How the live-in caregivers program can benefit foreign caregivers as well

by Shirish Chotalia

The Live-in Caregivers Program (LCP) provides a fair and accessible immigration avenue to foreign caregivers, in particular women. Concurrently it meets the needs of Canadian women who, in spite of maintaining full-time careers, continue to disproportionately take responsibility for child and home care.

These are the LCP's current requirements:

- LCP applicants must demonstrate the successful completion of a Canadian high school education or equivalent.
- They must show six months' full-time training or 12 months' experience in paid employment in a field related to the job sought in Canada as a live-in caregiver.
- Such experience may have been gained through training or experience in early childhood education, geriatric care, pediatric nursing or first aid.
- Applicants must be able to speak, read and understand either English or French.

In Canada, unlike most other countries, LCP applicants are eligible to apply for permanent resident status in Canada after a period of 36 months. The LCP thus allows immigrant women who otherwise would not qualify under existing immigration categories to enter Canada.

This area of the law has come to recognize the vulnerability of a number of LCP workers. For example, in *Turingan v. Minister of Employment and Immigration* (1993), 72 F.T.R. 316, the court ruled that the Department of Immigration must take a "flexible and constructive" approach in facilitating LCP workers for landing once they complete their live-in work requirements.

The court observed that the LCP's primary purpose is to encourage people to come to Canada and fill a void in our labour market. As consideration for their commitment to work in the domestic field, the Program's participants are virtually guaranteed permanent residence status, provided they work the required 24-month period.

In *Bernardez v. Canada* (1995), 101 F.T.R. 203, Canadian employers directed their nanny not only to work as a live-in domestic, but also to clean their store on an occasional basis. The adjudicator at the deportation inquiry found that the applicant was "an obedient servant who feared dismissal and thought this work was part of her duties." However, the adjudicator determined that she had violated the law and ordered her to leave the country within 30 days.

The court allowed the application for judicial review, holding that the test for employment was not narrow, technical or restrictive, but depended on the nature of the work and the circumstances under which it was performed. The court said the applicant was never advised of the type of conduct that was unauthorized and was never given a chance to correct the impugned conduct.

Similarly, in *Peje v. Canada* [1997] F.C.J. No. 274 (T.D.), the court sympathized with the Filipino LCP. Peje was employed by various employers for a period of approximately 17 months during her first three years in Canada. The program required the completion of 24 months' work during the first three years of being in Canada.

However, the applicant developed health problems that prevented her from working. She first relied on friends for aid and later turned to Social Services for assistance. She reported that Immigration refused her applications for work permits.

The court held that "similarly [to *Turingan*], this applicant appears to have been trapped in a situation where she was afraid to work without the required authorization, and yet unable to obtain the necessary permit from the minister. The respondent surely must bear some portion of the responsibility for her failing to meet the conditions of the program."

The court set aside the decision to disqualify the applicant under the domestic program and directed that urgent consideration be given to the issuance of a work permit in conformity with the law and these reasons.

However, it is important to note *Laluna v. Canada,* [February 2000], an application for judicial review of a decision to refuse permanent residence on the grounds that the live-in caregiver had only worked 21 months instead of the required 24 months.

The court took a more rigid position, confirming the need to meet the statutory requirements and upholding the immigration officer's application of the regulation.

Practitioners should be aware that some live-in caregivers face problems such as abuse, incorrect payment of wages and exploitation. Seldom are the employers brought to task for such violations.

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Un programme équitable pour les aides familiaux résidants étrangers

Le Programme concernant les aides familiaux résidants (PAFR) offre aux aides familiaux étrangers, et notamment les femmes, un moyen accessible et équitable d'immigrer au Canada. Pour y être admissible, il faut satisfaire aux exigences ci-dessous :

- avoir terminé avec succès l'équivalent des études secondaires prévues dans le système scolaire canadien;
- avoir suivi une formation pendant six mois, à temps plein, ou avoir acquis 12 mois d'expérience dans un emploi rémunéré dans un domaine ou une profession liés à l'emploi que vous désirez obtenir en tant qu'aide familial résidant;
- avoir une formation ou expérience en puériculture, en gérontologie, en pédiatrie ou dans le domaine des premiers soins; et
- la capacité de parler, de lire et de comprendre l'anglais ou le français.

Le PAFR permet à des femmes immigrantes, autrement inadmissibles en vertu des catégories existantes, d'entrer au Canada.

Dans la cause *Turington c. Ministère de l'Emploi et de l'Immigration* (1993), le tribunal a ordonné au Ministère d'adopter une attitude « flexible et constructive » envers ces personnes une fois qu'elles se sont conformées aux exigences de travailleur résidant.

Les praticiennes et praticiens doivent aussi comprendre que certains aides familiaux résidants doivent faire face à des situations d'agression, de non-paiement de plein salaire et d'exploitation. Il est rare que des employeurs soient obligés de rendre compte de telles violations devant un tribunal.

En dépit du besoin de l'améliorer, le programme rend service aux femmes immigrantes et tous les efforts doivent être faits pour le rendre plus accessible.

1999-2000 an extremely busy time for our Section

By Elizabeth Chow Bryson, Past Chair, Citizenship & Immigration Law Section

Meetings, consultations, elections and the preparation of numerous submissions, briefs and letters kept members of the National Citizenship and Immigration Section busy during 1999-2000.

At a special planning meeting in Ottawa in September 1999, the Section's priorities were debated and determined, helping to focus our involvement in a variety of issues in the coming year.

Elizabeth Chow Bryson, Richard Kurland and Betsy Kane attended the Section's annual consultation with Department of Justice officials in October 1999. The primary focus of our discussion was the development of alternative dispute mechanisms.

David Matas and Ben Trister were chosen to sit on the reconstituted Federal Court Bench and Bar Liaison Committee, where they have been providing valuable insights into the realities of immigration practice before the Federal Court.

The Department of Immigration formed a CIC-Immigration Practitioners Overseas Operations and Policy Committee to develop solutions for overseas practice issues. Members of the committee include lawyers, consultants and senior department officials. National executive members actively represent the Section on this committee. The department is continuing regular meetings of this highly effective group in various Canadian cities.

Other activities of the Section over the past year include:

- Our members testified before the Parliamentary Committee on Bill C-16 (*Citizenship of Canada Act*).
- Elizabeth Bryson and David Davis attended the National Sections Council meetings in Ottawa in September 1999 and in Brandon in February 2000, respectively.
- National executive members met with senior Department officials in Ottawa for an annual consultation.

Our Section's preparation and submission of briefs and letters over the past year has been phenomenal. The list includes submissions and letters to the department, to the Federal Court and to the Immigration & Refugee Board (IRB) on:

- the Skilled Worker Selection Model;
- legal counsel for Fujian migrants;
- immigrant selection issues;
- IRB videoconferencing;
- Canada-based immigration processing;
- draft guidelines on the exercise of discretionary jurisdiction in Removal Order appeals;
- Federal Court immigration rules;
- detention under the *Immigration Act*;
- Bill C-16: *Citizenship of Canada Act*; and
- Bill C-31: *Immigration & Refugee Protection Act.*

Looking back, 1999-2000 was an extremely busy year for our National Executive. 2000-2001 continues to be the same. I extend my heartfelt appreciation to everyone who contributed to the excellent and substantial work that we, as a national Section, accomplished during my term as your Chair.

PRÉCIS

1999-2000, une année chargée !

par Elizabeth Chow Bryson
présidente sortante

Réunions, consultations, élections, préparation de nombreux mémoires et lettres : les membres de la Section nationale du droit de l'immigration et de la citoyenneté ont été fort occupés au cours de la dernière année.

Lors d'une réunion spéciale de planification à Ottawa, en septembre 1999, nous avons débattu et déterminé les priorités de la Section. Nous avons ainsi ciblé notre action pour l'année.

Richard Kurland, Betsy Kane et moi-même avons participé à la réunion annuelle de la section et du ministère de la Justice en octobre 1999, portant principalement sur les mécanismes extrajudiciaires de règlement des conflits.

David Matas et Ben Trister ont été élus au Comité de liaison entre la magistrature de la Cour fédérale et le Barreau, fraîchement reconstitué, et y font valoir avec beaucoup d'à-propos les réalités du droit de l'immigration.

Le Ministère a formé un comité, avec les praticiennes et les praticiens en droit de l'immigration, sur les politiques et opérations à l'étranger. Des avocates, avocats, consultantes, consultants et cadres supérieurs du Ministère siègent au comité, y compris des membres de l'Exécutif de notre Section. Le Ministère organise des réunions régulières du comité dans plusieurs villes canadiennes, compte tenu de son efficacité comme forum pour identifier et régler des problèmes.

Au cours de la dernière année, la Section a organisé et participé à plusieurs activités y compris :

- une comparution devant le comité parlementaire sur le projet de loi C-16 (*Loi sur la citoyenneté canadienne*);
- ma participation et celle Davis Matas à la réunion du Conseil des sections nationales, à Ottawa, en septembre 1999, et à Brandon (Manitoba) en février 2000;
- la participation des membres de l'Exécutif national à la réunion annuelle avec des représentantes et représentants du ministère de la Justice, à Ottawa.

La Section a en outre préparé et présenté une quantité phénoménale de mémoires et de lettres au cours de la dernière année. En examinant de près les activités de l'année 1999-2000, on voit facilement à quel point l'année a été chargée pour notre Exécutif national. Je remercie de tout coeur tous ceux et toutes celles qui ont contribué à l'excellent travail que nous avons, à titre de section nationale, accompli au cours de mon mandat à la présidence.

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In spite of the need to improve the program, the LCP provides substantial and meaningful opportunities to immigrant women to obtain permanent residence status in Canada.

Every effort should be made to make this program accessible to applicants and Canadians.

Note: This article is an excerpt from a paper written by Ms. Chotalia. For the full document, please contact her directly at shirish.chotalia@ualberta.ca.