are trained or educated outside Canada, the applicant

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[253] *Robinson Commentary to the 1954 Convention*, *supra* note 11 at 40.
[254] *Ibid*.
[255] In Ontario, there are 45 regulated professions. For simplicity, the example of the legal profession was used as a guide to summarize the typical legal framework that the provinces have implemented for regulating professions in their jurisdiction.
[256] For example, see legislation regarding the practice of law: *Legal Profession Act*, RSA 2000, c L-8, available at: http://canlii.ca/t/522lv; *Legal Profession Act*, SBC 1998, c 9, available at: http://canlii.ca/t/527wc; *Law Society Act*, RSO 1990, c L.8, available at: http://canlii.ca/t/527j8; *An Act Respecting the Barreau du Québec*, CQLR c B-1, available at: http://canlii.ca/t/526jh.

may also need to complete additional accreditation courses in the province, or elsewhere in Canada, in order to ensure a specific educational standard is met and to obtain the professional license. This latter requirement also applies regardless of whether the individual who was internationally trained or educated is a Canadian citizen, permanent resident or foreign national.[257]

In *Andrews v. Law Society of British Columbia*, the Supreme Court of Canada stated that "a rule which bars an entire class of persons from certain forms of employment solely on the ground that they are not Canadian citizens violates the equality rights of that class…it discriminates against them on the ground of their personal characteristics, i.e., their non-citizen status."[258] In that case, Andrews was a permanent resident seeking to practice law in British Columbia, but he was prevented from doing so because British Columbia's former *Barristers and Solicitors Act* only allowed Canadian citizens to join the profession. The Supreme Court's decision recognized that non-citizens are entitled to the equality rights protection of s. 15(1) of the *Charter* and resulted in abandoning the requirement that a person be a Canadian citizen in order to be licensed and practice a profession in Canada.

Finally, it should be noted that if a foreign national is licensed to practice their profession in a Canadian province, they still require a valid work permit in order to work in their profession in Canada.

III. Assessment

The review of the Canadian legal framework indicates that Canadian citizens, permanent residents and foreign nationals face the same requirements in order to practice their profession in Canada. In light of the foregoing, it appears the Canadian legal framework is compatible with Article 19 of the 1954 Convention.

[257] As an example of all of the professions regulated by a province, see the database of information provided for individuals wishing to immigrate and work in a regulated profession in Ontario. Government of Ontario, "Find Information on your Profession" (30 January 2015), available at: http://www.ontarioimmigration.ca/en/working/OI_HOW_WORK_PROF_PROFS.html.

[258] *Andrews*, *supra* note 47 at p. 151.

CHAPTER IV: WELFARE

ARTICLE 21: HOUSING

> As regards housing, the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to stateless persons lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

I. Background & Commentary

Article 21 of the 1954 Convention is identical to Article 21 of the 1951 Refugee Convention. It relates to rent control and the assignment of apartments and premises. Since the system of allocation often falls within the responsibilities of local authorities (municipalities, regional self-governments), they are equally bound by this provision.[259]

II. Canadian Legal Framework

a. Social Housing

The provinces are responsible for regulating social housing policy within in its jurisdiction. Depending on the province, social housing is also known as subsidized housing, rent-geared-to-income housing or community housing. In order to be eligible for social housing, not only must a person meet established income criteria, but they must also meet eligibility criteria with respect to a person's residency and status in Canada. The provinces of Alberta, British Columbia, Ontario and Quebec all have similar eligibility criteria in this respect.

In Alberta, to be eligible for social housing the "household" must be "comprised of Canadian citizens, individuals lawfully admitted into Canada for permanent residence, refugees sponsored by the Government of Canada, or individuals who have applied for refugee or immigration status and for whom private sponsorship has broken down."[260] In British Columbia, eligible applicants must permanently reside in British Columbia when applying, and each member of the household must be a Canadian citizen, an individual lawfully admitted into Canada for permanent residence, a refugee sponsored by the Government of Canada, an individual who has applied for refugee status or an immigrant whose private sponsorship has broken down.[261] In Ontario, each member of the household must be a Canadian citizen, have made an application for status as a permanent resident, or have made a claim for refugee protection. Furthermore, in Ontario the household is ineligible if any member of the household is the subject of an enforceable removal

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[259] *Robinson Commentary to the 1954 Convention*, *supra* note 11 at 41.
[260] *Social Housing Accommodation Regulation*, Alta Reg 244/1994, at s. 9-10, 13 & 15, available at: http://canlii.ca/t/5298d [*Social Housing Accommodation Regulation*]
[261] BC Housing, "Residency Requirements" (2015), available at: http://www.bchousing.org/Options/Subsidized_Housing/Apply/Eligibility/Residency [*BC Housing Residency Requirements*].

order.[262] In Quebec, the person must be a Canadian citizen or permanent resident and have lived in the province of Quebec for 12 out of the past 24 months.[263]

b. Housing and Anti-Discrimination Law

There is no right to housing in Canada.[264] However, human rights legislation in Alberta, British Columbia, Ontario and Quebec all provide some legislative protection against discrimination with respect to the renting or purchasing of accommodation between private parties. In Alberta, the *Human Rights Act* prohibits denial or discrimination in accommodation, facilities and the right to occupy as a tenant a self-contained dwelling unit on the basis of place of origin.[265] In British Columbia, the *Human Rights Code* prohibits denial or discrimination in accommodation, facilities, the purchase of property, and the right to occupy as a tenant on the basis of place of origin.[266] In Ontario, the *Human Rights Code* includes the right to equal treatment with respect to the occupancy of accommodation, without discrimination because of place of origin or citizenship.[267] In Quebec, the *Charter of Human Rights and Freedoms* prohibits discrimination on the basis of ethnic or national origin by refusing to make a juridical act concerning goods or services ordinarily offered to the public.[268] The latter includes housing.[269]

III. Assessment

Based on a review of social housing legislation in Alberta, British Columbia, Ontario and Quebec, most foreign nationals appear to be ineligible for social housing even if they are "lawfully staying". This includes stateless persons, unless he or she is a stateless permanent resident. While this does not grant stateless persons "lawfully staying" treatment as favourable as possible, it appears to treat them no less favourably than foreign nationals generally in the same circumstances. In this respect, the Canadian legal framework is largely compatible with Article

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[262] *General*, O Reg 367/11, at s. 24-25; http://canlii.ca/t/52c25.
[263] *By-law respecting the allocation of dwellings in low rental housing*, CQLR c S-8, r 1, at s. 14, available at: http://canlii.ca/t/52b2n.
[264] This is currently the subject of litigation. See, *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852, available at: http://canlii.ca/t/gffz5. The appellants argue that actions and inaction on the part of Canada and Ontario have resulted in homelessness and inadequate housing, which violates their rights under sections 7 and 15 the *Charter*. The application was dismissed at the Superior Court of Ontario and the Ontario Court of Appeal denied the appeal. The appellants have sought leave to appeal before the Supreme Court of Canada. The leave application is pending as of 27 April 2015.
[265] *Alberta Human Rights Act*, *supra* note 54 at ss. 4-5.
[266] *BC Human Rights Code*, *supra* note 55 at ss. 8-10.
[267] *Ontario Human Rights Code*, *supra* note 56 at ss. 1-2(1). With respect to citizenship in the *Ontario Human Rights Code*, section 16 provides that non-discrimination because of citizenship is not infringed where: Canadian citizenship is a requirement, qualification or consideration imposed or authorized by law; or is a requirement, qualification or consideration adopted for the purpose of fostering and developing participation in cultural, educational, trade union or athletic activities by Canadian citizens or persons lawfully admitted to Canada for permanent residence; or is a requirement, qualification or consideration adopted by an organization or enterprise for the holder of chief or senior executive positions.
[268] *Quebec Charter of Human Rights and Freedoms*, *supra* note 57 at s. 10 & 12.
[269] For example, see *Commission des droits de la personne et des droits de la jeunesse c. Beaulé*, 2009 QCTDP 25, at para. 1, available at: http://canlii.ca/t/27c2x.

21 of the 1954 Convention.[270]

However, considering many stateless persons live on the socio-economic margins of society and do not have access to social assistance, their ineligibility for social housing may simply compound their already precarious circumstances. The fact that social housing legislation in Alberta and British Columbia makes an exception if the person is an immigrant whose "sponsorship agreement has broken down," indicates that some foreign nationals in similar circumstances as stateless persons are deemed eligible. It is with this in mind that Canada is reminded of the following international human rights obligations with respect to the right to housing, which apply to everyone, including stateless persons in its territory.

Under Article 11(1) of the *ICESCR*, Canada is "to recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions…"[271] In addition, Canada has obligations under Article 27(1) and 27(3) of the *Convention on the Rights of the Child* "to recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development…,"[272] and to "take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing."[273] Finally, Canada has committed under the *International Convention on the Elimination of All Forms of Racism* ("*ICERD*") "to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of…The right to housing"[274] In this regard the Committee on the Elimination of Racial Discrimination ("CERD") has recommended that although some rights "may be confined to citizens, human rights are, in principle, to be enjoyed by all persons. States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law."[275] In particular the CERD recommends that States "[r]emove obstacles that prevent the enjoyment of economic, social and cultural rights

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[270] This is not to say that discrimination in housing does not occur. For example, in Ontario a landlord can request credit references, rental history information, authorization to conduct credit checks, and may request income information from a prospective tenant (see, *Business Practices Permissible to Landlords in Selecting Prospective Tenants for Residential Accommodation*, O Reg 290/98, available at: http://canlii.ca/t/1mg2). For stateless persons living on the margins in Canada, without status, precarious employment and no references in Canada, this can prevent stateless persons from accessing adequate housing in Ontario (See, Centre for Equality Rights in Accommodation, *Human Rights in Housing in Canada: An Advocate's Guide* (2008), at 20 & 24, at: http://tinyurl.com/po5wkb9. Although Ontario's legislation allows landlords to use this information to select tenants, they cannot refuse accommodation based on a protected ground of discrimination.[270]

[271] *ICESCR*, *supra* note 235 at Art. 11(1).

[272] *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, at Art. 27(1), available at: http://www.refworld.org/docid/3ae6b38f0.html (entered into force 2 September 1990, ratification by Canada 13 December 1991) [*Convention on the Rights of the Child*]

[273] *Ibid.*, at Art. 27(3).

[274] *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, at Art. 5(e)(iii), available at: http://www.refworld.org/docid/3ae6b3940.html (entered into force 4 January 1969, ratification by Canada 14 October 1970) [*ICERD*].

[275] UN Committee on the Elimination of Racial Discrimination (CERD), *CERD General Recommendation XXX on Discrimination Against Non Citizens*, 1 October 2002, at para. 3, available at: http://www.refworld.org/docid/45139e084.html [*CERD General Recommendation No. 30*]

by non-citizens, notably in the areas of…housing."[276]

IV. Recommendations

15) UNHCR should engage with provincial governments on the precarious status of stateless persons in Canada and the practical and legal obstacles that stateless persons experience in exercising their international human right to housing, including accessing and becoming eligible for social housing in Canada.

ARTICLE 22: PUBLIC EDUCATION

1. The Contracting States shall accord to stateless persons the same treatment as is accorded to nationals with respect to elementary education.

2. The Contracting States shall accord to stateless persons treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships.

I. Background & Commentary

Article 22 is restricted to "education provided by public authorities from public funds and to any education subsidized in whole or in part by public funds or to scholarships derived from them."[277] Furthermore, Article 22(1) does not make explicit reference to lawful stay or habitual residence, and therefore, it is assumed to be equally applicable to both resident and non-resident stateless persons.[278]

What is considered "elementary" education and what is "higher education" depends on the definition applied in the given country.[279] The grade structure and definition for "elementary", "secondary" and "post-secondary" education in each province is described below.

II. Canadian Legal Framework

a. Article 22(1) – Federal Legislation

The provinces have legislative authority over education.[280] However, the federal government has legislative authority over foreign nationals and it establishes the rules and procedures that foreign

[276] *Ibid.*, at paras. 29-30.
[277] *Robinson Commentary to the 1954 Convention*, *supra* note 11 at 41-42.
[278] *Ibid.*, at 43.
[279] *Ibid.*, at 42.
[280] *Constitution Act, 1867*, *supra* note 51 at s. 93.

nationals must undertake in order to be authorized to study in Canada.

In most circumstances, the *IRPA* authorizes minor children to attend elementary and secondary school without a study permit. Section 30(2) of the *IRPA* states that "[e]very minor child in Canada, other than a child of a temporary resident not authorized to work or study, is authorized to study at the pre-school, primary or secondary level."[281] This provision allows minor children who are unlawfully in Canada to attend elementary and secondary school without a valid study permit. On the other hand, minor children who accompany their parent who is in Canada as a visitor are not authorized to study in Canada without a study permit.[282] Foreign nationals who wish to study at a post-secondary/higher education institution also require a study permit. Citizenship and Immigration Canada provides the following table to determine whether a minor child requires a study permit to attend elementary or secondary school:[283]

If the child is…	**Documents needed**	**Study permit required**
a Canadian	Passport, citizenship card, or birth certificate	No
a permanent resident	Record of Landing, Confirmation of Permanent Residence; or Permanent Resident Card	No
a foreign national accompanied by a parent in the visitor class	Stamp on the child's passport or on the father's or mother's passport on which the child is listed as a son or daughter	Yes
alone or with a parent who is a temporary resident and has a study or work permit	Child's passport or child listed on the parent's passport. The child may have a visitor record. The parent has a study or work permit.	No
a refugee claimant, accompanied or not by a parent	Determination of Eligibility letter from CIC. Child's passport or child listed on a parent's passport, or no travel or identity documents.	No
in Canada without status	Child's passport or child listed on a parent's passport, or no travel or identity documents. May also have an expired CIC document.	No

Although the *IRPA* allows most minor children to attend elementary and secondary school without a study permit, the *IRPA* does not exempt them from paying foreign student fees at these

[281] *IRPA*, *supra* note 20 at s. 30(2).
[282] Citizenship and Immigration Canada, "Find out if your child needs a study permit" (24 March 2015), available at: http://www.cic.gc.ca/English/study/minors-documents.asp [*Find out if your child needs a study permit*]; and see UN Committee on Economic, Social and Cultural Rights, *Replies of the Government of Canada to the List of issues to be taken up in connection with the consideration of the fourth periodic report of CANADA concerning the rights referred to in articles 1-15 of the International Covenant on Economic, Social and Cultural Rights* (25 April 2006), at 12, available at: available at: http://tinyurl.com/oun7pc5. [*Canada's Reply to CESCR 2006*], Canada stated that "temporary resident not authorized to work or study" mentioned in s. 30(2) are those who are visiting Canada for a brief period.
[283] *Find out if your child needs a study permit*, *ibid*.

schools. In addition, minor children who require a study permit to study at elementary and secondary school are subject to school fees.[284]

b. Article 22(1) – Provincial Legislation

Alberta Education Legislation

In 2012, the Government of Alberta drafted new education legislation to replace the existing *School Act*.[285] The new *Education Act*, and its subsequent amendments, have received royal assent. However, at the time of writing they are not yet in force.[286] Although Alberta's *School Act* is the current education law in Alberta, this section focuses on the compatibility of Alberta's new *Education Act* with the 1954 Convention.

In Alberta, elementary education is Kindergarten to Grade 6. Secondary school includes junior high school, which is Grade 7 to Grade 9, as well as senior high school, which is Grade 10 to Grade 12.[287]

Under the new *Education Act*, the right to access education in Alberta is available to every person who: is between the ages of 6 and 21, is a "resident of Alberta", and has a parent who is a "resident of Canada". "Resident of Alberta" is defined as: a person who is lawfully entitled to be or to remain in Canada, and who is living and ordinarily present in Alberta, but does not include a tourist or visitor to Alberta.[288] A "resident of Canada" for the purposes of the *Education Act* means a person who is lawfully entitled to be or to remain in Canada, and who is living and is ordinarily present, in Canada, but does not include a tourist or visitor to Canada.[289]

It is not entirely clear who is considered to be "lawfully entitled to be or to remain" in Alberta and Canada in order to be eligible for public education under the *Education Act*. For example, the *School Act* is more specific and its eligibility criteria require persons be "lawfully admitted to Canada for permanent residence, or a child of an individual who is lawfully admitted to Canada for permanent or temporary residence." Assuming "lawfully entitled to be or to remain" under the new *Education Act* is intended to mean the same as "lawfully admitted to Canada for permanent residence, or a child of an individual who is lawfully admitted to Canada for permanent or temporary residence" under the *School Act*, then a foreign national could be eligible for admission to attend public schools in Alberta if they:

- Have been issued a study permit and have registered and paid tuition for a full-time provincially recognized diploma or degree program that is a minimum of two years in

[284] *Canada's Reply to CESCR 2006*, *supra* note 282 at 12.
[285] *School Act*, RSA 2000, c S-3, available at: http://canlii.ca/t/52fj7 [*Alberta School Act*].
[286] *Education Act*, SA 2012, c E-0.3, available at: http://canlii.ca/t/52fkf [*Alberta Education Act*]; and Bill 19, *Education Amendment Act,* 3d Sess, 28th Leg, Alberta, 2015 (assented to 30 March 2015), available at: http://tinyurl.com/nmp8ml5; and see, Alberta Education, "The Education Act and Regulatory Review", available at: http://education.alberta.ca/department/policy/education-act.aspx.
[287] Study in Alberta, "Structure of the Alberta School System" (2015), available at: http://studyinalberta.ca/primary-and-secondary/overview/structure/.
[288] *Alberta Education Act*, *supra* note 286 at s. 1(4)(a).
[289] *Ibid.*, at s. 1(4)(b).

duration or a full-time graduate or post-doctoral program of study that is a minimum of one year in duration;
- Have been issued an employment authorization to work temporarily in Canada (e.g. temporary foreign workers);
- Filed a refugee claim;
- Have been issued a federal Temporary Resident Permit (TRP); or
- Are persons with diplomatic status in Canada[290]

Individuals who are not described above have not been considered "residents of the board"; and therefore, must pay tuition fees for public education.[291]

British Columbia Education Legislation

In British Columbia, elementary education includes Kindergarten to Grade 7. Secondary school includes Grade 8 to Grade 12.[292]

Under British Columbia's *School Act*, a person is entitled to access an educational program provided by the board of a school district if the person is of school age, and is resident in that school district.[293] Furthermore, a school board must provide an educational program in a school operated by the board free of charge to every student of school age resident in British Columbia.[294] A student is "resident" in British Columbia if the student and the student's guardian are ordinarily resident in British Columbia.[295] Unfortunately, the *School Act* does not define "ordinarily resident" for the purposes of enrollment. Instead, the Ministry of Education's policy on the "Eligibility of Students for Operating Grant Funding" states "[b]oards must determine, in a fair and even-handed manner, whether an applicant falls within the definition of 'ordinarily resident'"[296] With respect to the eligibility of foreign nationals, the policy states:

> Immigration status is relevant but does not determine ordinary residence. The determination of whether a person is ordinarily resident should never be based solely on the person's immigration status. A person need not be a Canadian citizen or permanent resident to be 'ordinarily resident' in BC for the purposes of Section 82 of

[290] UN Committee on the Elimination of Racial Discrimination (CERD), *Reports submitted by States parties under article 9 of the Convention: International Convention on the Elimination of All Forms of Racial Discrimination : 19th and 20th periodic reports of States parties due in 2009 : Canada*, 8 June 2011, CERD/C/CAN/19-20, at para. 318, available at: http://www.refworld.org/docid/506181602.html [*CERD State Report 2011*].
[291] *Alberta Education Act*, *supra* note 286 at ss. 13(2)-(3) & 57, and *Ibid.* at para. 318. Elementary and secondary school tuition fees in Alberta for individuals requiring a study permit range from $4,000-$6,000 per semester. A refund for the fees could only be obtained if the individual cancels before the start of the semester, they are unable to obtain a study permit, or they obtain permanent residence before September 30 of the current school year, see Study in Alberta, "How much does it cost?" (2015), available at: http://www.studyinalberta.ca/primary-and-secondary/cost/ [*How much does it cost?*]
[292] Statistics Canada, "Levels within pre-elementary and elementary-secondary schools, by jurisdiction" (13 December 2010), available at: http://www.statcan.gc.ca/pub/81-582-g/2010001/c-g/c-g1-eng.htm
[293] *School Act*, RSBC 1996, c 412, at s. 2(1), available at: http://canlii.ca/t/52cdg [*BC School Act*]
[294] *Ibid.*, at s. 82(1).
[295] *Ibid.*, at s. 82(2).
[296] Ministry of Education, "Eligibility of Students for Operating Grant Funding" (18 March 2013), available at: http://tinyurl.com/qzrmekv.

the School Act. For example, persons who have applied for convention refugee status but not yet received a determination, and persons who have applied for permanent resident status from within Canada, are ordinarily resident in BC if there are other indicators of continuity with the community and residence for a settled purpose other than receiving free public education. On the other hand, a person who comes to Canada on a time-limited basis and has not taken steps to obtain permanent residence in Canada usually will not be ordinarily resident because he or she has no legitimate expectation of remaining in Canada.

Similarly, persons who have relocated from another Canadian province or territory are ordinarily resident if they show sufficient other indicators of continuity and settled purpose.

[…]

In addition to those who have a clear entitlement to public education under Section 82 of the School Act, the minister will provide operating grant funding for school age students in the categories listed below…

- A student who resides in British Columbia and
  - Who has made a claim for refugee status in Canada and whose claim has not yet been determined, or
  - Who is detained in custody in a youth custody centre
- A student who is in British Columbia with his or her guardian if the guardian meets one of the criteria set out below (supporting documentation required):
  - Has been lawfully admitted to Canada for temporary residence and is authorised to work for a period of one year or more, and is or will be employed for at least 20 hours per week;
  - Has been lawfully admitted to Canada and is authorised to study for a period of one year or more, and is enrolled in a degree or diploma programme;
  - Has been lawfully admitted to Canada and is authorised to study for a period of one year or more and all of the following conditions apply:
    - The parent or guardian is enrolled in an eligible English as a Second Language (ESL) program of up to a year in duration (The ESL adult student will be deemed resident for up to one year only, after which the child of the student will be considered an international students may be charged international student fees;
    - The parent or guardian has been accepted to a degree or diploma programme at a public post-secondary institution in British Columbia, or a degree program at a private post-secondary institution;
    - The acceptance to the degree or diploma program is contingent upon the completion of an ESL program;
  - Has been lawfully admitted to and is authorized to study in Canada, and has been awarded a multi-year scholarship that covers the cost of both tuition and living expenses for an eligible post-secondary with an ESL and a degree

program component;
    - Has been lawfully admitted to Canada and is participating in an educator exchange program with a public school in British Columbia;
    - Has diplomatic status in Canada, or is carrying out official duties under the authority of the *Visiting Forces Act*[297]

Ontario Education Legislation

In Ontario, elementary education includes Junior Kindergarten to Grade 8. Secondary school includes Grade 9 to Grade 12.[298]

Under Ontario's *Education Act*, every person between the ages 6 and 18 is required to attend school, subject to few exceptions under the Act.[299] The *Education Act* provides that temporary residents and persons with a study permit must pay a tuition fee to attend public schools.[300] However, the *Education Act* also establishes exceptions to the obligation to pay fees to:

- A participant in an educational exchange program under which a pupil of the board attends a school outside Canada without a fee;
- A person who is a dependant within the meaning of the *Visiting Forces Act* (Canada);
- A person if that person, his or her parent or someone else with lawful custody of him or her is in Canada:
    - Under a temporary resident permit (TRP),
    - Under a diplomatic, consular or official acceptance, or
    - Claiming refugee protection or having had such protection conferred;
- A person if that person is awaiting determination of an application for permanent residence in Canada or an application for Canadian citizenship and his or her parent or someone else with lawful custody of him is a Canadian citizen resident in Ontario;
- A person if his or her parent or someone else with lawful custody of him or her is in Canada:
    - Under a work permit or awaiting the determination of an application for a work permit,
    - As a permanent resident or is awaiting determination of an application for permanent residence in Canada,
    - As a religious worker authorized to work in Canada,
    - Is authorized to study in Canada and is a full-time student at a university, college or institution in Ontario,
    - In accordance with an agreement with a university outside Canada to teach at an

[297] *Ibid*.
[298] Ministry of Education, "Education Facts, 2013-2014" (22 December 2014), available at: http://www.edu.gov.on.ca/eng/educationFacts.html.
[299] *Ontario Education Act*, *supra* note 69 at s. 21(1). Section 21(2) identifies when a person is not compelled to attend school.
[300] *Ibid.*, at s. 49(6); *Calculation of Fees For Pupils for the 2014-2015 School Board Fiscal Year*, O Reg 77/14, at s. 7, available at: http://canlii.ca/t/527jx. The regulation allows it to be set by the policy of specific school boards. As an example, the Trillium Lakelands District School Board has set the Tuition Fees for s. 49(6) students for the 2014/2015 school year at $1,075.90 per month and secondary students is $1,139.90 per month payable in advance. See Trillium Lakeland District School Board, "Tuition Fees 2014/2015", available at: http://tldsb.ca/wp-content/uploads/2013/07/Tuition-Fees-2014-15.pdf

> institution in Ontario, including its affiliated or federated institutions, that receives operating grants from the Government of Ontario[301]

Furthermore, unlike Alberta and British Columbia, the Ontario *Education Act* specifically allows a foreign national who is less than 18 years old and otherwise eligible to attend primary or secondary school to do so, even if they are unlawfully in Canada.[302] This ensures compliance with s. 30(2) of the *IRPA* and prevents children in Ontario from being excluded from school merely because they or their parents are unlawfully living in Canada. The Government of Ontario has issued a Policy/Program Memorandum on the admission of persons who do not have any legal status. The Policy instructs schools and school boards to not refuse admission of students even if their parents do not have: proof of immigration status or proof that they have applied for status, a work permit or social insurance number, or Ontario Health Insurance Program (OHIP) coverage.[303] When a child without legal status is able to attend an Ontario public school, the Policy also clarifies that the student will not be required to pay fees.[304] This latter rule implements Canada's obligations under Article 28 of the *Convention on the Rights of the Child* in Ontario.

Despite the right of all children in Ontario to attend public school without the payment of fees, even when they are illegally in Canada, there are reports identifying barriers to the right. One example is that school board administrators do not always implement the Policy in practice.[305]

Quebec Education Legislation

In Quebec, elementary education includes Kindergarten to Grade 6. Secondary school includes Grade 7 to Grade 11.[306] Following Grade 11, Quebec offers *Collège d'enseignement général et professionnel* (CÉGEP) for 2-3 years. This provides students with a publically funded "post-secondary" college diploma in general and vocational education. These diplomas are required for students who wish to study at a university.[307]

Under Quebec's *Education Act*, every person is entitled to preschool education services and elementary and secondary school instructional services provided for under the *Education Act.* Every person is entitled from the age of admission to preschool, which is 5 years old, or

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[301] *Ontario Education Act*, *supra* note 69 at s. 49(7).
[302] *Ibid.*, at s. 49.1, "[a] person who is otherwise entitled to be admitted to a school and who is less than eighteen years of age shall not be refused admission because the person or the person's parent or guardian is unlawfully in Canada."
[303] Ministry of Education, "Policy/Program Memorandum No. 136", available at: http://www.edu.gov.on.ca/extra/eng/ppm/136.html [*Policy/Program Memorandum No. 136*].
[304] *Ibid*.
[305] Social Planning Toronto, *The Right to Learn: Access to Public Education for Non-Status Immigrants* (June 2008), available at: http://tinyurl.com/nd9ftv6; Social Planning Toronto, *Policy without Practice: Barriers to Enrollment for Non-Status Immigrant Students in Toronto's Catholic Schools* (July 2010), available at: http://tinyurl.com/pthutl7.
[306] Statistics Canada, "Levels within pre-elementary and elementary-secondary schools, by jurisdiction"(13 December 2010), available at: available at: http://tinyurl.com/ohrzfg9.
[307] Ministère de l'Éducation, du Loisir et du Sport, *Education in Quebec: An Overview* (2006), at 4-7, available at: http://tinyurl.com/oet27nr.

elementary school, which is 6 years old, until the age of 18.[308] Furthermore, the educational services are to be provided free to every "resident" of Quebec.[309] Students who are not resident in Quebec must pay fees established by the Minister of Education, Recreation and Sports.[310]

"Resident in Quebec" for the purposes of accessing free preschool, elementary and secondary school under the *Education Act* means a student who is a Canadian citizen or a permanent resident within the meaning of the *IRPA* and who is in one of the following situations:

- The student was born in Québec or was adopted by a person who had his or her residence in Québec at the time of the adoption;
- One of the student's parents or his or her sponsor has his or her residence in Québec;
- The student's parents or sponsor are deceased and one of the parents or the sponsor had his or her residence in Québec at the time of the death;
- The student maintains a residence in Québec even though his or her parents or sponsor have ceased to reside in Québec;
- Québec is the last place where the student resided for 12 consecutive months while not pursuing full-time studies;
- The student holds a selection certificate issued under the *Act respecting immigration to Québec*;
- The student has been residing in Québec for at least 3 months without having resided in another province for more than 3 months;
- The student resided in Québec for 3 consecutive years within the last 5 years (for bullet points 2, 4, 5 or 7); or
- The student's spouse has or had his or her residence in Québec according to one of the preceding bullet points.[311]

In addition, the Government of Quebec has additional exceptions from obtaining a study permit for Quebec. The exceptions include:

- Students who wish to enroll in a program or course lasting six months or less;
- Recipients of Commonwealth scholarship or a full bursary (covering all expenses);
- Participants in a Canadian aid program for developing countries;
- The spouse and dependent children of diplomats, consular officers or international representatives or officials staying in Québec;
- Minor children (under age 18):
    - Of preschool age (age 4 to 5);
    - At the primary or secondary level, already in Québec in the company of either parent who holds a work or study permit;
- A minor child or the child of a person seeking asylum or is recognized as a refugee or a person in need of protection in Canada;
- Holders of a valid Certificat de Sélection du Québec (CSQ-Québec Selection Certificate)

[308] *Education Act*, CQLR c I-13.3, at s. 1, available at: http://canlii.ca/t/52c6l [*Quebec Education Act*]. The age limit is 21 years old if the person is considered "handicapped" under the regulations.
[309] *Ibid.*, at s. 3.
[310] *Ibid.*, at s. 216.
[311] *Regulation respecting the definition of resident in Québec*, CQLR c I-13.3, r 4, at s. 1, available at: http://canlii.ca/t/hqkq.

and whose permanent residence application is processed in Canada.[312]

Quebec's *Education Act* does not include an exception for persons without legal status. In November 2014, the Quebec Ombudsman concluded that between 300 and 400, and potentially thousands of children do not have access to free public education because they are not considered resident in Québec due to their parents' precarious immigration status. In most cases, these children have no official immigration papers because their family remained in Canada after expiration of a temporary visa or after having been refused refugee status and are therefore no longer allowed to be in Quebec.[313] Additional media reports have found individuals who are unable to attend due to their lack of immigration status are subject to fees of $5,000 to $6,000 per year.[314]

c. Article 22(2) – Higher Education

Article 22(2) addresses the treatment of stateless persons in the pursuit of secondary school education and higher education. Higher education, or "post-secondary education" as it is known in Canada, includes studies undertaken at a diploma and degree granting college or university. Foreign nationals wishing to study at a college or university in one of the provinces or territories are required to possess a valid study permit. As an international student, a foreign national is required to pay applicable international tuition fees.[315] Only Canadian citizens, permanent residents, or persons who have "protected person" status can pay domestic tuition fees.[316] In 2012, the average international tuition fee was $18,641 per year; nearly three times the cost of tuition for Canadian citizens and permanent residents.[317] Furthermore, without Canadian citizenship, permanent resident status, or protected person status in Canada, stateless persons in Canada are ineligible to access government operated grants and student loan programs in Alberta, British Columbia, Ontario and Quebec.[318]

The *IRPR* outlines regulations that allow some foreign nationals within Canada to apply for a study permit in order to attend a post-secondary education institution. Foreign nationals eligible to apply for a study permit include foreign nationals who: already have a study permit, have a work permit, are subject to an unenforceable removal order, or hold a temporary resident permit (TRP) of at least six months.[319] Family members of foreign nationals who hold a study permit, work permit, temporary resident permit, or are subject to an unenforceable removal order can

[312] Ministry of Immigration, Diversity and Inclusion, "List of exemptions", (9 February 2009), available at: available at: http://tinyurl.com/b524u5q.
[313] Le Protecteur du Citoyen, *Summary Report* (7 November 2014), available at: available at: http://tinyurl.com/pv2sv9w.
[314] Miriam Katawazi, "Quebec laws keep undocumented children out of school" (12 September 2014), available at: http://tinyurl.com/k49h4nd.
[315] *Canada's Reply to CESCR 2006*, *supra* note 282 at 12.
[316] *Ibid*.
[317] Canadian Federation of Students, "International Students", available at: http://cfs-fcee.ca/the-issues/international-students/
[318] CanLearn, "Find Out if you are Eligible for a Student Loan" (23 July 2013), available at: http://www.canlearn.ca/eng/loans_grants/loans/qualify.shtml
[319] *IRPR*, *supra* note 21 at s. 215(1)(a)-(e).

also apply for a study permit.[320]

However, stateless persons who apply for a study permit from within Canada because they are subject to an unenforceable removal order do not receive temporary residence status.[321] This is problematic because for minor children to attend public schools in Alberta, British Columbia and Quebec their parents may need to be considered temporary residents (ie. "lawfully staying" or "lawfully in") in order to avoid paying tuition fees to attend public schools.

III. Assessment

Article 22(1) requires States to provide public elementary education to stateless persons with treatment as favourable as nationals. Based on a review of the legislation above, Alberta, British Columbia and Quebec's education legislation is not compatible with Article 22(1) of the 1954 Convention. This is because of the residency, lawfully admitted, and temporary residency restrictions placed on foreign nationals in order to be enrolled in public elementary schools. By not meeting the provinces' residency, lawfully admitted and temporary residency restrictions, stateless children who are in Canada without a status may not have access to free elementary education like Canadian citizens. This is contrary to section 30(2) of the *IRPA*, and falls short of Canada's obligations under Article 28 of the *Convention on the Rights of the Child.*

Furthermore, even though stateless persons subject to an unenforceable removal order can apply for a study permit from within Canada, having a study permit would not exempt them from elementary school fees, since the *IRPA* provides that simply having a study permit issued does not provide them with temporary residence status.

Finally, with respect to Article 22(2) of the 1954 Convention, Canada's legislative framework appears to be compatible. This is because stateless persons are treated as favourably as aliens generally with respect to the eligibility and cost associated with post-secondary education, and the requirements and eligibility for accessing student loans and grants in Alberta, British Columbia, Ontario and Quebec.

a. Canada's International Human Rights Legislation

As a result of the apparent gap in the legal framework of Alberta, British Columbia and Quebec, Canada is reminded of its international human rights obligations under the *Convention on the Rights of the Child,* the *ICESCR* and the *ICERD.* Since Canada's obligations under these treaties are more generous than the lower standard of treatment under Article 22(1) of the 1954 Convention, the most liberal provision(s) are to apply in order to ensure that Canada fulfils all of its obligations under international law.

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[320] *IRPR*, *supra* note 21 at s. 215(2)(a)-(d). The cost of the study permit is $150 unless the individual holds a study permit and is temporarily destitute, see *IRPR*, *supra* note 21 at s. 300(1) and 300(2)(f).
[321] *IRPR*, *supra* note 21 at s. 218. "A foreign national referred to in paragraph 215(1)(*d*) and their family members do not, by reason only of being issued a study permit, become temporary residents."

First, Canada may be in breach of Articles 2(1) and 28(1)(a) of the *Convention on the Rights of the Child* by discriminating on the basis of national, ethnic, social origin, birth or other status in the right of every child to education, and in particular making primary education compulsory and available free to all children.[322]

Second, Canada has international human rights obligations under Articles 2(2) and 13(2)(a) of the *ICESCR* to provide compulsory primary education freely available to all without discrimination on the basis of national, social origin, birth or other status.[323] In this respect, the CESCR states that "[t]he ground of nationality should not bar access to Covenant rights, e.g., all children within a State, including those with an undocumented status, have a right to receive education and access to adequate food and affordable health care. The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers, and victims of international trafficking, regardless of legal status and documentation.[324]

Third, the *ICERD* reinforces the *ICESCR* and prohibits Canada to discriminate on the basis of national or ethnic origin in the enjoyment of economic, social and cultural rights, and in particular, the right to education and training.[325] In this regard the CERD has recommended that although some rights "may be confined to citizens, human rights are, in principle, to be enjoyed by all persons. States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law."[326] In particular the CERD recommends that States "[r]emove obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the areas of education, housing, employment and health;…[and] ensure that public educational institutions are open to non-citizens and children of undocumented immigrants residing in the territory of a State party."[327]

On a number of occasions the United Nations has previously made concluding observations respecting access to education for stateless persons and called on the Government of Canada to ensure access.[328]

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[322] *Convention on the Rights of the Child*, *supra* note 272, at Arts. 2(1) & 28(1)(a).
[323] *ICESCR*, *supra* note 235 at Arts. 2(2) & 13(2).
[324] *General Comment No. 20*, *supra* note 234 at para. 30.
[325] *ICERD*, *supra* note 274 at Art. 5(e)(v).
[326] *CERD General Recommendation No. 30*, *supra* note 275 at para. 3.
[327] *Ibid.*, at paras. 29-30.
[328] UN Committee on the Elimination of Racial Discrimination (CERD), *Report of the Committee on the Elimination of Racial Discrimination: seventieth session (19 February-9 March 2007) ; seventy-first session (30 July-17 August 2007)*, 1 October 2007, A/62/18, at para. 84, available at: http://www.refworld.org/docid/473424062.html [*CERD Concluding Observations 2007*]; UN Committee on the Elimination of Racial Discrimination (CERD), *Report of the UN Committee on the Elimination of Racial Discrimination, Sixtieth Session (4-22 March 2002) and Sixty-first Session (5-23 August 2002)*, 1 November 2002, A/57/18, at para. 337, available at: http://www.refworld.org/docid/3f52f7aa4.html; UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations: Canada*, 27 October 2003, CRC/C/15/Add.215, at paras. 44-45, available at: http://www.refworld.org/docid/403a22804.html.

IV. Recommendations

16) Further research should be conducted on stateless children in Canada in order to determine whether stateless children are able to exercise their right to free education in accordance with Article 28 of the *Convention on the Rights of the Child* and Article 22 of the 1954 Convention.

17) UNHCR should engage the governments of Alberta, British Columbia, Ontario and Quebec on the issue of stateless persons and their ability to access free public education in these jurisdictions. In particular, UNHCR should explain the precarious circumstances of stateless persons in Canada, the practical obstacles they may experience in providing immigration documentation to register children for public education, and that "lawfully admitted" or "lawfully staying" requirements are incompatible with Article 28 of the *Convention on the Rights of the Child* and Article 22 of the 1954 Convention.

18) Alberta, British Columbia and Quebec should implement legislative and policy safeguards similar to Ontario, which would guarantee access to free public education for all stateless children regardless of immigration status, documentation, or ability to pay.

ARTICLE 23: PUBLIC RELIEF

> The Contracting States shall accord to stateless persons lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.

I. Background & Commentary

Article 23 of the 1954 Convention is identical in wording to Article 23 of the 1951 Refugee Convention. It requires stateless persons to be "lawfully staying" in Canada in order to be entitled to receive treatment as is accorded Canadian nationals.[329] However, when the Ad Hoc Committee for the 1951 Refugee Convention drafted this article, the Committee expressed its understanding that refugees should not be required to meet any conditions of local residence or affiliation which might be required of nationals. Therefore, a similar understanding should apply to stateless persons.[330]

In terms of a definition of "public relief and assistance", the commentary on the 1951 Refugee

[329] See Article 15 or the Annex for the definition of "lawfully staying" understood by the drafters of the 1954 Convention. Canada has a reservation to Article 23 of the 1951 Refugee Convention with regards to its interpretation of "lawfully staying". Canada states that "lawfully staying" for the purposes of the 1951 Refugee Convention refers "only to refugees admitted for permanent residence, refugees admitted for temporary residence will be accorded the same treatment with respect to articles 23 and 24 as is accorded visitors generally. For the purpose of the analysis in this report, the definition identified in the *travaux préparatoires* of the 1951 Refugee Convention and the 1954 Convention is applied. See UNHCR, "Declarations and Reservations to the 1951 Convention relating to the Status of Refugees" (1 March 2006), at 6, available at: http://www.unhcr.org/4d934f5f9.pdf [*Declarations and Reservations to the 1951 Convention*].

[330] *Robinson Commentary to the 1954 Convention*, *supra* note 11 at 43-44.

Convention indicates that it "includes hospital treatment, emergency relief, relief for the blind and also the unemployed, where social security benefits are not applicable."[331] This report focuses on the legal framework relating to public healthcare, welfare and disability benefits.

II. Canadian Legal Framework

a. Federal Legal Framework

Interim Federal Health Program

The provincial governments have legislative authority in the area of public healthcare, welfare and disability benefits.[332] However, by maintaining jurisdiction over naturalization and aliens, the federal government provides limited, temporary, taxpayer-funded coverage of healthcare benefits to protected persons, resettled refugees, refugee claimants, and certain "other groups" who do not qualify for tax-payer funded provincial health insurance.[333] This federal program is known as the Interim Federal Health Program (IFHP). The IFHP does not provide healthcare coverage to individuals who are eligible for provincial healthcare insurance plans.

The IFHP is currently the subject of litigation. The litigation is based on arguments that recent reforms to the IFHP violate the constitutional rights of IFHP applicants. In July 2014, the Federal Court of Canada agreed and ruled that the reforms made to the IFHP violate the rights of the applicants not to be subjected to cruel and unusual treatment or punishment, as well as violate their equality rights under the *Charter*.[334] The Government of Canada is appealing this ruling.

While the IFHP decision is under appeal, the Government of Canada has established "temporary measures" to the IFHP.[335] Although the temporary measures for the IFHP focus on the healthcare coverage available to refugees, refugee claimants and protected persons, they also affect the coverage available to "other groups" who may be eligible to receive healthcare benefits under the IFHP. The eligibility requirements and coverage available to "other groups" of persons is relevant for understanding the healthcare context for stateless persons in Canada.

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[331] *1951 Convention travaux préparatoires*, *supra* 61 at 125.

[332] *Constitution Act, 1867*, *supra* 51 at s. 92(7), 92(13) & 92(16). This is not to be confused with social security programs, such as unemployment insurance, pensions and old age disability pensions, which are generally within the authority of the federal government under s. 94A of the *Constitution Act, 1867*, and will be discussed below for Article 24 of the 1954 Convention.

[333] Citizenship and Immigration Canada, "Determine your eligibility and coverage type – Interim Federal Health Program", available at: available at: http://tinyurl.com/o97cwoz [*IFHP eligibility and coverage type*]. Also, the federal government has the constitutional authority to legislate with respect to naturalization and aliens under s. 91(25) of the *Constitution Act, 1867*.

[334] *Canadian Doctors for Refugee Care v. Canada (Attorney General)*, 2014 FC 651, at paras. 689-691 & 871, available at: http://canlii.ca/t/g81sg. Under the section 15(1) equality rights, the Federal Court found the reforms discriminated on the grounds that the IFHP provided a lesser level of healthcare coverage to refugee claimants from certain countries. The decision in this case rejected the argument that the IFHP reforms discriminated against applicants on the basis of "immigrant status". This followed a precedent set by the Federal Court of Appeal in *Toussaint*, *infra* 336, which ruled "immigrant status" is not analogous ground of discrimination under section 15 of the *Charter.*

[335] Citizenship and Immigration Canada, "Interim Federal Health Program: Summary of Benefits" (3 February 2015), available at: http://tinyurl.com/7xwktnf [*Temporary IFHP Benefits Summary*]

Under the IFHP's "temporary measures", there is no specific coverage available for stateless persons, or for persons who are without status in Canada. With respect to persons who are in Canada without legal status, the Federal Court of Appeal has held that denying access to healthcare to persons illegally in Canada does not violate the *Charter*.[336]

Under the IFHP, the level of healthcare coverage varies depending on the group of persons to whom the applicant belongs. There are six types of coverage available. Types 1-3 provide coverage for "most services that insured residents are covered for under their provincial or territorial health insurance plans, such as hospital services and services received from a doctor." Therefore, those who are only eligible for Types 4-6 coverage do not receive healthcare coverage comparable to Canadian nationals. For a stateless person to be eligible for any IFHP coverage they must be:

Type 1:
- A refugee who is or was receiving monthly income support through the Resettlement Assistance Program;
- A victim of human trafficking with a temporary resident permit under s. 24(3) of the *IRPA*;
- Note: A child under 19 years old also receives Type 1 coverage under the IFHP if otherwise eligible for the IFHP and they are in any of the categories identified under Type 1 or listed below.

Type 2:
- A rejected refugee claimant who cannot be removed due to deferral of removal for generalized risk;
- Note: A pregnant woman will also receive Type 2 coverage under the IFHP if they are otherwise eligible for the IFHP and they are in any of the categories identified under Type 2 or listed below. If a pregnant woman is in any of the categories listed under Type 1 coverage, she is eligible for that level of coverage.

Type 3:
- A privately sponsored refugee who does not receive and has not received monthly income support through the Refugee Assistance Program or its equivalent in Quebec;
- A refugee claimant, while their refugee claim is still awaiting a decision from the Immigration and Refugee Board of Canada (IRB), including any appeals of a negative decision on their refugee claim;
- A person who receives a positive IRB decision on their refugee claim;
- A person who receives a positive Pre-Removal Risk Assessment (PRRA) decision;
- A person who receives a positive PRRA decision, but only receives a stay of removal;

Type 4:
- A person whose refugee claim is suspended;
- A person ineligible to file a refugee claim, but who is eligible to apply for a pre-

[336] *Toussaint v. Canada (Attorney General)*, 2011 FCA 213, http://canlii.ca/t/fm4v6 (leave to appeal to the Supreme Court of Canada denied) [*Toussaint*]. The Federal Court of Appeal ruled that the appellant's section 7 right to life, liberty and security of the person, as well as their section 15(1) equality rights non to be discriminated against on the basis of immigrant status were not infringed even though the appellant faced a legitimate risk of death if she did not receive appropriate healthcare, treatment and medications in the near future.

removal risk assessment (PRRA);
- A person whose refugee claim was rejected and appeals exhausted;

Type 5:
- A person detained by the Canada Border Services Agency (CBSA);

Type 6:
- Coverage for an Independent Medical Examination.[337]

Furthermore, IFHP coverage ceases when an individual's refugee claim is withdrawn, the IRB determines that an individual's refugee claim is abandoned, an individual's refugee claim is re-determined ineligible and is ineligible for a PRRA, or an individual has been removed from Canada.[338] Clearly, in order to be eligible for the IFHP there is a significant focus on the individual being a refugee and establishing risk in their country of origin or former habitual residence, or having gone through the refugee determination process.

While some groups are provided with healthcare coverage comparable to what Canadian citizens and permanent residents receive under provincial health insurance programs, it is important to note those who do not receive healthcare coverage similar to Canadian citizens or permanent residents under the IFHP:
- A person whose refugee claim is suspended;
- A person ineligible to file a refugee claim, but who is eligible to apply for a pre-removal risk assessment (PRRA);
- A persons whose refugee claim was rejected and appeals exhausted;
- A person detained by the Canada Border Services Agency (CBSA).[339]

It is in these four categories that stateless persons in Canada may find themselves. This may occur after a stateless person has made a refugee claim, but yet the IRB does not recognize their statelessness as meeting the threshold of persecution necessary to establish a refugee claim.[340] Following the rejection of a refugee claim or PRRA application, a stateless person is unlikely to be considered "lawfully staying" for the purposes of accessing their rights under Article 23.[341]

Welfare & Disability Assistance

The provincial governments have legislative authority over welfare and disability welfare. However, the federal government provides funding to the provinces for social assistance programs through the Canada Social Transfer. The purpose of the Canada Social Transfer is to ensure consistent standards in the delivery of social programs across the country. In order to ensure consistency, the federal government has historically required that there be no minimum period of residence on anyone as a condition for social assistance eligibility in a province.

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[337] See *IFHP eligibility and coverage type*, *supra* note 333.
[338] *Temporary IFHP Benefits Summary*, *supra* note 335.
[339] See *IFHP eligibility and coverage type*, *supra* note 333; and *Ibid*.
[340] See *Statelessness in the Canadian Context*, *supra* note 4 for Andrew Brouwer's analysis of how statelessness is addressed in Canadian refugee law.
[341] Unless they acquire another legal status in Canada, such as a temporary resident permit (TRP), permanent residence through an H&C application, or a valid work or study permit that in some circumstances may make them eligible for provincial healthcare insurance.

However, recently the federal government passed legislation which permits provincial governments to allow for a period of residence requirement, unless the person is a Canadian citizen, permanent resident, has a temporary resident permit, or is a "protected person" under the *IRPA*.[342] At the time of writing, no province has yet implemented a residency requirement on foreign nationals in order to be eligible for welfare and disability assistance.

b. Alberta Legal Framework

Alberta Health Care Insurance Plan

In Alberta, stateless persons are not specifically eligible to register for the taxpayer funded Alberta Health Care Insurance Plan ("AHCIP"). In order to be eligible for the public healthcare coverage, the *Alberta Health Care Insurance Act* requires the person to be a "resident" of Alberta and committed to being physically present in Alberta for at least 183 days in a 12-month period.[343] A "resident" or "resident of Alberta" is a person lawfully entitled to be or to remain in Canada, who makes the person's home and is ordinarily present in Alberta and any other person deemed by the regulations to be a resident, but does not include a tourist, transient or visitor to Alberta.[344]

Persons can also be "deemed resident" of Alberta for the purposes of obtaining AHCIP benefits. This includes persons whose ordinary place of residence is outside Canada, have been lawfully admitted to Canada, have established residence in Alberta, intend to remain in Alberta for 12 or more consecutive months and are in Alberta under a work assignment, contract or arrangement or are a person who is in full-time attendance as a student at an accredited educational institute in Alberta.[345] Those lawfully admitted to Canada for work or study will require a valid work or study permit.[346] However, work permits must be for a minimum of 6 months and the Alberta Health website notes that not all Alberta work, study, or visitor permits qualify the permit holder for health care insurance coverage in Alberta.[347] In order to register for healthcare coverage under the AHCIP, the person will also have to provide supporting documentation concerning their status and identity. Therefore, Alberta Health recommends that those who are physically present in Canada, but not eligible for AHCIP coverage, should obtain private health insurance.[348]

Alberta Welfare & Disability Assistance

In cases where an individual is unable to meet their basic needs due to low-income and

[342] *Federal-Provincial Fiscal Arrangements Act*, RSC 1985, c F-8, at s. 25.1, available at: http://canlii.ca/t/52d91 (accessed 10 April 2015).
[343] *Alberta Health Care Insurance Act*, RSA 2000, c A-20, at s. 4(1), available at: http://canlii.ca/t/527k7 [*Alberta Health Care Insurance Act*]; and Alberta Health, "Are you eligible for AHCIP? Registration requirements" (2015), available at: http://www.health.alberta.ca/AHCIP/registration-requirements.html [*Eligibility for AHCIP*]
[344] *Alberta Health Care Insurance Act*, *ibid.*, at s. 1(x).
[345] *Alberta Health Care Insurance Regulation*, Alta Reg 76/2006, at s. 5, available at: http://canlii.ca/t/51x4j.
[346] Alberta Health "Temporary residents and AHCIP" (2015), available at: http://www.health.alberta.ca/AHCIP/temporary-residents.html [*Temporary residents and AHCIP*]
[347] *Ibid*.
[348] *Ibid.*

unemployment, the provinces provide welfare relief and assistance. For those who have a disability and are unable to work, provinces also provide relief. Disability welfare is usually differentiated from usual welfare by providing additional funds and having additional eligibility requirements.

In Alberta, welfare relief and assistance is through the Alberta Works program. Depending on the person's circumstances, there are different assistance classifications and programs available. For the purposes of Alberta Works, this report will focus on the categories of "individuals who face barriers to full employment" and individuals who are "expected to work or are working".

Individuals who are classified as facing "barriers to full employment" include: adults 18 years or older (16/17 years of age if cohabitating) who are experiencing multiple barriers to full employment that are beyond their control. The category also includes adults who are having a persistent and severe health problem that is expected to be more than six months in duration."[349] Individuals who are classified as "expected to work or are working" are adults who are able to work but are temporarily unavailable to work because of a temporary health problem of six months duration or less, are the primary caretaker of a child 12 months old or younger, or face other circumstances determined by Alberta Works to make the adult temporarily unavailable for work.[350]

The eligibility criteria for the two classifications requires the adult be present in Alberta[351] and to be a Canadian citizen, permanent resident, temporary resident permit (TRP) holder approved for entry into Canada by the Alberta government, a refugee or refugee claimant, or a victim of human trafficking.[352] The assets and financial resources of the applicant are also assessed before the individual can be determined to be eligible.[353]

For persons who are "severely handicapped", they may be eligible for additional income benefits. A "severe handicap" means an impairment of mental or physical functioning, or both, that causes substantial limitation in the person's ability to earn a livelihood and is likely to continue to affect that person permanently because no remedial therapy is available to improve the person's ability to earn a livelihood.[354] A person is eligible to receive a disability benefit if the person satisfies that they:

- Are a Canadian citizen or permanent resident ordinarily resident in Alberta and are of 18 years of age or older;
- Have a severe handicap;
- Have, and their cohabitating partner have, income less than the maximum amount of the living allowance;
- Have assets less than $100,000;
- Not be in receipt of a monthly Old Age Security pension;

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[349] *Income Support, Training and Health Benefits Regulation*, Alta Reg 122/2011, at s. 8(2), available at: http://canlii.ca/t/52bsl [*Income Support, Training and Health Benefits Regulation*].
[350] *Ibid.*, at s. 9(2).
[351] *Ibid.*, at s. 11.
[352] *Ibid.*, at s. 10(2).
[353] *Ibid.*, at ss. 20-24.
[354] *Assured Income for the Severely Handicapped Act*, SA 2006, c A-45.1, at s. 1(i), available at: http://canlii.ca/t/kxcx.

- Not be in receipt of income support and training benefit under the *Income and Employment Supports Act*; and
- Not be a resident of an institution[355]

c. British Columbia Legal Framework

British Columbia Medical Services Plan

In British Columbia, "residents" must apply to enroll as beneficiaries in the Medical Services Plan ("MSP") in order to receive publicly funded healthcare services in British Columbia[356] A "resident" means a person who is: a citizen of Canada or a person who is lawfully admitted to Canada for permanent residence; makes their home in British Columbia; and is physically present in British Columbia for at least 6 months in a calendar year or a shorter prescribed period.[357]

"Resident" also includes a person who is a "deemed resident" under the regulations.[358] A "deemed resident" does not include a tourist or a visitor to British Columbia.[359] However, a deemed resident includes the following individuals who make their home in British Columbia, are physically present in British Columbia for at least 6 months in a calendar year, and:

- Possesses a valid study permit of at least 6 months,
- Possesses a valid work permit of at least 6 months,
- Is a spouse or child of a resident who has applied for permanent resident status and the application is still active, or
- Is an adopted child, or is being adopted, by a resident.[360]

Individuals who are not eligible to be enrolled in the MSP need to acquire private health insurance at personal expense in order to cover any required medical services.

British Columbia Welfare & Disability Assistance

In order to be eligible for welfare in British Columbia, known as BC Employment and Assistance ("BCEA"), a person must be an adult (19 or older), live in British Columbia and have a low income following an assessment for assets and financial resources.[361] In addition, the person must meet the "citizenship requirements". This means that at least one adult member of the family unit must be a Canadian citizen, a permanent resident, a Convention refugee or a Person in Need of Protection under the *IRPA*, in Canada under a temporary residence permit

[355] *Ibid.*, at s. 3(3); and *Assured Income for the Severely Handicapped Regulation*, Alta Reg 91/2007, at s. 4(2), available at: http://canlii.ca/t/lggt.
[356] *Medicare Protection Act*, RSBC 1996, c 286, at ss. 7.1-7.2, available at: http://canlii.ca/t/52crl [*Medicare Protection Act*]. See also, Ministry of Health, "Eligibility and Enrolment?", available at: http://tinyurl.com/p92cayj.
[357] *Medicare Protection Act*, *ibid.*, at s. 1.
[358] *Ibid.*, at s. 1.
[359] *Ibid.*, at s. 1.
[360] *Medical and Health Care Services Regulation*, BC Reg 426/97, at s. 2(a), (b), (d), (f), (g), available at: http://canlii.ca/t/52dq2.
[361] *Employment and Assistance Regulation*, BC Reg 263/2002, at ss. 5, 8-13.1, available at: http://canlii.ca/t/52fd9.

(TRP), waiting for a final decision on your claim for refugee status (or status as a Person in Need of Protection), or be under a deportation or removal order that cannot be executed.[362]

In order to be eligible for disability employment assistance ("PWD"), the person must be at least 18 years of age. The person must also demonstrate that they have a severe mental or physical impairment that is likely to continue for at least 2 years and restricts their ability to perform daily living activities continuously, or periodically for extended periods, and as a result, the person requires help to perform those activities.[363] In addition, the person must meet the same citizen requirements described above under the BCEA program.[364]

d. Ontario Legal Framework

Ontario Health Insurance Plan

In Ontario, every person who is a resident of Ontario is entitled to be insured under the Ontario Health Insurance Plan ("OHIP").[365] In order to be considered a "resident" a person must have an "eligible status" and have their "primary place of residence" in Ontario.[366]

An eligible status for the purposes of being insured under OHIP include:

- Being a Canadian citizen,
- Being a landed immigrant or permanent resident under the *IRPA*,
- Being registered as an Indian under the *Indian Act*,
- Being a "protected person" under the *IRPA*,
- Being a person who is eligible to apply for permanent residence and has submitted an application for permanent residence in Canada, even if the application has not yet been approved or denied,
- Being a person who holds a valid work permit or other document issued under the *IRPA*, that permits the person to work in Canada for no less than 6 months,
- Being a person who holds a valid work permit or other document issued under the *IRPA* that permits the person to work at an occupation in Canada while self-employed for no less than six consecutive months.
- Being a member of the clergy of a religious denomination or a spouse or dependent of the member of the clergy, if the member has finalized an agreement to minister to a religious congregation or group in Ontario for at least six months, as long as the member, spouse and dependent is legally entitled to stay in Canada,
- Having a valid temporary resident permit (TRP) under the *IRPA*, if the permit is for a member of an "inadmissible class",
- Being a person who is eligible to apply for citizenship and has submitted an application for Canadian citizenship, even if the application has not yet been approved or denied.

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[362] *Ibid.*, at s. 7(1).
[363] *Employment and Assistance for Persons with Disabilities Act*, SBC 2002, c 41, at s. 2(2), available at: http://canlii.ca/t/520xp.
[364] *Employment and Assistance for Persons with Disabilities Regulation*, BC Reg 265/2002, at s. 6(1), available at: http://canlii.ca/t/52fhs.
[365] *Health Insurance Act*, RSO 1990, c H.6, at s. 11(1), available at: http://canlii.ca/t/l352.
[366] *General*, RRO 1990, Reg 552, at s. 1.3(1), available at: http://canlii.ca/t/52f7d [*OHIP Regulations*]

- Having a valid work permit under the Government of Canada's "Live-in Caregiver Program".
- Being a child born out of country to a mother who is receiving approved insured services outside of Ontario, if at the time the mother left Ontario she was pregnant with that child.[367]

The second prerequisite that a person's "primary place of residence" is in Ontario, means:

> "[t]he place with which a person has the greatest connection in terms of present and anticipated future living arrangements, the activities of daily living, family connections, financial connections and social connections, and for greater certainty a person only has one primary place of residence, no matter how many dwelling places he or she may have, inside or outside Ontario."[368]

To be recognized as a resident of Ontario, the person must be physically present in Ontario for 153 days in any 12-month period,[369] and be physically present in Ontario for at least 153 days of the first 183 days immediately after establishing residency in the province.[370] If none of the above conditions were met to be eligible for OHIP, an individual would require private health insurance at personal expense.

Ontario Welfare & Disability Assistance

In Ontario, welfare is known as Ontario Works. In order to be eligible for Ontario Works, the person must be 18 years of age,[371] be resident in Ontario, have their budgetary requirements exceed their income and assets, and provide the appropriate personal identification.[372] Furthermore, rather than identify who is eligible for Ontario Works, the *Ontario Works Regulations* identifies persons who are ineligible, and then provides exceptions to those who are ineligible. The Regulations state that persons who are ineligible include:

- Persons against whom a deportation, a departure order, or an exclusion order the *IRPA* has become effective, unless
  - For reasons wholly beyond the control of the person, the person is unable to leave the country; or
  - The person has made an application for status as a permanent resident on the basis of humanitarian or compassionate considerations under the *IRPA*
- Persons against whom a removal order has become enforceable, unless
  - For reasons wholly beyond the control of the person, the person is unable to leave the country; or
  - The person has made an application for status as a permanent resident status on the basis of humanitarian or compassionate considerations under the *IRPA*
- A person who is a visitor, unless
  - The person has made a claim for refugee protection, or

[367] *Ibid.*, at s. 1.4.
[368] *Ibid.*, at s. 1(1).
[369] *Ibid.*, at s. 1.6(3).
[370] *Ibid.*, at s. 1.5(1).
[371] *General*, O Reg 134/98, available at: http://canlii.ca/t/52dpr [*Ontario Works Regulations*]
[372] *Ontario Works Act*, 1997, SO 1997, c 25, Sch A, available at: http://canlii.ca/t/51wtc.

- The person has made an application for status as a permanent resident for which they are eligble
- A person who is a tourist.[373]

The Ontario Disability Support Program ("ODSP") provides additional assistance to those who are unable to work due to a "disability". A person has a disability for the purposes of ODSP if:

- The person has a substantial physical or mental impairment that is expected to last at least one year;
- The impairment effects the person's ability to attend to his or her personal care, function in the community and in a workplace, and results in a substantial restriction in one or more of these activities of daily living; and
- A medical professional has verified the impairment, its restrictions and duration.[374]

Furthermore, in order to be eligible for ODSP income support the person has to be 18 years of age and meet the same "status in the Country" eligibility requirements as the Ontario Works program described above.[375]

e. Quebec Legal Framework

Régie de l'assurance maladie du Québec

In Quebec, every person who is a "resident" or a "temporary resident" of Québec must register with the Régie de l'assurance maladie du Québec ("RAMQ") in order to become an insured person.[376]

A "resident" of Québec means a person domiciled in Québec who meets the conditions prescribed by regulation and who is:

- A Canadian citizen,
- A permanent resident,
- An Indian who is registered under the *Indian Act*,
- A person having been granted refugee status by a competent authority,
- A person who holds a permit issued by the Minister of Immigration of Canada under the *IRPA* with a view to granting permanent residence,
- A person who has been authorized under the *IRPA* to apply for permanent residence while in Canada and who have been granted entry by Canadian immigration authorities and hold a Québec selection certificate,
- Minor children who are in Québec while being considered for adoption by a resident of Québec,
- Children born outside Québec if the parent with whom the child resides on a permanent basis is a resident of Québec,

[373] *Ontario Works Regulations*, *supra* note 371 at s. 6.
[374] *Ontario Disability Support Program Act*, 1997, SO 1997, c 25, Sch B, at s. 4(1), available at: http://canlii.ca/t/kpnt.
[375] *General*, O Reg 222/98, available at: http://canlii.ca/t/52dps.
[376] *Health Insurance Act*, CQLR c A-29, at ss. 1(g.1) & 9, available at: http://canlii.ca/t/526jg.

- An unemancipated minor, if the minor has settled in Québec.[377]

A "temporary resident" of Québec means:

- Foreign nationals who hold an employment authorization valid for a period of more than 6 months issued by Canadian immigration authorities and indicating the employer's name and the place of employment,
- Foreign nationals who hold a certificate attesting to their status as a student or trainee in Québec under an official scholarship program;
- Foreign nationals who have been issued an employment authorization by Canadian immigration authorities for seasonal employment as an agricultural worker;
- Foreign nationals who have been granted entry by Canadian immigration authorities to hold a liturgical office for more than 6 months;
- Canadian citizens who have settled in another country and whose main purpose for being in Québec is to work and who hold an office or employment for a period of more than 6 months; and
- The spouse or any dependant accompanying a person referred to in any of the above five instances, during the temporary residence and who, if a foreign national, has been granted entry for a stay of more than 6 months.[378]

A person becomes a resident or temporary resident of Québec from the first day of the third month.[379] The resident must also be resident in the province for 183 days or more in any calendar year.[380]

Quebec Welfare & Disability Assistance

In general, welfare is available to adults (at least 18 years old) who reside in Quebec and are:

- Canadian citizens,
- Permanent residents,
- Indians registered under the *Indian Act*,
- Persons who have been granted asylum;
- Persons who applied for asylum in Canada;
- Persons refused asylum, but their presence is permitted under the *IRPA*,
- A person who is the subject of a humanitarian and compassionate grounds application under the *IRPA*, has a selection certificate issued by the Minister of Immigration Quebec, and the adult's spouse is a Canadian citizen, permanent resident, Indian or been granted asylum.[381]

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[377] *Ibid.*, at s. 5; and *Regulation respecting eligibility and registration of persons in respect of the Régie de l'assurance maladie du Québec*, CQLR c A-29, r 1, at s. 2, available at: http://canlii.ca/t/52bhl [*Quebec Health Insurance Regulation*]

[378] *Quebec Health Insurance Regulation*, *ibid* at s. 3, pursuant to *Quebec Health Insurance Act*, *supra* note 376 at s. 5.0.1.

[379] *Quebec Health Insurance Regulation*, *ibid.*, at s. 4.

[380] *Ibid.*, at s. 6.

[381] *Individual and Family Assistance Act*, CQLR c A-13.1.1, at s. 26, available at: http://canlii.ca/t/527cw; and *Individual and Family Assistance Regulation*, CQLR c A-13.1.1, r 1, at s. 20, at s. 47, available at: http://canlii.ca/t/52cwt.

Subject to a few exceptions, if the individual is absent from Quebec for a full calendar month, they cease to be a resident of Quebec for the purposes of income assistance.[382] In addition, to receive benefits the individual or family must establish that their cash, property, earnings, benefits and income, fall short of a specific amount that is necessary to meet his or her basic needs.[383]

For individuals to qualify for disability assistance, also known as the Social Solidarity Program, the individual must meet the eligibility criteria above and be considered to have "severely limited capacity for employment." "'Severely limited capacity for employment' means that the adult's physical or mental condition is significantly and in all likelihood permanently or indefinitely deficient or impaired and that, in view of the adult's socio-professional profile, the adult's capacity for employment is severely limited."[384]

III. Assessment

In 2012, the CERD observed that there were "[d]iscrepancies between provinces and territories in entitlements to social services by refugee claimants whose asylum requests have been rejected, as well as undocumented non-citizens and Stateless persons, in particular in the areas of health, social assistance and access to education."[385] Based on a review of the federal and provincial legal framework on healthcare, welfare and disability assistance, there remains inconsistency and a concern that stateless persons who could be considered "lawfully staying" may not receive the same treatment accorded to Canadian citizens. It also appears that a stateless person's chances of receiving healthcare, welfare or disability assistance depends entirely on the province they reside and their particular immigration status. As a result, Alberta, British Columbia, Ontario and Quebec's legislation does not appear to be compatible with Article 23 of the 1954 Convention.

The primary challenge in assessing the compatibility of Canada's legal framework with Article 23 is that there is no definitive understanding in *IRPA* on which permits and statuses constitute "lawfully staying". However, based on the *travaux préparatoires* and section 31.1 of the *IRPA*, it would appear that stateless persons in possession of a valid work permit or study permit for several months, as well as persons in possession of a temporary work permit (TRP) could be considered "lawfully staying".[386] One obstacle is the *IRPA* explicitly denies temporary resident status to stateless persons in possession of a work or study permit when they are subject to an unenforceable removal order under s. 206(1)(b) and 215(1)(d) of the *IRPA*. While it could be argued that these individuals are "implicitly lawfully staying" in Canada; and therefore, should be entitled to healthcare, welfare and disability assistance, this is far from certain. Nonetheless,

[382] *Individual and Family Assistance Regulation*, *ibid.*, at s. 20.
[383] *Individual and Family Assistance Act*, *supra* note 381 at ss. 48, 55; and *Ibid.*, at Chapter III.
[384] *Individual and Family Assistance Act*, *supra* note 381 at s. 70.
[385] Committee on the Elimination of All Forms of Racial Discrimination, "List of the themes" 80th Sess., 26 January 2012 (CERD/C/CAN/Q/19-20), at para. 1(g), available at: http://tinyurl.com/okkm47t.
[386] See definition of "lawfully staying" at Article 15 and in Annex on definitions. Furthermore, temporary resident permits are deduced to mean "lawfully staying" by virtue of s. 31.1 of the *IRPA*, which states: "a designated foreign national whose claim for refugee protection or application for protection is accepted is lawfully staying in Canada only if they become a permanent resident or are issued a temporary resident permit under section 24."

there is an argument to be made that allowing stateless persons in possession of a work permit under section 206(1)(b) to access public healthcare and social assistance benefits is fair consideration for being gainfully employed and paying taxes towards these public services.

a. Healthcare

The following discrepancies illustrate that Canada's legal framework on healthcare may not be compatible with Article 23 of the 1954 Convention. First, the Government of Alberta states that not all work or study permits will mean that a foreign national is eligible for healthcare insurance in the province. It is not clear whether this refers to work and study permits issued to persons subject to an unenforceable removal order pursuant to sections 206(1)(b) and 215(1)(d) of the *IRPA*. In addition, in Alberta there is no mention of whether individuals issued a TRP under section 24(1) are eligible for healthcare, even though they could be considered "lawfully staying". Second, in British Columbia persons with work or study permits of at least 6 months are eligible for public health insurance, but it is not clear whether this eligibility extends to persons issued work and study permits under sections 206(1)(b) and 215(1)(d) of the *IRPA*, since such persons are not given temporary resident status. In British Columbia, it is also not certain whether persons in possession of a TRP are eligible despite those persons being considered "lawfully staying". Third, in Ontario persons with a TRP, or a work permit of at least six-months are eligible for healthcare coverage. However, it is not clear whether foreign nationals with a work permit under section 206(1)(b) are eligible for healthcare. Also, foreign nationals with a study permit appear to be ineligible for health insurance coverage entirely in Ontario. Fourth, Quebec does not clearly provide that persons with a work or study permit under sections 206(1)(b) and 215(1)(d), or persons with a TRP, are eligible for public healthcare.

Finally, the IFHP does not fill the gap for the persons described above, unless they fall within the limited categories of people eligible for the IFHP. The IFHP does not provide coverage comparable to that available for Canadian nationals for foreign nationals who are on work or study permits of any duration, are subject to an unenforceable removal order, or are persons with a TRP under s. 24(1) of the *IRPA*. Curiously, persons issued a TRP under section 24(3) of the *IRPA* because they are victims of human trafficking are eligible for the IFHP. Persons issued a TRP under 24(1) are eligible for healthcare only in Ontario.

b. Welfare and Disability Assistance

With respect to welfare and disability assistance, all provinces exclude persons with a study or work permit. In addition, the following inconsistencies are noteworthy. First, in Alberta a foreign national with a TRP is eligible for welfare and disability assistance. However, foreign nationals subject to an unenforceable removal order and foreign nationals who have submitted an application for permanent residence on H&C grounds are not eligible for welfare and disability assistance in Alberta. Second, in British Columbia foreign nationals with a TRP, and persons subject to an unenforceable removal order are eligible for welfare and disability assistance. Third, in Ontario foreign nationals who have submitted an application for permanent residence on H&C grounds, and persons subject to an unenforceable removal order are eligible for welfare and disability assistance. However, persons with a TRP are not eligible. Finally, in Quebec

foreign nationals whose presence is permitted or persons who have submitted an application for permanent residence on H&C grounds are eligible for welfare and disability assistance. However, a person with a TRP and those subject to an unenforceable removal order are not eligible for welfare and disability assistance in Quebec.

Due to the identified discrepancies and gaps in Canada's healthcare, welfare and disability assistance legal framework, it appears that some stateless persons who could be considered "lawfully staying" or "implicitly lawfully staying" are not accorded the same treatment as Canadian citizens in accessing their rights to public relief under Article 23. Therefore, Canada is reminded of its applicable international human rights obligations towards stateless persons in accessing healthcare and social assistance.

c. Canada's International Human Rights Obligations

Article 11(1) of the *ICESCR* states that State Parties are to "recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and…to the continuous improvement of living conditions."[387] Furthermore, Article 12(1) of that Convenant requires States Parties to "recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[388] In this regard, the CESCR has communicated that the ground of nationality should not bar access to Covenant rights, such as accessing adequate food and affordable healthcare because Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.[389]

In addition, although the IFHP provides some added protection for the healthcare rights of children and pregnant women who are eligible for the IFHP, a review of the IFHP, provincial healthcare, welfare and disability assistance programs illustrate that stateless pregnant women and children who are not eligible for the IFHP or provincial programs could be at risk of being denied their rights to healthcare and social assistance. In this respect, Canada has obligations under Article 24 of the *Convention on the Rights of the Child* to "recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services."[390] Furthermore, Article 27(1) requires that States Parties "recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development…"[391] On women's rights, Canada is obligated under Article 12 of the *Convention on the Elimination on All Forms of Discrimination Against Women (CEDAW)*:

> 1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

[387] *ICESCR*, *supra* note 235 at Art. 11(1).
[388] *ICESCR*, *supra* note 235 at Art. 12(1).
[389] *General Comment 20*, *supra* note 234.
[390] *Convention on the Rights of the Child*, *supra* note 272 at Art. 24.
[391] *Ibid.*, at Art. 27.

> 2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.[392]

Finally, Article 5(e)(iv) the *ICERD* requires Canada to not discriminate on the basis of race, colour, or national or ethnic origin and ensure the right of everyone to the enjoyment of their economic, social and cultural rights, in particular their rights to public health, medical care, social security and social services.[393] On this provision, the CERD's *General Recommendation No. 30* explains that States are obligated to guarantee equality between citizens and non-citizens in the enjoyment of these rights and that differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for differentiation is not "applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim."[394]

Concerns over Canada's treatment of stateless persons were noted in the CERD's 2007 Concluding Observations to Canada's Report on its implementation of the *ICERD*. In its concluding observations the Committee urged Canada to take necessary legal and policy measures to ensure that undocumented migrants and stateless persons whose asylum applications have been rejected are provided with access to social security, health care and education in all provinces and territories, in line with article 5(e) of the *ICERD*. In pursuit of this goal, the CERD recommended that Canada consider amending the *IRPA* to explicitly include statelessness as a factor of humanitarian and compassionate consideration.[395]

IV. Recommendations

19) In support of Recommendation #5, further research should be conducted on the practical and legal obstacles that stateless persons experience in accessing and becoming eligible for public healthcare and social assistance benefits in Canada.

20) UNHCR should engage with provincial governments on the precarious status of stateless persons in Canada and the practical and legal obstacles that stateless persons experience in exercising their international human right to healthcare and social assistance programs.

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[392] *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, available at: http://www.refworld.org/docid/3ae6b3970.html (entered into force 3 September 1981, ratification by Canada 10 December 1981) [*CEDAW*]
[393] *ICERD*, *supra* note 274 at Art. 5(e)(iv).
[394] *CERD General Recommendation 30*, *supra* note 275 at paras. 3-4.
[395] *CERD Concluding Observations 2007*, *supra* note 328 at para. 23.

ARTICLE 24: LABOUR LEGISLATION AND SOCIAL SECURITY

1. The Contracting States shall accord to stateless persons lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters:

(a) In so far as such matters are governed by laws or regulations or are subject to the control of administrative authorities; remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age of employment, apprenticeship and training, women's work and the work of young persons, and the enjoyment of the benefits of collective bargaining;

(b) Social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations:

(i) There may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition;

(ii) National laws or regulations of the country of residence may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension.

2. The right to compensation for the death of a stateless person resulting from employment injury or from occupational disease shall not be affected by the fact that the residence of the beneficiary is outside the territory of the Contracting State.

3. The Contracting States shall extend to stateless persons the benefits of agreements concluded between them, or which may be concluded between them in the future, concerning the maintenance of acquired rights and rights in the process of acquisition in regard to social security, subject only to the conditions which apply to nationals of the States signatory to the agreements in question.

4. The Contracting States will give sympathetic consideration to extending to stateless persons so far as possible the benefits of similar agreements which may at any time be in force between such Contracting States and non-contracting States.

I. Background & Commentary

The wording of Article 24 of the 1954 Convention is identical to Article 24 of the 1951 Refugee Convention. Like Article 23 of this Convention, Article 24 contains a "lawfully staying" requirement in order for stateless persons to enjoy the rights therein.[396]

[396] See Article 15 or the Annex for the definition of "lawfully staying" for the purposes of the 1954 Convention. Canada has the same reservation to Article 24 of the 1951 Refugee Convention as it does Article 23 of that Convention with regards to its interpretation of the phrase "lawfully staying". For the purpose of the analysis in this report, the definition identified in the *travaux préparatoires* of the 1951 Refugee Convention and the 1954 Convention is applied. See *Declarations and Reservations to the 1951 Convention*, *supra* note 329.

For this report, only Article 24(1)(a)-(b) and Article 24(2) will be assessed. In particular, the applicable legal framework respecting employment standards, collective bargaining, workers' compensation, employment insurance and pensions will be reviewed in relation to lawfully staying stateless persons.

II. Canadian Legal Framework

a. Article 24(1)(a): Federal Labour & Employment Standards

The Government of Canada legislates labour and employment standards for industries within federal jurisdiction. The relevant legislation in regard to remuneration, hours of work, overtime, holidays with pay, minimum age of employment, and the enjoyment of the benefits of collective bargaining is the *Canada Labour Code.*[397] For federal public sector employees the applicable legislation is the *Public Service Labour Relations Act*.[398]

The *Canada Labour Code* and the *Public Service Labour Relations Act* state that "employees" are able to form associations and trade unions.[399] The term "employee" is not restricted on the basis of whether a foreign national is "lawfully staying", but can be limited by the person's position or the type of service they provide. However, practically speaking, in order for a stateless person to be an "employee", they would need to be in possession of a valid work permit, which arguably renders them "lawfully staying." Even if a stateless person was subject to an unenforceable removal order and they were issued a work permit under section 206(1)(b), which does not grant them temporary resident status, the lack of a distinction in the definition of "employee" in the *Canada Labour Code* and the *Public Service Labour Relations Act* between foreign nationals and Canadian citizens would ensure treatment equal with Canadian nationals.

The *Canada Labour Code* outlines the standards applicable to all employees for hours of work, wages, vacation and holidays. These standards apply equally to all "employees" of an organization.[400] Furthermore, in the "enjoyment of the benefits of collective bargaining" the *Canada Labour Code* requires trade unions that are the bargaining agent for a bargaining unit to maintain a "duty of fair representation" towards its members. This requires the union to not act in a manner that is discriminatory in the representation of any of the employees in the bargaining unit with respect to their rights under the collective agreement.[401] If a stateless person believes that he or she is being discriminated on the basis of their national or ethnic origin in employment or by their trade union, they can make a human rights complaint.[402]

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[397] *Canada Labour Code*, *supra* note 166 at preamble. The preamble to the *Canada Labour Code* states that the Code is implementing legislation for Canada's obligations in ratifying the *ILO Convention No. 87*, *supra* note 166.
[398] *PSLRA*, *supra* note 167 at s. 2.
[399] *Canada Labour Code*, *supra* note 166 at s. 3(1) & 8(1); *Ibid.*, at ss. 2(1) & 5.
[400] *Canada Labour Code*, *ibid.*, at ss. 166-267. Note that those who are excluded from the provisions regarding hours of work are individuals who are in architectural, dental, engineering, legal or medical professions, see *Canada Labour Standards Regulations*, CRC, c 986, at s. 3, available at: http://canlii.ca/t/52f3p.
[401] *Canada Labour Code*, *ibid.*, at s. 37.
[402] *Canadian Human Rights Act*, *supra* note 52 at ss. 3(1), 7-10 & 40(1).

b. Article 24(1)(a): Provincial Labour & Employment Standards

Provincial labour relations and employment standards legislation in Alberta,[403] British Columbia,[404] Ontario,[405] and Quebec[406] do not make a distinction in their definition of "employee" on the basis of whether the foreign national or stateless person is "lawfully staying". However, like in the federal context, it is likely that a foreign national would be in possession of a valid work permit that would make them "lawfully staying" for the purposes of Article 24(1)(b). Even if a stateless person was subject to an unenforceable removal order and they were issued a work permit under section 206(1)(b), which does not grant them temporary resident status, the lack of a distinction in the definition of "employee" in labour and employment legislation between foreign nationals and Canadian citizens would ensure treatment equal with Canadian nationals.

Provincial employment standards legislation outlines the applicable standards regarding hours of work, wages, vacation and holidays. These standards apply equally to all employees of an organization. In addition, in regards to the enjoyment of the benefits of collective bargaining, provincial labour legislation also states that trade unions have a duty of fair representation and non-discrimination in the representation of any of the employees in the bargaining unit with respect to their rights under the collective agreement.[407]

If a stateless person experienced discrimination in relation to an employment contract or their trade union on the grounds of their place of origin, they are entitled to file a complaint with the appropriate human rights tribunal or commission in their respective province.[408]

c. Article 24(1)(b): Federal Occupational Health & Safety / Workers Compensation

For persons who work in federally regulated industries, the *Canada Labour Code* establishes rights and obligations on employers and employees to ensure workplaces are healthy and safe and to prevent workplace injury or death.[409] The *Canada Labour Code* requires that a federal employer subscribe to a plan that provides an employee who is absent from work due to work-related illness or injury with wage replacement, payable at an equivalent rate to that provided for

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[403] *Alberta Labour Relations Code*, *supra* note 172; and *Alberta Public Service Employee Relations Act*, *supra* note 172; *Alberta Employment Standards Code*, *supra* note 222.
[404] *BC Labour Relations Code*, *supra* note 173; *BC Public Service Labour Relations Act*, *supra* note 173; and *BC Employment Standards Act*, *supra* note 223 at s. 1(1).
[405] *Ontario Labour Relations Act*, *supra* note 174; and *Crown Employees Collective Bargaining Act*, *supra* note 174; and *Ontario Employment Standards Act*, *supra* note 224 at s. 1(1).
[406] *Quebec Labour Code*, *supra* note 175; *Quebec Public Service Act*, *supra* note 175; and *Quebec Labour Standards Act*, *supra* note 225 at s. 1(10).
[407] *Alberta Labour Relations Code*, *supra* note 172 at ss. 152(1) & 153(1); *BC Labour Relations Code*, *supra* note 173 at s. 12(1); *Ontario Labour Relations Act*, *supra* note 174 at s. 74; *Quebec Labour Code*, *supra* note 175 at s. 47.2.
[408] *Alberta Human Rights Act*, *supra* note 54 at ss. 7-9 & 20; *BC Human Rights Code*, *supra* note 55 at ss. 11-14 & 21; *Ontario Human Rights Code*, *supra* note 56 at ss. 5-6 & 34; *Charter of Human Rights and Freedoms*, *supra* note 57 at ss. 16-20 & 74.
[409] *Canada Labour Code*, *supra* note 166 at ss. 122.1-122.2, 124-126; and *Canada Occupational Health and Safety Regulations*, SOR/86-304, http://canlii.ca/t/52c4h.

under the workers' compensation legislation in the employee's province of residence.[410] However, in terms of workers' compensation for workplace disability or death, there is only federal workers' compensation legislation for federal public service workers.[411] For persons working in federally regulated private sector industries, provincial workers' compensation legislation and compensation funds are used to address workers' compensation claims from federally regulated workplaces.[412]

d. Article 24(1)(b): Provincial Occupational Health & Safety / Workers Compensation

For persons who work under provincially regulated employment contracts, Alberta,[413] British Columbia,[414] Ontario[415] and Quebec[416] each have occupational health and safety legislation that places rights and obligations on employers and employees to ensure workplaces are healthy, safe and prevent workplace injury or death. Furthermore, as mentioned above, some provincial legislation respecting workers' compensation requires federal employers to participate in provincially operated worker compensation schemes.[417]

In order for a person to have access to workers' compensation in the event of injury, disability or death in the workplace, the person must be a "worker" as defined under the workers' compensation legislation in the province where they are employed. In addition, the worker must work in an industry or for an "employer" that is subject to the province's workers' compensation legislation. The definition of "worker" in the worker's compensation statutes in Alberta, British Columbia, Ontario and Quebec do not restrict access to workers' compensation schemes on the basis of one's immigration status; instead it is contingent on whether the "worker" is employed in an industry and by an employer under the province's jurisdiction.[418]

e. Article 24(2): Workers Compensation for Beneficiaries Outside Canada

In considering Article 24(2) of the 1954 Convention, Alberta's worker's compensation legislation permits the Workers' Compensation Board to compensate dependents that reside

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[410] *Canada Labour Code*, *supra* 166 at s. 239.1(2).
[411] *Government Employees Compensation Act*, RSC, 1985, c. G-5, available at: http://laws-lois.justice.gc.ca/eng/acts/G%2D5/FullText.html.
[412] McMillan LLP, *Employment Law in Canada: Federally Regulated Employers* (September 2011), at 10-13, available at: http://tinyurl.com/pbeb3ak [*Employment Law in Canada*].
[413] *Occupational Health and Safety Act*, RSA 2000, c O-2, available at: http://canlii.ca/t/5246j.
[414] *Workers Compensation Act*, RSBC 1996, c 492, available at: http://canlii.ca/t/52d5q [*BC Workers Compensation Act*]
[415] *Occupational Health and Safety Act*, RSO 1990, c O.1, available at: http://canlii.ca/t/52c09.
[416] *An Act Respecting Occupational Health and Safety*, CQLR c S-2.1, available at: http://canlii.ca/t/52cwm.
[417] *Employment Law in Canada*, *supra* note 412; see *Workers' Compensation Act*, RSA 2000, c W-15, available at: http://canlii.ca/t/52d4j [*Alberta Workers Compensation Act*]; *BC Workers Compensation Act*, *supra* note 414; *Workplace Safety and Insurance Act*, 1997, SO 1997, c 16, Sch A, available at: http://canlii.ca/t/51xr9 [*Ontario Workplace Safety and Insurance Act*]; *An Act Respecting Industrial Accidents and Occupational Diseases*, CQLR c A-3.001, available at: http://canlii.ca/t/52cvz [*Quebec Industrial Accidents and Occupational Diseases Act*]
[418] *Alberta Workers Compensation Act*, *ibid.*, at s. 1(1)(z); *BC Workers Compensation Act*, *supra* note 414 at s. 1; *Ontario Workplace Safety and Insurance Act*, *ibid.*, at s. 2(1); *Quebec Industrial Accidents and Occupational Diseases Act*, *ibid.*, at s. 2.

outside Canada.[419] Although British Columbia, Ontario and Quebec's workers' compensation legislation does not have a similar provision, legislation in these provinces do not appear to prohibit the disbursement of compensation to beneficiaries outside Canada.

f. Article 24(1)(b): Social Security – Employment Insurance & Pensions

Regular & Special Employment Insurance Programs

There are several employment insurance programs in Canada. They include "regular" employment insurance benefits, and "special" employment insurance programs. "Special" employment insurance programs include maternity benefits, sickness benefits, parental benefits and compassionate care benefits.[420] In order to be eligible for "regular" employment insurance benefits, an applicant must meet specific eligibility criteria outlined in the Act and Regulations, such as working in "insurable employment", paying employment insurance premiums, working a minimum number of hours in insurable employment and having just cause for being unemployed.[421] The Act and Regulations describe the types of employment to be excluded from consideration as "insurable employment", but generally most employment constitutes "insurable employment". In order to apply for "regular" employment insurance a foreign national has to provide proof of immigration status and a work permit.[422] For individuals applying for "special" employment insurance programs, the eligibility criteria are the same, except the minimum number of insurable hours worked is different and there is no "just cause" requirement.[423]

With respect both "regular" and "special" employment insurance programs, the level of benefits a person receives is not contingent on a person's immigration status. However, the level of benefits may be indirectly impacted due to the temporary nature of a foreign national's work permit and how many insurable work hours they must accumulate before being eligible to make an employment insurance benefit claim.

Self-employment Insurance Benefits

The Government of Canada recently implemented an employment insurance program for self-employed persons. This new program allows self-employed persons to opt-in to the employment

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[419] *Alberta Workers Compensation Act*, *supra* note 417 at s. 53.
[420] *Employment Insurance Act,* Sc 1996, c 23, at ss. 6-55, available at: http://laws-lois.justice.gc.ca/eng/acts/e-5.6/ [*Employment Insurance Act*]
[421] *Ibid.*, at ss. 5, 14, 29-33; and *Employment Insurance Regulations*, SOR/96-332, at ss. 2-7, 9.1-11, available at: http://laws-lois.justice.gc.ca/eng/regulations/SOR-96-332/FullText.html [*Employment Insurance Regulations*]
[422] *Employment Insurance Regulations, ibid.*, at s. 7; see also Service Canada, "Applying for Employment Insurance benefits" (4 September 2014), available at: http://tinyurl.com/nfuzvjm.
[423] *Employment Insurance Act*, *supra* note 420 at s. 21-23.2; and *Employment Insurance Regulations*, *supra* note 422 at ss. 27, 38, 40, 41, 41.1-41.3 and 41.4-41.6; see also Service Canada, "Employment Insurance Maternity and Parental Benefits" (21 November 2014), available at: http://tinyurl.com/ke76nk2; Service Canada, "Employment Insurance Sickness Benefits" (19 November 2014), available at: http://www.servicecanada.gc.ca/eng/ei/types/sickness.shtml#eligible; Service Canada, "Employment Insurance Compassionate Care Benefits" (26 September 2014), available at: http://tinyurl.com/oj7lcjo; Service Canada, "Eligibility Criteria for Parents of Critically Ill Children" (6 June 2013), available at: http://www.servicecanada.gc.ca/eng/sc/ei/pcic/eligibility.shtml.

insurance system. However, employment insurance for self-employed persons is only available to Canadian citizens and permanent residents.[424]

g. Article 24(1)(b): Canada's Pension System

Canada Pension Plan & Disability Benefit

The Canada Pension Plan ("CPP") is available to individuals who have worked in "pensionable employment" and made contributions on their "pensionable earnings" to the CPP.[425] Most employment constitutes "pensionable employment", but some occupations are identified in the Act and Regulations as exempt from consideration as pensionable employment. Persons who are employed in pensionable employment have CPP contributions deducted directly from their income and the employer also makes a corresponding pension contribution to the CPP.[426] If a person obtains pensionable employment at the age of 18, they must begin contributing to the CPP.[427] A person who has made pension contributions can apply for a "full" pension at the age of 65 years old. The amount a person is eligible to receive for a full CPP benefit is 25% of their average monthly pensionable earnings.[428] A person is eligible to apply for a reduced CPP benefit once they reach 60 years of age.[429]

There is also a CPP Disability Benefit Program, which is for individuals who are under 65 years of age and are unable to work due to a severe and prolonged disability. In order to be eligible for the CPP Disability Benefit, a person has to have worked and contributed to the CPP in at least four of the last six years, or for persons with 25 or more years of valid contributions, have worked and contributed to the CPP in at least three of the last six years.[430]

In order to obtain "pensionable employment", a foreign national would require a valid work permit. Under the Act and Regulations there is no exclusion of foreign nationals or stateless persons from obtaining pensionable employment or from applying for CPP. However, it is worth noting that in order to apply for CPP, the Government of Canada may request that a person provide "proof of birth" with their application for CPP.[431] Although this is not a requirement, the Government of Canada reserves the right to request it at any time. This could create significant

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[424] *Employment Insurance Act*, *supra* note 420 at s. 152.02.
[425] *Canada Pension Plan*, RSC 1985, c C-8, at s. 6(1), 8(1) & 21(1), available at: http://canlii.ca/t/52bt9 [*Canada Pension Plan Act*], and *Canada Pension Plan Regulations*, CRC, c 385, at s. 15-34.1, available at: http://canlii.ca/t/529t0 [*Canada Pension Plan Regulations*]. The Act and regulations list a number of pensionable employment exceptions. However, in general terms "employment" means "the state of being employed under an express or implied contract of service or apprenticeship, and includes the tenure of an office."
[426] *Canada Pension Plan*, *ibid.*, at s. 8(1) & 9(1).
[427] *Ibid.*, at s. 49.
[428] *Ibid.*, at s. 46(1).
[429] *Ibid.*, at s. 44(1)(a).
[430] *Ibid.*,at s. 44(2). In order to receive CPP Disability Benefit the pensioner must demonstrate with medical evidence that they are unable, on a regular basis, to work at *any* job because of a mental or physical disability that is both severe and prolonged, see *Canada Pension Plan Regulations*, *supra* note 425 at ss. 68-70.
[431] Service Canada, "Information Sheet for the Canada Pension Plan Retirement Pension" (23 February 2015), at 2, available at: http://tinyurl.com/pl8nrqs.

challenges for stateless persons who are without valid original birth documents from the country of their birth and have no way of collecting such documents from their country of birth.

Finally, Quebec has its own pension plan separate from the CPP, the Quebec Pension Plan ("QPP"). It provides similar benefits and eligibility criteria as the CPP.[432]

h. Article 24(1)(b): Old Age Security Pension

Old Age Security ("OAS") is an additional social security program that provides a taxable pension benefit to Canadian citizens and some legal residents who are 65 years of age or over.[433] OAS is not contingent on a person's employment history, but on meeting a legal status and Canadian residency requirement. In particular, to qualify an applicant:

- Must be 65 years of age or older;
- Must have legal status in Canada;
- If they live outside of Canada, must have had legal status on the day before they left Canada;
- Must have lived in Canada for at least 10 years after turning 18 (or 20 years if you now reside outside of Canada);
- Must submit the necessary documents[434]

Documents that may be required to apply for OAS pension include proof of date of birth, proof of Canadian legal status, and proof of residence history. Although proof of date of birth is not required, the Government of Canada reserves the right to request it at any time.[435] "Legal resident" is not clearly defined in the Act or Regulations, but in order to have Canadian legal status an applicant must either be a Canadian citizen, a permanent resident; or hold a temporary resident's permit (TRP) on the day before the applicant's application is approved or the day before the person left Canada.[436] For those born outside of Canada, certified copies of the following documentation could be used to confirm Canadian citizenship or legal status: certificate of Canadian citizenship, naturalization certificate, or Canadian passport issued in 1970 or later, Canadian immigration documents (Record of Landing or Permanent Resident Card) or Canadian immigration stamp on your passport, or temporary resident's permit.[437]

One media report has found that in order for some persons to provide proof of legal status in Canada and residency requirements, the types of information requested has become increasingly difficult to obtain.[438] This is of particular concern to stateless persons. In addition, similar to the situation stateless persons may find themselves when applying for CPP benefits; stateless

[432] *An Act Respecting the Québec Pension Plan*, CQLR c R-9, available at: http://canlii.ca/t/525qp.
[433] *Old Age Security Act*, RSC 1985, c O-9, at ss. 4(1), 19(2), 21(2), available at: http://canlii.ca/t/527qf [*Old Age Security Act*]
[434] *Ibid.*, at s. 3(1).
[435] *Old Age Security Regulations*, CRC, c 1246, at s. 18(1), available at: http://canlii.ca/t/5263k [*Old Age Security Regulations*]
[436] *Ibid.*, at s. 20-22; and see Service Canada, "Information Sheet for the Old Age Security Pension" (3 March 2014), at 2, available at: http://tinyurl.com/p9vjlj2 [*Information Sheet for the Old Age Security Pension*].
[437] *Information Sheet for the Old Age Security Pension*, *ibid.*, at 2.
[438] Nicolas Keung, "OAS benefits denied: Immigrants told to produce residency proofs" (30 July 2012), available at: http://tinyurl.com/mv8zthr.

persons born outside Canada may face barriers in obtaining OAS if they are denied benefits because they are unable to produce proof of birth date from authorities in the country of their birth.

III. Assessment

Overall, legislation relating to labour relations, employment standards and worker's compensation appears to be compatible with Article 24(1)(a)-(b) and 24(2). These laws provide equal treatment between Canadian citizens and foreign nationals, including stateless persons, due to their inclusive definition of employee and worker. None of the laws reviewed make a distinction on the basis of immigration status or whether a person is "lawfully staying." Even if a stateless person obtained a work permit because they were subject to an unenforceable removal order and unable to support themselves, the labour and employment standards in Canada would equally apply to them. Any exclusion from the applicability of these labour and employment standard laws is not due to one's status as a foreign national or stateless person, but due to the nature of their occupation or position.

With respect to social security legislation relating to employment insurance and pensions, there were a couple of concerns. First, while legislation relating to regular and special employment insurance programs appear to be compatible with Article 24(1)(b), the new provisions respecting employment insurance for self-employed individuals excludes foreign nationals, and thereby excludes stateless persons. This is clearly incompatible with Article 24(1)(b). Second, although federal legislation on pensions appears to be on its face compatible with Article 24(1)(b), there is a potential that policies dealing with a person's application for CPP and OAS benefits could disproportionately and negatively impact stateless persons. This is because of the possibility that the Government of Canada may request a stateless person to prove their birth date in order to collect pension benefits. Stateless person may not be able to easily fulfil such a requirement due to their inability to access records in the country of their birth. Third, another concern is that the threshold for eligibility to collect OAS may exclude stateless persons who could be considered "lawfully staying" under the 1954 Convention. The legislation seemingly establishes a lower threshold by using the term "legally resided". However, the policy provides that only persons with Canadian citizenship, permanent residence and a temporary resident permit are eligible. For stateless persons who have lived in Canada on a number of study permits or work permits for many years, it appears that they may have lived in Canada for a sufficient number of years, but can be denied benefits. This could occur despite the person having worked in Canada and paying taxes that fund the OAS pension.

a. Canada's International Human Rights Obligations

In view of the three concerns identified above, Canada should be reminded of its international human rights obligations respecting stateless persons and the provision of social security. In particular Article 9 of the *ICESCR* articulates that States Parties "recognize the right of everyone to social security, including social insurance."[439] Reiterating *General Comment No. 20* from the

[439] *ICESCR*, *supra* note 235 at Art. 9.

CESCR, the rights of the *ICESCR* apply to everyone including non-nationals, such as stateless persons.

In addition, in accordance with its obligations under Article 5(e)(iv) of the *ICERD*, Canada has undertaken to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law in the enjoyment of the right to social security.[440] Furthermore, the CERD observes in *General Recommendation No. 30* that although some rights "may be confined to citizens, human rights are, in principle, to be enjoyed by all persons. States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law."[441]

IV. Recommendations

21) Employment Insurance legislation should be amended to allow stateless persons to be eligible for self-employment insurance.

22) If a stateless person is required to provide documentation establishing birth date in order to collect CPP and OAS benefits for which they are entitled, Canada should not rigidly apply the requirement when a stateless person does not possess and is unable acquire the necessary birth documentation.

[440] *ICERD*, *supra* note 274 at Art. 5(e)(iv).
[441] *CERD General Recommendation No. 30*, *supra* note 275 at para. 3.

CHAPTER V: ADMINISTRATIVE MEASURES

ARTICLE 25: ADMINISTRATIVE ASSISTANCE

1. When the exercise of a right by a stateless person would normally require the assistance of authorities of a foreign country to whom he cannot have recourse, the Contracting State in whose territory he is residing shall arrange that such assistance be afforded to him by their own authorities.

2. The authority or authorities mentioned in paragraph I shall deliver or cause to be delivered under their supervision to stateless persons such documents or certifications as would normally be delivered to aliens by or through their national authorities.

3. Documents or certifications so delivered shall stand in the stead of the official instruments delivered to aliens by or through their national authorities and shall be given credence in the absence of proof to the contrary.

4. Subject to such exceptional treatment as may be granted to indigent persons, fees may be charged for the services mentioned herein, but such fees shall be moderate and commensurate with those charged to nationals for similar services.

5. The provisions of this article shall be without prejudice to articles 27 and 28.

I. Background & Commentary

Article 25 of the 1954 Convention is nearly identical in wording to Article 25 of the 1951 Refugee Convention. Article 25 requires a Contracting State to provide assistance to stateless persons for services which nationals "ordinarily receive from their judicial, administrative, or consular authorities, such as delivery of documents relating to their family position (birth, marriage, adoption, death, or divorce certificate) or their special position (school or professional certificates) certifications (copies or translations of documents, regularity of documents or their conformity with the law of the country), identity."[442] This assistance is critical for stateless persons because they cannot expect to receive such assistance from the authorities of their former nationality or residence.[443] It is noteworthy that the words "habitual residence" is not used in the text of Article 25, indicating that permanent residence is not a requirement for assistance.[444] The right to administrative assistance is owed to a stateless person due to being subjected to the country's jurisdiction or physical presence, it is "defined in absolute terms because the drafters deemed them fundamental to the most basic definition of protection, or because a contingent standard of respect is unviable given their [stateless]-specific nature."[445]

[442] *Robinson Commentary to the 1954 Convention*, *supra* note 11 at 47.
[443] *Ibid*.
[444] *Ibid.*, at 48.
[445] James C. Hathaway, *The Law of Refugee Status*, 2ed (Cambridge: Cambridge University Press, 2014) at 47, referring to the same provision in the 1951 Refugee Convention.

II. Canadian Legal Framework

There are no clear legislative provisions in the *IRPA*, or any specific jurisprudence discussing Article 25 of the 1951 Refugee Convention. However, with respect to Article 25(2), the *travaux préparatoires* of the 1951 Refugee Convention observed that in common law jurisdictions, such as Canada, personal affidavits would be acceptable in lieu of original documents.[446] Although such affidavits would not be given the "same validity" as instruments issued by the national authorities, they are to be given credence in the absence of proof to the contrary.[447] In Canadian jurisprudence on this matter involving refugees, this principle has also been observed "when a refugee claimant swears to the truth of certain allegations, a presumption is created that those allegations are true unless there are reasons to doubt their truthfulness."[448]

In addition, when the CBSA is attempting to establish a foreign national's identity, they may contact authorities in the individual's country of origin or last habitual residence. This may be so the foreign national can be released from detention or to obtain a travel document in order to remove the foreign national from Canada.[449] With respect to assistance gathering documentation specifically on family position, social position or professional certifications, no legislative or policy guidelines were found.

Article 25(5) of the 1954 Convention makes it clear that although "the issuance of identity papers and travel documents is ordinarily included in 'administrative assistance,'" it is not applicable to these two services.[450] Nonetheless, Guy Goodwin-Gill is of the opinion that Article 25 of the 1951 Refugee Convention may need to be read together with Articles 27 and 28, "as part of single system of protection of the person's entitlement to identity and documentation, since practically speaking the issuance of identity documents under Article 27 may be contingent on the issuance and acceptance of the necessary antecedent documents under Article 25, relating, for example, to births and deaths, marriages and civil status generally."[451]

III. Assessment

The *IRPA* and the *IRPR* do not explicitly address the content of Article 25, nor is there jurisprudence or any clear policy guidelines on the issue of the right to administrative assistance in Canada. This is despite Canada being a State Party to the 1951 Refugee Convention, which contains the same Article 25 provision. Although this could be considered a possible gap in the Canadian legal framework, the content of Article 25 is unique as it addresses issues for stateless

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[446] *1951 Convention travaux préparatoires*, *supra* note 61 at 59 & 61.
[447] *Robinson Commentary to the 1954 Convention*, *supra* note 11 at 48.
[448] *Maldonado v. Minister for Employment and Immigration* (1980) 2 FC 302 at 305; cited in UN High Commissioner for Refugees (UNHCR), *Opinion: The 1951 Convention relating to the Status of Refugees and the Obligations of States under Articles 25, 27 and 28, with particular reference to refugees without identity or travel documents*, May 2000, at paras. 30-37, available at: http://www.refworld.org/docid/51af00184.html [*Guy Goodwin-Gill Opinion*]
[449] Citizenship and Immigration Canada, *ENF 10 Removals* (31 March 2013), at 50, available at: http://www.cic.gc.ca/english/resources/manuals/enf/enf10-eng.pdf; and *IRPR*, *supra* note 21 at s. 244(c) & 247.
[450] *Robinson Commentary to the 1954 Convention*, *supra* note 11 at 48.
[451] *Guy Goodwin-Gill Opinion*, *supra* 448 at para. 37.

persons that are not found in international human rights instruments other than the 1954 Convention and the 1951 Refugee Convention.[452] As a result, there are no additional international human rights obligations that require Canada to comply with the content of Article 25 of the 1954 Convention.

ARTICLE 26: FREEDOM OF MOVEMENT

> Each Contracting State shall accord to stateless persons lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.

I. Background & Commentary

A stateless person "lawfully in its territory" means physically present, and provided presence is not unlawful, includes short-time visitors and even persons merely travelling through the country.[453] Article 26 requires that stateless persons be in the country legally, but it also depends on the status of aliens in the state concerned as to what rights stateless persons will enjoy. For stateless persons who may be in the territory under a labour contract, which requires the stateless person to commit to remain in a particular job for a specific period of time, such restrictions are not believed to be in conflict with the right to freedom of movement under Article 26.[454]

II. Canadian Legal Framework

Canadian citizens and permanent residents (including stateless permanent residents), have a right to move and take up residence in any province and to pursue the gaining of a livelihood in any Canadian province.[455] Foreign nationals who are legally in Canada as visitors, transients or tourists, are also able to freely move within its territory.

There is no general prohibition in the *IRPA* or the *IRPR* that prevents foreign nationals from moving within the territory of Canada. However, foreign nationals in possession of study permits or work permits may be subject to conditions that impact their freedom to choose their place of residence. Such conditions include studying at a designated learning institution, working for a specific Canadian employer and studying or working at a specific location.[456]

Other occasions when a stateless person may encounter movement restrictions, includes when a stateless person is released from immigration detention. In such cases an officer or a Member of the Immigration and Refugee Board ("IRB") may release an individual subject to "any conditions".[457] Such conditions can include informing the CBSA of any change of address and

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[452] *Handbook on Stateless Persons*, *supra* note 12 at para. 143.
[453] *Atle Grahl-Madsen 1951 Commentary*, *supra* note 239 at 45.
[454] *Robinson Commentary to the 1954 Convention*, *supra* note 11 at 49.
[455] *Charter*, *supra* note 45 at s. 6(2).
[456] *IRPA*, *supra* note 20 at s. 29; *IRPR*, *supra* note 21 at s. 185(b)(ii)-(iii), 185(c)(ii)-(iii) & 185(d).
[457] *IRPA*, *supra* note 20 at 56(1) & 58(3).

seeking approval for a change of address.[458] However, these provisions apply equally to any foreign national who is released from immigration detention.

III. Assessment

Based on the legal framework explained above, it appears the Canadian legal framework is compatible with Article 26 of the 1954 Convention. This is because the *IRPA* and the *IRPR* by definition treat foreign nationals the same as stateless persons, and as a result, stateless persons are assimilated with all aliens in the same circumstances in their right to choose their place of residence and to move freely within Canada.

ARTICLE 27 & ARTICLE 28: IDENTITY PAPERS AND TRAVEL DOCUMENTS

> The Contracting States shall issue identity papers to any stateless person in their territory who does not possess a valid travel document.

> The Contracting States shall issue to stateless persons lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and the provisions of the schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other stateless person in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to stateless persons in their territory who are unable to obtain a travel document from the country of their lawful residence.

I. Background & Commentary

Article 27 of the 1954 Convention is identical to Article 27 of the 1951 Refugee Convention. It requires the issuance of "identity papers" to any stateless person physically present in the Contracting State's territory, regardless of residence or lawful status.[459] The "identity papers" referred to in the 1954 Convention are for internal use and can be temporary or final. The issuance of an identity paper does not result in an obligation of the state to keep the stateless person within its borders.[460] Compared to "travel documents" referred to in Article 28, "identity documents" act as a "certificate of identity" or "domestic passport" showing the identity of the stateless person, they are not for journeys abroad.[461]

With respect to travel documents, stateless persons must be "lawfully staying" in the country to benefit from the rights in Article 28. The Article is obligatory, but the Commentary on the 1954

[458] For example see, *Hussain v. Canada* (Minister of Public Safety and Emergency Preparedness), 2008 FC 234, available at: http://canlii.ca/t/1vvb8.
[459] *Robinson Commentary to the 1954 Convention*, *supra* note 11 at 50.
[460] *Ibid.*
[461] *Ibid.*

Convention notes that the second sentence "leaves it to the discretion of the Contracting State whether or not to issue documents to stateless persons who are in their territory but are not lawfully staying there, i.e., are there on a temporary basis only or even illegally. Special consideration is to be given to stateless persons who need such a document but are unable to obtain it from the country of their lawful residence."[462] Several countries that are not parties to the 1954 Convention offer such travel documents to stateless person.

Related to the issuance of travel documents is the Schedule to the 1954 Convention. Of particular relevance are paragraphs 3 and 4 of the Schedule. Paragraph 3 states fees charged for a travel document shall not exceed the lowest scale of charges for national passports.[463] Paragraph 4 states that the travel document must be made valid for the largest number of countries, unless for special or exceptional cases.[464]

II. The Canadian Legal Framework

a. Identity Papers

Passport Canada does not issue a certificate of identity for "internal purposes", as envisioned under Article 27. However, other immigration documents, such as a permanent resident card, a study permit, a work permit, a temporary resident permit and a visitor's record can be considered valid proof of identity.[465] If a stateless person is without status in Canada, they may not seek identity documents from the authorities for fear of exposing their unlawful status and risk detention or attempted removal.[466]

b. Travel Documents

Passport Canada can issue a "Certificate of Identity" to permanent residents of Canada who are not yet citizens, do not have refugee status in Canada, but are otherwise stateless or unable, for a valid reason, to obtain a national passport or travel document from any source.[467] Although this document is called a "Certificate of Identity", it is a travel document and not an identity paper as discussed in Article 27. Stateless persons who are not permanent residents are not eligible to obtain a Certificate of Identity from Passport Canada.[468]

Strangely, the Certificate of Identity is not valid for the "bearer's country of citizenship."[469] It is unclear whether Passport Canada means to refer to the bearer's country of origin or former habitual residence, since stateless persons do not possess a citizenship. If Passport Canada is

[462] *Ibid.*, at 52.
[463] *1954 Convention*, *supra* note 3 at Schedule para. 3.
[464] *Ibid.*, at Schedule para. 4.
[465] See for example, Service Ontario, "Acceptable identity documents" (2015), available at: https://www.ontario.ca/government/acceptable-identity-documents.
[466] This summary is also found in Brouwer's report *Statelessness in the Canadian Context*, supra note 4 at 52-53.
[467] Passport Canada, "Types of Travel Documents" (8 April 2014), available at: http://www.ppt.gc.ca/pptc/documents.aspx?lang=eng [*Types of Travel Documents*]
[468] *Ibid*.
[469] *Ibid*.

referring to a stateless person's country of origin or former habitual residence, this limitation seems unjustifiably restrictive for stateless persons when they are not refugees, do not fear persecution, and there is no issue of reavailment to their country of origin or country of former habitual residence. In this regard, paragraph 4 of the Schedule to the 1954 Convention states that "[s]ave in special or exceptional cases, the document shall be made valid for the largest possible number of countries."[470] There is no requirement or statement in the Schedule that a travel document for a stateless person be invalid for travel to his or her country of origin or country of former habitual residence.

Another travel document available from Passport Canada is the Refugee Travel Document, which is issued to Convention refugees or protected persons. A stateless person, if also found to be a protected person, could apply for a Refugee Travel Document. The Refugee Travel Document is also not valid for travel to the bearer's country of citizenship.[471]

Finally, the fee for a Certificate of Identity is $260, while the fee for a Refugee Travel Document and Canadian Passport are $120.[472]

III. Assessment

a. Identity Papers

Although immigration documents serve in most instances as valid identification, Canada does not have a mechanism to provide valid identity papers to stateless persons who are present in its territory and have no lawful status. As a result, the Canadian legal framework does not appear to be compatible with Article 27 of the 1954 Convention.

b. Travel Documents

With respect to travel documents, only stateless persons who obtain permanent resident status are eligible for a Certificate of Identity travel document. This excludes stateless persons who could be considered "lawfully staying" in Canada by virtue of possessing a TRP, or a valid work or study permit. Furthermore, the cost of the Certificate of Identity travel document is more than double the cost of a national passport and there is unnecessary restriction on the countries to which stateless persons can travel. In view of these concerns, the Canadian legal framework on travel documents for stateless persons appears to be incompatible with Article 28 of the 1954 Convention.

c. Canada's International Human Rights Obligations

Like Article 25 of the 1954 Convention, Articles 27 and 28 address issues that are not found in

[470] *1954 Convention*, *supra* note 3 at Schedule para. 4.
[471] *Types of Travel Documents*, *supra* note 467.
[472] Passport Canada, "Fees" (20 May 2015), available at: http://www.ppt.gc.ca/info/section6.aspx?lang=eng.

other international human rights instruments.[473] Therefore, although there are identified legal gaps in the Canadian legal framework respecting identity papers and travel documents under the 1954 Convention, there are no international human rights obligations on Canada to provide such documents to stateless persons.

IV. Recommendations

23) Canada should provide identity papers to all stateless persons who are physically present in its territory.

24) Canada should provide a travel document to stateless persons who are not permanent residents, but who are "lawfully staying" in its territory. The travel document should allow stateless persons to re-enter Canada after travelling outside Canada.

ARTICLE 31: EXPULSION

1. The Contracting States shall not expel a stateless person lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a stateless person shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the stateless person shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a stateless person a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

I. Background & Commentary

Article 31 of the 1954 Convention is identical to Article 32 of the 1951 Refugee Convention on expulsion. Article 31(1) provides a prohibition to expelling stateless persons lawfully in a Contracting State's territory. Once a stateless person has been admitted or legalized, they are entitled to stay in the country indefinitely, unless the stateless person becomes a national security risk or by disturbing public order. A decision to expel on grounds of national security and public order must be in accordance with the procedure prescribed in 31(2).[474]

Since Article 31(1) addresses the expulsion of stateless persons "lawfully in" the country, there are no similar safeguards available to stateless persons who are unlawfully in the territory of the state.[475] "Lawfully in" a State party requires a stateless person's presence in the country to be

[473] *Handbook on Stateless Persons*, *supra* note 12 at para. 143.
[474] *Robinson Commentary to the 1954 Convention*, *supra* note 11 at 61.
[475] *Ibid*.

authorized by the State. The concept includes presence that is explicitly authorized, as well as presence that is known and not prohibited, while taking into account all personal circumstances of the individual."[476] Lawfully "includes stateless persons who had lawfully entered a country whose permission to stay had not elapsed or those who have entered the country unlawfully and had subsequently obtained permission to stay."[477] What constitutes "public order" within the meaning of Article 31 is largely within the domain of the State party to determine. It could include persons convicted of serious crimes, but not for "social grounds", such as indigence, illness, or disability.[478]

In regards to Article 31(2) of the 1954 Convention, stateless persons who are accused of breaches to public order and national security are to be given the opportunity and resources to submit evidence to clear them of the allegations. It is only in "compelling" circumstances, or in such serious and unusual cases, that due process of law and procedural guarantees not be applied.[479]

Expulsion is considered an exceptional measure for persons who are unable to leave the country of their own volition.[480] As a result, a final decision of expulsion does not result in an immediate expulsion and Article 31(3) provides stateless persons with a period of time to seek admission to another country.[481] Furthermore, since Article 31(3) places an obligation on a stateless person to seek "legal" admission to another country, it is assumed that the expelling state is not authorized to expel a stateless person to a country that does not agree to accept them.[482] It is in cases where no country is willing to accept the stateless person and they are required to stay in the country, that the country the stateless person is in "may apply such restrictions as are necessary…to safeguard the interests of the state."[483] It was observed at the conference on the 1954 Convention that given the nature of *de jure* statelessness, an expulsion order would probably rarely be executed against a stateless person.[484]

II. Canadian Legal Framework

a. Articles 31(1) & 31(2)

Foreign nationals who do not have a legal status in Canada are obliged to leave.[485] Where there are reasonable grounds to believe that a foreign national is inadmissible, they may be subject to a hearing before the Immigration Division of the IRB to determine their inadmissibility and issue a removal order.[486] Grounds of inadmissibility that may result in a foreign national being subject to

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[476] *Handbook on Stateless Persons*, *supra* note 12 at para. 135 & fn 80.
[477] *Robinson Commentary to the 1954 Convention*, *supra* note 11 at 61.
[478] *Ibid*.
[479] *Ibid*.
[480] *Ibid.*
[481] *Ibid.*
[482] *Ibid.*, at 62.
[483] *Ibid.*, at 63.
[484] Comment by the German representative in *ibid.*, at 62.
[485] *IRPA*, *supra* note 20 at s. 49. This includes those whose "lawful status" has expired, and therefore, are required to leave Canada upon expiration. See also *Statelessness in the Canadian Context*, supra note 4 at 53.
[486] *IRPA*, *ibid.*, at ss. 44(2) & 45(d), and *IRPR*, *supra* note 21 at s. 228

a removal order from Canada include: security grounds, human or international rights violations, serious criminality, criminality, organized criminality, health grounds, financial reasons, misrepresentation, failure to comply with conditions established under the *IRPA*, and being an accompanying family member of an inadmissible foreign national.[487] Whether a foreign national receives an inadmissibility hearing before the Immigration Division or is issued a removal order after an interview with a Minister's delegate depends on the inadmissibility ground for which the foreign national is facing removal.[488] Generally, when a foreign national receives a full hearing at the Immigration Division, there are "reasonable grounds to believe" that the foreign national is inadmissible on the grounds of security, human or international rights violations, serious criminality and organized crime.[489] These grounds are most likely to include matters of "national security and public order" and this appears to be in compliance with Article 31(1) and 31(2). However, the *IRPA* also permits the issuance of a removal order to a foreign national when they are inadmissible on medical, financial reasons, misrepresentation, failure to comply with obligations under the *IRPA* (ie. conditions on a permit), or accompanying an inadmissible family member. Some of these inadmissibility grounds could be considered "social grounds" that the drafters of the 1954 Convention did not envision being included under Article 31.[490]

b. Article 31(3)

Under the *IRPR*, a foreign national subject to a removal order may be granted time to leave the country voluntarily.[491] This, in theory, provides the person with time to seek legal admission to another country. However, when a *de jure* stateless person is issued a removal order and requested to leave Canada voluntarily, they will likely be unable to leave because they do not possess a legal status in any other country. Without the ability to leave, there is a real possibility that a stateless person will remain in legal limbo indefinitely.[492]

The Minister may still attempt to enforce the removal order of a stateless person when there is no possibility for them to leave Canada.[493] This can occur because Canada simply treats stateless persons like any other foreign national in the absence of a formal statelessness determination procedure. The *IRPR* provides that in cases where the Minister enforces removal, a foreign national is to be removed to the following possible countries:

- The country from which they came to Canada;
- The country in which they last permanently resided before coming to Canada;
- A country of which they are a national or citizen; or
- The country of their birth.[494]

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[487] *IRPA*, *ibid.*, at ss. 34-41. See also, Citizenship and Immigration Canada, *ENF 1 Inadmissibility* (4 September 2013), available at: http://www.cic.gc.ca/english/resources/manuals/enf/enf01-eng.pdf [*ENF 1 Manual*]; Citizenship and Immigration Canada, *ENF 3 Admissibility, Hearings and Detention Review Proceedings* (29 April 2015), available at: http://tinyurl.com/pxkzc2h. [*ENF 3 Manual*]; *ENF 10 Removals*, *supra* note 449.
[488] See *IRPR*, *supra* note 21 at s. 228; and *ENF 3 Manual*, *ibid.*, at 8.
[489] See *IRPR*, *ibid.*, at s. 228-229.
[490] *IRPA*, *supra* note 20 at ss. 38-42.
[491] *IRPR*, *supra* note 21 at s. 240.
[492] *Statelessness in the Canadian Context*, supra note 4 at 54-57. Andrew Brouwer discusses the issues of stateless persons subject to a removal order at length, some of which is summarized again in this report.
[493] *IRPR*, *supra* note 21 at s. 239.
[494] *Ibid.*, at s. 241.

If none of these countries are willing to authorize the foreign national to enter, the Minister can select any country that will authorize entry within a reasonable time and remove the foreign national to that country.[495] This approach to removal has been criticized because it does not take into consideration a stateless person's circumstances and that they are being removed to a state where they lack status and do not have access to political, civil, social and economic rights.[496]

Furthermore, when travel documents are not available, the CBSA may attempt to obtain travel documents on behalf of the foreign national in order to enforce removal. If no travel documents can be obtained, in exceptional circumstances the CBSA may issue a "Canada Immigration Single Journey Document". This document does not guarantee entry to the destination country.[497] In cases where another country refuses to allow the foreign national to enter, after they left or were removed from Canada because a removal order was made against them, an immigration officer must allow the foreign national to re-enter Canada.[498] Although this latter provision provides a stateless person with an opportunity to return, it does not address the potential risk of detention and other rights violations that a stateless person who is removed from Canada may experience once at the frontier of the "receiving country".

Another scenario that is possible when a stateless person does not leave Canada voluntarily when issued a removal order is that they may be detained until removal takes place.[499] Detention may occur on the basis that an individual has not been able to establish their identity, is inadmissible and a danger to the public, and/or there are reasonable grounds to believe that they will not appear for an admissibility hearing, for removal, or for an examination by an officer.[500] While such detention is subject to regular detention reviews, Andrew Brouwer explains that the basis of detention reviews at the Immigration Division can result in detention that is prolonged, since officials may fear the stateless person will abscond and because there is no maximum detention length for immigration detention in Canada.[501] For stateless persons who are subject to an unenforceable removal order and there is no country in which they have a lawful status, they may be at risk of indefinite detention.

III. Assessment

In view of the discussion above, there are some significant gaps that demonstrate the Canadian legal framework is not compatible with Article 31 of the 1954 Convention. Of particular concern is that the Canadian legal framework fails to specifically reference or address the unique circumstances and concerns of stateless persons during removal. In addition, the fact that stateless persons may be subject to removal on grounds other than national security and public order appears to be contrary to Article 31. Additionally, since persons subject to removal on these grounds may not have a full hearing before the Immigration Division, but only an interview

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[495] *Ibid.*, at s. 241.
[496] *Statelessness in the Canadian Context*, supra note 4 at 54.
[497] *ENF 10 Removals*, *supra* note 449 at 51-53.
[498] *IRPR*, *supra* note 21 at s. 39(a). One might assume the individual would be considered then "lawfully in Canada", but it is not clear what status they would have or for how long they are authorized to stay.
[499] *Statelessness in the Canadian Context*, supra note 4 at 53, pursuant to *IRPA*, *supra* note 20 at s. 55.
[500] *IRPA*, *ibid.*
[501] *Statelessness in the Canadian Context*, supra note 4 at 55-56. See *IRPA*, *supra* note 20 at ss. 57 & 58.

with a Minister's delegate, there is a concern that the procedural requirements of Article 31(2) may not be satisfied.

Finally, the risk of stateless persons being detained indefinitely and removed to countries where they do not have a legal status or right to entry illustrates a lack of consideration for stateless person's circumstances.

a. Canada's International Human Rights Obligations

In order to fill some of the gaps between Canada's legal framework and the 1954 Convention, Canada is reminded of its international human rights obligations under Article 13(1) of the *ICCPR*, which states:

> An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.[502]

Furthermore, as explained in the *Handbook on Protection of Stateless Persons*, there is risk of stateless persons being subject to arbitrary and indefinite detention due to the nature of statelessness and lack of consideration of their circumstances. Indefinite and arbitrary detention is contrary to Canada's international human rights obligations under Article 9(1) of the *ICCPR*:

> 112. …Statelessness, by its very nature, severely restricts access to basic identity and travel documents that nationals normally possess. Moreover, stateless persons are often without a legal residence in any country. Thus, being undocumented or lacking the necessary immigration permits cannot be used as a general justification for detention of such persons. Article 9 of the International Covenant on Civil and Political Rights ("ICCPR"), guaranteeing the right to liberty and security of person, prohibits unlawful as well as arbitrary detention. For detention to be lawful, it must be regulated by domestic law, preferably with maximum limits set on such detention, and subject to periodic and judicial review. For detention not to be arbitrary, it must be necessary in each individual case, reasonable in all the circumstances, proportionate and non-discriminatory. Indefinite as well as mandatory forms of detention are arbitrary per se.
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> 113. Detention is therefore a measure of last resort and can only be justified where other less invasive or coercive measures have been considered and found insufficient to safeguard the lawful governmental objective pursued by detention. Alternatives to detention – from reporting requirements or bail/bond systems to structured community supervision and/or case management programmes – are part of any assessment of the necessity and proportionality of detention. General principles relating to detention apply a fortiori to children who as a rule are not to be detained in any circumstances.
>
> […]
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> 115. For stateless persons, the absence of status determination procedures to verify identity or nationality can lead to prolonged or indefinite detention. Statelessness determination procedures are

[502] *ICCPR*, *supra* note 39 at Art. 13(1).

therefore an important mechanism to reduce the risk of prolonged and/or arbitrary detention.[503]

IV. Recommendations

25) Canada should implement the following recommendations relating to expulsion and detention. These recommendations were made by Andrew Brouwer in *Statelessness in the Canadian Context*:

    a. Detention of stateless persons should always be avoided except where, and for as long as, it is demonstrably necessary and justifiable.

    b. Section 247 of the *IRPR* and Immigration Manual Chapter ENF 20, section 5 should be amended explicitly to note the unique situation of stateless persons vis-à-vis access to identity documents as well as travel documents, so that they are not unnecessarily or unjustly detained.

    c. Stateless persons should only be removed to countries of former habitual residence where they will have effective protection and a legal status.

    d. CBSA to regularly make statistics publically available that identifies the number of stateless persons in administrative immigration detention and the length of their detention.

    e. CBSA to regularly make statistics publically available that identifies the number of stateless persons removed from Canada.

26) The *IRPA* should be amended to ensure that stateless persons cannot be expelled for reasons other than "national security or public order".

ARTICLE 32: NATURALIZATION

> The Contracting States shall as far as possible facilitate the assimilation and naturalization of stateless persons. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.

I. Background & Commentary

Article 32 of the 1954 Convention is identical to Article 34 of the 1951 Refugee Convention. Article 32 promotes a "general moral obligation" on State Parties to facilitate as far as possible the naturalization and assimilation of stateless persons residing in their countries. The word

[503] *Handbook on Stateless Persons*, *supra* note 12 at paras. 112-113 & 115. Article 9(1) of the *ICCPR* states: Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law…

"assimilation" means to integrate the stateless person into the economic, social and cultural life of the country. Article 32 also includes a "specific obligation" to expedite proceedings whenever an application for naturalization can be or has been made and to reduce the costs involved.[504]

The UNHCR's Executive Committee has issued conclusions on the naturalization of stateless persons. In particular, the Executive Committee "encourages States to co-operate with UNHCR on methods to resolve cases of statelessness and to consider the possibility of providing resettlement places where a stateless person's situation cannot be resolved in the present host country or other country of former habitual residence, and remains precarious.[505] For States that are not yet Parties to the 1954 Convention, the Executive Committee encourages States "to treat stateless persons lawfully residing on their territory in accordance with international human rights law; and to consider, as appropriate, facilitating the naturalization of habitually and lawfully residing stateless persons in accordance with national legislation."[506]

II. Canadian Legal Framework

In *Statelessness in the Canadian Context*, Andrew Brouwer provides an extensive overview of the limited options, as well as the practical and legal obstacles, stateless persons experience in attempting to obtain Canadian citizenship and permanent resident status. Below is a summary of the major programs potentially available to stateless persons, as well as the limitations of the legal framework that prevent many stateless persons from obtaining citizenship.[507]

a. Grants of Citizenship

Grants of Citizenship: Stateless Children Born Abroad to Canadian Parents Born Abroad

The *Citizenship Act* was recently amended to include a "first-generation limit" provision, which restricts the right of Canadian citizen parents who are born abroad from passing on Canadian citizenship to their children who are also born abroad.[508] This provision has created concern that in some exceptional circumstances children born to Canadian citizens abroad could be born stateless.[509]

In such cases of statelessness, the *Citizenship Act* allows stateless children born abroad to

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[504] *Robinson Commentary to the 1954 Convention*, *supra* note 11 at 64.
[505] UN High Commissioner for Refugees (UNHCR), *General Conclusion on International Protection*, Conclusion No. 95 (LIV) (10 October 2003), at (v), available at: http://www.unhcr.org/3f93aede7.html.
[506] *EXCOM Conclusion No. 106*, *supra* note 36 at (u).
[507] *Statelessness in the Canadian Context*, supra note 4 at 38-50.
[508] *Citizenship Act*, *supra* note 22 at s. 3(3). An exception exists under children and grandchildren born to parents who are or were members of the Canadian Forces (s. 3(5) & 3(5.1)). See also various citizenship scenarios at Citizenship and Immigration Canada, "Changes to citizenship rules as of April 2009" (24 July 2014), available at: http://www.cic.gc.ca/english/citizenship/rules_2009.asp. Real life examples of stateless persons born in Canada, or stateless persons born abroad to Canadian citizens who were born abroad can be found at: Canadian Centre on Statelessness, "Stateless Canadians" (2014), available at: http://www.statelessness.ca/canadian-stories.html
[509] Canadian Council for Refugees, "Canadian Citizenship – 2009 Changes" (February 2009), available at: http://ccrweb.ca/en/citizenship-2009-changes

Canadian citizen parents to be granted citizenship if the child meets certain criteria. The provision states that the Minister shall grant citizenship to a person who:

- Is born outside Canada;
- Has a birth parent who was a citizen at the time of the birth;
- Is less than 23 years of age;
- Has resided in Canada for at least three years during the four years immediately before the date of his or her application;
- Has always been stateless; and
- Has not been convicted of a terrorism offence, treason, intimidating Parliament, sabotage or various offenses under the *Security of Information Act*.[510]

Grants of Citizenship: Ministerial Discretion

The *Citizenship Act* also allows the Minister to grant citizenship at his or her discretion "to any person to alleviate cases of special and unusual hardship or to reward services of an exceptional value to Canada."[511] In such applications, statelessness can be taken into account for compassionate consideration.[512] However, jurisprudence from the Federal Court of Canada has also held that statelessness is more of an inconvenience rather than a sufficient hardship to warrant a grant of citizenship.[513]

There is little information available on the procedure and application requirements for the Minister to grant citizenship in discretionary cases and what factors are to be considered. The limited information available from Citizenship and Immigration Canada reiterates that it is an exceptional application:

> Grants under this subsection are only used in very exceptional cases and each case is considered on its own merit. It is important that applicants appreciate the significance of being conferred a grant of citizenship under this provision and that it should not be used as a means of circumventing the normal citizenship process.[514]

Grants of Citizenship: Eligible Permanent Residents

Other than the exceptions mentioned above, obtaining permanent resident status is a prerequisite to naturalization in Canada. Stateless persons may apply for citizenship after they have been

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[510] *Citizenship Act*, *supra* note 22 at s. 5(5); see also Citizenship and Immigration Canada, "Citizenship grants: Statelessness" (16 July 2014), available at: http://www.cic.gc.ca/english/resources/tools/cit/grant/stateless.asp

[511] *Citizenship Act*, *ibid.*, at s. 5(4). In addition, s. 5(3) of the *Citizenship Act* also has specific "compassionate grounds" upon which the Minister may grant a waiver from having to meet certain requirements to obtaining Canadian citizenship. These exceptions include having knowledge of one of the official languages, having knowledge of Canada and the responsibilities and privileges of citizenship, having to take the oath, etc.

[512] *Statelessness in the Canadian Context*, *supra* note 4 at 50, referring to the case of *Daifallah (Re)*, [1992] F.C.J. No. 441 (FCTD).

[513] *Goudimenko v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 447, at para. 22, available at: http://canlii.ca/t/ksb.

[514] Citizenship and Immigration Canada, "Citizenship: Ministerial discretion to grant citizenship in special cases" (27 March 2015), available at: http://tinyurl.com/okdwff7.

granted permanent resident status and meet the criteria to apply for citizenship. In order to be eligible to be granted Canadian citizenship a permanent resident will have to: apply for citizenship, be 18 years of age, meet a minimum residency requirement, have knowledge of one of Canada's official languages, have knowledge of Canada and the responsibilities and privileges of citizenship, and not be subject to a removal order for threats against the security of Canada.[515]

Once a person has permanent resident status an individual has many of the same rights as Canadian citizens, such as the freedom to live, work and study anywhere in Canada, receive social assistance benefits, protection under the *Charter*, and the ability to eventually apply for Canadian citizenship.[516]

b. Permanent Resident Status

In order to obtain permanent resident status there are several "programs" available to stateless persons in Canada and abroad. Stateless persons, if meeting the specific requirements and criteria of a given immigration program, could be granted permanent residence or a temporary residence status that would allow them to apply for permanent resident status in the future. There are two immigration streams that can result in permanent resident status. They include the economic classes and non-economic classes. The economic classes include: federal skilled worker class, self-employed class, start-up business class, Canadian experience class, federal skilled trades class, provincial nominee program, caring for children and high medical needs class, live-in caregiver class, immigrant investor / venture capital class.[517] Non-economic classes include the family class, Convention refugees / protected persons class, and humanitarian and compassionate (H&C) considerations application.[518]

Economic Classes

In the legal framework, stateless persons have the same opportunity as other foreign nationals to apply to come to Canada through the economic classes. The eligibility criteria for economic immigration programs is not contingent on whether a foreign national is stateless and statelessness itself is not a factor that would be relevant to an application for one of the economic

[515] *Citizenship Act*, *supra* note 22 at s. 5(1). For persons who do not meet the requirements of s. 5(1) listed above, a waiver under 5(3) may be available in some cases, such as for minor children and persons who lack capacity. In June 2014, the Government of Canada amended the *Citizenship Act* and its requirements for the application of Canadian citizenship. However, at the time of writing these amendments have not yet come into force. The amendments include lengthening the residency requirement for permanent residents and requiring an applicant to have filed income taxes. The amendment also removes a provision that allows applicants to count towards the residency requirement time they resided in Canada prior to becoming permanent residents. See Bill C-24, *An Act to amend the Citizenship Act and to make consequential amendments to other Acts*, 2nd Sess., 41st Parl, 2014, cl 3(1), (assented to 19 June 2014) SC 2014, c 22, available at: http://tinyurl.com/qauh9ao.

[516] Citizenship and Immigration Canada, "Understand permanent resident status" (27 November 2014), available at: http://www.cic.gc.ca/ENGLISH/newcomers/about-pr.asp. Permanent residents cannot vote or run for political office and hold some jobs that need a high-level security clearance.

[517] Citizenship and Immigration Canada, "Permanent resident program: Economic classes" (16 April 2015), available at: http://tinyurl.com/p5hyxwe.

[518] Citizenship and Immigration Canada, "Permanent resident program: Non-economic classes" (16 April 2015), available at: http://tinyurl.com/okm5c38.

classes. However, if accepted through one of the economic classes, the foreign national will obtain either permanent resident status, or temporary resident status that may allow them to apply for permanent residence after a specific period of time.[519]

In the economic classes an applicant would need to meet specific criteria. Depending on the program, such criteria can include the use of a point system. The point system determines the person's eligibility based on points awarded for the applicant's language skills, education, work experience, adaptability, arranged employment, and age, among other criteria.[520] Realistically, since stateless persons typically live on the socio-economic margins of society, the economic classes may not be a reasonable option for acquiring permanent resident status.

Non-Economic Classes

Family Class

For family class applications, a stateless applicant would need to be sponsored by a family member who is at least 18 years of age, is a Canadian citizen or a permanent resident of Canada, and is the subject of a sponsorship agreement.[521] Family classes include sponsoring of children, parents, grandparents, spouses or common-law partners, and adoption.[522] Stateless persons have the same opportunity as other foreign nationals to apply to come to Canada through non-economic classes. The eligibility for such programs is not contingent on whether the foreign national applying is stateless, nor is statelessness a factor that would favour a positive application. If accepted through one of the family class programs, a stateless person could obtain either permanent resident status upon arriving in Canada, or temporary resident status that may allow them to apply for permanent residence after a specific period of time.[523]

Convention Refugees & Persons in Need of Protection

Stateless persons in Canada can make a refugee claim or a claim as a person in need of protection and have the claim determined by the IRB. If recognized as a Convention refugee or a person in need of protection, the person may apply for permanent residence upon obtaining a positive decision.[524] In such cases, the stateless person would receive the benefit of the more favourable provisions of the 1951 Refugee Convention, rather than any potential benefit from the

[519] *IRPR*, *supra* note 21 at ss. 70(1) & 70(2)(b), 71.1, 72(1)(a)-(e) & 72(2)(a).
[520] See *ibid.*, at Part 6. Some of these programs only have a limited number of visas available each year.
[521] *IRPA*, *supra* note 20 at ss. 13; *IRPR*, *supra* note 21 at 130(1). Additional conditions would apply, such as the ability of the sponsor to support the foreign national coming to Canada for a specific period of time, as well the foreign national or stateless person cannot be inadmissible to Canada.
[522] *IRPR*, *ibid.*, at ss. 116-117, 123-124
[523] *Ibid.*, at ss. 70(1) & 70(2)(a), 71.1, 72(1) & 72(2)(b).
[524] *IRPA*, *supra* note 20 at s. 21(2), and Citizenship and Immigration Canada, "Applying for permanent residence from within Canada: Protected persons and convention refugees (IMM 5205)" (16 September 2014), available at: http://tinyurl.com/p47c6y7. However, if the person is a "designated foreign national" they cannot apply for five years pursuant to 20.2(1) of *IRPA*.

1954 Convention. However, as Andrew Brouwer argues, statelessness has not been recognized to be sufficient in itself to ground a refugee claim under Canadian refugee law.[525]

Alternatively, stateless persons outside Canada could potentially come to Canada and receive permanent resident status upon entering, if they are recognized as members of the Convention Refugees Abroad Class and the Country of Asylum Class.[526] However, for both of the refugee abroad classes, it is only stateless *refugees* who are eligible.

Currently, there are a number of stateless persons who have come to Canada and made refugee claims believing that their statelessness would demonstrate their refugee claim. Unfortunately, in many cases their refugee claims were rejected because their statelessness alone was not considered to have met the threshold of persecution. Furthermore, although some adjudicators at the IRB have "recognized" refugee claimants as "stateless persons" this has no legal impact, since there is no legally recognized stateless person status under Canadian law. Following the rejection of their refugee claim, stateless persons live in legal limbo without any status in Canada and few viable options for permanent residence. They are unable to leave to any other country, but live under constant threat of deportation and detention. In such cases there are two options for stateless persons to attempt to acquire permanent residence. These include an application for humanitarian and compassionate considerations ("H&C") or a Pre-Removal Risk Assessment ("PRRA") application. Both of these mechanisms have also been criticized by Andrew Brouwer for their lack of consideration of statelessness and for not providing a realistic chance of success for stateless persons.

Pre-Removal Risk Assessment ("PRRA")

The final opportunity to potentially obtain protected person status, and then apply for permanent residence, is the PRRA application. The PRRA is available to persons who are either subject to an enforceable removal order or are inadmissible to Canada.[527] However, if a person has made a refugee claim or a PRRA application within the last 12 months (or within the last three years for persons from designated "safe countries of origin") they are ineligible to apply for PRRA.[528]

The PRRA application is assessed on similar grounds to a refugee claim, but it is usually a written application and only considers "new evidence" since the applicant's previous refugee claim or PRRA application was rejected.[529] For *de jure* stateless persons, the PRRA has been argued to not be an effective path to permanent residence, as stateless persons subject to an unenforceable removal order will never have the opportunity to apply. This is because without having a country in which to return, valid travel documents, and/or a state agreeing to accept a stateless person, a PRRA application would not likely be provided to stateless persons.[530] This

[525] *Statelessness in the Canadian Context*, *supra* note 4 at 48, citing *Thabet v. Canada (Minister of Citizenship and Immigration)*, [1998] 4 FCR 21 (FCA), available at: http://canlii.ca/t/4mj3.
[526] *IRPR*, *supra* note 21 at ss. 70(1) & 70(2)(c), 139, 144-147.
[527] *IRPA*, *supra* note 20 at 112(1).
[528] *Ibid.*, at 112(2)(b.1)-(c).
[529] *Ibid.*, at 113.
[530] *Ibid.*, at 112(1); *IRPR*, *supra* note 21 at ss. 160, 165-166; *Statelessness in the Canadian Context*, *supra* note 4

lack of access to a PRRA can leave stateless persons in a continued state of limbo where they are denied protection and permanent residence, but also unable to be removed.[531]

Humanitarian and Compassionate Grounds ("H&C")

Persons in Canada and outside Canada who do not meet the requirements of the *IRPA* can submit an application for an exemption on the basis of H&C grounds. The H&C application requests an immigration officer to consider the "unusual and undeserved or disproportionate hardship" that would result from refusing the exemption and granting a permanent residence visa.[532] Considerations include:

- Establishment in Canada (for In-Canada applications) or ability to establish in Canada (for overseas applications),
- Ties to Canada,
- The best interests of any children affected by their application,
- Factors in their country of origin, including adverse country conditions,
- Health considerations, including inability of a country to provide medical treatment,
- Family violence considerations,
- Consequences of the separation of relatives, and
- The inability to leave Canada has led to establishment (in the case of applicants in Canada).[533]

Statelessness is not specifically identified as a relevant factor in granting H&C applications. However, it is not excluded from consideration, since the above factors are not an exhaustive list. If statelessness is raised as a factor, the immigration officer has to consider it.[534] However, the officer evaluating the H&C application is not to consider as a "hardship": the risk of persecution, or the danger of torture, or the risk to life or risk of cruel and unusual treatment or punishment a stateless person will experience if they have to make a permanent residence application in their country of nationality or country of habitual residence.[535]

It has been noted by Andrew Brouwer that the factors that an immigration officer considers in deciding H&C applications create a practical barrier for stateless applicants. The "establishment" factor is especially difficult to achieve given the social and economic marginalization stateless

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[531] *Statelessness in the Canadian Context*, *ibid.*, at 45.
[532] *IRPA*, *supra* note 20 at s. 25(1). Persons identified as "designated foreign nationals" under the IRPA would not be able to submit an H&C application for five years pursuant to s. 25(1.02) of *IRPA*. Also, pursuant to s. 25(1.2)(c) & 25(1.21): persons who have had a refugee claim rejected within the past 12 months are unable to apply, unless removal would mean the person's life would be at risk because of a lack of adequate medical treatment in their country of origin, or if removal would adversely affect the best interests of the child.
[533] Citizenship and Immigration Canada, "The humanitarian and compassionate assessment: Hardship and the H&C assessment" (24 July 2014), available at: http://tinyurl.com/qesunqb, see also *Statelessness in the Canadian Context*, *supra* note 4 at 48-49 & 52 citing policy manuals no longer published on the CIC website: Citizenship and Immigration Canada, *Immigration Manual: Inland Processing*, Chapter IP 5: Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds, at 5.11, and Citizenship and Immigration Canada, *Immigration Manual: Overseas Processing, Chapter OP4: Processing of Applications under s. 25 of IRPA*, at 8.3.
[534] *Statelessness in the Canadian Context*, *supra* note 4 at 48.
[535] *IRPA*, *supra* note 20 at s. 25(1.3).

persons are more likely to experience compared to other foreign nationals.[536] The "establishment" factors include:

- The length of time the applicant has been in Canada
- Were the circumstances that led the applicant to remain in Canada beyond their control?
- Is, or was, the applicant the subject of a temporary suspension of removal?
- To what degree has the applicant co-operated with the Government of Canada, particularly with regard to travel documents? Did the applicant wilfully lose or destroy travel documents?
- Does the applicant have a history of stable employment?
- Is there a pattern of sound financial management?
- Has the applicant remained in one community or moved around?
- Has the applicant integrated into the community through involvement in community organizations, voluntary services or other activities?
- Has the applicant undertaken any professional, linguistic or other studies that show integration into Canadian society?
- Do the applicant and their family members have a good civil record in Canada? (e.g. no criminal charges or interventions by law enforcement officers or other authorities for domestic violence or child abuse).[537]

In the "establishment" factors, it is noteworthy that statelessness is not a consideration for "circumstances that lead them to remain in Canada beyond their control." Furthermore, whether the individual went "underground" and remains in Canada illegally is not considered beyond the person's control. This is the case even if a stateless person goes underground to avoid potential indefinite detention or forced removal to a country where they have no status and would not have been received, or would not be provided with travel documents.[538]

Finally, another obstacle to applying for an H&C is that stateless persons may be so economically marginalized that they are unable to afford the necessary $550 fee to submit an H&C grounds application.[539]

III. Assessment

Aside from the grant of citizenship in circumstances of stateless children born abroad to Canadian parents born abroad, there are no naturalization options specifically targeting the precarious circumstances of stateless persons in Canada. While a stateless person could potentially have some of the litany of factors used to consider an H&C application, the fact that they often live a marginal socio-economic existence means that the above permanent resident programs do not provide an effective remedy. Simply being stateless has not been enough on its own to receive a positive H&C decision.

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[536] *Statelessness in the Canadian Context*, *supra* note 4 at 48.
[537] Citizenship and Immigration Canada, "The humanitarian and compassionate assessment Establishment in Canada" (24 July 2014), available at: http://tinyurl.com/p67tro8.
[538] *Ibid*.
[539] *Statelessness in the Canadian Context*, *supra* note 4 at 47; and Citizenship and Immigration Canada, "Guide 5291 - Humanitarian and Compassionate Considerations" (21 November 2014), available at: http://tinyurl.com/oohyeb3.

Furthermore, Canadian jurisprudence has not been supportive of stateless persons attempting to obtain citizenship through discretionary grants of citizenship, or being granted refugee status or protected person status on the basis of statelessness. Therefore, based on a review of Canada's legal framework on naturalization for stateless persons, it appears as though Canada' legal framework is incompatible with Article 32 of the 1954 Convention.

a. Canada's International Human Rights Obligations

The moral obligation to naturalize stateless persons under Article 32 engages several notable human rights obligations relating to Canada's legal framework. The following international instruments to which Canada is a State Party relate to naturalization.

In *General Recommendation No. 30*, the CERD reaffirms that States Parties to the *ICERD* are to provide access to citizenship to non-citizens:

> 13. Ensure that particular groups of non-citizens are not discriminated against with regard to access to citizenship or naturalization, and to pay due attention to possible barriers to naturalization that may exist for long-term or permanent residents;
>
> 14. Recognize that deprivation of citizenship on the basis of race, colour, descent, or national or ethnic origin is a breach of States parties' obligations to ensure non- discriminatory enjoyment of the right to nationality;
>
> 15. Take into consideration that in some cases denial of citizenship for long-term or permanent residents could result in creating disadvantage for them in access to employment and social benefits, in violation of the Convention's anti-discrimination principles;
>
> 16. Reduce statelessness, in particular statelessness among children, by, for example, encouraging their parents to apply for citizenship on their behalf and allowing both parents to transmit their citizenship to their children[540]

Naturalization can also be a key ingredient to stateless persons being able to enter and leave Canada freely in order to enjoy family rights. In particular reference to the specific obligation under Article 32 to expedite naturalization proceedings, and to reduce as far as possible the charges and costs of such proceedings, the *ICCPR* recognizes that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State."[541] Furthermore, in cases of stateless children born to Canadian parents, Canada should be mindful of the risk of separation due to non-admission of a stateless child. In this regard, Article 9(1) of the *Convention on the Rights of the Child* asserts that "States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child."[542] In specific

[540] *General Recommendation No. 30*, *supra* note 275 at paras. 13-16.
[541] *ICCPR*, *supra* note 39 at 23(1).
[542] *Convention on the Rights of the Child*, *supra* note 272 at Art. 9(1).

reference to alleviate and avoid such separation, the *Convention on the Rights of the Child* also requires that "... applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner."[543]

IV. Recommendations

27) Citizenship and Immigration Canada should provide statistics on the number of stateless persons who have applied and been accepted into all economic and non-economic immigrant programs over the last 5 years and what status they acquired upon acceptance (temporary resident status, permanent resident status, etc.).

28) Citizenship and Immigration Canada should provide statistics on the number of stateless persons who have applied and been granted citizenship under the following legal avenues:
    - A stateless child born abroad to a Canadian parent born abroad
    - A discretionary grant of citizenship by the Minister
    - An eligible permanent resident

29) Citizenship and Immigration Canada should make publically available its policy manual/guidelines on the factors and application procedure for discretionary grants of citizenship under section 5(4) of the *Citizenship Act*.

30) Reiterating Andrew Brouwer's recommendations in *Statelessness in the Canadian Context*:

    a. Section 5(4) of the *Citizenship Act* should be amended to include statelessness as a "special and unusual hardship" factor that warrants a discretionary grant of citizenship to a person who may not fulfill all of the usual criteria.

    b. The Minister should use the authority of ss. 25.2(1) of the *IRPA* to establish "protection of stateless persons" as a public policy category for permanent resident status in cases processed both in Canada and overseas, where such stateless persons otherwise lack effective protection. Alternatively, at a very minimum, statelessness should be included as a persuasive factor in processing H&C applications from inside and outside Canada, as well as with respect to applications from former citizens. Establishment requirements should be explicitly minimized or waived, in view of the hardships faced by stateless persons.

    c. Include statelessness as a ground for resettlement to Canada, where the stateless person lacks effective protection and access to a durable solution within a reasonable time.

    d. Statistics on whether or not statelessness was considered as a positive factor in H&C cases, including disaggregated data on the country of former habitual residence, age and gender.

[543] *Ibid.*, at Art. 10(1).

31) Citizenship and Immigration Canada should waive the application fee for H&C applications for stateless persons who do not have the financial means to pay the application fee.

32) Stateless persons in Canada on a work or study permit pursuant to sections 206(1)(b) and 215(1)(d) of the *IRPA* should be granted temporary resident status or a status that considers the stateless person "lawfully staying" in Canada. Furthermore, given the documented obstacles that stateless persons experience in obtaining permanent resident status through various naturalization programs, stateless persons who are temporary residents should have their time spent in Canada as a temporary resident count towards the residency requirements for permanent residence and Canadian citizenship.

CONCLUSION

This report has assessed Canada's claims that there is no need for it to accede to the 1954 Convention because Canadian law contains all the necessary safeguards to cover adequately the situation of stateless persons. Upon reviewing the Canadian legal framework of the federal government, as well as the legal framework of Alberta, British Columbia, Ontario and Quebec, this report demonstrated that the Canadian legal framework does not appear to safeguard all the rights of stateless persons in the 1954 Convention. The report further illustrates that Canada, as a State Party to other international human rights instruments, has an obligation to address identified legal gaps in order to protect the rights of stateless persons.

The most significant gaps in the Canadian legal framework are with respect to the definition of statelessness (Article 1); housing (Article 21); free public education (Article 22); healthcare and social assistance (Article 23); social security (Article 24); identity papers (Article 27); travel documents (Article 28); expulsion (Article 31); and naturalization (Article 32). Although some of these articles are enshrined in other international human rights treaties to which Canada is a State Party, some are unique to the 1954 Convention. In any event, this report provided recommendations to ensure that gaps be addressed in order to ensure the Canadian legal framework protects the rights of stateless persons in Canada.

Key recommendations of the report include conducting future research projects that gather quantitative and qualitative information on stateless persons in Canada, their demographic profile and their legal histories. Of particular interest in future research are the practical obstacles that stateless persons experience in accessing their rights under the Canadian legal framework discussed in this report. Such research is necessary in order to truly determine the extent to which seemingly neutral legal provisions may create disproportionate and adverse impacts on stateless persons. In addition, other recommendations include establishing a statelessness determination procedure and establishing a "stateless person status" similar to that of "protected person status" under Canadian law. This status would enable stateless persons to work, study, access healthcare and social assistance, acquire travel documents, reduce the risk of indefinite detention and removal, and apply for permanent residence and eventually citizenship.

ANNEX A: SUMMARY OF RECOMMENDATIONS

1) Canada should incorporate the definition of "stateless persons" from Article 1(1) of the 1954 Convention into the *IRPA* and *Citizenship Act.*

2) Canada should establish a statelessness determination procedure for identifying stateless persons in Canada.

3) Citizenship and Immigration Canada, the Canada Border Services Agency, and the Immigration and Refugee Board should publically disclose all policy guidelines, if any, which its officers and Members use in assessing a person's statelessness. This includes how officers and Members gather and assess evidence of statelessness. Citizenship and Immigration Canada, the Canada Border Services Agency, and the Immigration and Refugee Board should also disclose how its officers and Members are trained in identifying persons as stateless.

4) Canada should implement a "stateless person status", similar to "protected person status". The "stateless person status" should allow persons identified as stateless to be eligible for work, social housing, education, public healthcare and social assistance, etc. In addition, such a status should provide stateless persons with expedited access to permanent resident status, and ultimately, Canadian citizenship.

5) Further research should be conducted on stateless persons in Canada. The research should survey stateless persons, legal practitioners, community workers and academics. In particular, the research should seek to gather information on stateless persons' demographic profile, their unique legal history while in Canada, as well as the "practical" obstacles stateless persons experience in exercising their rights under the Canadian legal framework and the 1954 Convention.

6) Develop a statelessness litigation strategy for Canada, similar to the European Network on Statelessness' *Strategic Litigation: An Obligation for Statelessness Determination under the European Convention on Human Rights.*

7) Further research should be conducted on the following matters, in order to confirm that the Canadian legal framework concerning "personal status" is compatible with Article 12 of the 1954 Convention:
    - The age of majority
    - The rights of persons under age
    - Capacity of married women
    - The instances when a person may lose legal capacity
    - Divorce
    - Recognition and adoption of children
    - The powers of parents over their children and mutual rights to support
    - The mutual rights of spouses to property
    - Who succeeds whom

- What are the consequences of a will, and
- Who is considered to have survived in case of unknown date of death

8) In support of Recommendation #5, further research should examine the practical obstacles that stateless persons experience in exercising their moveable and immoveable property rights under Article 13 of the 1954 Convention. Such research can include the ability of stateless persons to acquire and dispose of commercial property, open a bank account, deal in securities, sign leases and acquire a mortgage in order to purchase residential or commercial property.

9) In support of Recommendation #5, further research should examine the circumstances and the practical obstacles stateless persons experience in exercising their freedom of association rights enshrined in the Canadian legal framework and Article 15 of the 1954 Convention.

10) In support of Recommendation #5, further research should examine whether stateless persons have difficulty accessing legal assistance for immigration matters due to merit assessment criteria.

11) Citizenship and Immigration Canada should clarify what status or authorization is required for a stateless person to be considered "lawfully staying" and "lawfully in" Canada.

12) In support of Recommendation #5, further research should be conducted on the practical obstacles stateless persons experience in order to engage in wage-earning employment in Canada.

13) Citizenship and Immigration Canada should provide the following information on work permits issued to stateless persons:
    - The number of stateless persons who apply for work permits, including applications for a work permit under section 206(1)(b) of the *IRPA*
    - The number of stateless persons granted work permits, including applications for a work permit under section 206(1)(b) of the *IRPA*
    - The restrictions placed on open and closed work permits issued to stateless persons (average length of permit, number of renewals, number of employers, etc.)
    - How many times stateless persons renew an open work permit while under an unenforceable removal order
    - The average fee paid by stateless persons for an open and closed work permit
    - How many stateless persons apply, but are unable to pay the processing fee
    - How often the fee is waived for stateless persons, if at all
    - The criteria used in determining work permit applications under s. 206(1)(b) of the *IRPA*

14) In support of Recommendation #4, Canada should recognize statelessness as a compelling factor that "justifies in the circumstances" the issuance of a temporary residence permit (TRP). Furthermore, if a TRP is issued to a stateless person, stateless persons should be permitted to work, study, access public healthcare and social assistance, as well as count

time already spent in Canada toward permanent residence requirements and Canadian citizenship residency requirements. The TRP should be accessible not only to a stateless child born abroad to a Canadian parent born abroad, but to all stateless persons.

15) UNHCR should engage with provincial governments on the precarious status of stateless persons in Canada and the practical and legal obstacles that stateless persons experience in exercising their international human right to housing, including accessing and becoming eligible for social housing in Canada.

16) Further research should be conducted on stateless children in Canada in order to determine whether stateless children are able to exercise their right to free education in accordance with Article 28 of the *Convention on the Rights of the Child* and Article 22 of the 1954 Convention.

17) UNHCR should engage the governments of Alberta, British Columbia, Ontario and Quebec on the issue of stateless persons and their ability to access free public education in these jurisdictions. In particular, UNHCR should explain the precarious circumstances of stateless persons in Canada, the practical obstacles they may experience in providing immigration documentation to register children for public education, and that "lawfully admitted" or "lawfully staying" requirements are incompatible with Article 28 of the *Convention on the Rights of the Child* and Article 22 of the 1954 Convention.

18) Alberta, British Columbia and Quebec should implement legislative and policy safeguards similar to Ontario, which would guarantee access to free public education for all stateless children regardless of immigration status, documentation, or ability to pay.

19) In support of Recommendation #5, further research should be conducted on the practical and legal obstacles that stateless persons experience in accessing and becoming eligible for public healthcare and social assistance benefits in Canada.

20) UNHCR should engage with provincial governments on the precarious status of stateless persons in Canada and the practical and legal obstacles that stateless persons experience in exercising their international human right to healthcare and social assistance programs.

21) Employment Insurance legislation should be amended to allow stateless persons to be eligible for self-employment insurance.

22) If a stateless person is required to provide documentation establishing birth date in order to collect CPP and OAS benefits for which they are entitled, Canada should not rigidly apply the requirement when a stateless person does not possess and is unable acquire the necessary birth documentation.

23) Canada should provide identity papers to all stateless persons who are physically present in its territory.

24) Canada should provide a travel document to stateless persons who are not permanent residents, but who are "lawfully staying" in its territory. The travel document should allow stateless persons to re-enter Canada after travelling outside Canada.

25) Canada should implement the following recommendations relating to expulsion and detention. These recommendations were made by Andrew Brouwer in *Statelessness in the Canadian Context*:

    a. Detention of stateless persons should always be avoided except where, and for as long as, it is demonstrably necessary and justifiable.

    b. Section 247 of the *IRPR* and Immigration Manual Chapter ENF 20, section 5 should be amended explicitly to note the unique situation of stateless persons vis-à-vis access to identity documents as well as travel documents, so that they are not unnecessarily or unjustly detained.

    c. Stateless persons should only be removed to countries of former habitual residence where they will have effective protection and a legal status.

    d. CBSA to regularly make statistics publically available that identifies the number of stateless persons in administrative immigration detention and the length of their detention.

    e. CBSA to regularly make statistics publically available that identifies the number of stateless persons removed from Canada.

26) The *IRPA* should be amended to ensure that stateless persons cannot be expelled for reasons other than "national security or public order".

27) Citizenship and Immigration Canada should provide statistics on the number of stateless persons who have applied and been accepted into all economic and non-economic immigrant programs over the last 5 years and what status they acquired upon acceptance (temporary resident status, permanent resident status, etc.).

28) Citizenship and Immigration Canada should provide statistics on the number of stateless persons who have applied and been granted citizenship under the following legal avenues:
    - A stateless child born abroad to a Canadian parent born abroad
    - A discretionary grant of citizenship by the Minister
    - An eligible permanent resident

29) Citizenship and Immigration Canada should make publically available its policy manual/guidelines on the factors and application procedure for discretionary grants of citizenship under section 5(4) of the *Citizenship Act*.

30) Reiterating Andrew Brouwer's recommendations in *Statelessness in the Canadian Context*:

    a. Section 5(4) of the *Citizenship Act* should be amended to include statelessness as a "special and unusual hardship" factor that warrants a discretionary grant of citizenship to a person who may not fulfill all of the usual criteria.

    b. The Minister should use the authority of ss. 25.2(1) of the *IRPA* to establish "protection of stateless persons" as a public policy category for permanent resident status in cases processed both in Canada and overseas, where such stateless persons otherwise lack effective protection. Alternatively, at a very minimum, statelessness should be included as a persuasive factor in processing H&C applications from inside and outside Canada, as well as with respect to applications from former citizens. Establishment requirements should be explicitly minimized or waived, in view of the hardships faced by stateless persons.

    c. Include statelessness as a ground for resettlement to Canada, where the stateless person lacks effective protection and access to a durable solution within a reasonable time.

    d. Statistics on whether or not statelessness was considered as a positive factor in H&C cases, including disaggregated data on the country of former habitual residence, age and gender.

31) Citizenship and Immigration Canada should waive the application fee for H&C applications for stateless persons who do not have the financial means to pay the application fee.

32) Stateless persons in Canada on a work or study permit pursuant to sections 206(1)(b) and 215(1)(d) of the *IRPA* should be granted temporary resident status or a status that considers the stateless person "lawfully staying" in Canada. Furthermore, given the documented obstacles that stateless persons experience in obtaining permanent resident status through various naturalization programs, stateless persons who are temporary residents should have their time spent in Canada as a temporary resident count towards the residency requirements for permanent residence and Canadian citizenship.

ANNEX B: GLOSSARY

Domicile – A person's "domicile" is the place at which a person permanently has his or her home. No person can be without a domicile. "Domicile" is different from "residence", and examining the person's circumstances and intention makes the distinction. Domicile generally implies a personal intent, while residence is a question of fact. A person may have more than one residence, but can have only one domicile or permanent home. A person may change residence without changing domicile. In Canada, persons have provincial domiciles, which are established by such factors as intention, residence and permanency. Case law has established that an illegal immigrant in Canada who intends to make the jurisdiction his or her permanent home may acquire a new domicile in Canada, even though their illegality in Canada arises from a breach of immigration law. (See Article 12 for further discussion and citations)

Foreign national – "means a person who is not a Canadian citizen or a permanent resident, and includes a stateless person." (See the *IRPA*, s. 2(1))

Habitually resident – the drafters of the 1954 Convention understood "habitual residence" to mean "residence of a certain duration, but it implies much less than permanent residence. Thus, to enjoy the rights…a stateless person need not have in the country a permanent residence but only a residence of sufficiently long duration to consider him as locally connected with the country. A stateless person may have several such residences (although such instances would be rather rare in view of their specific status)."

The *Handbook on Protection of Stateless Persons* summarized that "the condition that a stateless person be "habitually resident" or "residing" indicates that the person resides in a State party on an on-going and stable basis. "Habitual residence" is to be understood as stable, factual residence. This covers those stateless persons who have been granted permanent residence, and also applies to individuals without a residence permit who are settled in a country, having been there for a number of years, who have an expectation of on-going residence there." (Habitually resident applies to Articles 14 & 16(2), see those articles for further discussion and citations)

In the same circumstances – Article 6 of the 1954 Convention defines "in the same circumstances". The term is included in relation to several rights in the 1954 Convention. The term was included because if stateless persons were placed on the same footing as other foreigners, they would be obliged to fulfil certain requirements, such as providing evidence of nationality, which they could not fulfil. Therefore, Article 6 states: "in the same circumstances implies that any requirements (including requirements as to length and conditions of sojourn or residence) which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a stateless person, must be fulfilled by him, with the exception of requirements which by their nature a stateless person is incapable of fulfilling." (See *Robinson Commentary on the 1954 Convention*, 19-20)

Lawfully staying (in the territory of a State Party) – There is no generally recognized interpretation of "lawfully staying". However, based on the *travaux préparatoires* of the 1951 Refugee Convention there is some guidance on what it describes with respect to the 1954 Convention. "Lawfully staying" refers to stateless persons either lawfully admitted or whose illegal entry was legalized. It is understood not to refer to persons who although legally admitted or legalized, have overstayed the period of their lawful admission or violated any other conditions attached to their admission or stay. "Lawfully staying" is not meant to include individuals who are temporarily visiting for special reasons and for a specific period of time. While the drafters did not discuss in detail what they consider to be "visiting for special reasons", the example provided was of a musician staying in a country for one or two nights in order to give concerts. Such a person would not be considered "lawfully staying" in the territory.

The *Handbook on Protection of Stateless Persons* summarizes that ""lawfully staying" envisages a greater duration of presence in a territory. However, this need not take the form of permanent residence. Shorter periods of stay authorised by the State may suffice so long as they are not transient visits. Stateless persons who have been granted a residence permit would fall within this category. It also covers individuals who have temporary permission to stay if this is for more than a few months. Individuals recognised as stateless following a determination procedure but to whom no residence permit has been issued will generally be "lawfully staying" in a State party by virtue of the length of time already spent in the country awaiting a determination." In other words "lawfully staying" means a permitted, regularized stay of some duration. (The lawfully staying requirement applies to Articles 15, 17, 19, 21, 23, 24 and 28; see those articles for further discussion and citations)

It has been argued that although "lawfulness" is usually explicit and within the rights of states to prescribe by domestic law, an otherwise unlawful stay could implicitly become lawful. Such cases could include persons who are subject to an indefinite stay of deportation because they are unable to be removed, like stateless persons who do not have the ability to gain entry to another country and continue to live in legal limbo in Canada. Therefore, in order to determine whether the stay is "lawful", lawfulness is to consider all the prevailing circumstances and the fact that the stay in question is known and not prohibited, i.e. tolerated, because of the precarious circumstances of the person. (See Article 15 and Article 31 for further discussion and citation on this "implicitly lawful" argument)

Lawfully staying in Canada – The *IRPA* does not explicitly identify which statuses constitute "lawfully staying" under Canadian law. However, there is some indication due to Canada's reservations to Articles 23 and 24 of the 1951 Refugee Convention and section 31.1 of the *IRPA*. In Canada's reservations to Articles 23 and 24 of the 1951 Refugee Convention, Canada states: "Canada interprets the phrase 'lawfully staying' as referring only to refugees admitted for permanent residence: refugees admitted for temporary residence will be accorded the same treatment with respect to the matters dealt with in articles 23 and 24 as is accorded visitors generally." While, this interpretation only appears to apply with respect to article 23 and 24 of the 1951 Refugee Convention, it indicates that permanent residence constitutes "lawfully staying" status in Canada.

Furthermore, section 31.1 of the *IRPA* dealing with "designated foreign nationals" indicates that at the very least possession a temporary resident permit under s. 24 of the *IRPA* also constitutes "lawfully staying" in Canada. Unfortunately, it is not clear whether persons with any other status in Canadian law would be considered lawfully staying in Canada for the purposes of the 1954 Convention, but by looking at the definition of "lawfully staying" from the Commentary on the 1954 Convention, persons with temporary residence status of at least a few months could be argued to be lawfully staying. (See Article 23 for further discussion and citation)

Lawfully in the territory of a State party – In the 1954 Convention the terms "lawfully in their territory" or "lawfully in its territory" are used. "Lawfully in" means, an individual's presence in the country must be authorized by the State. The concept encompasses both presence, which is explicitly sanctioned, and also that which is known and not prohibited by the State while taking into account all personal circumstances of the individual. The duration of presence can be temporary. Furthermore, persons who apply for statelessness status to a statelessness determination procedure are considered "lawfully in" the territory of a state party.

"Lawfully in" is a lower standard than "lawfully staying". The term "lawfully in their territory" comprises those "who are physically present in the territory, provided that their presence is not unlawful. It includes short-time visitors and even persons merely travelling through the country."

It is not clear whether persons with a work or study permit under section 206(1)(b) and 215(1)(d) of the *IRPA* are considered "lawfully in" Canada for the purposes of the 1954 Convention. However, considering persons with a work or study permit under section 206(1)(b) and 215(1)(d) are not considered temporary residents, Canada may not consider these persons "lawfully in" Canada for the purposes of the 1954 Convention. ("Lawfully in" is a requirement of Articles 18, 26 and 31; see those articles for further discussion and citation).

Ordinarily resident – The Supreme Court of Canada has defined "ordinarily resident" as "distinct and separate from the notion of "citizenship", "domicile" or "permanent residence" in that it essentially calls for a determination of the country where a person's general mode of life unfolds". In particular, "[i]t is held to mean residence in the course of the customary mode of life of the person concerned and it is contrasted with special or occasional or casual residence. The general mode of life is, therefore, relevant to its application." (See Article 14 for further discussion and citations)

Permanent resident – "means a person who has acquired permanent resident status and has not subsequently lost that status under section 46". (See *IRPA*, s. 2(1))

Status – If a person is not a Canadian citizen, permanent resident, temporary resident or in Canada on a Temporary Resident Permit, they are in Canada without status. A work or study authorization or permit does not in itself grant admission or status. For example persons who are in Canada due to an unenforceable removal order may apply for a work permit if they have no

other means of support under s. 206(1)(b) of the *IRPR*. However, s. 202 of the *IRPR* states that simply because the individual is granted a work permit, they are still not considered to have temporary resident status. The work permit provides them with the authorization to work, but does not grant them status. (See glossary terms "lawfully staying", "lawfully staying in Canada" and "lawfully in" for further discussion, as well as Article 17 for citations and discussion)

Sympathetic consideration - "sympathetic consideration" for the purposes of Article 17(2) of the 1954 Convention means that the Contracting State has an obligation to deal with requests by stateless persons in regard to wage-earning employment and to not refuse them without proper reason, even though the provision is discretionary in nature and not mandatory. (See Article 17 for citations)

Temporary resident permit (TRP) – Under s. 24 of the *IRPA*, if a foreign national is inadmissible or does not meet the requirements of the *IRPA*, they can apply to an officer outside or inside Canada for a temporary resident permit (TRP). If the officer is of the opinion that it is "justified in the circumstances" they may issue a temporary resident permit allowing the foreign national to enter or to remain in Canada for a specific period and grants them temporary resident status. The TRP may be cancelled at any time. Upon cancellation or expiration of the TRP, the foreign national must leave Canada. A person in possession of a TRP who continuously resides in Canada for the prescribed period of time may apply to become a permanent resident of Canada.

The TRP and temporary resident status does not in itself authorize the foreign national to study or work in Canada. However, if the TRP is valid for at least six months, the foreign national may apply for a work and/or study permit, which would "authorize" them to study or work in Canada for a specific period of time and subject to conditions. The TRP is an exceptional mechanism and not a matter of routine; it is for when compelling circumstances warrant a TRP. (See Art. 17, *IRPA*, s. 24, and CIC, "Temporary Resident Permits (TRPs): Eligibility and assessment", available at: http://www.cic.gc.ca/english/resources/tools/temp/permits/eligibility.asp)

Temporary resident visa – Foreign nationals who wish to work, study or visit Canada require a visa prior to coming to Canada. Some countries are exempted from requiring a visa. Even with a visa an officer may not necessarily allow the foreign national to enter Canada. At the port of entry the officer must be satisfied that the person is not inadmissible and will leave Canada by the end of their stay. A temporary resident visa does not grant foreign nationals temporary resident status, nor does it grant the foreign national the right to remain in, work or study in Canada. Temporary resident status is obtained when the officer at the port of entry makes the final decision to admit the visitor to Canada. (From Lorne Waldman, *Immigration and Refugee Protection Act and Commentary*, (Toronto: LexisNexis, 2005) at § 14.11-14.12)

ANNEX C: BIBLIOGRAPHY

Treaties

Canada-US Safe Third Country Agreement, available at: http://www.cic.gc.ca/english/department/laws-policy/safe-third.asp (signed 5 December 2002).

Convention concerning Freedom of Association and Protection of the Right to Organise, available at: http://tinyurl.com/nlcepm9 (entry into force 4 July 1950, ratification by Canada 23 March 1972).

Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, available at: http://www.refworld.org/docid/3ae6b3970.html (entered into force 3 September 1981, ratification by Canada 10 December 1981).

Convention on the Reduction of Statelessness, 30 August 1961, United Nations, Treaty Series, vol. 989, p. 175, available at: http://www.refworld.org/docid/3ae6b39620.html (entered into force 13 December 1975, accession by Canada 17 July 1978).

Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: http://www.refworld.org/docid/3ae6b38f0.html (entered into force 2 September 1990, ratification by Canada 13 December 1991).

Convention Relating to the Status of Stateless Persons, 28 September 1954, United Nations, Treaty Series, vol. 360, p. 117, available at: http://www.refworld.org/docid/3ae6b3840.html (entered into force 6 June 1960).

International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, available at: http://www.refworld.org/docid/3ae6b3940.html (entered into force 4 January 1969, ratification by Canada 14 October 1970).

International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: http://www.refworld.org/docid/3ae6b36c0.html (entered into force 3 January 1976, accession by Canada 19 May 1976).

International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: http://www.refworld.org/docid/3ae6b3aa0.html (entered into force 23 March 1976, accession by Canada 19 May 1976).

Legislation

Alberta Human Rights Act, RSA 2000, c A-25.5, available at: http://canlii.ca/t/52fj4.

Alberta Rules of Court, Alta Reg 124/2010, available at: http://canlii.ca/t/52b1t.

Alberta Health Care Insurance Regulation, Alta Reg 76/2006, available at: http://canlii.ca/t/51x4j.

Alberta Health Care Insurance Act, RSA 2000, c A-20, available at: http://canlii.ca/t/527k7.

Aliens' Real Property Act, RSO 1990, c A.18, available at: http://canlii.ca/t/g3.

An Act Respecting the Barreau du Québec, CQLR c B-1, available at: http://canlii.ca/t/526jh.

An Act Respecting Industrial Accidents and Occupational Diseases, CQLR c A-3.001, available at: http://canlii.ca/t/52cvz.

An Act Respecting Labour Standards, CQLR c N-1.1, available at: http://canlii.ca/t/52913.

An Act Respecting Occupational Health and Safety, CQLR c S-2.1, available at: http://canlii.ca/t/52cwm.

An Act Respecting the Québec Pension Plan, CQLR c R-9, available at: http://canlii.ca/t/525qp.

Assured Income for the Severely Handicapped Act, SA 2006, c A-45.1, available at: http://canlii.ca/t/kxcx.

Assured Income for the Severely Handicapped Regulation, Alta Reg 91/2007, available at: http://canlii.ca/t/lggt.

Barreau du Québec, *Regulation respecting accounting and standards of professional practice of advocates*, available at: http://tinyurl.com/pt8sr45.

Bill 19, *Education Amendment Act,* 3d Sess, 28th Leg, Alberta, 2015 (assented to 30 March 2015), available at: http://tinyurl.com/nmp8ml5.

Bill C-24, *An Act to amend the Citizenship Act and to make consequential amendments to other Acts*, 2nd Sess., 41st Parl, 2014, (assented to 19 June 2014) SC 2014, c 22, available at: http://tinyurl.com/qauh9ao.

Bill C-31, *Economic Action Plan 2014 Act, No. 1*, 2nd Sess., 41st Parl, 2014 (assented to 19 June 2014), available at: http://tinyurl.com/na72du9.

Business Corporations Act, RSA 2000, c B-9, available at: http://canlii.ca/t/52d7b.

Business Corporations Act, SBC 2002, c 57, available at: http://canlii.ca/t/52crq.

Business Corporations Act, RSO 1990, c B.16, available at: http://canlii.ca/t/ldxj.

Business Corporations Act, CQLR c S-31.1, available at: http://canlii.ca/t/523d9.

Business Practices Permissible to Landlords in Selecting Prospective Tenants for Residential Accommodation, O Reg 290/98, available at: http://canlii.ca/t/1mg2.

By-law respecting the allocation of dwellings in low rental housing, CQLR c S-8, r 1, available at: http://canlii.ca/t/52b2n.

Calculation of Fees For Pupils for the 2014-2015 School Board Fiscal Year, O Reg 77/14, available at: http://canlii.ca/t/527jx.

Canada Business Corporations Act, RSC, 1985, c C-44, available at: http://laws-lois.justice.gc.ca/eng/acts/C-44/FullText.html#h-20.

Canada Labour Code, RSC, 1985, c L-2, available at: http://laws-lois.justice.gc.ca/eng/acts/l-2/.

Canada Labour Standards Regulations, CRC, c 986, available at: http://canlii.ca/t/52f3p.

Canada Occupational Health and Safety Regulations, SOR/86-304, http://canlii.ca/t/52c4h.

Canada Pension Plan, RSC 1985, c C-8, available at: http://canlii.ca/t/52bt9.

Canada Pension Plan Regulations, CRC, c 385, available at: http://canlii.ca/t/529t0.

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11, available at: http://laws-lois.justice.gc.ca/eng/Const/page-15.html.

Canadian Human Rights Act, RSC 1985, c H-6, available at: http://laws-lois.justice.gc.ca/eng/acts/h-6/FullText.html.

Charter of Human Rights and Freedoms, CQLR c C-12, available at: http://canlii.ca/t/hxt9.

Citizenship Act, RSC 1985, c C-29, available at: http://laws-lois.justice.gc.ca/eng/acts/c-29/FullText.html.

Citizenship Regulations, SOR/93-246, available at: http://laws-lois.justice.gc.ca/eng/regulations/SOR-93-246/FullText.html.

Civil Code of Québec, CQLR c C-1991, available at: http://canlii.ca/t/52bhc.

Civil Marriage Act, SC 2005, c 33, available at: http://laws-lois.justice.gc.ca/eng/acts/c-31.5/FullText.html.

Code of Civil Procedure, CQLR c C-25, available at: http://canlii.ca/t/52cw9.

Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, available at: http://laws-lois.justice.gc.ca/eng/Const/FullText.html.

Copyright Act, RSC 1985, c C-42, available at: http://canlii.ca/t/52dfv.

Court Rules Act, RSBC 1996, c 80, available at: http://canlii.ca/t/527vv.

Courts of Justice Act, RSO 1990, c C.43, available at: http://canlii.ca/t/52cmq.

Criminal Code, RSC, 1985, c C-46, available at: http://laws-lois.justice.gc.ca/eng/acts/C-46/FullText.html.

Crown Employees Collective Bargaining Act, 1993, SO 1993, c 38, available at: http://canlii.ca/t/l0bl.

Education Act, SA 2012, c E-0.3, available at: http://canlii.ca/t/52fkf.

Education Act, RSO 1990, c E.2, available at: http://canlii.ca/t/52f6t.

Education Act, CQLR c I-13.3, available at: http://canlii.ca/t/52c6l.

Employment and Assistance for Persons with Disabilities Act, SBC 2002, c 41, available at: http://canlii.ca/t/520xp.

Employment and Assistance for Persons with Disabilities Regulation, BC Reg 265/2002, available at: http://canlii.ca/t/52fhs.

Employment and Assistance Regulation, BC Reg 263/2002, available at: http://canlii.ca/t/52fd9.

Employment Insurance Act, SC 1996, c 23, available at: http://laws-lois.justice.gc.ca/eng/acts/e-5.6/.

Employment Insurance Regulations, SOR/96-332, available at: http://laws-lois.justice.gc.ca/eng/regulations/SOR-96-332/FullText.html.

Employment Standards Act, RSBC 1996, c 113*,* available at: http://canlii.ca/t/527vx.

Employment Standards Act, 2000, SO 2000, c 41, available at: http://canlii.ca/t/52dlc.

Employment Standards Code, RSA 2000, c E-9, available at: http://canlii.ca/t/52bwr.

Federal-Provincial Fiscal Arrangements Act, RSC 1985, c F-8, available at: http://canlii.ca/t/52d91.

Federal Courts Act, RSC, 1985, c F-7, available at: http://laws-lois.justice.gc.ca/eng/acts/F-7/FullText.html.

Federal Courts Rules, SOR/98-106, available at: http://laws-lois.justice.gc.ca/eng/regulations/sor-98-106/FullText.html.

Foreign Ownership of Land Regulations, Alta Reg 160/1979, available at: http://canlii.ca/t/km9v.

General, O Reg 134/98, available at: http://canlii.ca/t/52dpr (*Ontario Works Regulations*).

General, O Reg 222/98, available at: http://canlii.ca/t/52dps (*Ontario Disability Support Program Regulations*).

General, O Reg 367/11, available at: http://canlii.ca/t/52c25 (*Housing Services Regulations*).

General, RRO 1990, Reg 552, available at: http://canlii.ca/t/52f7d (*Ontario Health Insurance Plan Regulations*).

Government Employees Compensation Act, RSC, 1985, c G-5, available at: http://laws-lois.justice.gc.ca/eng/acts/G%2D5/FullText.html.

Human Rights Code, RSBC 1996, c 210, available at: http://canlii.ca/t/jj1b.

Human Rights Code, RSO 1990, c H.19, available at: http://canlii.ca/t/51tsz.

Health Insurance Act, RSO 1990, c H.6, available at: http://canlii.ca/t/l352.

Health Insurance Act, CQLR c A-29, available at: http://canlii.ca/t/526jg.

Immigration and Refugee Protection Act, SC 2001, c 27, available at: http://laws-lois.justice.gc.ca/eng/acts/I-2.5/FullText.html.

Immigration and Refugee Protection Regulations, SOR/2002-227, available at: http://laws-lois.justice.gc.ca/eng/regulations/SOR-2002-227/FullText.html.

Income Support, Training and Health Benefits Regulation, Alta Reg 122/2011, available at: http://canlii.ca/t/52bsl.

Individual and Family Assistance Act, CQLR c A-13.1.1, available at: http://canlii.ca/t/527cw.

Individual and Family Assistance Regulation, CQLR c A-13.1.1, r 1, available at: http://canlii.ca/t/52cwt.

Industrial Design Act, RSC 1985, c I-9, available at: http://canlii.ca/t/hzpm.

Industrial Design Regulations, SOR/99-460, available at: http://canlii.ca/t/52bs1.

Judicature Act, RSA 2000, c J-2, available at: http://canlii.ca/t/52d89.

Labour Code, CQLR c C-27, available at: http://canlii.ca/t/52bwh.

Labour Relations Act, RSO 1990, c L.2, available at: http://canlii.ca/t/527xz.

Labour Relations Code, RSA 2000, c L-1, available at: http://canlii.ca/t/52bwm.

Labour Relations Code, RSBC 1996, c 244, available at: http://canlii.ca/t/520vh.

Law Society Act, RSO 1990, c L.8, available at: http://canlii.ca/t/527j8.

Law Society of Alberta, *The Rules of the Law Society of Alberta*, available at: http://tinyurl.com/pzq3awc.

Law Society of British Columbia, *Law Society Rules*, available at: http://tinyurl.com/p4o42s7.

Law Society of Upper Canada, *By-Law 7.1*, available at: http://tinyurl.com/p5xkoqq.

Lands Protection Act, RSPEI 1988, c L-5, available at: http://canlii.ca/t/52cl0.

Legal Profession Act, RSA 2000, c L-8, available at: http://canlii.ca/t/522lv.

Legal Profession Act, SBC 1998, c 9, available at: http://canlii.ca/t/527wc.

Marriage Act, RSA 2000, c M-5, available at: http://canlii.ca/t/528fb.

Marriage Act, RSBC 1996, c 282, available at: http://canlii.ca/t/528th.

Marriage Act, RSO 1990, c M.3, available at: http://canlii.ca/t/ldwr.

Marriage (Prohibited Degrees) Act, SC 1990, c. 46, available at: http://laws-lois.justice.gc.ca/eng/acts/M-2.1/FullText.html.

Medical and Health Care Services Regulation, BC Reg 426/97, available at: http://canlii.ca/t/52dq2.

Medicare Protection Act, RSBC 1996, c 286, available at: http://canlii.ca/t/52crl.

Occupational Health and Safety Act, RSA 2000, c O-2, available at: http://canlii.ca/t/5246j.

Occupational Health and Safety Act, RSO 1990, c O.1, available at: http://canlii.ca/t/52c09.

Old Age Security Act, RSC 1985, c O-9, available at: http://canlii.ca/t/527qf.

Old Age Security Regulations, CRC, c 1246, available at: http://canlii.ca/t/5263k.

Ontario Disability Support Program Act, 1997, SO 1997, c 25, Sch B, available at: http://canlii.ca/t/kpnt.

Ontario Works Act, 1997, SO 1997, c 25, Sch A, available at: http://canlii.ca/t/51wtc.

Patent Act, RSC 1985, c P-4, available at: http://canlii.ca/t/52f16.

Property Law Act, RSBC 1996, c 377, available at: http://canlii.ca/t/528hv.

Public Service Act, CQLR c F-3.1.1, available at: http://canlii.ca/t/524tw.

Public Service Employee Relations Act, RSA 2000, c P-43, available at: http://canlii.ca/t/522rb.

Public Service Employment Act, SC 2003, c 22, available at: http://canlii.ca/t/52cjm.

Public Service Labour Relations Act, S.C. 2003, c. 22, available at: http://laws-lois.justice.gc.ca/eng/acts/P-33.3/FullText.html.

Public Service Labour Relations Act, RSBC 1996, c 388, available at: http://canlii.ca/t/lgzd.

Regulation respecting eligibility and registration of persons in respect of the Régie de l'assurance maladie du Québec, CQLR c A-29, r 1, available at: http://canlii.ca/t/52bhl.

Regulation respecting the definition of resident in Québec, CQLR c I-13.3, r 4, available at: http://canlii.ca/t/hqkq.

Rules of Civil Procedure, RRO 1990, Reg 194, available at: http://canlii.ca/t/52f7j.

School Act, RSA 2000, c S-3, available at: http://canlii.ca/t/52fj7.

School Act, RSBC 1996, c 412, available at: http://canlii.ca/t/52cdg.

Social Housing Accommodation Regulation, Alta Reg 244/1994, available at: http://canlii.ca/t/5298d.

Superior Court of Justice and Court of Appeal - Fees, O Reg 293/92, available at: http://canlii.ca/t/51wdb.

Supreme Court Civil Rules, BC Reg 168/2009, available at: http://canlii.ca/t/529ps.

Tariff of Court Costs in Civil Matters and Court Office Fees, CQLR c T-16, r 9, available at: http://canlii.ca/t/52dkn.

Trade-marks Act, RSC 1985, c T-13, available at: http://canlii.ca/t/52dg3.

Trade-marks Regulations, SOR/96-195, available at: http://canlii.ca/t/527r2.

Workers' Compensation Act, RSA 2000, c W-15, available at: http://canlii.ca/t/52d4j.

Workers Compensation Act, RSBC 1996, c 492, available at: http://canlii.ca/t/52d5q.

Workplace Safety and Insurance Act, 1997, SO 1997, c 16, Sch A, available at: http://canlii.ca/t/51xr9.

Jurisprudence

Adler v. Ontario, [1996] 3 SCR 609, available at: http://canlii.ca/t/1fr6t.

Advisory Opinion OC-21/14 of August 19, 2014 requested by the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Oriental Republic of Uruguay: Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, OC-21/14, Inter-American Court of Human Rights (IACrtHR), 19 August 2014, available at: http://www.refworld.org/docid/54206c744.html.

Andrews v. Law Society of British Columbia, [1989] 1 SCR 143, available at: http://canlii.ca/t/1ft8q.

Apotex Inc. v. Wellcome Foundation Ltd., 2002 SCC 77, available at: http://canlii.ca/t/1kc.

Canadian Doctors for Refugee Care v. Canada (Attorney General), 2014 FC 651, available at: http://canlii.ca/t/g81sg.

Ciba-Geigy Canada Ltd. v. Apotex Inc., [1992] 3 SCR 120, available at: http://canlii.ca/t/1fg4b.

Commission des droits de la personne et des droits de la jeunesse c. Beaulé, 2009 QCTDP 25, available at: http://canlii.ca/t/27c2x.

Daifallah (Re), [1992] F.C.J. No. 441.

Fraser v. Janes Family Foods Ltd., 2012 FCA 99, available at: http://canlii.ca/t/fqsbb.

Goudimenko v. Canada (Minister of Citizenship and Immigration), 2002 FCT 447, available at: http://canlii.ca/t/ksb.

Han v. Cho, 2008 BCSC 1229, available at: http://canlii.ca/t/20nv4.

Hussain v. Canada (Minister of Public Safety and Emergency Preparedness), 2008 FC 234, available at: http://canlii.ca/t/1vvb8.

Jablonowski v. Jablonowski, [1972] 3 OR 410, available at: http://canlii.ca/t/g186h.

Lavoie v Canada, 2002 SCC 23, available at: http://canlii.ca/t/51sx.

Marshall v. George Vale Golf Club (1987), 39 D.L.R. (4th) 472 (BCSC).

Mohammadian v. Canada (Minister of Citizenship and Immigration), 2001 FCA 191, available at: http://canlii.ca/t/4k29.

Mounted Police Association of Ontario v. Canada (Attorney General), 2015 SCC 1, available at: http://canlii.ca/t/gfxx8.

New Brunswick (Minister of Health and Community Services) v. G. (J.), [1999] 3 SCR 46, available at: http://canlii.ca/t/1fqjw.

Olney v. Rainville, 2009 BCCA 380, available at: http://canlii.ca/t/25dwr.

R. v. Big M Drug Mart Ltd., [1985] 1 SCR 295, available at: http://canlii.ca/t/1fv2b.

R. v. D.J.W., 2011 BCCA 522, available at: http://canlii.ca/t/fpf37.

R. v. Hape, 2007 SCC 26, available at: http://canlii.ca/t/1rq5n.

R. v. Kapp, 2008 SCC 41, available at: http://canlii.ca/t/1z476.

R. v. Oakes, [1986] 1 SCR 103, available at: http://canlii.ca/t/1ftv6.

R. v. *Rowbotham*, 1988 CanLII 147, available at: http://canlii.ca/t/1npn6.

R. v. Tran, [1994] 2 SCR 951, available at: http://canlii.ca/t/1frqw.

Sarnoff Corp. v. Canada (Attorney General), 2008 FC 712, available at: http://canlii.ca/t/1x5qd.

Singh v. Minister of Employment and Immigration, [1985] 1 SCR 177, available at: http://canlii.ca/t/1fv22.

Tanudjaja v. Canada (Attorney General), 2014 ONCA 852, available at: http://canlii.ca/t/gffz5.

Thabet v. Canada (Minister of Citizenship and Immigration), [1998] 4 FCR 21, available at: http://canlii.ca/t/4mj3.

Thomson v. Minister of National Revenue, [1946] SCR. 209, available at: http://canlii.ca/t/1nmzk.

Toussaint v. Canada (Attorney General), 2011 FCA 213, available at: http://canlii.ca/t/fm4v6.

Van Vlymen v. Canada (Solicitor General), 2004 FC 1054, available at: http://canlii.ca/t/1hvv2.

Vriend v. Alberta, [1998] 1 SCR 493, available at: http://canlii.ca/t/1fqt5.

Waldman v. Canada (Communication No. 694/1996), available at: http://www.bayefsky.com//html/162_canada694vws.php.

Wyllie v. Wyllie, (1987), 37 D.L.R. (4th) 376, available at: http://canlii.ca/t/23f9x.

UN Documents

UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, available at: http://www.refworld.org/docid/4a60961f2.html.

UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author (Art. 15, Para. 1 (c) of the Covenant)*, 12 January 2006, E/C.12/GC/17, available at: http://www.refworld.org/docid/441543594.html.

UN Committee on Economic, Social and Cultural Rights, *Replies of the Government of Canada to the List of issues to be taken up in connection with the consideration of the fourth periodic report of CANADA concerning the rights referred to in articles 1-15 of the International Covenant on Economic, Social and Cultural Rights* (25 April 2006), available at: http://tinyurl.com/oun7pc5.

UN Committee on the Elimination of Racial Discrimination (CERD), *CERD General Recommendation XXX on Discrimination Against Non Citizens*, 1 October 2002, available at: http://www.refworld.org/docid/45139e084.html.

UN Committee on the Elimination of Racial Discrimination (CERD), *Reports submitted by States parties under article 9 of the Convention: International Convention on the Elimination of All Forms of Racial Discrimination: 19th and 20th periodic reports of States parties due in 2009: Canada*, 8 June 2011, CERD/C/CAN/19-20, available at: http://www.refworld.org/docid/506181602.html.

UN Committee on the Elimination of Racial Discrimination (CERD), *Report of the Committee on the Elimination of Racial Discrimination: seventieth session (19 February-9 March 2007); seventy-first session (30 July-17 August 2007)*, 1 October 2007, A/62/18, available at: http://www.refworld.org/docid/473424062.html.

UN Committee on the Elimination of Racial Discrimination (CERD), *Report of the UN Committee on the Elimination of Racial Discrimination, Sixtieth Session (4-22 March 2002) and Sixty-first Session (5-23 August 2002)*, 1 November 2002, A/57/18, available at: http://www.refworld.org/docid/3f52f7aa4.html.

UN Committee on the Elimination of Racial Discrimination, "List of the themes" 80th Sess., 26 January 2012 (CERD/C/CAN/Q/19-20), available at: http://tinyurl.com/okkm47t.

UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations: Canada*, 27 October 2003, CRC/C/15/Add.215, available at: http://www.refworld.org/docid/403a22804.html.

UN High Commissioner for Refugees (UNHCR), *Commentary of the Refugee Convention 1951 (Articles 2-11, 13-37)*, October 1997, available at: http://www.refworld.org/docid/4785ee9d2.html.

UN High Commissioner for Refugees (UNHCR), "Comments on the Proposed Regulations Amending the Immigration and Refugee Regulation" (14 November 2002), available at: http://ccrweb.ca/sites/ccrweb.ca/files/static-files/regula_11.html.

UN High Commissioner for Refugees (UNHCR), *Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons*, Conclusion No. 106 (LVII) - 2006 (6 October 2006), available at: http://www.unhcr.org/453497302.html.

UN High Commissioner for Refugees, "Declarations and Reservations to the 1951 Convention relating to the Status of Refugees" (1 March 2006), available at: http://www.unhcr.org/4d934f5f9.pdf.

UN High Commissioner for Refugees (UNHCR), *Final Report Concerning the Questionnaire on Statelessness Pursuant to the Agenda for Protection. Steps taken by States to Reduce Statelessness and to Meet the Protection Needs of Stateless Persons*, March 2004, available at: http://www.refworld.org/docid/405f09834.html.

UN High Commissioner for Refugees (UNHCR), *General Conclusion on International Protection*, Conclusion No. 95 (LIV) (10 October 2003), available at: http://www.unhcr.org/3f93aede7.html.
UN High Commissioner for Refugees (UNHCR), *Handbook on Protection of Stateless Persons*, 30 June 2014, available at: http://www.refworld.org/docid/53b676aa4.html.

UN High Commissioner for Refugees (UNHCR), Nehemiah Robinson, *Convention relating to the Status of Stateless Persons. Its History and Interpretation*, Institute of Jewish Affairs, World Jewish Congress, 1955, reprinted by the Division of International Protection of the United Nations High Commissioner for Refugees 1997, available at: http://www.refworld.org/docid/4785f03d2.html.

UN High Commissioner for Refugees (UNHCR), *Opinion: The 1951 Convention relating to the Status of Refugees and the Obligations of States under Articles 25, 27 and 28, with particular reference to refugees without identity or travel documents*, May 2000, available at: http://www.refworld.org/docid/51af00184.html.

UN High Commissioner for Refugees (UNHCR), *Special Report: Ending Statelessness in 10 years*, July 2014, available at: http://www.unhcr.org/statelesscampaign2014/Stateless-Report_eng_final3.pdf.

UN High Commissioner for Refugees (UNHCR), *Statelessness determination procedures, Identifying and protecting stateless persons*, August 2014, available at: http://www.refworld.org/docid/5412a7be4.html.

UN High Commissioner for Refugees (UNHCR), *Statelessness in the Canadian Context: An updated discussion paper*, March 2012, available at: http://www.refworld.org/docid/4facb7a62.html.

UN High Commissioner for Refugees (UNHCR), *The Exclusion Clauses: Guidelines on their Application*, 2 December 1996, available at: http://www.refworld.org/docid/3ae6b31d9f.html.

UN High Commissioner for Refugees (UNHCR), *The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis*, 1990, available at: http://www.refworld.org/docid/53e1dd114.html.

UN High Commissioner for Refugees, *"Lawfully Staying" – A Note on Interpretation* (3 May 1988), available at: http://www.unhcr.org/refworld/docid/42adk93304.html.

UN Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, 85th Sess., 20 April 2006, available at: http://tinyurl.com/o4w2ppe.

United Nations, *Draft Articles on Diplomatic Protection with commentaries*, 2006, available at: http://www.refworld.org/docid/525e7929d.html.

Federal & Provincial Government Documents

Alberta Education, "The Education Act and Regulatory Review", available at: http://education.alberta.ca/department/policy/education-act.aspx.

Alberta Health "Temporary residents and AHCIP" (2015), available at: http://www.health.alberta.ca/AHCIP/temporary-residents.html.

Alberta Health, "Are you eligible for AHCIP? Registration requirements" (2015), available at: http://www.health.alberta.ca/AHCIP/registration-requirements.html.

BC Housing, "Residency Requirements" (2015), available at: http://www.bchousing.org/Options/Subsidized_Housing/Apply/Eligibility/Residency.

Canadian Intellectual Property Office, "What is copyright?" (2 September 2014), available at: http://tinyurl.com/pghlz8l.

Canadian Intellectual Property Office, *Copyright Guide* (30 April 2015), available at: http://tinyurl.com/opmnwam.

CanLearn, "Find Out if you are Eligible for a Student Loan" (23 July 2013), available at: http://www.canlearn.ca/eng/loans_grants/loans/qualify.shtml.

Citizenship and Immigration Canada, "Access to Grant of Citizenship for Stateless Persons Impacted by Bill C-37" (9 April 2010), available at: http://www.cic.gc.ca/english/resources/manuals/bulletins/2010/ob189.asp.

Citizenship and Immigration Canada, "Applying for permanent residence from within Canada: Protected persons and convention refugees (IMM 5205)" (16 September 2014), available at: http://tinyurl.com/p47c6y7.

Citizenship and Immigration Canada, "Changes to citizenship rules as of April 2009" (24 July 2014), available at: http://www.cic.gc.ca/english/citizenship/rules_2009.asp.

Citizenship and Immigration Canada, "Citizenship grants: Statelessness" (16 July 2014), available at: http://www.cic.gc.ca/english/resources/tools/cit/grant/stateless.asp.

Citizenship and Immigration Canada, "Citizenship: Ministerial discretion to grant citizenship in special cases" (27 March 2015), available at: http://tinyurl.com/okdwff7.

Citizenship and Immigration Canada, "Determine your eligibility – Work in Canada" (2 March 2015), available at: http://www.cic.gc.ca/english/work/apply-who-eligible.asp.

Citizenship and Immigration Canada, "Determine your eligibility and coverage type – Interim Federal Health Program", available at: http://tinyurl.com/o97cwoz.

Citizenship and Immigration Canada, "Fee list", (3 March 2015) available at: http://www.cic.gc.ca/english/information/fees/fees.asp.

Citizenship and Immigration Canada, "Find out if your child needs a study permit" (24 March 2015), available at: http://www.cic.gc.ca/English/study/minors-documents.asp.

Citizenship and Immigration Canada, "First Generation Limit and Citizenship by Descent – Clarification for Port of Entry Officers" *Operational Bulletin 133* (17 July 2009), available at: http://www.cic.gc.ca/english/resources/manuals/bulletins/2009/ob134.asp.

Citizenship and Immigration Canada, "Guide 5291 - Humanitarian and Compassionate Considerations" (21 November 2014), available at: http://tinyurl.com/oohyeb3.

Citizenship and Immigration Canada, "Interim Federal Health Program: Summary of Benefits" (3 February 2015), available at: http://tinyurl.com/7xwktnf.

Citizenship and Immigration Canada, "International Mobility Program: Open work permit" (22 December 2014), available at: http://tinyurl.com/ncvl4cn.

Citizenship and Immigration Canada, "OP 2 Processing Members of the Family Class", 14 November 2006, available at: http://tinyurl.com/cl4h8ry.

Citizenship and Immigration Canada, "Permanent resident program: Economic classes" (16 April 2015), available at: http://tinyurl.com/p5hyxwe.

Citizenship and Immigration Canada, "Permanent resident program: Non-economic classes" (16 April 2015), available at: http://tinyurl.com/okm5c38.

Citizenship and Immigration Canada, "The humanitarian and compassionate assessment: Hardship and the H&C assessment" (24 July 2014), available at: http://tinyurl.com/qesunqb.

Citizenship and Immigration Canada, "The humanitarian and compassionate assessment Establishment in Canada" (24 July 2014), available at: http://tinyurl.com/p67tro8.

Citizenship and Immigration Canada, "Understand permanent resident status" (27 November 2014), available at: http://www.cic.gc.ca/ENGLISH/newcomers/about-pr.asp.

Citizenship and Immigration Canada, "Visa and immigration applications" (24 April 2015), available at: http://www.cic.gc.ca/english/information/applications/index.asp.

Citizenship and Immigration Canada, "What is an open work permit?" (9 February 2015), available at: http://www.cic.gc.ca/english/helpcentre/answer.asp?q=176&t=17.

Citizenship and Immigration Canada, *ENF 1 Inadmissibility* (4 September 2013), available at: http://www.cic.gc.ca/english/resources/manuals/enf/enf01-eng.pdf.

Citizenship and Immigration Canada, *ENF 10 Removals* (31 March 2013), available at: http://www.cic.gc.ca/english/resources/manuals/enf/enf10-eng.pdf.

Citizenship and Immigration Canada, *ENF 3 Admissibility, Hearings and Detention Review Proceedings* (29 April 2015), available at: http://tinyurl.com/pxkzc2h.

Citizenship and Immigration Canada, "Terms and definitions related to refugee protection" (25 February 2013), available at: http://tinyurl.com/poqw8et.

Government of Ontario, "Find Information on your Profession" (30 January 2015), available at: http://tinyurl.com/3dyqup9.

Le Protecteur du Citoyen, *Summary Report* (7 November 2014), available at: http://tinyurl.com/pv2sv9w.

Legal Aid Alberta, "Eligibility", available at: http://www.legalaid.ab.ca/help/Pages/Eligibility.aspx.

Legal Aid Ontario, "Getting legal help", available at: http://www.legalaid.on.ca/en/getting/default.asp.

Commission des services juridique, "Services", available at: http://www.csj.qc.ca/sitecomm/W2007English/Main_En_v4.asp.

Legal Services Society, "Legal representation by a lawyer", available at: http://www.lss.bc.ca/legal_aid/legalRepresentation.php.

Ministère de l'Éducation, du Loisir et du Sport, *Education in Quebec: An Overview* (2006), available at: http://tinyurl.com/oet27nr.

Ministry of Education Ontario, "Education Facts, 2013-2014" (22 December 2014), available at: http://www.edu.gov.on.ca/eng/educationFacts.html.

Ministry of Education British Columbia, "Eligibility of Students for Operating Grant Funding" (18 March 2013), available at: http://tinyurl.com/qzrmekv.

Ministry of Education Ontario, "Policy/Program Memorandum No. 136", available at: http://www.edu.gov.on.ca/extra/eng/ppm/136.html.

Ministry of Health British Columbia, "Eligibility and Enrolment?", available at: http://tinyurl.com/p92cayj.

Ministry of Immigration Quebec, Diversity and Inclusion, "List of exemptions" (9 February 2009), available at: http://tinyurl.com/b524u5q.

Passport Canada, "Fees" (20 May 2015), available at: http://www.ppt.gc.ca/info/section6.aspx?lang=eng.

Passport Canada, "Types of Travel Documents" (8 April 2014), available at: http://www.ppt.gc.ca/pptc/documents.aspx?lang=eng.

Service Canada, “Applying for Employment Insurance benefits” (4 September 2014), available at: http://tinyurl.com/nfuzvjm.

Service Canada, “Eligibility Criteria for Parents of Critically Ill Children” (6 June 2013), available at: http://www.servicecanada.gc.ca/eng/sc/ei/pcic/eligibility.shtml.

Service Canada, “Employment Insurance Compassionate Care Benefits” (26 September 2014), available at: http://tinyurl.com/oj7lcjo.

Service Canada, “Employment Insurance Maternity and Parental Benefits” (21 November 2014), available at: http://tinyurl.com/ke76nk2.

Service Canada, “Employment Insurance Sickness Benefits” (19 November 2014), available at: http://www.servicecanada.gc.ca/eng/ei/types/sickness.shtml#eligible.

Service Canada, “Information Sheet for the Canada Pension Plan Retirement Pension” (23 February 2015), available at: http://tinyurl.com/pl8nrqs.

Service Canada, “Information Sheet for the Old Age Security Pension” (3 March 2014), available at: http://tinyurl.com/p9vjlj2.

Service Ontario, “Acceptable identity documents” (2015), available at: https://www.ontario.ca/government/acceptable-identity-documents.

Statistics Canada, “Levels within pre-elementary and elementary-secondary schools, by jurisdiction”(13 December 2010), available at: http://tinyurl.com/ohrzfg9.

Statistics Canada, “Population by year, by province and territory”, (26 September 2014), available at: http://tinyurl.com/acm88up.

Study in Alberta, “How much does it cost?” (2015), available at: http://www.studyinalberta.ca/primary-and-secondary/cost/.

Study in Alberta, “Structure of the Alberta School System” (2015), available at: http://studyinalberta.ca/primary-and-secondary/overview/structure/.

Trillium Lakeland District School Board, “Tuition Fees 2014/2015”, available at: http://tldsb.ca/wp-content/uploads/2013/07/Tuition-Fees-2014-15.pdf.

Other Documents

Canadian Centre on Statelessness, “Stateless Canadians” (2014), available at: http://www.statelessness.ca/canadian-stories.html.

Canadian Council for Refugees, "Canadian Citizenship – 2009 Changes" (February 2009), available at: http://ccrweb.ca/en/citizenship-2009-changes.

Canadian Encyclopedic Digest, Conflict of Laws, Domicile – General Consideration, IV.1 (WestlawNext).

Canadian Federation of Students, "International Students", available at: http://cfs-fcee.ca/the-issues/international-students/.

Canadian Secular Alliance, "Briefing note: Funding religious schools" (14 May 2014), available at: http://tinyurl.com/p8pj5gs.

Centre for Equality Rights in Accommodation, *Human Rights in Housing in Canada: An Advocate's Guide* (2008), available at: http://tinyurl.com/po5wkb9.

Chris Nash, "Still Stateless, still suffering: It's time for European leaders to take action" (29 August 2014), available at: http://tinyurl.com/nk88ja6.

European Network on Statelessness (Caia Vlieks), *Strategic Litigation: An Obligation for Statelessness Determination under the European Convention on Human Rights* (September 2014), available at: http://tinyurl.com/ooblywd.

J. Anthony VanDuzer, *The Law of Partnerships & Corporations*, 3d ed. (Toronto: Irwin Law, 2009).

James C. Hathaway, *The Law of Refugee Status*, 2ed (Cambridge: Cambridge University Press, 2014).

James G. McLeod, *The Meaning of Ordinary Residence and Habitual Residence in the Common Law Provinces in a Family Law Context* (Ottawa: Department of Justice Canada, 2006), available at: http://tinyurl.com/ogmp3co.

Jennifer Wilson, "Faith based schools" (17 September 2007), available at: http://www.cbc.ca/ontariovotes2007/features/features-faith.html.

John Currie, *Public International Law* (Toronto: Irwin Law, 2008).

Kerry Gillespie, "Families caught in religious schools funding controversy" (11 August 2007), available at: http://tinyurl.com/ppdeh2u.

Lorne Waldman, *Immigration and Refugee Protection Act and Commentary* (Toronto: LexisNexis, 2005).

Louis LeBel, "A Common Law of the World? The Reception of Customary International Law in the Canadian Common Law" (2014) 65 UNBLJ 3.

McMillan LLP, *Employment Law in Canada: Federally Regulated Employers* (September 2011), available at: http://tinyurl.com/pbeb3ak.

Miriam Katawazi, "Quebec laws keep undocumented children out of school" (12 September 2014), available at: http://tinyurl.com/k49h4nd.

Nicolas Keung, "OAS benefits denied: Immigrants told to produce residency proofs" (30 July 2012), available at: http://tinyurl.com/mv8zthr.

Nicole LaViolette, "The Principal International Human Rights Instruments to Which Canada has not Acceded", (2006) 24 Windsor YB Access Just. 267.

Social Planning Toronto, *Policy without Practice: Barriers to Enrollment for Non-Status Immigrant Students in Toronto's Catholic Schools* (July 2010), available at: http://tinyurl.com/pthutl7.

Social Planning Toronto, *The Right to Learn: Access to Public Education for Non-Status Immigrants* (June 2008), available at: http://tinyurl.com/nd9ftv6.

Xiaojing Qin, "Foreigners' Right to Acquire Land under International Economic Agreements" (2011) 8 Manchester J. Int'l Econ. L. 57.

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