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# BASIC PRINCIPLES

**IRPA objectives – broad and contradictory:**

|  |  |
| --- | --- |
| 3(1)(a) Maximize social, cultural, economic benefits of immigration  (b) Enrich social & cultural fabric of society  (b.1) Support official minority language communities  (c) Support strong and prosperous Canadian economy  (d) Reunite families  (e) Promote successful integration into Canada  (f) Support attainment of immigration goals | (g) Facilitate temporary entry for trade, commerce, tourism, education, science  (h) Protect public health, safety, maintain security  (i) Promote intl justice and security by fostering respect for human rights and denying access to criminals or security risks  (j) Cooperate with provinces for better foreign credential recognition, rapid integration |

**Application of IRPA:**

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| 3(3)(a) Furthers domestic and international interests  (b) Promote accountability and transparency  (c) Facilitates cooperation between levels of government, between states, and with organizations | (d) Consistent with Charter  (e) Supports linguistic minority communities  (f) Complies with international human rights instruments to which Canada is signatory |

* ***De Guzman*** – limited to international instruments that are binding (i.e., ratified or don’t req ratification); international law is an aid to interpretation, not basis for remedy

### THEORETICAL DEBATES

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| **Closed Borders** (Waltzer)   * Primary good we distribute to one another is membership in some human community, and membership can only be distributed by taking people in or refusing to take people in * If we allow the unimpeded entry of strangers, can’t preserve community/practice self-det * Right to deny entry limited in three ways: must provide aid to needy strangers; must allow anyone admitted entry the right to acquire citizenship; new states may not expel existing inhabitants | **Open Borders** (Carens)   * If people were forced to govern their society from behind a veil of ignorance, knowing nothing about their own position in that society, they would all choose open borders * Waltzer is wrong because formal closure of borders is not required for distinctiveness (e.g. provinces/states) * Membership will have certain rights and obligations, but should be open to all who wish to join, and no distinction should be made between members and non-members |
| **Democratic Theory and Border Coercion** (Abizadeh)   * According to democratic theory, state’s coercion should apply to all those, and only those who are affected = whether borders open/closed depends on the opinion of everyone affected * Non-state members are affected because they are denied entry if borders are closed | **Political Equality** (Blake)   * Prospective immigrant in a diff relationship with state than citizen; seeking to be subject to the state’s coercion, so entitled to thinner pkg rights * It is appropriate that the state consider whether the applicant will be economically successful and integrate politically before granting access |
| **Feminist Analyses** (Dauvergne, Macklin)   * Feminization of global migration has coincided with increase in low-skilled migration * Consider categories of immigration: family overwhelmingly favours women; economic and refugee favour men * Consider types of temporary work permits: many low skill categories (sex, childcare, housework) are feminized | **Immigration Economics** (Trebilcock, Sweetman)   * Focuses on whether immigration improves the economy in terms of wages, GDP * Public concern focuses on labour market effects and increased fiscal burdens * But there is a lack of a counterfactual – we don’t know what the economy would look like without immigrants |

### IMMIGRATION/ADMIN LAW

**Obtaining JR** – A72(2)(a) must exhaust internal recourse; A72(1) submit application for leave, A72(2)(b) w/in 15 days if in Canada, 60 days if outside. *FCA* 2(1) FC has jurisdiction

**Grounds for JR** (*FCA* 18.1(4)) – No jurisdiction; PF violation; erred in law; erred in fact; fraud or perjured evidence; any other breach of law.

**Appeal to FCA** *–* A74(d) only if J certifies that a **serious question of general importance** involved and states q

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| **Reasonableness and reasons**   * ***Newfoundland Nurses –*** DM doesn’t have to make explicit finding on each element, J can infer at review * ***Komolafe*** – if no explanation and unclear why decision reached, duty of PF not met | **Weight**   * ***Khosa*** – can’t second-guess weighing of relevant factors by IAD * ***Suresh*** – can’t second-guess weighing of relevant factors by exercise of ministerial discretion | |
| **Kinds of Non-Statutory Rules:** |  | |
| *Ministerial Instructions*  🡪 within Minister’s ambit of power, so not statutory instruments but have the force of law (A2(2)). May set any limit on number of applications/requests, even 0, as long as made in gf and consistent w scheme (***Esensoy***) | | *Operations Manual*  **🡪** written by IRCC to provide guidelines about how to interpret IRPA/IRPR. Doesn’t have the force of law! |

### IMMIGRATION/CONSTITUTIONAL & INTL LAW

**Charter** – applies to all people physically in Canada (***Singh***); Cdn officials must comply with Charter in actions outside Canada where they aren’t governed by intl/foreign law (***Hape***)

S 6 – distinction btwn citizens/non-citizens; only citizens have right to enter, leave, remain (***Chiarelli***)

S 7 – deportation doesn’t engage s 7 though some features of it may (***Charkaoui***) e.g. security certificates; deportation to torture will generally violate the PFJ, unless justified in balancing or under s 1 (***Suresh***) 🡪 **increasing emphasis on natl security**

S 15 – citizenship status is an analogous ground of discrimination (***Andrews***), but immigration isn’t (***Toussaint***)

**International Law as remedy –** if exhaust all domestic remedies, can try to bring to intl bodies, e.g., UN Human Rights Tribunal (***Pillai***); UN Committee Against Torture (***Enrique Falcon Rios***); Inter-American Commission on Human Rights (***John Doe***) – but not very successful because no guarantee of implementation!

# ADMISSION

## ENTRY

**1. Application**

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| A11(1) A foreign national must, **before entering Canada**, apply to an officer for a visa for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.  A7(1) A foreign national may not enter Canada to remain on a temporary basis without first obtaining a **temporary resident visa**.  (2) Subsection (1) does not apply to a foreign national who  (a) is **exempted** under Division 5 of Part 9 from the requirement to have a temporary resident visa;  (b) holds a **temporary resident permit** issued under subsection 24(1) of the Act; or  (c) is authorized under the Act or these Regulations to re-enter Canada to remain in Canada. |

**🡪 Visa exemptions – by nationality,** R190:

|  |
| --- |
| (a) are a citizen of Andorra, Antigua and Barbuda, Australia, Austria, Bahamas, Barbados, Belgium, Brunei Darussalam, Chile, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Federal Republic of Germany, Finland, France, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, Netherlands, New Zealand, Norway, Papua New Guinea, Poland, Portugal, Republic of Korea, Samoa, San Marino, Singapore, Slovakia, Slovenia, Solomon Islands, Spain, Sweden or Switzerland; (b) are  (i) a British citizen, (ii) a British overseas citizen who is re-admissible to the United Kingdom, or  (iii) a citizen of a British overseas territory who derives that citizenship through birth, descent, naturalization or registration in one of the British overseas territories of Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Montserrat, Pitcairn Island, Saint Helena or Turks and Caicos Islands; or  (c) are a national of the United States or a person who has been lawfully admitted to the United States for permanent residence. |

**OR** by documents (e.g. diplomats, etc) **OR** purpose of entry (e.g. armed forces)

**Need** **valid document**, R52(1), UNLESS

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| R52(2) Subsection (1) does not apply to  (a) **citizens of the United States**; (b) persons seeking to enter Canada from the United States or St. Pierre and Miquelon who have been lawfully admitted to the United States for permanent residence;  (c) residents of Greenland seeking to enter Canada from Greenland; …  (e) members of the **armed forces** of a country that is a designated state;  (f) [flight crew person with licence]; or (g) [seafarer with ILO ID document part of crew on the vessel]. |

**2. Visa Document** – issued outside of Canada at visa office for purpose of admission; PF admissible but not guarantee

**3**. **Port of Entry** – A18(1) – must present self at point of entry for final det of whether will be admitted

**4 requirements for temporary resident visa:**

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| A22(1) A foreign national becomes a temporary resident if an officer is **satisfied that the foreign national has applied** for that status, has **met the obligations set out in paragraph 20(1)(b)**, is **not inadmissible** and is **not the subject of a declaration made under subsection 22.1(1)**. |

**4. Permits** – A30(1) blanket prohibition on work/study unless have permission (written auth/permit)

### TEMPORARY RESIDENT VISA

R180 – TRV only if you meet criteria at time of application AND at examination on entry:

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| R179 An officer shall issue a temporary resident visa to a foreign national if, following an examination, it is established that the foreign national  (a) has applied in accordance with these Regulations for a temporary resident visa as a member of the **visitor, worker or student class;**  (b) **will leave Canada** by the end of the period authorized for their stay under Division 2; | (c) **holds a passport or other document** that they may use to enter the country that issued it or another country;  (d) **meets the requirements** applicable to that class;  (e) is **not inadmissible**;  (f) meets the requirements of subsections 30(2) and (3), if they must submit to a **medical examination** under paragraph 16(2)(b) of the Act; and  (g) is not the subject of a declaration made under subsection **22.1(1)** of the Act. |

* **Place of Application** – R11(2) – application must be made outside of Canada where (a) applicant is present and has been lawfully admitted, OR (b) country of nationality, or if stateless, country of habitual residence, other than somewhere they weren’t lawfully admitted
* A22.1(1) – *Galloway amendment*: Minister may deny admission to FNs as TRs based on public policy
* R185 – officer may impose, vary, or cancel specific conditions on temporary resident

**Medical Examinations –** R30(1)(iii) – medical examination if work/study/TRV for longer than 6 consecutive months AND stayed somewhere for 6 consecutive months in 1 year prior that has higher incidence of srs communicable disease than Canada

* R30(2) – new medical examreqd if, **after being auth’d** to enter/remain in Canada, they stayed somewhere for more than 6 mo that has higher incidence of srs comm disease than Canada
* R30(3) – must hold **med certificate** that indicates health condition not likely to be danger to public health/safety and not reasonably expected to cause excessive demand

**Intention to leave –** A20(b) every FN trying to become TR must establish that they “will leave Canada by the end of the period authorized for their stay”

* **Dual intent –** A22(2):

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| A22(2) An intention by a foreign national to become a permanent resident **does not preclude them** from becoming a temporary resident if the officer is satisfied that they will leave Canada by the end of the period authorized… |

**Khatoon v Canada (C&I)** (2008) – example of unreasonable finding

FACTS: JR of refusal of TRV in visitor class bc found wouldn’t leave Canada at end of stay. Son w/o status so assumed she might do the same; said elderly widowed Pakistani women normally live with sons; only had gone to Saudi, didn’t count as intl travel. ANALYSIS/RATIO: Patently unreasonable finding on facts. Look to, e.g., $, family status, immigration status in country of origin, ec/political conditions, obligations at home.

**Expiry/extension** – R181(1) may apply for extension of TRV if application made before expiry; gets *implied status*

**Loss of temporary resident status** – A47 (a) at end of period authorized; (b) if determined by officer that failed to comply with reqs of Act; (c) on cancellation of TRP

***Restoration of status***: 182(1) if apply within 90 days of losing status and comply w other reqs, may restore TR status. ***Ozawa***: Restoration has legal effect of curing any breached reqs in original TRV

### VISITORS

**Types of visitor visas –**

1. **Single entry**
2. **Multiple entry** (max validity = validity of passport)
3. **Transit**
4. **Supervisa** (parent and grandparent) – can’t access healthcare; valid 10 years and may stay up to 2 years without needing to renew, but required to do healthcare check and purchase insurance. Reqs letter of financial support by applicant’s Canadian family

### TEMPORARY RESIDENT PERMIT

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| A24(1) A foreign national who, in the opinion of an officer, is inadmissible or does not meet the requirements of this Act becomes a temporary resident if an officer is of the opinion that it is justified in the circumstances and issues a **temporary resident permit**, which may be cancelled at any time. |

* “exception” class – when found inadmissible or otherwise don’t comply with *IRPA*. **TEST**: the need to enter/remain is compelling + need outweighs any risk to Cdns/Cdn society (look to intention of legislation, reason they’re coming)
* A24(2) don’t become TR until examined upon arrival
* **Valid until?** R63(a) permit cancelled, (b) permit holder leaves Canada w/o getting auth to re-enter, (c) period of validity expires, or (d) 3 years elapses from date of validity
* **Can apply for work/study permit inland if TRP valid for at least 6 months:**
  + R199 – work permit
  + R215(1)(e) – study permit
  + R208 – work permit if become temporarily destitute while holding TRP

### STUDY PERMITS

Require both a TRV and a study permit:

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| --- |
| A30(1) A foreign national may not work or study in Canada unless authorized to do so under this Act.  R216(1) Subject to subsections (2) and (3), an officer shall issue a study permit to a foreign national if, following an examination, it is established that the foreign national  (a) **applied for it** in accordance with this Part;  (b) **will leave Canada** by the end of the period authorized for their stay under Division 2 of Part 9;  (c) **meets the requirements** of this Part;  (d) [meets med exam reqs] **if they must submit to a medical examination** under paragraph 16(2)(b) of the Act; and  (e) **has been accepted to undertake a program of study at a designated learning institution**. |

* **Restrictions**:

R219 – must have written acceptance letter from designated learning institution

R220 – must have suff financial resources (w/o obtaining employment in Canada) to pay her tuition, maintain self and any accompanying family members, and pay transportation costs to Canada

R221 – must not have previously engaged in unauthorized work/study or failed to comply w condition of permit, EXCEPT IF:

More than 6 months have passed

Unauth activity re failing to abide by conditions, engaging in prohibited work etc

If person was subsequently issued TRP

* R220.1(1) Study permit holder must enrol at designated institution and remain enrolled until their complete their studies and actively pursue course/program BUT post-secondary intl students may transfer w/o applying for change to conditions, unless officer imposed conditions under R185
* **Place of Application** – R213 general rule is **from abroad**, but
  + **Port of Entry** – R214 – can apply at PoE if (a) National/PR of US; (b) lawfully admitted to US for PR; (c) resident of Greenland, or (d) resident of St. Pierre and Miquelon.
  + **Inland** – R215 – (a) hold study permit; (c) hold work permit; (d) subject to unenforceable removal order; (e) hold TRP valid for at least 6 mo …

**Babu v Canada (C&I)** (2013) – example of denial of admission

FACTS: Babu citizen of Pakistan, unsuccessfully applied for Cdn study permit 3 times in past 5 yrs -- refused most recently bc officer not satisfied he'd leave. Hadn’t studied for 4 years, said had been working but no savings/property, and that Hindus discriminated against at home. HOLDING: not unreasonable abt reasoning that this weighed against him; alternate explanation that B not genuinely focused on IT education. Discrimination arg works against him re likelihood of returning after studies

**Expiry** – R222(1) on the first of (a) 90 days after day on which permit holder completes studies; (b) day on which removal order becomes enforceable; (c) expiry

**Renewal** – R217(1) may apply for renewal if (a) done before expiry and (b) complied w conditions

**Exemptions to study permits** – R188(1)(a) diplomat; (b) armed forces; (c) if program is 6 months or less and will be completed within period authorized for stay; (d) Indian

**Students and work** – R186(f) can work on campus without work permit

R186(v) can work off campus without work permit (20hrs/week, FT only during breaks)

R208 can obtain work permit if temporarily destitute

\* *Post-grad work permit program* – allows to get experience/Cdn work exp if intending to apply for PR while staying as TR. Must have studied and graduated from 8mo+ program and apply within 90 days

## TEMPORARY FOREIGN WORKERS

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| R2 “work” = an activity for which wages are paid or commission is earned, or that is in direct competition with the activities of Canadian citizens or permanent residents in the Canadian labour market. |

### WORK PERMITS

**When/where to apply:**

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| --- |
| R197 A foreign national may apply for a work permit at any time **before entering** Canada.  R198(1) …may apply for a work permit **when entering Canada** if [visa-exempt].  R199 …may apply for a work permit **after entering Canada** if they  (a) hold a work permit; … (c) hold a study permit; (d) hold a temporary resident permit … that is valid for at least six months;  (e) are a family member of a person described in any of paragraphs (a) to (d) (f) are in a situation described in section 206 or 207  (g) applied for a work permit before entering Canada and the application was approved in writing but haven’t been issued the permit  … [some others that are less likely] |

**Work permit criteria** – R200(1)(a) submit proper application; (b) satisfy officer will leave (unless PR application); (c) has a job offer and an LMIA provided by ESDC, if one is required

*Exemptions to LMIA*

R206 – refugee claim or unenforceable removal order w no other means of support

R207 – member of caregiver, spouse/CL partner class, protected person, or H&C

R208 – student visa and temporarily destitute

R204 – agricultural work pursuant to intl agreement

R205 – work of significant social, cultural, economic benefit to Cdns/work of religious or charitable nature. ***Da Silva*** – only to be used in exceptional cases, teaching capoeira isn’t one

**LMIA –** R203(1) LMIA must assess whether genuine job offer; whether employment of FN will have neutral/positive effect on labour market; that issuance of work permit not inconsistent w/ fed-prov agreement; that employer hasn’t, for 6 yrs, underpaid any FN if made similar offer

R203(3) – “neutral or positive effect on labour market” = ESDC considers:

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| * Work will result in direct job creation/retention * Work will result in transfer skills/knowledge to Cdns * Will fill labour shortage | * Wages/working conditions suff to attract Cdns * Employer made reasonable efforts to hire/train Cdns * Employment won’t affect any labour dispute |

🡪 R203(1.01) – presumption that employment of FN won’t have positive/neutral effect on labour market if reqs ability to communicate in language other than Eng/Fr (***Construction and Specialized Workers Union***)

**National Occupational Classifications –** may restrict to particular NOC; lays out skill levels and duties required for particular job

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| **Randhawa** (2006)  FACTS: Er kept saying couldn’t follow hygiene reqs, didn’t train him. HOLDING: reasonable expectation that app would satisfy NOC reqs, but some job orientation should be provided | **Singh Grewal** (2013)  FACTS: officer used NOC duties to measure ability to do job even tho duties not required for job. HOLDING: reasonable to do so, guidelines say don’t limit assessment to LMO |

**Restrictions** **on work permits** – R200(3)

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| (a) unable to perform work sought  (c) work will adversely affect labour dispute  (d) live-in caregiver who doesn’t meet R112 reqs  (e) unauthorized work or study, unless  (i) 6 mo elapsed  (ii) unauth’d due to not complying w conditions deemed inconsequential  (iii) R206 destitute applies, or (iv) issued a TRP | (f.1) unpaid fees  (g) worked for 4+ years, unless  (i) 4 years has passed  (ii) work of social/cult/ec benefit  (iii) work pursuant to intl agreement incl ag work  (g.1) employer of sexual services  (h) employer is non-compliant |

**Exemptions from work permit requirement –** generally, must be primarily paid outside Canada from company located principally outside of Canada

R186(a), 187 – business visitors (specific examples in 187(2), (3))

R186 – performing artists, athletes, news reporters, public speakers, clergy, judges, referees, expert witnesses, investigators, health care students, civil aviation inspectors, full-time students

### STREAMS

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| **1. High wage positions** | **2. Low wage positions** |
|  |  |
| **3. Primary Agricultural stream**  SAWP – recruitment of seasonal Ees pursuant to bilateral agreements btwn Canada and Mexico (or other listed Caribbean countries)  🡪 max 8mo; Er reqd to provide 240hrs work/6wks. Ers responsible for almost all costs and expenses | **4. Caregiver class**  R112 + MIs – (a) apply before entering Canada. (b) Require secondary school or equivalent; (c) at least 6mo FT training in classroom or 1 yr FT paid employment (incl at least 6mo continuous with one Er) within 3 yrs before application; (d) English or French; (e) employment K with future employer  🡪 valid for at least 6mo and up to 4 years. Er-led; find Ee, apply, get LMIA, then caregiver gets WP and makes way to Canada |

# PERMANENT RESIDENCY

### ENTRY

**PR Visa (outside Canada)** – need visa to present at PoE

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| A11(1) A foreign national must, **before entering** Canada, apply to an officer for a visa or for any other document required by the regulations. … (2) The officer may not issue a visa or other document to a foreign national whose sponsor does not meet the **sponsorship requirements** of this Act.  R6 A foreign national **may not enter Canada to remain on a permanent basis without first obtaining a permanent resident visa.** |

**🡪 Criteria for PRV** – R70

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| An officer shall issue a permanent resident visa to a foreign national if, following an examination, it is established that  (a) the foreign national has applied in accordance with these Regulations for a permanent resident visa as a member of a class referred to in subsection (2);  (b) the foreign national is coming to Canada to establish permanent residence;  (c) the foreign national is a **member of that class**;  (d) the foreign national **meets the selection criteria and other requirements** applicable to that class; and  (e) the foreign national and their family members, whether accompanying or not, are **not inadmissible**. |

* 70(2) classes are family class, economic class, Convention refugees
* **Place of application** – R11(a) country where applicant residing and lawfully admitted for at least a year, OR (b) country of nationality, or if stateless, country of habitual residence other than somewhere they weren’t lawfully admitted

**PR Status (inland)** – R72(1) same criteria, but R72(2) narrower classes: LCI class, spouse/CL partner in Canada class, protected TR class, and R72(4) any accompanying family members who are not inadmissible

* **Place of application to remain** – R11(3) at Case Processing Centre that serves applicant’s place of habitual residence

### RIGHTS AND OBLIGATIONS

**Residency obligation** – A28(1) residency obligation wrt every 5 year period

28(2)(a) If for at least 730 days in 5 year period, they are

1. Physically present
2. Outside Canada accompanying Cdn citizen spouse/CL partner or parent of Cdn citizen child
3. Outside Canada employed on FT basis by Cdn business or in public service
4. Outside Canada accompanying PR spouse/CL partner/parent of PR child employed as above

\*\* note R61 further interpretation wrt Cdn business, employment/accompaniment outside Canada, etc

**Loss of Status**:

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| A46(1) A person loses permanent resident status (a) when they **become a Canadian citizen**;  (b) on a final determination of a decision made outside of Canada that they have **failed to comply with the residency** obligation under section 28; (c) when a **removal order** made against them comes into force;  (c.1) on a final determination under subsection 108(2) that their **refugee protection has ceased** for any of the reasons described in paragraphs 108(1)(a) to (d); (d) on a final determination under section 109 to vacate a decision to allow their claim for refugee protection or a final determination to vacate a decision to allow their application for protection; or  (e) on approval by an officer of their application to **renounce** their permanent resident status. |

## FAMILY CLASS

#### ACCOMPANYING FAMILY MEMBER (FAMILY MEMBERS)

Where principal applicant admitted under economic, family or humanitarian class, accompanying family members don’t need to meet reqs of class under which you entered

**Eligible family members** – R1(3) *family member* means (a) spouse/CL partner; (b) dependent child of person or person’s spouse/CL partner; (c) a dependent child of dependent child under (b)

🡪 narrow class of eligible family members

#### SPONSORSHIP (FAMILY CLASS)

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| A12(1) A foreign national may be selected as a member of the **family class** on the basis of their relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident.  A13(2) A Canadian citizen or permanent resident, or a group…may **sponsor** a foreign national, subject to the regulations. |

* **Eligible family members** – R117(1)

|  |  |
| --- | --- |
| (a) Spouse, CL/conjugal partner  (b) Dependent child of sponsor  (c) Sponsor’s mother/father  (d) Sponsor’s grandparent  (f) Orphan who is under 18, and not married/CL partner, who is sibling, child of sponsor’s sibling, or grandchild of sponsor | (g) person under 18 who sponsor intends to adopt in Canada  (h) a relative if sponsor doesn’t have a relative in the above categories who is a Cdn citizen/Indian/PR, OR whose PR application sponsor may otherwise sponsor [wild card relative if nobody else – policy basis] |

### SPOUSAL CLASS

**Inland Applications –** if FN is residing in Canada when relationship commences, legislated exemption to req that must apply for PR from outside Canada.

**Requirements** –R124(a) must cohabit; (b) must have TR status in Canada; (c) must be subj of sponsorship application

**Restrictions** – R125 e.g. spouse under 18, existing sponsorship undertaking for different spouse, at time of marriage the spouse was married to someone else, if have lived apart for 1 year and now with other people, etc

**Xuan v Canada (MCI)** (2013) – cohabitation requirement

FACTS: CBSA investigation of pair. Part of inland class, married, but drivers’ licences had different addresses. A couldn’t produce spouse’s toothbrush, said his clothes in boxes bc she was neater. HOLDING/RATIO: **separation must be temporary and short**. Officer had discretion to assign greater weight to home visit than joint interview later; though unnecessary for officer to conclude joint interests not consistent with marriage, didn’t meet cohabitation req so JR dismissed.

**Exclusions from family relationships** – R117(9)

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| (a) Spouse, CL/conjugal partner under 18  (b) Spouse, CL/conjugal partner and sponsor has existing sponsorship undertaking  (c) FN is spouse and  (i) sponsor or FN was married to someone else at time of marriage, OR  (ii) sponsor has lived apart from FN for at least 1 year, AND (A)/(B) new partners | (c.1) at time of marriage ceremony, one or both spouses not physically present  (d) sponsor previously made application for PR and become PR and, at time of that application, FN was a non-accompanying family member of sponsor and wasn’t examined |

**Spouses – Valid Marriage**

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| R1(2) *marriage* - in respect of a marriage that took place outside Canada, means a **marriage that is valid both under the laws of the jurisdiction where it took place and under Canadian law**. |

* Essential validity – legal capacity to get married, e.g., already married? First cousin? Polygamy? Assessed according to both jurisdictions.
* Formal validity – technical aspects of ceremony all OK? Assessed wrt where marriage took place.

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| **Agha v Canada (MCI)** (2008) – contact  FACTS: Refugee, arrange married over phone (no longer OK). Hadn’t met in person  HOLDING/RATIO: refugee so couldn’t go there, wife couldn’t come w/o visa; VO has **duty to consider this relevant evidence** | **Amin v Canada (MCI)** (2008) – foreign divorce  FACTS:married in Pakistan, sponsored wife for PR, religious dissolution of marriage, Pakistan says new marriage OK. Remarried in Pakistan, tried to sponsor new wife. HOLDING/RATIO: **if unlawful divorce, next marriage polygamous and thus invalid** |

* ***Gure*** – if rejected on polygamy, can’t just divorce one of the wives; defn of marriage doesn’t include anyone who *at any given time* was spouse of more than one person. + ban under 117(9)(c)(i)

**Common Law Partners – Cohabitation requirement**

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| R1(1) *common-law partner* means, in relation to a person, an individual who is cohabiting with the person in a conjugal relationship, having so **cohabited for a period of at least one year**.  1(2) For the purposes of the Act and these Regulations, an individual who has been in a conjugal relationship with a person for at least one year but is **unable to cohabit with the person, due to persecution or any form of penal control, shall be considered a common-law** partner of the person. |

**Conjugal Partners –** *Guidelines*: used for exceptional circs where sponsor can’t cohabit with FN partner due to immigration barrier or otherwise. Sexual relations are necessary though not sufficient condition

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| R2 *conjugal partner* means, in relation to a sponsor, a foreign national **residing outside Canada** who is in a conjugal relationship with the sponsor and has been in that relationship for a period of at least one year |

🡪 ***M v H*** (1999) — SCC **--****factors for conjugal partnership**:

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| * shared shelter (live in same home, sleeping arrangements) * sexual and personal behaviour (fidelity, commitment) * service (conduct and habit wrt household) | * economic support (financial arrangements, ownership of property) * children (attitude and conduct re kids) * societal perception of the two as a couple * social activities (attitude/conduct in comm) |

**Macpagal v Canada (MCI)** (2004) – IAD – use of M v H factors to find conjugal partnership

FACTS: PR met Phil citizen, got married after 2 yrs knowing and lived together for 3 wks. Keep in contact over phone. Arguing that conjugal relationship. ANALYSIS: **Consider M v H factors, keep in mind specific immigration setting.** Evidence meagre. No evidence re intentions in entering rel; unable to provide details abt each other, doesn’t support claim of freq/ongoing comm; not enough for emotional tie; claim of sexual relations not determinative; not enough to show existence of joint DM or plans for future. HOLDING: not shown to be spouse, CL partner or conjugal.

**Canada (MCI) v Morel** (2012) – FC – adjustment for same-sex marriage overseas

FACTS: M 59, Guo 27, met on “asiafriendfinder”. Originally denied, panel satisfied in romantic rel, but Minister appeals. ANALYSIS: Despite valid arg that same-sex marriage in China changes application of *M v H*, Panel shouldn’t have found they “shared a life together through a computer”. Almost whole decision re M’s intentions, should have considered both of them; ignored evidence that Guo in first homosexual rel, had lack of knowledge about M’s life. HOLDING: JR allowed, appeal to be redetermined

**Bad Faith Relationships** – FNs 2-part test:

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| R4(1)For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner or a conjugal partner of a person if the marriage, common-law partnership or conjugal partnership  (a) was **entered into primarily for the purpose of acquiring any status or privilege** under the Act; **or**  (b) is **not genuine**. |

* Disjunctive test – where marriage presently genuine but was entered into primarily for immigration purposes, not OK. Primary purpose fixed at time of entry into relationship

**Abebe v Canada (MCI)** (2011) – FC – genuineness

FACTS: Abebe was refugee who got PR and became citizen, introduced to wife over phone. Went to SA to meet and got married in 2 days. Wife applied for PR 3 mo later. Refused based on lack of genuineness. ANALYSIS/RATIO: **genuineness of relationship measured through eyes of parties against their cultural background** – **arranged marriages not disqualifying**. Here, A raised valid cultural arguments justifying what Board saw as “inconsistencies” e.g. lack of discussion about love, age difference.

**MacDonald v Canada (C&I)** (2012) – FC – marriage for immigration purposes

FACTS: Met Chinese wife online and married year later, applied to sponsor. VO/Board concluded she chose to create English-only profile to get entry. ANALYSIS/RATIO: IAD sufficiently justified, transparent, intelligible for reasonable conclusion. He was credible but she wasn’t!

Typical means of testing bad-faith marriage = separate interviews

**Canada (C&I) v Xie** (2013) – FC – re preparing for interviews

FACTS: X sponsored by first husband, had son before meeting spouse during visit to China. A bunch of visits, married. VO refused PR bc found not genuine/marriage entered for purpose of entry. IAD allowed appeal. ANALYSIS/RATIO: Board said that discrepancies didn’t significantly detract from positive factors, **assessed genuine integration rather than minor inconsistences.** “Cheat sheets” OK bc had poor memory based on affidavit of niece and wasn’t sophisticated person. Lots of other findings supporting genuineness of relationship e.g. compatibility; financial independence and L's job security in China; rship w family members; persistence in applying for PR

### DEPENDENT CHILDREN

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| R2*dependent child*, in respect of a parent, means a child who (a) has one of the following **relationships with the parent**, namely,  (i) is the **biological child** of the parent, if the child has not been adopted by a person other than the spouse or common-law partner of the parent, or (ii) is the **adopted child** of the parent; and  (b) is in one of the following situations of **dependency**, namely,  (i) is **less than 19** years of age and is **not a spouse or common-law partner**, or  (ii) is **19 years of age or older** and has **depended substantially on the financial support** of the parent since **before the age of 19** and is **unable to be financially self-supporting due to a physical or mental condition**. |

* 2013 amendments made it harder to get in adult children even if dependent; older dependent children have alternative of applying for TRV/study permit then apply for PR under Canadian Experience Class

**Biological Child** – *Guidelines*: meant to capture children born through assisted reproductive technologies; no req for genetic relationship in this sense

**MAO v Canada (MCI)** (2003) – FC – bio children and DNA evidence

FACTS: No documents due to Somalian civil war, wanted to bring in 3 children from first marriage. VO “invited” him to do DNA test, implying PR would be denied if not. One son revealed not to be bio son. Can’t adopt under Islamic law but argues should be legal son. CIC denied app. ANALYSIS/RATIO: (key – defn “issue”, no longer important but didn’t meet.) “Best evidence” not required, VO unfairly fettered own discretion by ordering DNA test. **DNA should be evidence of last resort due to its invasion of privacy** – JR allowed, matter remitted, DNA to form no part of IAD decision upon rehearing.

**Adopted Child** – can either be adopted in country of origin then sponsored, or brought over to adopt in Canada.

* **Adopted in Canada** – **requirements:** R117(1)(g)

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| (i) adoption not entered into primarily for purpose of acquiring status  (ii) if international adoption and parties to Hague Convention of Adoption, adoption has been approved in writing as conforming | (iii) if international adoption and either origin/destination not party to Hague Convention, (A) legally available in origin for adoption and no evidence of trafficking; (B) destination province approves in writing |

* **Adopted overseas when under 18** – **requirements**: R117(2) not considered member of fam class unless

1. Adoption in best interests of child according to Hague Convention
2. Adoption not entered into primarily for purpose of acquiring any status/privilege

🡪 best interests of the child – R117(3) incl home study done; free and informed consent of parents; genuine parent-child relationship; in accordance w laws; etc

* **Adopted children over 18** – **requirements**: R117(4) not considered member of fam class unless:

1. Adoption in accordance w laws where adoption took place and in laws of province if sponsor resided in Canada when adoption happened
2. A genuine parent-child relationship existed at time of adoption and existed before child 18, AND
3. Not entered into primarily for purpose of acquiring any status/privilege

**Limits on Adopted Children –** 2-part test:

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| R4(2)A foreign national shall not be considered an adopted child of a person if the adoption  (a) was **entered into primarily for the purpose of acquiring any status or privilege** under the Act; **or**  (b) did not create a **genuine parent-child relationship**. |

* R3(2) Adoption severs pre-existing parent-child relationship(adoptee can’t later sponsor bio parents)

**Kwan v Canada (MCI)** (2001) – FC – re genuine parent-child relationship

FACTS: child allegedly adopted at age 10 by Mr Kwan and Ms Zhao; submitted overseas PR application. Was denied immigrant visa based on IRPR 2(1) bc adopted by father's cousin and husband; in interview stated that she lived w bio parents and wanted to go to Canada to get better education. No fam problems, not familiar w sponsor. Appealed to IAD; was dismissed.

ANALYSIS/RATIO: IAD finds that motives of natural parents to ensure better future for eldest child; credible evidence that K&Z wanted 2nd fam. Argued that rel would form when child arrives, but **need to be involved in decisions** about the child and child’s trajectory – absent here. Consider factors:

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| *Per Waldman*:   * Evidence of ties between adoptive parents and child * Communication between adoptive parents and child * Financial support between adoptive parents and child * Control exercised by adoptive parents over life of child * Why adoption was entered into | *Per Guzman (1995):*   * motivation of adopting parents * motivation and conditions of natural parents (to a lesser extent) * **supplanting of authority of natural parents by that of adoptive parents** * relationship of the adopted child with natural parents after adoption * treatment of the adopted child vs natural children by adopting parents * relationship btwn adopted child and adopting parents before adoption * changes flowing from the new status of adopted child such as records, entitlements including documentary acknowledgment of adoption * arrangements and actions taken by adoptive parents as it relates to caring, providing and planning for the adoptive child |

### OTHER MEMBERS OF FAMILY CLASS

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| **Parents and Grandparents** – 117(1)(c)–(d)   * least favoured PR apps, at bottom of processing priorities; 2011 Super Visa aimed to remedy * 2013 – resumed taking family class apps: minimum necessary sponsor income raised by 30% + met for 3 years, sponsorship undertaking extended to 20 years | **Wild Card Relatives –** (117)(1)(g)   * May sponsor relative of any age if nobody else and sponsor doesn’t have citizen/PR to keep company * *De facto* family members – not defn of fam class but in situation of dependence. ***Okbai*** – FC set aside rejection of refugee’s app to sponsor younger siblings she raised since orphaned; VO didn’t take into acc *de facto* family relationship |

### SPONSORSHIP REQUIREMENTS AND OBLIGATIONS

Sponsorship creates statutory and contractual undertaking. **Requirements** – R130(1):

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| 130 (1) Subject to subsections (2) and (3), **a sponsor,** for the purpose of sponsoring a foreign national who makes an application for a permanent resident visa as a member of the family class or an application to remain in Canada as a member of the spouse or common-law partner in Canada class under subsection 13(1) of the Act, must be a Canadian citizen or permanent resident who  (a) is **at least 18** years of age; (b) **resides in Canada**; and (c) **has filed a sponsorship application** in respect of a member of the family class or the spouse or common-law partner in Canada class in accordance with section 10. |

Sponsor puts in app for sponsorship + FN puts in app for PR in origin country. **Exceptions to reqs**:

* 130(2) Cdn may sponsor from outside Canada if will reside in Canada when the FN gets PR
* 130(3) if you were sponsored, can’t sponsor spousal FN unless you have been PR/citizen for 5 yrs

**Bars to Sponsorship** – R133(1) extensive list including:

(c) Subject to removal order; (d) detained in penitentiary, jail, reformatory or prison;

(e) conviction under *CC* for: (i) offence of sexual nature; (i.1) indictable offence involving use of violence and punishable by max 10 years; (ii) offence that results in bodily harm to [relative]

🡪 ***exceptions*** – 133(2) not barred if (a) pardoned / acquitted, or (b) more than 5 years has passed  
– 133(3)(a) if acquitted of conviction outside Canada, or (b) more than 5 years since completion of sentence outside Canada and sponsor demonstrates rehabilitation

(g) in default of a sponsorship undertaking or court-ordered support payment obligations

(j) minimum necessary income requirement

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| --- | --- |
| Size of Fam | Minimum Income |
| 1 | 23,861 |
| 2 | 29,706 |
| 3 | 36,520 |
| 4 | 44,340 |
| 5 | 50,290 |
| 6 | 56,718 |
| 7 | 63,147 |
| 7+ | Addtl 6,429/pp |

🡪 ***exceptions* –** 133(4) – not barred if sponsored person is spouse, CL/conjugal, or children

**Obligations under Sponsorship Undertaking** – R131, R132 – obliges sponsor to pay any social assistance benefits back to Canada/province if accrued by sponsored FN during sponsor’s undertaking, starting on day where FN becomes a PR. **Length of undertaking –**

132(1)(b)(i) 3 years if spouse, CL/conjugal partner

132(1)(b)(ii) 3 years if dependent child becomes PR after 22

132(1)(b)(iv) 20 years for parents/grandparents

132(1)(b)(v) 10 years for everyone else

**Canada (AG) v Mavi** (2011) – SCC – parameters for enforcement of sponsorship debt

FACTS: brought by 8 sponsors on the hook for social assistance from relatives. ISSUE: what is the govt’s duty of PF regarding enforcement of sponsorship debt?

ANALYSIS/RATIO: Can/prov has discretion under IRPA/IRPR to defer but not forgive debt after considering a sponsor’s submissions. No obligation to inform when a sponsored relative begins collecting public assistance. Do owe duty of PF when enforcing claim. Content includes:

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| * Notify sponsor at last known address of its claim * Provide opportunity to explain personal circumstances | * Consider any relevant circumstances * Notify sponsor of decision * No need to provide reasons |

## ECONOMIC CLASS

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| A12(2)A foreign national may be selected as a member of the economic class on the basis of their ability to become economically established in Canada. |

### EXPRESS ENTRY

**Governed by MIs** – authorized by 3 different provisions in IRPA:

87.3 (2008) – empowers MCI to issue instructions re processing of apps; may establish eligibility criteria, caps, and pause apps

14.1 (2012) – grants minister power to est new ec classes

Div 0.1 (ss 10.1-10.4) (2013) – create MI regime under which apps for PR may only be made on receipt of invitation from CIC; launched "express entry" system

\*\* Insulates govt’s economic immigration policy from limits that might be imposed thru JR

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| **Liang** (2012) – re MIs  FACTS: 2008 backlog of 600k applications, 4 sets of MIs that created priority hierarchy.  HOLDING/RATIO: no govt obligation to process apps in particular order | **Austria** (2014) – A87.4 termination of apps  FACTS:refused to process ~1400 apps from before A87.4 amendment that terminated apps to clear queue. HOLDING/RATIO: termination was factual determination within purview of govt. |

**Express Entry Process**

1. **Eligibility –** submit **Expression of Interest** (fill out online form, meet minimum reqs of named ec class, register with job bank if no job offer or nomination)
2. **Invitation –** IRCC ranks received Expressions of Interest using Comprehensive Ranking System
   1. Variation on points system using 1200-pt ceiling: 600 “core” pts + 600 job offer/prov nom pts
   2. new MIs for each round of invitations, different pass scores each time

*Model candidate*: 20-29, PhD, fluency in Eng/Fr, 5+ years Cdn work exp, no spouse/partner

1. **If invited**, **applicant applies for PR** **–** requires proof of claims made through EE process for verification

#### FEDERAL SKILLED WORKERS

3 basic rules – 1) meet minimum reqs; 2) assess using points system; 3) have settlement funds or job offer

**Minimum Requirements** – R75(2)

* **Experience:** R75(2)(a) 1 year FT experience (or PT equivalent) during 10 years preceding application in mgmt-level occupation or occupation that normally requires university ed, college ed, or apprenticeship training (NOC levels O, A, or B).

(b) performed actions described in NOC lead statement (c) performed NOC duties incl all essential duties

* ***Taleb*** – *work cert for doc didn’t describe specific duties so denied* – VOs can infer whether NOC duties fulfilled based on documentary record
* **Language**: R75(2)(d) submitted results of evaluation that demonstrates Eng/Fr language proficiency
* R74(2) Minimum language proficiency thresholds based on *Canadian Language Benchmarks*. Each class has diff benchmark set; FSWs tend to have higher language reqs (level 7)
* **Credentials:** R75(2)(e)(i) submitted their Canadian educational credential, or (ii) foreign diploma/cert/ credential + equivalency assessment that is less than 5 years old
* R75(2.1) if designated professional body for occupation FN identifies as primary occupation, credential must be relevant to that occupation
* *Doesn’t necessarily lead to credential recognition because that’s usually regulated by prov govt*

**Points System** – if invited to apply for PR as FSW, must pass points system; assessment of points highly technical and discretionary. 76(2) MCI can fix minimum number of points depending on # apps, projected PRs, etc

R76–83 – **67 points pass mark**

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| * Official language (max 28 pts) * Education (max 25 pts) * Experience (max 15 pts) | * Age (max 12 pts) * Arranged employment (max 10 pts) * Adaptability (max 10 pts) | |
| **Patel** (2011) – FCA – re adaptability req  FACTS: 3 semesters getting diploma at biz college, then 1 sem at tech college. Should they be aggregated to meet 2-yr req for 5 extra pts? HOLDING/RATIO: VO should NOT aggregate disparate programs of study; fundamentally diff programs less likely to go to ec establishment. | | | **Shahid** (2011) – FCA – re education req  FACTS: denied for PR bc only 63 pts. Turned on whether spouse had “FT equivalent” studies bc got degree as “external candidate” on exam basis only  HOLDING/RATIO: defn of FT has to do with time, not mode/manner of studies. PT/accelerated studies don’t necessarily meet “FT equivalent” | |

**Minimum Necessary Income/Arranged Employment** – R76(1)(b) skilled worker must

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| (i) have in the form of transferable and available funds, unencumbered by debts or other obligations, an amount equal to **one half of the minimum necessary income** applicable in respect of the group of persons consisting of the skilled worker and their family members, or  (ii) be awarded points under paragraph 82(2)(a), (b) or (d) for arranged employment, as defined in subsection 82(1), in Canada |

**Substituted Evaluation –** officers have discretion over how many points to award

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| R76(3) …an officer may substitute for the criteria … their evaluation of the likelihood of the ability of the skilled worker to become economically established in Canada if the number of points awarded is not a sufficient indicator of whether the skilled worker may become economically established in Canada. |

* ***Nehme*** (2004) – not bound to embark on such an evaluation unless applicant specifically requests it
* ***Yan*** (2003) – even if slim chance of success, VO ignoring request may constitute breach of PF

**Chen v Canada (MCI)** (1994) – FC

FACTS: Sent interviewing immig officer $500 thank you card. Interviewed, explained and apologized for it. Senior immig officer approved discretion to refuse. ANALYSIS/RATIO (Robertson J dissent): Not an unlimited mandate, discretion meant to be quite narrow. **Determination criteria must be restricted to ability to make a living**; moral criteria can’t and shouldn’t be considered here

#### FEDERAL SKILLED TRADES

R87.2 – apply to NOC skill level B trades: (1)(a) industrial, electrical and construction; (b) maintenance and equipment operation; (c) supervisors and technical occupations in nat resources, ag, and related production; (d) processing, manufacturing and utilities supervisors and central control operators; (e) chefs and cooks; (f) butchers and bakers. **Additional criteria:**

* (3)(b) **Work experience** – in prior 5 years, at least 2 yrs FT exp or equiv in PT work, plus NOC duties
* (3)(c) **Employment requirements** – meet employment reqs for that trade w exception of actual certificate of qualification issued by provincial authority
* (3)(a) **Language threshold** – meet current language threshold (level 5 for first official lang, 4 for second)
* (5) **Settlement funds**
* (3)(d) **Work permit reqs** – (i) certificate of qualification OR (ii) hold work permit AND (C) job offer
  + Offers from up to two employers specified on WP, where officer performs informal LMIA

#### CANADIAN EXPERIENCE CLASS

R87.1 – aimed at attracting more TFWs and students and retaining them as PRs. 2-step program

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| (2) A foreign national is a member of the Canadian experience class if  (a) they have acquired in Canada, **within the three years** before the date on which their application for permanent residence is made, at least **one year of full-time work experience, or the equivalent in part-time** work experience, in one or more occupations that are listed in **Skill Type 0** Management Occupations or Skill Level **A or B** of the *National Occupational Classification* matrix, exclusive of restricted occupations; and (b) [performed NOC lead statement actions] and (c) [performed substantial number of NOC duties] and  (d) [level 7 proficiency in first official lang, 4 for second] |

### BUSINESS IMMIGRATION PROGRAMS

Selected on basis of ability to create jobs – *not under Express Entry!*

🡪 must have sufficient funds for one year

**Start-up Visa Program** – replaced entrepreneur program (people were abusing prior regime). Aimed at recruiting innovative entrepreneurs

* Need backing from Canadian investor group or venture capital fund
* Qualifying business must: meet ownership reqs (applicant owns at least 10%, only applicant or org may own controlling share); have letter of support from designated organization (VC funds, angel investor groups, business incubators); meet language reqs; meet education reqs; have settlement funds

**Self-Employed Persons** – R88(1) – specific requirements

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| *self-employed person* means a foreign national who has relevant experience and has the intention and ability to be self-employed in Canada and to make a significant contribution to specified economic activities in Canada.  *specified economic activities*, in respect of  (a) a self-employed person, other than a self-employed person selected by a province, means cultural activities, athletics or the purchase and management of a farm; and  (b) a self-employed person selected by a province, has the meaning provided by the laws of the province. |

* 2 years within last 5 years experience in cultural activities, athletics, or purchase and mgmt of farm
* Apply modified points system – R102–R105:

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| R102(1) For the purpose of determining whether a foreign national, as a member of the investor class, the entrepreneur class or the self-employed persons class, and the foreign national's family members will be able to become economically established in Canada, an officer shall assess that foreign national on the basis of the following factors:  (a) age, in accordance with section 102.1; (b) education, in accordance with section 102.2;  (c) proficiency in the official languages of Canada in accordance with s102.3; (d) experience in accordance with s103; and  (e) adaptability, in accordance with section 104 in the case of a member of the investor class or the entrepreneur class, and in accordance with section 105 in the case of a member of the self-employed persons class. |

### PROVINCIAL NOMINEES

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| *CA, 1867* s 95 – concurrent jurisdiction w federal paramountcy  A8 – MCI can enter agreements w provinces/territories  A9 – FN, unless inadmissible, shall be granted PR if meet province’s selection criteria  Recruitment and selection 🡪 provincial responsibility  Inadmissibility assessment 🡪 federal responsibility | **PNP objectives**:   * Regional diversity * Local labour market needs * Poor immigrant labour market outcomes * Local demographic requirements * Social support networks * Broader skill recruitment |

**PNP Regulatory Framework:**

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| R87(2) A foreign national is a member of the provincial nominee class if  (a) subject to subsection (5), they are named in a **nomination certificate** issued by the government of a province under a provincial nomination agreement between that province and the Minister; and  (b) they **intend to reside in the province** that has nominated them.  R87(3) If the fact that the foreign national is named in a certificate referred to in paragraph (2)(a) is not a sufficient indicator of whether they may become economically established in Canada and an officer has consulted the government that issued the certificate, the **officer may substitute** for the criteria set out in subsection (2) their evaluation of the likelihood of the ability of the foreign national to become economically established in Canada. R87(4) [this] requires the **concurrence** of a second officer. |

* ***Kikeshian*** – duty to consult with province; nomination is presumption that will become provincially est
* **Limits on investment schemes –** R87(5)-(6) – limits FN’s PNP nomination if was (a) based on provision of capital by FN or (b) FN intends to participate in an immigration-linked investment scheme

**Application to PNP**

1. **Apply to province of destination** – must pass provincial criteria and pay fees
   1. Province will notify by letter, issue certificate of nomination and notify appropriate visa office
   2. *Parallel tracks*: may apply to PNP first, get provincial nomination, then fill out EE profile OR fill out EE profile, enter pool, and wait for province to nominate
2. **Apply to visa office –** apply for PR (may opt in or out for EE stream) and pay processing fees to visa office

**Analysis of PNP –** *Sarah Baglay:* Discusses programs as being complimentary or competitive w fed program —overlapping or pulling. Problems with PNP—proliferation of a bunch of different rules that aren’t being regulated

🡪 Suggests developing overall framework e.g. threshold/baselines, timelines/fees

* Manitoba—most robust PNP, very active, 75% of immigrants, lots of lower-skilled workers
* Nova Scotia—Streams: fam-owned business, non-dependent child, community connection (need letter)
* Ontario—Economic/employer driven—help Ontario attract highly skilled, not as interested in more ppl

**PNP in BC**

* *BC Skills Immigration*: skilled worker, healthcare professional, intl grad, intl postgrad, entry level/semi-skilled workers (e.g. tourism/hospitality, trucking, etc – esp for those looking to populate northeast BC)
* *BC Express Entry*: skilled worker, healthcare professional, intl grad, intl postgrad – must also meet FSW, FST, or CEC criteria
* *Entrepreneur Program*: residency in and active management of business in BC
  + Reqs net worth of $600k; make eligible investment $200k; create at least one permanent FT job
  + Business or work experience – 3 years as business owner/manager (10% plus business ownership), 4 years as senior manager, 1 year as owner manager and 2 years as senior manager
  + Adaptability factors
  + Can include one key staff member who can get WP with you
  + Must sign performance agreement

## HUMANITARIAN & COMPASSIONATE

Allows Minister/delegate to grant an individual PR where someone doesn’t fit into class (ineligible) or fits in a class but is otherwise inadmissible – **exceptional, discretionary remedy**

🡪 based on either H&C (A25(1)) or public policy reasons (A25.2)

**H&C** – A25(1):

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| A25(1) Subject to subsection (1.2), the Minister **must**, on request of a foreign national in Canada who applies for permanent resident status and who is **inadmissible** — other than under section 34, 35 or 37 — **or who does not meet the requirements of this Act**, and **may**, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by **humanitarian and compassionate considerations** relating to the foreign national, taking into account the **best interests of a child** directly affected. |

* If inside Canada, compulsory review; if outside Canada, discretionary
* R66 – H&C application must be in writing and accompanied by application to remain as PR or, if outside Canada, application for PRV
* R67/68 – if H&C granted, FN becomes PR as long as not otherwise inadmissible/fam members, accompanying or not, are not inadmissible
* *Op Manual* & *Overseas Processing Manual* – H&C as relief from “undue, undeserved or disproportionate hardship” that would result from not admitting/removing applicant, considering 2 prominent factors:
  + Degree to which applicant already established in Canada
  + Hardship that would result to applicants and children if required to depart

**Restrictions on H&C Requests** – A25(1.01) designated FNs may not make requests:

1. if they made claim for refugee protection but not an application, until five years after final det
2. if they made app for protection, until five years after final det, or
3. in any other case, until five years after day they become designated FN

+ A25(1.2) Minister may not examine request if:

(c) less than 12 months since FN’s refugee claim last rejected, withdrawn, or abandoned

UNLESS A25(1.21)(a) FN in case of removal would be subjected to a risk to their life due to **inadequate health or medical care**; or (b) removal would have adverse effect on the **best interests of a child** directly affected

**Best Interests of the Child** – must examine with great deal of attention

**Baker** (1999) – use of hardship standard/test

ANALYSIS/RATIO: Oral hearing/interview not reqd; reasons reqd but low bar. Re best interests of the child: “DM should consider children’s best interests as an important factor, give them substantial weight, and be **alert, alive and sensitive** to them”

**Williams** (2012) – move away from basic needs/hardship approach

FACTS: 8 y/o born during visit to Canada, mother claimed refugee status based on domestic abuse. Rejected, applied to H&C; notes neg impact on child w severe asthma and social network in Canada. ANALYSIS/RATIO: using hardship as test for best interests incorrect because **child rarely, if ever, deserving of any level of hardship**. Balancing: 1) what is in child’s best interest? 2) to what degree are child’s interests compromised by one decision or the other?

**Kanthasamy** (2015) – consider circumstances as a whole

FACTS: 16y/o Tamil, came to Canada, made refugee claim which was refused, PRRA refused, H&C app. Rev officer said relief not justified bc not satisfied that return would result in “unusual, undeserved, or disproportionate” hardship. ANALYSIS/RATIO: 3 guidelines aren’t thresholds but instructive adjectives that are presumptively inapplicable to child – **concept of BIoTC = circs may entitle child to relief where adult wouldn’t get H&C**

🡪 **current H&C *Guidelines* factors:**

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| --- | --- | --- |
| **BIotC** | **H&C** | |
| * Age of child, level of dependency, degree of child’s establishment in Canada * Conditions of the country of removal and impact on child * Medical issues/special needs * Impact on child’s education * Any matters relating to child’s gender | * Establishment in Canada for inland applications * Ability to establish in Canada for overseas applications * The best interests of any children directly affected by the H&C decision * Factors in their country of origin including adverse country conditions e.g. safety, discrimination | * Health considerations incl inability of a country to provide medical treatment * Family violence considerations e.g. abuse * Consequences of the separation of relatives * Any unique or exceptional circumstances that might merit relief |

* Hardship still applies as general consideration – will applicant suffer if denied?
* Don’t apply one factor to the exclusion of others

# EXCLUSIONS

## INADMISSIBILITY

Can deny people coming in (deny visas abroad, CBSA denies at PoE) or remove (CBSA removes):

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| A34 | Security grounds | |  | | --- | | A33 The facts that constitute inadmissibility under section 34-37 include acts arising from omissions and, unless otherwise provided, include facts for which there are **reasonable grounds to believe** they have occurred, are occurring or may occur. |   **Re Almrei** (2009) – “reas grounds to believe”  RATIO: **minimum threshold for determining facts re inadmissibility –** SOP is less than bal prob and more like *bona fide* belief in srs possibility. Weighing of evidence and findings wrt which facts accepted |
| A35 | Human & intl rights violations |
| A36(1) | Serious criminality |
| A36(2) | Ordinary criminality |
| A37 | Organized criminality |
| A38 | Health |
| A39 | Financial |
| A40 | Misrepresentation |
| A40.1 | Cessation of refugee protection |
| A41 | Non-compliance with the Act |
| A42 | Having an inadmissible family member |

#### s 34 SECURITY GROUNDS

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| A34(1) A permanent resident or a foreign national is inadmissible on security grounds for  (a) engaging in an act of espionage that is against Canada or that is contrary to Canada’s interests;  (b) engaging in or instigating the subversion by force of any government;  (b.1) engaging in an act of subversion against a democratic government, institution or process as they are understood in Canada;  (c) engaging in **terrorism**; (d) being a danger to the security of Canada;  (e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or  (f) being a **member of an organization** that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b), (b.1) or (c).  R14 For the purpose of determining whether a foreign national or permanent resident is inadmissible under paragraph 34(1)(c) of the Act, if either the following determination or decision has been rendered, the findings of fact set out in that determination or decision shall be considered as conclusive findings of fact:  (a) a determination by the Board, based on findings that the foreign national or permanent resident has engaged in terrorism, that the foreign national or permanent resident is a person referred to in section F of Article 1 of the Refugee Convention; or  (b) a decision by a Canadian court under the Criminal Code. |

* **Exemption to A34** – A42.1(1) if satisfy Minister that presence not detrimental to natl interest; narrower due to A42.1(3) “may only take into account national security and public safety considerations but…is not limited to considering the danger that the FN presents to the public or the security of Canada”

**Membership** – A34(1)(f):

**Poshteh v Canada (MCI)** (2005) – FCA – re “membership” of minor

FACTS: P's father member of MEK (basically terrorist group). Father died, P blamed Iranian govt, wanted to join MEK to overthrow govt so approached father's friend. Didn't let him join but gave out propaganda leaflets a couple times a month for 2 yrs until just under 18 y/o. No other involvement. Found inadmissible. ANALYSIS/RATIO: *Membership* – no formal test for defn of “member”, not deg of integration. **Broad assessment of facts**; here, reasonable conclusion of membership b/c shared goal, wished to enlist, dist of propaganda important part of MEK activities and did so at “significant level of activity”

*Age* – **status for minor relevant and individuated**. Presumption against membership in case of young children; here, 17y/o more likely to possess requisite knowledge/mental capacity so find member

**TK v Canada (Min PSEP)** (2013) – FC – criteria re membership when duress

FACTS: TK and union told to mandatorily attend 7-day training session that ended up Tamil Tiger training. Followed instructions out of fear, never directly funded or acted voluntarily; never joined, given rank, employee, direct orders, etc. Said he agreed w having Tamil autonomous region but doesn't support LTTE. Found him an informal member of LTTE and thus inadmissible. ANALYSIS/RATIO: though broad, consider 3 criteria: **1) Person’s involvement in organization; 2) Length of time associated with organization; 3) Person’s degree of commitment to organization and objectives**

**Terrorism** – A34(1)(c):

**Suresh v Canada (MCI)** (2002) – SCC – re defn of “terrorism”

ISSUE: functional or stipulative defn? no IRPA or intl defn. ANALYSIS/RATIO: functional defn may change over time. Use working defn:

Any “act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act"

**R v Khajawa** (2010) – ONCA – “armed conflict” exception in *CC* defn of “terrorism”

ANALYSIS/RATIO: exception designed to exclude activities sanctioned by intl law from reach of terrorist activity, i.e., context of rules of war. Doesn’t req proof of physical presence in area. Reqs: **1) acts/omissions committed “during” an armed conflict and 2) acts/omissions, at time and place of commission, accorded with intl law applicable to armed conflict at issue.** Here, supported random murder of civilians so nope.

#### S 35 HUMAN RIGHTS/INTL RIGHTS VIOLATIONS

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| A35(1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for  (a) committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*;  (b) being a **prescribed senior official** in the service of a government that, in the opinion of the Minister, engages or has engaged in **terrorism, systematic or gross human rights violations**, or genocide, a war crime or a crime against humanity within the meaning of subsections 6(3) to (5) of the *Crimes Against Humanity and War Crimes Act*; or  (c) being a person, other than a permanent resident, whose entry into or stay in Canada is restricted pursuant to a decision, resolution or measure of an international organization of states or association of states, of which Canada is a member, that imposes sanctions on a country against which Canada has imposed or has agreed to impose sanctions in concert with that organization or association.  R15 [for purpose of determining whether FN/PR inadmissible, if any decisions or following determination made, shall be considered findings of fact]: (a) intl criminal tribunal established by resolution of Security Council of UN or ICC; (b) det by Board; or (c) decision by Canadian Court |

* **Exemption to A35(1)(b),(c)** – A42.1(1) if satisfy Minister that presence not detrimental to natl interest; narrower due to A42.1(3) “may only take into account national security and public safety considerations but…is not limited to considering the danger that the FN presents to the public or the security of Canada”

**Mugesera v Canada (MCI)** (2005) – SCC – *CC* elements for CAH

FACTS: anti-Tutsi speech in Rwanda, fled and made PR app in Canada. MCI sought deportation alleging speech constitute incitement & CAH. ISSUE: reasonable grounds for inadmissibility? ANALYSIS/RATIO: CAH if 4 elements:

1. **Enumerated proscribed act committed (AR + MR)** – speech meets hate speech crim act
2. **Committed as part of widespread OR systematic attack** – part of large-scale action
3. **Attack directed against any civilian population or IDable group of persons** – Tutsis
4. **Person committing proscribed act knew of attack and know/took risk that act comprised part of attack** – doesn’t need to be essential/officially sanctioned; met here as part of pattern of abuse

Made out reasonable grounds that committed CAH, therefore inadmissible

#### S 36(1) serious criminality

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| A36(1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for  (a) having been **convicted in Canada** of an offence under an Act of Parliament punishable by a **maximum term of imprisonment of at least 10 years**, or of an offence under an Act of Parliament for which a term of imprisonment of **more than six months has been imposed**;  (b) having been **convicted of an offence outside Canada that, if committed in Canada**, would constitute an offence under an Act of Parliament punishable by a **maximum term of imprisonment of at least 10 years**; or  (c) **committing an act** **outside Canada** that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years. |

* A36(3)(d) – if determining whether PR did (c), based on bal prob, not “reas grounds to believe”

**Equivalency** – A36(1)(b)

original test in ***Hill*** (1987):

1. Compare wording of stat offences to determine if EEs similar enough, or
2. Examining evidence to see if it establishes that EEs of offence in Canada proven in foreign proceedings, or **3.** A combination of the above

**Karchi v Canada (MCI)** (2006) – FC – updates equivalency reqs

FACTS: Convicted in Algeria of clumsy driving causing manslaughter, 3mo imprisonment and $44 fine. ISSUE: did officer err in finding inadmissible on equivalency to serious criminality? ANALYSIS/RATIO: **must be established that EEs of both offences equivalent** – Cdn offence has higher standard. Evidence submitted was insufficient to show that EEs of offence established. No evidence officer looked at EEs of two offences or even consulted Algerian CC.

**Li v Canada (MCI)** (1997) – FC – EEs include defences but not procedural rules

FACTS: convicted of bribery offences under HK law, sentenced to 4 years. VO said inadmissible. ANALYSIS/RATIO: Defn similar if similar criteria for establishing that offence occurred, whether criteria manifested as “elements” or “defences”. BUT not procedural/evidentiary rules like SOP differences; not a question of whether he would have been convicted in Canada but whether a *Canadian equivalent* exists for offence for which he was convicted

#### S 36(2) ordinary criminality

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| A36(2) A foreign national is inadmissible on grounds of criminality for  (a) having been **convicted in Canada** of an offence under an Act of Parliament punishable by way of **indictment**, or of **two offences** under any Act of Parliament not arising out of a single occurrence;  (b) having been **convicted outside Canada** of an offence that, if committed in Canada, would constitute an **indictable offence** under an Act of Parliament, or of **two offences** not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of Parliament; [equivalency]  (c) **committing an act outside Canada** that is an offence in the place where it was committed and that, if committed in Canada, would constitute an **indictable offence** under an Act of Parliament; or  (d) committing, **on entering Canada**, an offence under an Act of Parliament **prescribed by regulations.** |

**General Criminality Interpretation Exemptions** – A36(3)

**Hybrid offences** – (a) hybrid offence deemed indictable eve if prosecuted summarily

**Pardons and acquittals** – (b) can’t base inadmissibility on conviction if pardoned/acquitted

**Saini** (2002) – FC – recognition of foreign pardon

FACTS: S hijacked airline and pardoned in Pakistan. ANALYSIS/RATIO: recognition of foreign pardon if foreign legal system as whole similar to Canada; aim, content, effect of specific foreign law similar to Cdn law; and no valid reason to recognize effect of foreign law – here, not enough evidence about law/process. May consider gravity of offence – here, so abhorrent Court not reqd to respect pardon anyway

**Rehabilitation –** (c) someone who satisfies Minister that they’ve been rehabilitated. R18(2) “deemed” after 10 years of completion of sentence; R17 may apply after 5 years

**Young offenders** – (e)(ii) & (iii) inadmissibility not based on offence if found guilty under *Young Offenders Act* or if received a youth sentence under *Youth Criminal Justice Act*

#### S 37 organized criminality

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| A37(1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for  (a) being a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a **pattern of criminal activity** planned and organized by **a number of persons acting in concert** in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern; or  (b) engaging, **in the context of transnational crime**, in activities such as **people smuggling, trafficking in persons or laundering of money or other proceeds of crime.**   (2) Paragraph (1)(a) does not lead to a determination of inadmissibility *by reason only of the fact that the permanent resident or foreign national entered Canada with the assistance of a person who is involved in organized criminal activity*. |

* **Exemption to A37(1)** – A42.1(1) if satisfy Minister that presence not detrimental to natl interest; narrower due to A42.1(3) “may only take into account national security and public safety considerations but…is not limited to considering the danger that the FN presents to the public or the security of Canada”

**Chiau v Canada (MCI)** (2001) – FC – organized crime

FACTS: C is actor of 20+ films, incl 7 films for 2 HK studios widely believed to be controlled by a particular triad. First PR app, refused but FCTD set decision aside; renewed, went for interview resulting in credibility issues. ISSUE: 1) PF issues 2) use of secret/confidential evidence against him. ANALYSIS/RATIO:

*Balancing of individual interest w state’s security interest* – since FN, lower interest in his admission so can base decision on secret evidence bc **PF factors weighed. Factors: importance of decision to individual; nature of decision; public interest (org crime major threat!); factual context**

#### S 38 health grounds

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| A38(1) A foreign national is inadmissible on health grounds if their health condition  (a) is likely to be a **danger to public health**; (b) is likely to be a **danger to public safety**; or  (c) might reasonably be expected to cause **excessive demand** on health or social services. |

* “likely”(bal prob)/”reasonably be expected” = level of risk; courts don’t like VOs who consider possibility
* **“public health”** = contagious; STDs etc only if engage in high-risk behaviour but HIV probably inadmissible due to high cost on healthcare
* **“public safety”** = if MH etc that could pose danger to public health

**Excessive demand** – R1(1):

1. Demand that would likely exceed average Cdn per capita health/social services costs over 5 years, OR
2. Demand on health/social services that would add to existing waiting lists and increase rate of mortality/morbidity as result of inability to provide timely services to Cdn citizens/PRs

**🡪 Exemption to “excessive demand” limit** – A38(2) if FN is (a) member of family class as spouse, CL partner or child of a sponsor; (b) has applied for PR as refugee; (c) is a protected person; or (d) the spouse, CL partner, child or other family member of any of the above FNs

**Hilewitz; De Jong** **v Canada (MCI)** (2005) – SCC – defence to excessive demand: consider ability to pay

FACTS: both applied for PR under economic classes, both qualified but denied due to intellectual disability of dependent child. ANALYSIS/RATIO: legislative history and intention = shift towards individualized assessment. Threshold is “would” or “might reasonably be expected” to result in excessive burden, so follows that **ability and willingness to take burden are relevant factors** in determining whether excessive demand

* ***Colaco*** – all applicants now must be given opportunity to show have ability & intent to pay for health/social services, supported by credible plan

#### S 39 FINANCIAL GROUNDS

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| A39 A foreign national is inadmissible for financial reasons if they are or will be **unable or unwilling to support themself or any other person who is dependent** on them, and have not satisfied an officer that adequate arrangements for care and support, other than those that involve social assistance, have been made. |

🡪 but compare R133(4) exempting sponsors from LICO if bringing in spouse, CL/conjugal partner, child

#### S 40 MISREPRESENTATION

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| A40(1) A permanent resident or a foreign national is inadmissible for misrepresentation  (a) for **directly or indirectly** **misrepresenting or withholding material facts** relating to a relevant matter that induces or could induce an error in the administration of this Act;  (b) for being or having been **sponsored by a person who is determined to be inadmissible for misrepresentation**; |

* A40(2)(a) continue to be inadmissible for misrep for 5 years after final determination of inadmissibility (if outside Canada) or date removal order enforced (if inside Canada)

#### S 41 NON-COMPLIANCE WITH ACT

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| A41 A person is inadmissible for failing to comply with this Act  (a) in the case of a foreign national, through an act/omission which contravenes, directly or indirectly, a provision of **this Act**; and  (b) in the case of a permanent resident, through failing to comply with subsection 27(2) [any conditions imposed under IRPR] or section 28 [residency obligation]. |

* Non-compliance broader for FN than PR

#### S 42 INADMISSIBLE FAMILY MEMBER

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| 42 (1) A foreign national, other than a protected person, is inadmissible on grounds of an inadmissible family member if  (a) their **accompanying family member** or, in prescribed circumstances, their **non-accompanying family member** is inadmissible; or  (b) they are an accompanying family member of an inadmissible person. |

* “prescribed circs” – R23 (a) FN is a TR or has made app as TR or PR, AND (b) non-accompanying family member is spouse/CL partner/dependent child/dependent grandchild
* **Temporary Resident Exception** – A42(2) inadmissible only if family member/accompanying family member inadmissible under 34, 35, 37 (sec/HR and intl rights/org crim – only inadm if serious)

## REMOVAL AND DEPORTATION

**Timeline for removal following finding of inadmissibility**:

1. Officer's **A44 report** outlining conclusion of inadmissibility – submitted to Minister's delegate
   1. In some circs, 2nd officer may make removal order
   2. In other cases, report transferred to IRB for **admissibility hearing** and issuance of order
2. Some individuals: right to appeal to IAD to try to get stay of removal
3. Most FNs under removal order may apply on H&C grounds to stay of removal
4. In most circs, person entitled to make app for **pre-removal risk assessment**
   1. Successful application will have impact on enforcement of removal order
5. FNs may apply for TRP
6. Individuals may apply to FC for leave to seek JR of any decision made re removal from Canada

🡪 through entire process, may seek interim relief to ensure that removal order not enforced before they can exercise one of these options. May req app to FC for stay of removal order

#### SECTION 44 REPORTS

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| A44(1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a **report** setting out the relevant facts, which report shall be transmitted to the Minister.  (2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an **admissibility hearing**, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. **In those cases, the Minister may make a removal order**. |

* Can only make removal order against PRs if ground of inadm is failure to meet residency reqs
* R227(1): s 44 report against a FN is also a report against the FN’s family members in Canada
* R228: can make FN removal order *without hearing* where (a) serious crim/crim; (b) misrepresentation; (d) inadmissible family member. Otherwise refer to IRB.
* R229: list of applicable removal orders if found inadmissible

**Cha v Canada (MCI)** (2006) – FCA – re Minister “may”: scope of discretion

FACTS: FN from S Korea; student but never completed any course/program in which was enrolled. Convicted in Ottawa of DD: punishable by indictment + liable to imprison max 5 yrs. Brought in for interview, second interview, then s 44 report. Never given notice of what interviews for. ISSUE: scope of discretion?

ANALYSIS/RATIO: in this case, “may” = “shall” – **once person found inadmissible, must prepare s 44 report**. Not necessary to look beyond violation of essential condition for inadm to other circs

***PF rights*** – has minimal duty of PF since decision to deport predictable; can meet PF duty by providing copy of report; inform of allegations; conduct interview in person’s presence; and give opportunity to present evidence. Breach of PF here isn’t enough to set aside decision bc s 44 still fact-finding mission

**Monge Monge v Canada (Min PSEP)** (2009) – FCA – re scope of discretion

FACTS: MM in jail bc convicted of armed robbery, dangerous op of MV, possession of weapon for dangerous purposes. 29y/o, 27th conviction. Citizen of Poland and 16yr PR of Canada; "without doubt" MM is inadmissible. Insuff H&C to outweigh MM's v extensive crim record/harm to Cdn society. Min del didn’t send report to IRB. ISSUE: how much discretion to remove w/o a hearing? ANALYSIS/RATIO: jurisprudence unclear whether Min del had discretion or not, but if she did, it was reasonable decision here

#### REMOVAL ORDERS

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| R223 There are three types of removal orders, namely, **departure orders**, **exclusion orders** and **deportation orders**.  A52(1) If a removal order has been enforced, the foreign national shall not return to Canada, unless authorized by an officer or in other prescribed circumstances. |

* R227(2) a removal order against a FN is **also a removal order against their family members** in Canada if (a) an officer informed fam member that they’re subject of an admissibility hearing and (b) the family member subject to decision that they’re inadmissible due to inadmissibility of the FN
* R238 – if voluntary compliance, person may choose **destination**; if not, R241(1): will be country from which they came to Canada, of their last PR, of which person a citizen, or of their birth
* **Removal costs** may be paid by person being removed, transporter, or govt. R243 If at govt’s expense, FN who has been removed can’t return until paying (a) $750 if removed to US/St Pierre and Miquelon and (b) $1500 if removed to any other country
* A48(2) – if a removal order is enforceable, must be enforced as soon as possible

**Departure Orders –** R224(1) FN exempt from req to obtain authorization to return to Canada (can come back)

1. If doesn’t leave within 30 days, departure order becomes deportation order
2. If detained within 30 days/removal order stayed, period suspended until release or removal order becomes enforceable

R229 – **departure order applies if**:

(k) PR failed to comply with IRPR/residency obligations

**Exclusion Orders** – R225(1) – obliges FN to obtain written auth to return to Canada for 1yr after order enforced

(2) doesn’t need auth after 1 year, unless (3) misrepresentation, in which case needs written auth for 5 yrs  
(4) don’t need written auth if order based on being inadmissible as accompanying fam member

R229 – **exclusion order applies if**:

|  |  |
| --- | --- |
| (f) on health grounds  (h) and (n) for misrepresenting or withholding material facts/thru sponsorship by person responsible for misrepresentation | (g) for financial reasons  (j) failing to appear for examination  (l) failing to establish permanent residence  (m) failing to establish will leave at end of stay |

NOTE R229(3) – (1) (f), (g), (j), (l), (n) **becomes deportation order** if person (a) previously subject to removal order and inadmissible on same grounds; (b) failed to comply with other conditions under Act; or (c) has been otherwise convicted of indictable offence or two offences

**Deportation Orders –** R226(1) –FN must obtain written auth to return to Canada at any time after enforced

(2) don’t need written auth if order based on being inadmissible as accompanying fam member

R229 – **deportation order applies if:**

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| --- | --- |
| (a) on security grounds  (b) violating human/intl rights  (c) serious criminality | (d) criminality  (e) organized criminality  (i) having citizenship revoked under A40(1)(d) |

**Sahakyan v Canada (MCI)** (2004) – FC

FACTS: S Armenian citizen claimed refugee when on visitor’s visa, IRB refused, App for leave/JR refused. Removal order executed; should have left but didn't, so departure order became deportation order. Left of own accord but due to delay departure deemed enforced departure. Quebec selected him for PR but Minister’s delegate didn’t grant authority based on non-compliance. ANALYSIS/RATIO: Not given fair opportunity to address concerns before application denied; wasn’t asked about reason for late departure. Officer didn’t explain why found non-compliant, focussed on matters that wouldn’t have been relevant if S left in time. Hearing not fair.

**Removal Orders In Force** – A49(1) removal order comes into force on the latest of (a) day removal order made, if no right to appeal; (b) day appeal period expire, if right to appeal and no appeal made; (c) date of final determination of appeal, if it’s made

**Enforcing Removal Orders** – R240(1) removal order is enforced when the FN:

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| --- |
| (a) appears before an officer at a port of entry to verify their departure from Canada;  (b) obtains a certificate of departure from the Department;  (c) departs from Canada; and  (d) is authorized to enter, other than for purposes of transit, their country of destination. |

* Some removal orders enforceable immediately – when FN arrives at PoE, CBSA may issue removal order and enforce it on the same day

### RECOURSE AGAINST REMOVAL

#### IAD APPEALS OF REMOVAL ORDERS

**Who can appeal? –** A63–65:

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| --- | --- |
| A63(1) sponsors for family class members  A63(2) FNs with PRVs [usually inadmissible at PoE]  A63(3) any PR or protected person  A63(4) outside Canada, PR for decision re residency | A64(1) **no appeal** if FN/PR found inadm based on security, violating human/intl rights, srs/org crim, or (3) misrep unless FN is sponsor’s spouse, CL partner, or child |

**To allow an appeal**: A67(1) IAD must be satisfied that

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| --- |
| (a) the decision appealed is wrong in law or fact or mixed law and fact; (b) a principle of natural justice has not been observed; or (c) other than in the case of an appeal by the Minister, taking into account the **best interests of a child** directly affected by the decision, sufficient **humanitarian and compassionate considerations** warrant special relief **in light of all the circumstances** of the case. |

* Different test than A25 H&C considerations – similar provision in A68(1) for IAD staying a removal order
* R251 if stay granted, mandatory conditions imposed, e.g., provide copies of passport, don’t commit crimes, if charged or convicted, immediately report to dept

|  |  |
| --- | --- |
| **Khosa** (2009) – SCC – use of ***Ribic* factors**  RATIO: IAD should consider   * seriousness of offence * possibility of rehabilitation * circs surrounding failure to meet conditions * length of time in Canada * degree of establishment * dislocation to the family * support in the community * degree of hardship faced upon return | **Chieu** (2002) – SCC – foreign hardship  FACTS: Chieu misrepped marital status so could be sponsored as dependent. ISSUE: defn of “in light of all the circumstances”? ANALYSIS/RATIO: modern approach to stat interpretation = may also consider **degree of hardship caused by return to country of nationality** along with *Ribic* factors when considering all the circumstances of the case. Weight will vary depending on case |

#### H&C APPLICATIONS

A25 – Inadmissible FNs not entitled to appeal or whose appeals denied may apply to Min del for PR status or exemption for any of the applicable criteria under H&C grounds

🡪 remember ***Kanthasamy*** – hardship no longer determinative test

**Caliskan v Canada (MCI)** (2012) – FC – use of risk

FACTS: Turkey citizen; claimed to be Alevi religious/Kurdish sympathizer and thus claimed refugee protection. Refugee Protection div rejected claim on basis of credibility and that he didn't est personalized risk. Made app for PR on H&C; denied; at JR. ISSUE: is risk part of H&C considerations? ANALYSIS/RATIO: when considering risk in H&C, focus on **facts indicating hardship**, “adverse country conditions that have a direct negative impact on the applicant”, but don’t do formal risk assessment w specific fixation of personalized/general risk (save it for PRRA!)

**Hinzman v Canada (MCI)** (2010) – FCA – H&C factors re personal beliefs

FACTS: US soldier tried to get refugee based on political opinion (anti-war, about to be deployed), now JR for H&C. Certified question. ISSUE: Can punishment for desertion when it was motivated by sincere/deeply held objection to war amount to unusual, undeserved or disproportionate hardship in context of app for PR on H&C?

ANALYSIS/RATIO: **beliefs/motivations of important significance to decision given context of H&C** – can be used as a factor to consider. Officer must indicate that all factors analyzed and explain weight given to each factor.

#### APPLICATION FOR TEMPORARY RESIDENT PERMIT

A24 – inadmissible FN may apply for TRP as avenue of recourse – highly discretionary (moreso than H&C)

🡪 benefit = R64–66 may apply for PR if

R65(a) they have **TRP**

R65(b)(i) they’ve continuously resided in Canada as TRP for at least **3 years**, if inadmissible on health grounds or inadmissible family member grounds

R65(b)(ii) they’ve continuously resided in Canada as TRP for at least **5 years** if inadmissible on any other grounds (except sec/HR/srs or org crim)

R(65)(c) **haven’t become inadmissible** on any ground since permit issued

**Betesh v Canada (MCI)** (2008) – FC – use of multiple channels

FACTS: claimed ex-business partners trying to use org crime to get at him; filed refugee claim, PRRA, H&C, leave for JR, second H&C, then TRP. ISSUE: different considerations ground H&C claim; does it make refusal of TRP unreasonable? ANALYSIS/RATIO: TRP reqs officer to decide if “justified in circs” – includes other apps, so OK for officer to point out that duplication of review would happen even though channels not identical.

#### PRE-REMOVAL RISK ASSESSMENT

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| A112(1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, **apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate** described in subsection 77(1). |

* Assessment of risk – must show risk and must be subject to removal order which has become enforceable. Mostly relevant to failed refugee claimants, but likely deported long before applying

**Restrictions –**

A112(2) – may not apply if (a) to be extradited; (b) made ineligible refugee protection claim; (b.1)/(c) less than 12 mo/36mo [if designated country] have passed since claim for refugee protection or app for protection was rejected

A112(2.1) – Minister may exempt applicants from time restrictions if too harsh for particular nationality

**Considerations** – A113 if not described in 112(3), considered based on ss 96-98 [persecution on enumerated ground and protected person inquiries]

1. applicant whose refugee claim has been rejected must present only new evidence
2. hearing may be held if Minister of opinion that it’s required

🡪 A114(1)(a) if application successful, gain refugee protection

**Consequences of Inadmissibility** – A112(3) refugee protection not conferred on someone deemed

1. inadmissible on grounds of sec, HR/intl rights or org criminality
2. inadmissible on grounds of serious criminality wrt conviction in Canada of max term 10+ years or equivalent conviction outside Canada
3. is named in security certificate

🡪 A113(d) if fall into these categories, only assessed on A97 [protected person inquiry]

(a) formal definition of refugee/protected person, i.e., subject to torture, etc or (b) risk to their life or risk of cruel and unusual treatment, AND

A113(d)(i) whether danger to public if srs crim, or (ii) app should be refused based on nature and severity of acts committed

🡪 A114(1)(b) if successful but fall into one of these categories, won’t get protected person status – removal order just stayed

**Varga v Canada (MCI)** (2007) – FCA – PRRA and Canadian-born children

FACTS: PRRA officer said not satisfied they’d be at risk if removed to Hungary, didn’t consider 2 Cdn-born children. ISSUE: does PRRA officer have obligation to consider their interests?

ANALYSIS/RATIO: **PRRA officer has no obligation to consider interests of Cdn-born child when assessing risks involved in removing parent(s)**. As Cdn citizens, Cdn-born children can’t be subject to removal orders and thus can’t apply for protection; **their interests better considered under application for H&C**. Effective opportunity for considering their interests exists, doesn’t have to be considered before every decision.

* No analogy btwn PRRA officer and removals officer – removals officer has limited but undefined discretion

#### APPLICATION FOR JUDICIAL REVIEW

**Must apply for JR:**

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| A72(1) Judicial review by the Federal Court with respect to any matter [is] commenced by making an **application for leave** to the Court. |

* A72(2)(a) can’t apply until exhausted all rights of appeal
* A72(2)(e) no appeal of decision not to grant leave
* **Results in judicial stay**

#### STAYS OF REMOVAL

**Statutory Stays –**

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| A50 A removal order is stayed  (a) if a decision that was made in a judicial proceeding — at which the Minister shall be given the opportunity to make submissions — would be directly contravened by the enforcement of the removal order; [i.e., **crim charge pending**]  (b) in the case of a foreign national sentenced to a term of **imprisonment in Canada, until the sentence is completed**;  (c) for the duration of a stay **imposed by the Immigration Appeal Division** or any other court of competent jurisdiction;  (d) for the duration of a stay under paragraph 114(1)(b) [**PRRA**]; and (e) for the duration of a stay **imposed by the Minister**. |

**Ministerial Stays** –

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| R230(1) The Minister may impose a stay on removal orders with respect to **a country or a place** if the circumstances in that country or place pose a generalized risk to the entire civilian population as a result of  (a) an **armed conflict** within the country or place; (b) an **environmental disaster** resulting in a substantial temporary disruption of living conditions; (c) any situation that is **temporary and generalized.** |

* 230(3) stays don’t apply to serious inadmissibilities
* Temporary Suspension on Removals for some places (DRC, Iraq, Afghanistan) + Administrative Deferral of Removals for shorter-term humanitarian crises (parts of Somalia, Gaza Strip, Syria, etc)

**PRRA Stays** – R232 removal order stayed when person notified that they may make PRRA app under A112(1)

**H&C Application Stays –** R233 stayed if Minister of opinion that is justified by H&C or by PP considerations; effective until decision made to grant or not grant PR status

**IAD Stays** – A68(1) IAD satisfied, taking into account BIotC, that suff H&C considerations warrant special relief

**Judicial (Federal Court) Stays** – *FCA* 18.2 grants FC jurisdiction to stay removal order while app for JR pending

***Toth* test: to get leave for judicial review, applicant must show that**

1. Raised serious issue to be tried
2. Would suffer irreparable harm if no order granted, and
3. Balance of convenience favours the order

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| **Omar v Canada (MCI)** (2009) – FC  FACTS: 24y/o Somali, lengthy criminal record and found “danger to the public”. ANALYSIS:  **1.** *Srs issue* – no greater risk than other Somalis  **2.** *Irrep harm* – must be non-speculative; O gave no credible, independent evidence, can’t suffer based on mere possibility. **3*.*** *Bal con* – **favours Ministers where A has crim record**, especially here where habitual criminal; strong PI.  HOLDING: motion for stay of removal dismissed | **Ghahremani v Canada (MCI)** (2009) – FC  FACTS: Iranian couple, failed refugee/PRRA, basis of refugee claim fabricated, want JR. ANALYSIS:  **1.** *Srs issue* – potential return to Iran  **2.** *Irrep harm* – due to CSIS questioning, serious possibility even without unrest following election; JR app would be moot if removed now  **3*.*** *Bal con* – favours Gs bc uncertainty of Iran, app for JR leave likely decided in a month’s time  HOLDING: motion for stay of removal allowed |
| **Mauricette v Canada (Min PSEP)** (2008) – FC  FACTS: 3 Cdn-born children w med issues, abusive ex in St. Lucia. Witness in crim trial; H&C pending. RPD accepted testimony but also found that state protection exists in St. Lucia. ANALYSIS:   1. *Srs issue* – **threshold to establish srs issue is low – just show app isn’t frivolous/vexatious**. **Where refusal to defer removal, consider 1) practicality of removal 2) reasonableness of removal.** Removal unreasonable at this time, esp given BIotC 2. *Irrep harm* – **must consider child’s best interests** – risk from ex, separation from fam, medical 3. *Bal con* – **where serious issue and irrep harm established, balance tips to applicant** – doesn’t have crim record. HOLDING: removal stayed pending disposition of H&C claim | |

## DETENTION AND SECURITY CERTIFICATES

#### DETENTION

**Detention —** A55(4) if PR or FN taken into detention, officer immediate gives notice to ID

*With warrant:*

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| A55(1) An officer may issue a warrant for the arrest and detention of a permanent resident or a foreign national who the officer has **reasonable grounds to believe is inadmissible** and is a **danger to the public** or is **unlikely to appear** for examination, for an admissibility hearing, for removal from Canada or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2). |

*Without warrant:*

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| A55(2) An officer may, without a warrant, arrest and detain a foreign national, other than a protected person,   1. Who the officer has **reasonable grounds to believe is inadmissible** and is a **danger to the public** or is **unlikely to appear** for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2), or 2. If the officer is **not satisfied of the identity of the foreign national** in the course of any procedure under this Act. |

*Upon entry:*

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| A55(3) A permanent resident or a foreign national may, **on entry** into Canada, be detained if an officer  (a) considers it necessary to do so in order for the **examination to be completed**; or  (b) has **reasonable grounds** **to suspect** that the permanent resident or the foreign national is **inadmissible** on grounds of security, violating human or international rights, serious criminality, criminality or organized criminality. |

* If detained, right to counsel triggered
* A56(1) officer may order release from detention before the first detention review if officer of the opinion that the reasons for the detention no longer exist

**Review of detention –**

A57(1) review reasons for continued detention within **48 hours**

A57(2) at least once during next **7 days**, then at least once during each **30-day** period following each previous review, ID must review reasons for continued detention

**Conditions for release –**

A58(1) Immig Div shall order release unless satisfied, taking into account prescribed factors, that

(a) danger to public, (b) unlikely to appear, (c) Minister taking necessary steps to inquire into reasonable suspicion that they’re inadmissible on srs grounds, (d) ID hasn’t but may be established and they haven’t reasonably cooperated

**Prescribed factors --**  R244—247 – *only apply to danger, unlikely to appear, and ID*

* R245 **unlikely to appear**:

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| (a) being a fugitive from justice in a foreign jurisdiction in relation to an offence that, if committed in Canada, would constitute an offence…;  (b) voluntary compliance w previous departure order;  (c) voluntary compliance w any previously reqd appearance at an immigration/criminal proceeding;  (d) previous compliance with any conditions imposed in respect of entry, release or a stay of removal; | (e) any previous avoidance of examination or escape from custody, or any previous attempt to do so;  (f) involvement with a people smuggling or trafficking in persons operation that would likely lead the person to not appear … or to be vulnerable to being influenced or coerced by an organization involved in such an operation to not appear for such a measure; and  (g) the existence of strong ties to a community in Canada. |

* R246 **danger to public**:

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| (a) fact that person constitutes in opinion of Minister a **danger to public in Can** / **danger to security of Can**  (b) association with a criminal organization  (c) engagement in people smuggling or trafficking  (d) conviction in Canada under an Act of Parliament for (i) a sexual offence, or (ii) an offence involving violence or weapons;  (e) conviction for an offence in Canada under any of the following provisions of the [*CDSA*](http://laws-lois.justice.gc.ca/eng/acts/C-38.8), (i)  trafficking, (ii) importing/exporting, (iii) production; | (f) conviction outside Canada, or the existence of pending charges outside Canada, for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament for (i) a sexual offence, or (ii) an offence involving violence or weapons; and  (g) conviction outside Canada, or the existence of pending charges outside Canada, for an offence that, if committed in Canada, would constitute an offence under any of the following provisions of the [*CDSA*](http://laws-lois.justice.gc.ca/eng/acts/C-38.8), (i) (trafficking), (ii) importing/exporting (iii)production. |

* R247 **Identity**:

(1) (a) cooperation in providing evidence re ID, (b) possibility of getting ID without divulging info to origin country in case of FN who makes claim for refugee; (c) destruction of ID/travel docs; (d) provision of contradictory info wrt ID; (e) existence of docs that contradict info provided.

(2) **consideration of factors won’t have adverse impact wrt minor children**

* R248 **Sahin Factors** – if determined that grounds for detention, consider following factors before decision made on detention/release:

(a) reason for detention; (b) length of time in detention; (c) whether any elements to assist determining length of time detention likely to continue; (d) any unexplained delays/lack of diligence by Dept or person; (e) existence of alternatives

**🡪 Continued detention for smuggled people** – 58(1.1) Immig Div shall order continued detention of designated foreign national if satisfied any of the grounds exist and may not consider any other factors

**🡪 Conditions –** A58(3) Immig Div may impose whatever conditions it considers necessary on release

**Detention of minors –** A60 minor child detained only as measure of last resort, taking into account other applicable grounds and criteria including BIotC. Refer to R249 – special considerations

#### SECURITY CERTIFICATES

Allows govt to deport non-citizens it deems a threat to natl security; linked to ground of srs inadmissibility:

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| A77(1) The Minister and the Minister of Citizenship and Immigration shall sign a certificate stating that a permanent resident or foreign national is inadmissible on grounds of **security, violating human or international rights, serious criminality or organized criminality**, and shall refer the certificate to the Federal Court.  (2) When the certificate is referred, the Minister shall file with the Court the information and other evidence that is relevant to the ground of inadmissibility stated in the certificate and on which the certificate is based, as well as a **summary of information and other evidence that enables the person named in the certificate to be reasonably informed of the case** made by the Minister but that does not include anything that, in the Minister’s opinion, would be injurious to national security or endanger the safety of any person if disclosed. |

* A77(3) J then determines if certificate reasonable
  + A80 certificate determined to be reasonable = conclusive proof that person inadmissible and is a removal order that is in force
  + A81 Ministers may issue warrant for arrest and detention of person named in cert if they have reasonable grounds to believe that is danger to natl sec, anyone’s safety, or is unlikely to appear

**Review of detention for security certs** – A82(1) start review within **48 hours** after detention starts

A82(2) until determined whether reasonable, new review at least once every **6 month period**

A82(3) if continued to be detained after cert determined to be reasonable, may apply to FC for another review of reasons if period of **6 months** has expired since last review

A82(4) if released under conditions, may apply to FC for another review if period of **6 months** has expired since last review

**On review –** (a) J orders detention to be continued if release injurious to national security/endanger safety of any person or would be unlikely to appear, OR (b) order/confirm release and set any conds

**Procedures**

A83(1)(c) – J may at any time hear info/other evidence in absence of public and of PR/FN and counsel if, in J’s opinion, disclosure could be injurious to natl security or endanger safety of any person

A83(1)(e) – J shall ensure that PR/FN has summary of info to be reasonable informed but doesn’t include anything that, in J’s opinion, would be injurious to natl sec/endanger safety of any person

A83(1)(h) – J may receive into evidence anything reliable and appropriate even if inadmissible in court and may base decision on that evidence

🡪 **exception** – A83(1.1) doesn’t include info obtained thru torture or cruel, inhuman/degrading treatment/punishment

A83(1)(i) – may base decision on info/other evidence even if summary of that info not provided to PR/FN

**Special Advocates –** A83(1)(b) J shall appoint special advocate after hearing representations from PR/FN and Minister and after giving particular consideration and weight to preferences of PR/FN

**🡪** functions as counsel, etc; solicitor-client privilege applies (protects info, but not relationship)

**Canada (C&I) v Harkat** (2014) – SCC – upholds constitutionality of regime

ISSUE: does scheme violate rights of LLSP re fair opportunity to defend himself, despite fact that national security considerations prevent him from seeing all evidence/participating in hearings?

ANALYSIS: 2 central principles to scheme:

1. **Designated J intended to play gatekeeper role** – has wide discretion but also considers where overall process is fair. Interventionist approach, stopping short of inquisitorial
2. **Special advocates meant to be substantial substitute for personal participation** – not unconstitutional bc can send unlimited number of one-way communications to special advocates at any time; restrictions may be lifted with J authorization (A85.4(2)) so not absolute.

An “**incompressible minimal amount of disclosure is required**” to the PR/FN – if irreconcilable tension between informing and keeping info confidential, must withdraw the evidence

## TRAFFICKING AND SMUGGLING

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|  | **Trafficking** | **Smuggling** |
| Provisions | Palermo Protocols, IRPA 118(1), IRPA 121(1), CC 279.01, CC 279.02, CC 279.04 | Palermo Protocols, IRPA 117(1) |
| Action | Recruitment, transportation, transfer, harbouring | Movement across international border |
| Means | Force or other forms of coercion | Agreement/voluntary – often pay to be smuggled |
| Purpose | Exploitation | Financial or material benefit |
| Victim | Crime against individual | Crime against the country that they entered |
| Consent? | Trafficked victims do not consent/consent negated | Consent to be smuggled; supposed to be free upon arrival but often in debt bondage |
| Relationship | Relationship continues after crossing | Relationship supposed to end with crossing |

* Overlap between categories – think about them as a continuum

**Trafficking** –

Palermo Protocol:

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| The recruitment, transportation, transfer, harbouring or receipt of persons, by **means** of the threat/use of **force**/**coercion**, of abduction, fraud, deception, the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the **purpose of exploitation**. . . .  Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;  (b) The **consent** of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used; … |

*IRPA*:

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| A118(1) No person shall **knowingly organize** the coming into Canada of one or more persons by means of abduction, fraud, deception or use or threat of force or coercion. (2) …*organize* [includes] recruitment or transportation and, after their entry into Canada, the **receipt or harbouring** of those persons.  **Aggravating factors for s. 118**  A121(1) The court, in determining the penalty to be imposed under section 120, shall take into account whether  (a) bodily harm or death occurred, or the life or safety of any person was endangered, as a result …;  (b) the commission of the offence was for the benefit of, at the direction of or in assoc with a criminal organization;  (c) the commission of the offence was for profit, whether or not any profit was realized; and  (d) a person was subjected to humiliating or degrading treatment, including with respect to work or health conditions or sexual exploitation as a result of the commission of the offence. |

*Criminal Code*:

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| 279.01(1) Every person who **recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control, direction or influence over the movements of a person**, **for the purpose of exploiting them or facilitating their exploitation** is guilty of an indictable offence.  279.01(2) No consent to the activity that forms the subject-matter of a charge under subsection (1) is valid. |

* Incl narrower req of exploitation: conduct causes person to believe “their safety or the safety of a person known to them would be threatened if they failed to provide labour/service” CC279.04(1)
* CC279.04(2) court may consider whether (a) used/threatened force/coercion, (b) deception, (c) abused position of trust, power, authority

**Smuggling** –

Palermo Protocol:

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| “Smuggling of migrants” shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material **benefit**, of the **illegal entry of a person into a State** Party of which the person is not a national or a permanent resident.  ”Illegal entry” shall mean crossing borders w/o complying w the necessary requirements for legal entry into receiving state |

*IRPA*:

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| A117(1) No person shall organize, induce, aid or abet the coming into Canada of one or more persons knowing that, or being reckless as to whether, their coming into Canada is or would be in contravention of this Act. |

🡪 **Designated foreign national –** “designated foreign national” status if:

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| A20.1(1) The Minister may, by order, having regard to the **public interest**, designate as an **irregular arrival** the arrival in Canada of a group of persons if he or she  (a) is of the opinion that **examinations of the persons** in the group, particularly for the purpose of establishing identity or determining inadmissibility — and any investigations concerning persons in the group — cannot be conducted in a timely manner; or  (b) has reasonable grounds to suspect that, in relation to the arrival in Canada of the group, there has been, or will be, a **contravention of subsection 117(1) for profit**, or for the benefit of, at the direction of or in association with a **criminal organization or terrorist group**. |

* Results in detention; detention review schedule becomes more like security certificate

**B010 v Canada** (2015) – SCC – statutory interpretation of smuggling

FACTS: As all found inam under org crim for trafficking. Said they were just helping asylum-seekers flee persecution. ISSUE: Does “**material benefit**” requirement for smuggling require financial benefit?

ANALYSIS/RATIO: 37(1)(b) must be interpreted to have financial benefit due to cxn with intl/org crime. Otherwise, would catch absurd situations like humanitarian/family actions – leg wasn’t intended to do so

🡪 migrant who aids in own illegal entry not inadmissible under 37(1); acts of humanitarian or mutual aid don’t constitute smuggling under 37(1)(b)

**R v Appulonappa** (2014) – BCCA – constitutionality of s 117

FACTS: A, H, K, T alleged point persons for transnational for-profit operation to smuggle migrants. ISSUE: is s 117 overbroad? If so, inconsistent w PFJ? ANALYSIS/RATIO: Overbroad. Must interpret s 117 in way that respects both security concerns and also humanitarian aims of IRPA; **people smuggling ≠ mere humanitarian conduct, mutual assistance, aid to fam members**. Reads down provision

# CITIZENSHIP

## CITIZENSHIP STATUS

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| CA 3(1) Subject to this Act, a person is a citizen if  (a) the person was **born in Canada after February 14, 1977**;  (b) the person was **born outside Canada** after February 14, 1977 and at the time of his birth **one of his parents, other than a parent who adopted him, was a citizen**;  (c) the person has been **granted or acquired citizenship** pursuant to section 5 or 11 and, in the case of a person who is fourteen years of age or over on the day that he is granted citizenship, he has taken the oath of citizenship |

### JUS SOLI (BORN IN TERRITORY)

* Born in Canada after Feb 14, 1977
* **Excludes** children born to foreign diplomats, employees of foreign diplomats, or officers/employees of specialized intl orgs who hold diplomatic privileges (CA3(2))

**Budlakoti v Canada (MCI)** (2014) – FC

FACTS: CIC determined had never been Cdn citizen; declared inadm for srs crim. Parents said they left diplomatic jobs before birth, which would make him Cdn citizen. HOLDING: was issued Cdn BC and passport, but in error; evidence inconsistent, so not declared Cdn citizen.

🡪 left essentially stateless – only possible avenues H&C, get married and be sponsored, TRP

### JUS SANGUINIS (BY DESCENT)

* Born outside Canada after February 14, 1977 and at the time of birth one of his parents, other than one who adopted him, was a citizen

CA 3(5) where parent employed in armed services/working overseas for Cdn govt, child born overseas will acquire citizenship

***Kandola*** – only type of connection which can confer derivative citizenship is genetic/gestational

**28 year rule** –

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| CA8 A person who was born outside of Canada, after Feb 1977, and who derived Canadian citizenship from a parent who was also born outside of Canada and derived citizenship from their parent, ceases to be a citizen on their 28th birthday unless that person has (a) **applied to retain** citizenship, and (b) either **resided in Canada for a year** before applying or established a **substantial connection** with Canada |

🡪 repealed by 2009 amendments but NOT RETROACTIVE – **persons born between Feb 15, 1977 and April 16, 1981 are subject to loss on 28th birthday**. Options: apply for PR and resume citizenship (CA 11(1)) or Ministerial discretion to grant resumption (CA 5(4))

**1st generation limit –** citizenship by descent doesn’t apply after the first generation

CA 3(3)(a) if parent(s) got citizenship by descent, children born outside of Canada don’t get citizenship

*Exceptions* – Cdn armed forced, federal/prov public administration/service

**Statelessness –**

CA5(4)–(6) **Mandatory grant** of citizenship to someone born outside Canada to parent who was Canadian if person less than 23 years old; has resided in Canada for 3/4 years before date of application; has always been stateless; and hasn’t been convicted of various listed national security offences

CA5(4) **Minister may use discretion** to grant citizenship to alleviate statelessness, special/unusal hardship, or to reward services of an exception value to Canada

**International Adoption –** direct grant of citizenship to adoptees, BUT if you were adopted and weren’t born on Cdn soil or naturalized, then can only pass citizenship to adopted child through naturalization.

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| **Adoptee’s route to citizenship** | **Result** | **Adoptee’s children born overseas** | **Adoptee’s adopted children born overseas** |
| Naturalization (now preferred) | No first gen limit | Canadian at birth | Can receive direct grant |
| PR on arrival, direct grant after entry | First gen limit | Not Canadian at birth | Not eligible for direct grant |
| Citizen direct grant prior to entry | First gen limit | Not Canadian at birth | Not eligible for direct grant |

= people choosing to naturalize their adopted children rather than applying for direct grant

### NATURALIZATION

**Requirements for naturalization:**

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| CA5(1) The Minister shall grant citizenship to any person who  (a) makes application for citizenship;  (b) is **eighteen** years of age or over;  (c) is a **permanent resident** within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*, has, subject to the regulations, no unfulfilled conditions under that Act relating to his or her status as a permanent resident and has  (i) been **physically present in Canada for at least 1,095 days during the five years immediately before the date of application**, and … (iii) met any applicable requirement under the *Income Tax Act* to file a return of income in respect of three taxation years that are fully or partially within the five years immediately before the date of application;  (d) if under 55 years of age at the date of application, has an **adequate knowledge of one of the official languages of Canada**;  (e) if under 55 years of age at the date of his or her application, demonstrates in one of the official languages of Canada that he or she has an **adequate knowledge of Canada and of the responsibilities and privileges of citizenship**; and  (f) is **not under a removal order** and is not the subject of a declaration by the Governor in Council made pursuant to section 20. |

* **Physical presence req** – calculated using CA5(1.001)

(a) every day as TR or protected person = half a day of physical presence up to max of 365 days; (b) every day as PR = 1 day of physical presence

* **Language req –** CR14 “adequate knowledge” = can take part in short, routine conversations; understand simple instructions/directions; use basic grammar in oral communication; use vocab adequate for routine oral communication
* **Knowledge req** – applies btwn 18-54, assessed through written citizenship test and/or interview. CR15 – “adequate knowledge” reqs incl knowledge of Cdn history, geography, system govt, democracy, rights

**Citizenship Ceremony and Oath –** challenges brought to oath based on *Charter* freedoms have largely failed

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| **McAteer** (2013) – ONSC  FACTS: McAteer Irish immigrant, republican beliefs preventing him from taking oath of allegiance to Queen; Topey Jamaican immigrant, Rastafarian so would violate religious belief to take oath to "head of Babylon"; Bar-Natan Israeli immigrant, says would violate his belief in equality of all persons to bow to Queen for ancestry alone  HOLDING: **oath doesn’t undermine FoE, is affirmation of societal values and *Charter*** | **Ishaq** (2015) – FC  FACTS: objects to manner, not content of oath, worried will be forced to unveil in public.  ANALYSOIS/HOLDING: **citizenship J has no discretion but to apply *CR*, namely, to allow “greatest possible freedom in religious solemnization”** – legislation trumps GiC Policy directive to ensure face uncovered. Stick to non-constitutional ground where can be decided |

**Bars to Citizenship** –

CA19(2) – Minister may make report to SIRC if Minister of opinion shouldn’t be granted citizenship/administered oath if reas grounds (a) threat to security of Canada or (b) org crim

CA22(1) – **prohibitions:**

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| (a) while person (i) under probation order, (ii) a paroled inmate, (iii) serving term of imprisonment  (a.1)/(a.2) while serving sentence outside Canada for equivalent offence  (b) while person charged with, on trial for, or doing appeal re indictable offence  (b.1) while charged with, on trial for, doing appeal re offence committed outside Canada with Cdn equivalent  (c) while under investigation, or charged, on trial, or appeal re crime against humanity/war crime  (d) if convicted of crime against humanity/war crime  (e) if hasn’t obtained authorization to return to Canada  (e.1) if person misrepresents or withholds material circs re a relevant matter  (e.2) if, during 5 years before app, was prohibited from being granted citizenship/taking oath, or  (f) if, during 10 years before app, person ceased to be citizen [due to terrorism] |

## LOSS OF CITIZENSHIP

#### REVOCATION

**Revocation based on misrepresentation/fraud:**

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| CA10(1) Subject to subsection 10.1(1), the **Minister** may revoke a person’s citizenship or renunciation of citizenship if the Minister is satisfied on a **balance of probabilities** that the person has obtained, retained, renounced or resumed his or her citizenship by **false representation** or **fraud** or by **knowingly concealing material circumstances**.  10.1(1) If the Minister has reasonable grounds to believe that a person obtained, retained, renounced or resumed his or her citizenship by false representation or fraud or by knowingly concealing material circumstances, with respect to a fact described in **section 34, 35 or 37** of the *IRPA* other than a fact that is also described in paragraph 36(1)(a) or (b) or (2)(a) or (b) of that Act, the person’s citizenship or renunciation of citizenship may be revoked only if the **Minister seeks a declaration**, in an action that the Minister commences, that the person has obtained, retained, renounced or resumed his or her citizenship by false representation or fraud or by knowingly concealing material circumstances and the **Court makes such a declaration**. |

* i.e., where state takes citizenship away when it was not meant to be granted in first place
* *frequent kinds of misrep* – crime etc, misrep of residency (especially amount of time), dependent children/family status
* *procedure* – required to give notice and must allow citizen opportunity to make written representations or oral hearing if required

**Status after revocation --**

A46(2) – misrep/fraud during citizenship process only 🡪 PR

CA10.1(1) – if misrep/fraud wrt A34, 35, 37 (sec/HR or intl/org criminality) 🡪 FN

CA10.2 – if obtains citizenship after becoming PR by misrep/fraud 🡪 FN

#### RENUNCIATION

**Renunciation of citizenship** **requirements:**

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| CA(9)(1)(a) is **citizen of a country other than Canada** or, if application is accepted, will become citizen of a country other than Canada;  (b) is not the subject of a declaration by the Governor in Council made pursuant to section 20 **[terrorism provisions]**;  (c) is **not a minor**; (d) is not prevented from understanding the significance of renouncing citizenship by reason of the person having a **mental disability**; and (e) **does not reside in Canada**. |

* **Resumption of citizenship** – CA11(1) Minister may grant citizenship if make app for resumption; must be PR and physically present for at least 365 days during prior 2 years
  + i.e., moved to another country to get citizenship where had to give up Cdn citizenship, then moved back and wants it back

#### PASSPORTS

*Canadian Passport Order* – 9 Minister may refuse to grant a passport; 10 Minister may revoke a passport on number of grounds (including 10.1 national security grounds)

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| **Abdelrazik** (2009) – FC – emergency passports  FACTS: detained in Sudan at risk of detention/torture, living in Cdn embassy but pp expired. Canada says UN says is assoc of Al-Qaida so subject to travel ban and won’t issue PP for repatriation under s 10.1.  ANALYSIS/RATIO: **where a citizen outside Canada, GoC has a positive obligation to issue an emergency pp** to allow him to enter Canada – otherwise right of movement under *Charter* is illusory | **Kamel** (2013) – FCA – refusal to grant  FACTS: convicted in France of crim org for purpose of terrorism and complicity in forgery of pps; returned to Canada after imprisonment w temp pp. Was refused new pp. ANALYSIS/RATIO: **national security grounds to be accorded fair, large, liberal interpretation**. Here, was causal link btwn natl sec and the refusal to issue (due to pp fraud). Could always get another temp pp, just no general pp. |