Immigration Themes 3

History 3

State Sovereignty 3

Securitization 3

Criminalization 4

Key Actors 4

Citizenship and Immigration Canada (CIC) 4

Canadian Border Services Agency (CBSA) 5

Immigration and Refugee Board of Canada 5

Federal Court of Canada – Judicial Review 5

Federal Court of Appeal 5

Immigration and Refugee Protection Act (effective June 2002) 5

Constitutional and International Law Perspectives 5

Constitutional Law 5

Division of Powers 5

Charter Application 6

International Legal Framework 9

Admissions to Canada 10

Basic Rules 10

Citizens 11

Permanent Residents 11

Economic Migration 11

Federal Skilled Workers Program (FSWP) 11

Federal Skilled Trades Program 12

Canada Experience Class 12

PhD Stream 12

Provincial Nominee Program (PNP) 12

Caregiver Program 13

Business Immigrants 13

Express Entry 13

Accompanying Family Members 13

Family Class Migration 14

Who is Family? 14

Important Definitions 14

Excluded Relationships 14

Family Class 15

Family Class Inadmissibility 15

Spouse of Common-Law Partner in Canada Class 15

Case Law re: Partnerships 16

Sponsorship and Undertakings 18

Who is Eligible? 18

Conditional Provisions for Partner Sponsorships 18

Appeals to the IAD 19

Humanitarian and Compassionate Admissions 19

H&C as Way of Contesting Removal (for inadmissibility) 21

Temporary Admissions 21

Visitors 22

Students 22

Rules for all temporary residents: 22

Temporary Foreign Workers 22

Policy Considerations re TFWP 23

Other Temporary Residents – TRP 23

Enforcement: Sovereignty and Border Control 23

**“Illegal” Migration** 24

o “crimmigration” – criminology of mobility

 **Border Securitization** 24

 **The Deportation Turn** 24

 **Human Trafficking** 24

 **Human smuggling** – assisting ppl to move across border in clandestine way, in absence of abductio 25

 *R v Appulonappa* (2014 BCCA 163) 25

Inadmissibility 25

Criminal Inadmissibility 25

Security 26

Human Rights or International Rights Violations 27

Serious Criminality and Criminality 27

Organized Criminality 28

Equivalency of Crimes 29

Criminal Inadmissibility – Appeals 30

Other Grounds of Inadmissibility 30

Health Concerns 30

o Reg. 24- exception to excessive demand – includes (a) sponsor’s conjugal partner, dependent child, or adopted child or (b) spouse’s dependent child 31

Definitions 31

Financial Concerns 31

Misrepresentation 32

Non-compliance with Act 32

Inadmissible Family Member 32

Appeals to IAD 32

The Process of Removal 32

Types of Removal Order 32

Enforcement 33

Removal Procedure 34

Appeals to the IAD re: Removal (IRPA s 62-71) 35

Temporary Resident Permit – Minister’s Permit 36

Pre-Removal Risk Assessment (PRRA) 37

Danger Opinion 37

Judicial Review 38

Staying a Removal Order 38

Statutory Stays 38

Judicial Stays 38

Security Certificates 39

Process 40

Detention Under Scheme 40

New Procedures (post-Charkaoui) 40

Immigration Detention 41

Immigration and Refugee Boards of Canada, Guidelines: Detention 43

Designated Foreign Nationals 44

Immigration Law CAN Kellan McKeen

# Immigration Themes

## History

Nation-building 1867-1960 – British citizens can move around, race based immigration policies (language tests, continuous journey requirement, Chinese head tax)

* Komagata Maru – 376 Indians aboard ship, sent back 1914 (Singh v Canada)
* Temporary migration – Seasonal Agri Worker Program (Portugese)

Liberal-humanitarian (60s – 90s) – HR discourse, no racial based immigration

* Points system – economic or family qualifications (Charter also)
* 70s-80s – 25% of immigration was refugees (Uganda, Chile)
* refugees, H&C grounds, based on Int’l law

Securitization and rapid change – 21st century

* Kenny made more changes than any other Minister – reset policy and political framework of immigration

Immigration Act and IRPA – 3 features: 1) objectives of legislation: eg. Humanitarian aims and promoting economic growth. 2) Gov’t annual plan of immigration. 3) 3 categories: independent, family, humanitarian

*Du Guzman v Canada* (2005 FCA) : legally binding int’l HR instrument which Canada is signotry – IRPA must be interpreted and applied w/ this, absence of contrary leg – used as persuasive/contextual factors, not determinative

## State Sovereignty

* States free to decide who to close borders to, who can remain in country
* Singh v Canada – freedom to admit whomever – continuous journey rule constitutional
* Deportation for criminalization – tool for silencing labour agitators/political activists (Winnipeg General Strike of 1919) – 10 leaders deported
* Also poor and disabled - deportation for “public charge” – 30s
* Refusal to accept asylum for Jews (1939 SS St Louis 930 jews)
* Gulf btw immigration and aboriginal law in Canada – un-extinguished Aboriginal rights – fetter on power of state to control which non-citizens may remain in country?
* IRPA contributes to closed community (Communitarianism) – used education/economic/language criteria – explicitly and implicitly excludes individs from racial/ethnic/economic backgrounds- creates more homogenous community
* Broad objectives under IRPA – support any potential discretionary implementation choice
* Executive granted large power – exceptional discretion often incorporated into migration leg – eg. H&C grounds
* Linkage btw migration law and core state power
* Even w/ globalization, immigration remains important part of sovereign control – has strengthened over recent decades

## Securitization

Post 9/11 Security turn – political climate served to mute objections to securitization of IRPA (but was already changing in this direction). – no more political opposition

*Medovarski v Canada* (2005 SCC): court looked at objectives of IRPA and concluded it has intent to prioritize security. Objectives: prevent entry/remove of applicants w/ crim records, emphasize obligation of PRs to behave lawfully in Canada. Change from previous statute, which focused on successful integration of apps

* Similar to other Western liberal democracies
* Amendments to IRPA have continued this trend
* Arguably immigration law invented to ppl out, then amended to allow ppl in
* Growing CBSA – funding doubled from 2003
* CBSA – employe ‘migration integrity officers’ overseas – ensure ppl have proper travel docs – part of securitization of Canada’s borders, extends border overseas

“Security and Migration Law in the Less Brave New World” (Dauvergne, 2007)

* Strong linkage btw migration leg and core state power (large discretion to executive) – closely tied to shifting political winds (Dauvergne)
* Eg. Shifts post 9/11 made w/o change to law – discretionary practices allowed for large changes
  + Eg. More use of detention provisions
* Security issues: traditionally based in military, war- changed w/ “war on terror”
  + New idea of security, based on threat to existence/way of being – respond w/ extraordinary actions, not normal decision making (w/in rule of law)
* Security issues becoming “normalized” – not exceptional measures any more- political shift to treat migration as policing matter rather than economic/humanitarianism
* Fear of migration – no longer fear of loss of culture/linguistics- instead fear of terrorism – t hreat of migration fits w/in normalized security situation
* Threat/security fears is social construct – how leaders cast event/public response
* Most refugees/immigrations don’t actually pose a threat – this evidence is hid
* Securitization of migration – “it is a palatable political response to changed climate of fear, and resonates w/ public” (p. 38)
* Security politics – thrive on exceptions – tests core legal issues: right to liberty, habeas corpus, rule of law – eg. Indefinite detention, Guantanamo Bay

Global Commission on Int’l Migration: “Migration in an Interconnected World” New Directions for Action” (2005).

* Migrating out of choice: migration and the global economy
* Reinforcing economic and developmental impact
* Addressing irregular migration
* Strengthening social cohesion through integration
* Protecting the rights of migrants
* Enhancing governance: coherence, capacity and cooperation

Conclusion: importance of economic values in policy discourse, and int’l context for migration reflects commitment for states to coordinate/cooperate efforts, instead of int’l control mechanisms.

## Criminalization

* Related to securitization – non-citizens viewed as presumptively criminal
* Evidence of this bias
* Higher provisions for consequences of criminal activity – even lower levels of crime
* Breaches of immigration law (previously regulatory offences, no morality) – now seen in society as crimes – eg. “illegal aliens” (instead “undocumented”?)
* Increasing hostility towards migrants
* Cnd immigration becoming more litigious

## Key Actors

### Citizenship and Immigration Canada (CIC)

* Principal federal gov’t ministry – assess applications and provide decisions
* Provide immigration policy and legislative leadership
* Research production – status of other countries, prospective immigrants
* Decide who comes to Canada:
  + Select PR and temp residents
  + Issue visitor, worker and student visa, passports

### Canadian Border Services Agency (CBSA)

* Manage, control, secure Canada’s borders – policing, security screening
* Responsible for removing, arresting, detaining ppl, enforcement/removals

### Immigration and Refugee Board of Canada

* Largest admin trib in Canada – 4 divisions (Ottawa, tor, montreal, van)
* Made decisions on immigration/refugee matters: applies law and policy
* Includes Refugee Protection Division and Refugee Appeal Division
* Immigration Division:
  + Hears detention (18,000/yr) and admissibility (2500/yr) issues
* Immigration Appeal Division:
  + Appeals by family class sponsors who are Cnd citizens or PR
  + Appeals of ‘removal orders’ by those eligible for appeal
  + Appeals by PR who contravene residency requirement
  + Appeals by CBSA of ID decisions re: admissibility

### Federal Court of Canada – Judicial Review

* Must seek leave, only 15% granted
* Access to justice issue – harder to organize test case litigation
* JR is discretionary remedy – no automatic right
* SOR of reasonableness most likely applies (Dunsmuir)
* SOR of correctness applies to issues of procedural fairness
* Remedy: sent back to officer, ID or IAD for re-consideration w/ instructions

### Federal Court of Appeal

* No right to appeal to FCA unless Fed Ct judge certifies that the case raises a question of general importance (pass Charter scrutiny)
* Counsel should always ask for certified question
* Appeal to SCC very difficult – requires leave, no automatic right of appeal

### Immigration and Refugee Protection Act (effective June 2002)

* Type of ‘framework’ legislation: expanded via regs and Ministerial instructions
* S. 3 objectives and application:
  + (c) focus on Canada’s economic prosperity
  + (f) focus on timely procedures and processing
  + (h) focus on security since 9/11
* Key idea: broad discretion in immigration law; purposes/objectives are often in conflict w/ one another
* S. 94 – requires annual report to Parliament

# Constitutional and International Law Perspectives

## Constitutional Law

### Division of Powers

* S. 95 twinned authority – provincial law “not repugnant” to Parliament
* S. 91(25) – federal authority – naturalization and aliens (paramountcy doctrine)
* Chinese Immigration acts – federal gov’t make ineffective
* *Mangat v Law Society of BC* (2001 SCC) – paramountcy doctrine applies to federalial law that permitted immigration consultants to represent ppl before IRB
* Federal Provincial agmts – Canada-Quebec Accord (‘91) – Quebec has autonomy of who to let in, but not “hard end” of immigration law
* Provinces: role on admission, selection, settlement
* Federal: enforcement – inadmissibility, removal, security

### Charter Application

* Charter rights protect ‘everyone’ physically present in country (*Singh*)
* Charter governs conduct of officials outside country, if not limited by foreign or int’l law (*Hape, Khadr*) – ie. not other rights protection framework

*Khadr*: Cnd officials who interrogated him at Guantanamo – in breach of American/intl’l law (US courts) so Charter applied to Cnd officials

* + Principle could be applied in immigration context in the future
* Section 6 (mobility of citizens)– distinguishes btw citizens and non-citizens, despite saying Charter applies to everyone – opens door for variation in rights protection
  + (and includes PR in its ‘internal’ freedom of movement protection)

Section 7L Life, Liberty and Security of the Person

#### Singh v Minister of Employment and Immigration (1985 SCC)

3 principles:

1. Section 7 rights protect every person physically present in Canada, regardless of immigration status.
2. Substantive decision about refugee protection engages core s. 7 interests
3. Because of s. 7 interest, refugee determination must allow person opportunity for hearing.

Note: international law principle of *non-refoulement* applies

This case led to establishment of IRB in 1989.

#### Chiarelli v Canada (1992 SCC)

**Facts**: C was PR, found inadmissible on grounds of criminality (narcotics trafficking), deportation order made. In-camera meeting occurred, Cab

**Issue:** Ability to reduce scope of appeal review (not consider H&C grounds) for those with criminal convictions, and in-camera process violation of s. 7 and s. 12 rights?

**Outcome:**

* Deportation doesn’t engage s. 7 (no deprivation of liberty/security of person)
* Deportation doesn’t violate s. 12 b/c no punishment – rather, consequence of C’s act or withdrawal of privilege granted to him (he breached condition of right to remain)
* S. 6 – non-citizens do not have an unqualified right to remain in country (“most fundamental principle of immigration law”)
* Allowing C to stay in Canada would outrage standards of decency, undermine ppl’s faith in immigration system – deportation does not

#### Suresh v Canada (2002 SCC)

**Facts:** S had refugee status in Canada, and during PR processing, Canada formed opinion he was member of Tamil Tigers, org that was engaged in terrorist activity. He was ordered deported and challenged. Also determined members of the group likely faced torture.

**Issue:** Can Canada deport someone who faces a *prima facie* risk of being tortured?

**Outcome:**

* International conventions and instruments inform POFJ – prohibit torture (ICCPR, CAT, int’l case law, etc., BUT Ref. Convention Article 33 – allows if danger to security of the country
* Barring extraordinary circumstances, deportation to torture violated POFJ in s. 7 of Charter
* Minister should generally decline to deport refugees to risk of torture, but leaves open possibility – must balance state’s genuine interest in combatting terrorism and protecting public security
  + Note: against int’l law: absolute prohibition against this

#### Charkaoui v Canada (2007 SCC)

**Facts:** Challenge to Canada’s security certificate regime brought by 3 Muslim men, detained for years b/c they were considered un-deportable. IPRA allowed Minister to issue cert. of inadmissibility (leading to detention) if deemed threat to national security. Person in cert can’t see material of why it was issue – national security reasons. Judge decides in private if it is reasonable, no appeal.

**Issue:** Does procedure for determining reasonableness of certificate infringe s. 7, saved under s. 1? Does detention of PR or FN infringe s. 7, 9, 10(c) or 12, saved under s. 1?

**Outcome:**

* S. 7 interests engaged – deprivation of liberty rights (detention automatic) and possible removal to face threat to life/freedom
  + Note, not deportation itself
* POFJ – procedural fairness – violation b/c defendant not able to develop legal arguments in defence w/o disclosure and full participation, know case against him
* Not saved under s. 1 – fails for minimal impairment of individ’s right to judicial determination on the facts and the law and right know and meet the case
* Gov’t can do more to protect individ while keeping critical info confidential
  + Eg. UK uses special counsel to provide protection to person’s interests
* Extended periods of detention pending deportation under cert. provisions don’t violate s. 7 or s. 12. Provided reviewing courts adhere to guidelines – provides regular opportunities for review, taking into account all relevant factors
  + But judge may find at certain point that particular detention constitutes cruel/unusual treatment, so infringes Charter
* No s. 15 breach (discrimination against non-citizens). S. 6 allows for differential treatment, only citizens accorded right to enter, remain in Canada (Chiarelli)

3 Elements of POFJ:

1. Right to a hearing before an independent/impartial magistrate
2. Decision by magistrate on facts and the law
3. Right to know the case put against one, and right to answer that case

Section 15: Equality Before the Law

#### Lavoie v Canada (2002 SCC)

**Facts:** FNs applied to fed gov’t for employment. Provision of Public Service Employment Act gave preferential treatment to citizens when allocating applicants to different departments. They challenged as violation of s. 15 equality rights.

**Issue:** Does provision giving preference to citizens infringement on s. 15 for non-citizens, and is it saved by s. 1?

**Outcome:**

* Provision is violation of s. 15, but can be justified as reasonable limit under s. 1
* Creates distinction btw citizens and non-citizens – non-citizens constitutes analogous ground of discrimination under s. 15(1)
* Upheld under s. 1 – proportionality test important (infringement of Charter right vs. objective of the law)
* Not true that lifting the citizenship preference would substantially increase employment prospects of non-citizens (difficult for citizens too, and mostly filled internally)
* Inconvenience they suffer isn’t too high a price to pay for gov’t right to define the rights an privileges of its citizens

**Dissent:**

* No rational connection btw objective of enhancing value of citizenship, and the discrimination faced
* Citizenship preference as incentive to naturalize is not persuasive
* Cnd citizenship shouldn’t be a benefit of discriminatory practices

#### Toussaint v Canada (AG) (2011 FCA)

**Facts:** T from Grenada, unauthorized immigrant. Worked for 7 yrs, then fell ill. Needed substantial medical care, tried for valid status in Canada. Applied for PR and TR in Ont to get OHIP, asked for waiver of fees (refused) – never paid, so apps never considered. Applied for Interim Fed Health Program, covers cost of emergency med care for indigent persons legally in Canada, and was rejected. Claims her exclusion from med covered infringed her s. 7 and s. 15 rights.

**Issue:** Does excluding a person w/o immigration status in Canada from provisions of federal health program a s. 15 infringement?

**Outcome:**

* Failed –1) immigration isn’t analogous ground under s. 15 – not an immutable characteristic, and gov’t has legit interest in expecting person to change
  + Gov’t has valid interest in expecting ppl in Canada to have legal right
* 2) Fails to establish there is reliance on prejudice/stereotyping – she was denied b/c she wasn’t legally in Canada
* 3)Legislative choice not to accord particular benefit absent discrimination doesn’t give rise to s. 15 review – gov’t can target social programs it wants to
  + No discrimination, so deference given to legislature
* 4) Policy reason: floodgates – issue of healthcare safe haven
* Order in council isn’t operative cause of disadvantage- she endangered her life and health by coming and remaining illegally

Note: post *Withler*, comparator groups not as crucial – especially when overlapping grounds of discrimination. S. 15 analysis must be contextual and focus on potential of provision to exacerbate situations of historic disadvantage. This emphasis may help non-citizens in the future, so Toussaint shouldn’t be seen as final word.

Also…Challenge to changes to Interim Fed. Health program in 2012 – ppl claiming refugee status (or failed), no longer eligible for health care. Challenge by Canadian Association for Refugee Lawyers, and Cnd Doctors for Refugee Care – before SCC.

**Section 15 Takeaway**

* Andrews 1989 – non-citizenship recognized as analogous ground – despite this, s. 6 defeats s. 15 claim
* Issue of comparator group: works against non-citizens
* Difference btw non-citizens: Successful claimants usually established, have PR – unsuccessful are ppl whose rights are more precarious

**Section 7 Takeaway**

* More successful than s. 15
* Analysis is linked to a ‘context’ – immigration context, and security context – changes s. 7 language depending on this
* POFJ and linkage to int’l law – argument bolstered by connection to int’l leg
* Deportation does not equal punishment
* Not quite indefinite detention and not quite secret trials are ok

## International Legal Framework

States free to determine who can cross borders – 2 exceptions: citizens and refugees

International HR docs apply to everyone

Int’l HR docs – source of both procedural protections as well as substantive

* Optional protocols and reports
  + States voluntary sign up to – allows individuals to make complaints
  + DM may run into enforcement problems
* Important instruments:
  + UN HRC
  + Committee Against Torture (CAT)
  + Inter-American Commission on HR
  + NATFA
* Non-citizens still have protection from int’l HR, but hard to access
* Convention on the Protection of the Rights of All Migrant Workers and Member of their Families
  + Aimed at non-citizens, even w/ illegal status
  + Only 47 parties (none of West. Lib. Democracies) – migrant sending states

Individual Complaints

* After individ exhausted all attempt to get remedy from Cnd DM, may be able to lodge complaint w/ int’l trib – Canada has ratified optional protocols
* Expensive and time-consuming to appeal to these bodies
* Cnd gov’t frequently refused to comply w/ body’s views and recommendations
* Cnd courts determined they aren’t bound by views of int’l treaty bodies (*Ahani*)

#### Pillai v Canada (2011 UNHCR)

United Nations Human Rights Committee – established by *Protocol to the International Covenant on Civil and Political Rights*

**Facts:** Family from Sri Lanka caught btw LTTE Tamil Tigers and Sri Lankan police and were tortured/sexually abused. Arrived in Canada, applied for refugee status. Psychologist diagnosed man w/ PTSD, and recommended this taken into account. IRB rejected the expert’s opinion – found problems w/ credibility. IRB found little evidence the LTTE would’ve pursued them, and they wouldn’t have been at risk to return to Sri Lanka.

**Issue:** Does the Cnd decision to deport them constitute breach of Article 7 of Covenant (non one subjected to torture or cruel, inhuman or degrading treatment/punishment)?

**Outcome:**

* The IRB refrained from questioning him about torture and didn’t take into account diagnosis of PTSD
* Found different standard for determining deportation – Canada argues harm as necessary and foreseeable consequence of deportation; Convention prevents it where substantial grounds for believing there is real risk of irreparable harm
* Insufficient weight given to his allegations of torture and risk if deported – violation of Art. 7 of covenant
* Outcome: effective remedy includes full reconsideration of claim regarding risk of torture

\*\* Note, after this decision, Pillai family was allowed to remain in Canada on H&C grounds – the decision makes note of the committee’s opinion.

#### Enrique Falcon Rios v Canada (2004 UN Committee Against Torture)

United Nations CAT, established by the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

**Facts:** Rios lived in Mexico w/ his family, his uncle accused of being member of EZLN. He alleged military tortured him and family, forced him to sign identity doc admitting he was part of EZLN. Applied for refugee status in Canada, rejected. IRB found him not credible – implausible that uncle deserted EZLN, no evidence that they issued ID cards to members. Didn’t take into account psychological or medical report that substantiated his claim. He applied to UN CAT: claimed his forced return to Mexico violated article 3 of CAT.

**Issue:** Does his deportation violate Article 3 of CAT?

**Outcome:**

* Yes, violation of article 3 – substantial grounds for believing he would be in danger of being subjected to torture
* Critical of limited access to JR and H&C not effective remedy
* For credibility, IRB didn’t properly take into account med reports w/ injuries consistent w/ torture he described, or psychological vulnerability

#### John Doe (2011 IACHR)

Inter-American Commission on Human Rights, established by *American Declaration of the Rights and Duties of Man* (Canada a party due to member of Org of American States)

**Facts:** 3 refugees came to Canada by land and were returned to US due to direct back policy. This allowed refugees who came to Canada by border entry w/ US to be directed back to US if Canada couldn’t asses their claims, and given dates to come back to Canada later when refugee eligibility would be determined. Once in US, they were arrested and deported to countries of origin, before claim assessed in Canada.

**Issue:** Does the direct back policy violate Article XXVII of American Declaration to be protected from risk of refoulement, and their right to seek asylum?

**Outcome**:

* Three breaches found by Commission:
  + Violation of JD right to seek asylum
  + Violation of JD right to protection from possible chain refoulement by failing to conduct individualized risk assessments prior to returning to US
  + Violation of JD right to resort to the courts before being returned to US
    - This is most important – allows refugees to have their claims heard before being deported – guarantees due process, gives legitimacy to immigration system

\*\*Note: the direct-back policy has been overtaken by the Safe Third-Country Agreement btw Canada and US

**International Law/Charter Law Takeaway**

* All int’l HR cases involve refugee law – immigration law not so involves w/ HR
* Charter law litigation – refugee litigants more successful than immigration litigants
* Theme: Ppl who are better off do better in immigration Charter litigation

# Admissions to Canada

## Basic Rules

Different categories:

* Permanent vs temporary admissions
* Economic, family, humanitarian admissions

Rule:

* Must apply outside Canada
* Get permission (visa) + examination at border – must be compliant w/ terms of visa at time of exam (can’t assert right on visa alone)
* Must meet criteria, and not be inadmissible

Visa exempt entry:

* Non-citizens that can cross Cnd border – discretionary list – issued 3-6 month tourist visa

Ministerial instructions – allowed by s. 14.1(1)

### Citizens

Can always enter country

* S. 19(1) every Cnd citizen, right to enter/remain in Canada (and Indians un *Indian Act*)

### Permanent Residents

* Have labour motility – don’t need permission to work
* Subject to requirements that allow/require the gov’t to remove them
* PR status remains until taken away: admissibility process required to remove status
* S. 12 – framework of PR
  + (1) FN may be selected as member of family class on basis of relationship as spouse, cL partner, child, parent, or other prescribed family member
  + (2) FN may be selected as member of economic class on basis of ability to become economically established in Canada
  + (3) FN may be selected who is Convention refugee, or similar
* s. 18 – *every* person entering Canada must appear for examination
* s. 19(2) Officer shall allow PR to enter Canada if satisfied they have that status
* s. 20 FN must have (a) visa to become PR (b) visa to become temporary resident, and will leave by end of period authorized for stay
* s. 21 becoming a PR
  + (1) FN becomes PR if officer satisfied that they applied, have visa to become PR, and is not inadmissible
  + (2) Convention refugee or protected persons become PR if not inadmissible
* s. 27 (1) PR Right to enter/remain in Canada, subject to Act (2) must comply w/ regulations or MIs

**Residency Requirement**

* s. 28 – 5 yr period rolling residency obligation
* (2)(a) must reside in Canada for 730 days out of 5 yr period by being (i) physically present in Canada or (ii)-(v) – other situations (see Act - ie. accompanying spouse, working for gov’t or Cnd business, etc – close connection to Canada)
  + (b) must be able to show that they have met or will be able to meet obligations w/in 5 yrs (ii) 5 yr period immediately before exam
  + (c) H&C considerations – determination of H&C by officer, taking into account BIC, overcomes breach of residency obligation
* R 61 –defines Cnd business – doesn’t include one just set up for this purpose (must have ongoing operations in Canada)
* R 62 – calculation of days doesn’t include any day after (a) s. 44 report made failing residency ob, or (b) any decision made outside Canada re failure of residency ob

Loss of PR status

* S. 46 loss of PR status:
  + (a) when they become citizen
  + (b) failure to comply w/ residency obs in s. 28
  + (c) when removal order comes into force
  + (d) when refugee protection has ceased under s. 108 (cessation)
  + (e) approval of application to renounce PR status

# Economic Migration

## Federal Skilled Workers Program (FSWP)

* based on A 12(2) – economically established
* basic category against which other categories are developed
* significant modifications through Ministerial instruction (eg. Caps, subcaps)
  + sets processing priorities (FSWs, investors, etc.)
* current cap is 25,000 apps – no cap for those w/ job offer
* R75(2) FN is skilled worker if (a) worked 1 yr skilled work past 10 yrs – (b) NOC requirements (d) proficiency in English/French (e) submitted (i)Cnd education credential or (ii) foreign diploma/credential
* 3 basic rules (R75, R76):
  + 1) fit the definition of skilled worker
  + 2) R76 – (1)(a) must be awarded enough points to ‘pass’ (67 in 2003) (b)(i)
  + 3) have enough money to support for 6 mos – Low Income Cut Off (depends on family size/income) OR R76(1)(b)(ii) arranged employment in Canada defined in R82(1)
* R76 Ability to become economically established – assessed on following criteria
  + (1)(a) have minimum points in points categories:
    - R78 Education
    - R79 Language
    - R80 Work experience
    - R81 Age
    - R82 Arranged employment
    - R83 Adaptability
  + (1)(b) enough money or a job (see above)
* R77 Applicable time for assessment of criteria is date app for PR made
* R76(3) Substituted Evaluation
  + Discretionary provision that can be utilize where the applicant doesn’t meet points req’t, but can demonstrate that they are likely to become economically established in Canada (if point awarded isn’t sufficient indicator of whether they will)
  + (4) a substituted evaluation requires concurrence of second officer
* R85 Accompanying family members – of person who made application as FSW will become PR after exam if (a) the person who made app becomes PR, and (b) the FN is not inadmissible

## Federal Skilled Trades Program

* came into effect 2013 – targets ppl trained n specific trades (named in regs)
* Reg 87.2 defines the class: (1) types of jobs (3)(a) language proficiency (b) 2 yrs out of 5 work experience (d) at least one other thing (cert., work permit/job offer, etc)
* Once w/in the definition, a modified point system is applied
* (5) Must have money if not a job or offer already (6 mos income)

## Canada Experience Class

* R87.1(2) FN is member of CEC if they have one yr of full-time work in NOC Skill A, B, or O in past 3 yrs and (d) have language proficiency
* R87.1(3)(a) time working as full-time student will not count (c)must have TRP
* Then assessment using same points as FSWs (just alters definitional portion of FSW)

## PhD Stream

* Created by ministerial instructions for those doing PhD work in Canada
* Must meet FSW criteria, and must in all case meet 1 yr experience criterion
* Work doesn’t have to be in Canada, but can’t have been while full-time student
* Then assessment using same points as FSWs (just alters definitional portion of FSW)

## Provincial Nominee Program (PNP)

* Federal-provincial agmt – IRPA s. 8, 9 allows provinces to select migrants based on provincial policy initiatives – meant to fulfill local labour market needs
* R87(2) member of PNP if (a) named in nomination certificate + (b) intend to reside in that province
* R87(3) nomination alone isn’t sufficient evidence of ability to become economically established in Canada – officer must still assess this (plus inadmissibility)
* (4) rejecting PN requires second opinion
* (5) limits on how provinces can use PNP to establish business migration programs
  + note, the provinces wanted investment to set lower thresholds
  + Reg. amended – investment program equity must be $1M min (+ other req’s)

\*\*Note- PNP can be preferable to FSW, since it’s often faster. – may include workers, entrepreneurs, investors – provides option to high-skilled workers who don’t fit into FSW

## Caregiver Program

* Live-in caregiver still exists for ppl who applied before new program introduced in Nov 2014. Ppl who have visas can still renew them.
* No longer requirement of live-in program (which created vulnerabilities)
* Nfew non-live in program – apply for regular work permit w/ regular LMIA – then, after working as caregiver for set time (childcare/high needs care), caregiver can apply for PR through new categories created by MI
  + Care for Children class
  + Caring for People w/ High Medical Needs Class – RN, practical nurse, nurse aid/ordly, home support worker (not housekeeper)
* Criteria to enter program more difficult – ‘high medical needs’ care defined
* Still a temporary to PR two step program

## Business Immigrants

* Business and entrepreneur categories terminated June 2014 – Immigrant Investor Venture Capital & Business skills program – proposed, but not in effect
* R88 definition – “self-employed person class” = FN who has “relevant experience” and has intention/ability to be self-employed in Canada and make significant contribution to “specified economic activities”
* “relevant experience” = 2 yrs out of 5 work (self-employed/world class/combo)
* “specified economic activities” = cultural activities, athletics or purchase and managements of a farm
* R100 members of self-employed persons class
* Selection criteria – points under R102
* R107 – Accompanying family member get PR if (a) applicant gets PR and (b) FN not inadmissible

Note \*\* - some provinces (like BC) have business programs under PNP umbrella

## Express Entry

* Began January 2015, in conjunction w/ FSW, FST and CEC categories
* Creates super pools of most qualified applicants, who are drawn and invited to apply – also creates new comprehensive points system
* Almost guaranteed a job (but mostly just processed faster – w/in 6 months)
* Attempt to address the enormous queue in economic category

## Accompanying Family Members

* For R85 and R 107 – each family member must be admissible on their own
* R1(3) “family member” = (a) spouse or CL partner (b) dependent child of person/spouse/CL partner (c) grandchild (child of child in b)
* “dependent child” = (a)(i) biological child (if not adopted by someone other than spouse/CL partner) or (ii) adopted child (b) dependent b/c (i) under 19 and not married/CL (ii) over 19 yrs but have depended financially since before 19, and has physical/mental condition
* R117(9)(d) requires that all family members be declared at the time of PR application – if not declared, that individual is no longer a member of the family class and can’t be sponsored later; no appeal to IAD

# Family Class Migration

* Basic structure of program: citizen or PR can sponsor defined family member s. 13(1)) – sponsorship undertaking is binding on the individual who takes it (s. 13.1)
* Sponsorship undertaking is central – person privately responsible for welfare
* There is appeal to IAD when sponsorship denied (not available to economic)
* Inadmissibility applies but not the same way (ie health/welfare req’t)
* Two divisions: ‘Family Class’ and ‘Spouse of CL Partner in Canada’
* 80% admissions are intimate partners, 60% women – previously largest category
* Basic rule = Must meet criteria, and must not be inadmissible
* Criteria = Are you a family member (be sponsored), and can person sponsor you?

## Who is Family?

### Important Definitions

R1 “Common-law partner” = individual cohabiting w/ the person in a conjugal relationship, cohabited for at least a year.

+ interpretation – R1(2) also considered CL if unable to live w/ for reasons of persecution/penal control (this is an exception to the req’t to live together)

R1(3) “family member” = wrt a person: (a) spouse or CL partner (b) dependent child of person/spouse/CL partner (c) dependent child of dependent child

R2 “conjugal partner” = wrt sponsor, a FN residing outside Canada who is in conjugal relationship w/ sponsor for at least one yr (“marriage like”)

R2 “dependent child” = (a)(i) biological child of parent, if not adopted by person other than spouse/CL partner of parent (ii) adopted child of parent AND (b) dependent by either (i) under age of 19 and married/CL OR (ii) older than 19, depended financially on parent since before 19, and unable to be financially self-supporting due to physical/mental condition

R2 “marriage” = wrt marriage took place outside Canada, means marriage that is valid **both** under laws of jurisdiction where it took place, and under Cnd law

* Creates issues if marriage legal in one jurisdiction but not another (eg. polygamy)

R2 “relative” = means person who is related to another person by blood or adoption.

### Excluded Relationships

R4 Bad faith – (1) not considered spouse/CL/conjugal if (a) entered into primarily for purpose of acquiring status or privileges under Act, **OR** (b) is not genuine

R4(2) FN not considered adopted child if adoption (a) entered into primarily for purpose of acquiring status or privileges under Act, **OR** (b) is not genuine

\*\* Note – previously required both (a) and (b) – now captures larger group

R4.1 New relationship – Create specific exception – FN can’t be spouse/CL/conjugal partner if he/she left a spouse (with this purpose) and married the PR for the purposes of immigration

R5(a) Excludes child marriage (except conjugal) – can’t be spouse/CL partner if FN under the age of 16

(b) Excludes polygamy – FN can’t be spouse of person if (i) FN or person was married to someone else **OR** (ii) person has lived separate and apart from FN for at least one yr and is CL partner of another person (even if still legally married!)

## Family Class

R117 Defines family class – (1) FN is member of family class if, wrt sponsor, FN is:

1. sponsor’s spouse, CL partner or conjugal partner
2. dependent child of sponsor (see def)
3. sponsor’s mother or father
4. mother or father of the sponsor’s mother or father [*grandparents*]

(f) person whose parents are deceased, who is under 18 yrs of age, who is not a spouse or CL partner, and who is: [*orphaned relatives*]

(i) a child of the sponsor’s mother or father [*siblings and half-siblings*]

(ii) a child of a child of the sponsor’s mother or father [*nieces/nephews*]; **OR**

(iii) a child of the sponsor’s child [*grandchildren whose parents are deceased*]

(g) person under 18 yrs whom the sponsor intends to adopt in Canada if meets a number of requirements **(see (i) to (iii))**

(h) relative of sponsor, any age, if sponsor doesn’t have any other relatives that are citizens/PR, or who are otherwise able to sponsor as PR [*lonely Cnd provision*]

(2) Adoption must be in BIC and entered into for good reasons (3) about BIC (4) over 18

R117(9) Excluded from family class b/c of relationship to sponsor if:

1. FN is sponsor’s spouse/CL/conjugal partner if under 16 yrs of age
2. FN is sponsor’s spouse/CL/conjugal partner if sponsor has existing sponsorship undertaking (even if legally can enter new relationship)
3. Polygamy bar (for marriage + CL/conjugal relationships)

(i) sponsor or FN, at time of marriage, married to someone else

(ii) FN is sponsor’s spouse, they lived separately for 1 yr, and (a) sponsor has other CL/conjugal partner **OR** (b) FN has other CL/conjugal partner

R117(9)(d) Importance of Declaring Non-Accompanying Family

* Not family class if FN was non-accompanying family member of the sponsor (at time of their previous PR application), and who was not declared/examined them
* **Outcome**: undeclared non-accompanying family members are NOT part of family class, and you NEVER sponsor them
* Challenged re: Convention of Rights of Child but failed (*De Guzman*)
* **Exception**: (10) – if officer said they weren’t required to examine them – must be able to demonstrate this – (11) gives examples of when (10) doesn’t apply

### Family Class Inadmissibility

* Criminal, medical and security inadmissibility all still apply
* R24 Exception: spouse/CL/conjugal partner, dependent or adopted child not subject to excessive demand req’t
* Note, R 188 – need to declare medical condition for adopted child

**Accompanying Family Members**

R122 FN who is accompanying family member of person who makes application as member of family class shall become PR, after exam, if

1. person who made application becomes PR; **AND**
2. family member is not inadmissible

## Spouse of Common-Law Partner in Canada Class

R124 definition: FN is member of spouse/CL partner in Canada class if they:

1. are spouse or CL partner of a sponsor and cohabit w/ them in Canada
2. have temporary resident status in Canada; **AND**
3. are the subject of a sponsorship application

Note \*\* R4 – 2 pronged test for “bad faith” relationships

R125 Same excluded relationships as Family Class (see regs)

Same rules apply for accompanying family members

Note \*\* No appeal to IAD as not “family class”

## Case Law re: Partnerships

Marriage/Divorce

#### Agha v Canada (2008 FC)

Facts: Applicant man is citizen of Pakistan. He married his spouse over the phone, w/o meeting her. They signed marriage cert. She was granted refugee protection in Canada. She couldn’t return to Pakistan b/c she would lose refugee status. He couldn’t get visa to Canada.

Issue: Did the CIC officer err in deciding whether their marriage was genuine b/c they didn’t consummate marriage or meet in person.

Outcome:

* unreasonable for officer not to grant PR – he didn't consider evidence that it was impossible for them to meet in person
* application for JR allowed – decision of CIC officer set aside and sent back for redetermination

#### Amin v Canada (2008 FC)

Facts: Man was previously married, brought wife to Canada,. He got a Muslim divorce, but didn’t properly register it in Pakistan. He remarried in Pakistan, then attempted to sponsor new wife as PR to Canada. CIC officer and IRB both denied because they found his divorce was not legally valid.

Issue: Did the Board err by failing to recognize the legal validity of his *talaq* divorce?

Outcome:

* Conflict of law problem with religious divorce vs. legal divorce – telaq also unilateral, so didn’t align w/ Canadian standards
* DM’s conclusion that he didn’t prove the legal validity of the divorce was reaonsable and therefore unimpeachable on JR
* Gives potential cure – partner can travel to Canada on visitor visa and marry here

Conjugal Relationship

#### Macapagal v Canada (2004 IADD)

Facts: Couple was married in Philippines, but couldn’t get a divorce there – got a divorce in Canada. He married a new woman in Philippines, then came to Canada and applied to sponsor new wife to bring to Canada. Officer determined they weren’t married b/c not divorced from previous wife. Also didn’t fit CL category b/c one of them was in Canada.

Issue: Do the couple fit into the category of conjugal partner?

Outcome:

* A conjugal relationship is a marriage like one – this includes different factors:
  + Shelter – if live together as couple
  + Sexual and personal behaviour
  + Services – shared household responsibilities, mutual assistance
  + Social activities – leisure, relationships w/ each other’s families
  + Economic support – financially interdependent, joint assets
  + Children – attitude and conduct towards children
  + Special perception – treated or perceived by community as couple
* Found not to be in conjugal marriage – no satisfactory evidence of emotional tie btw the couple – sexual relations not determinative

Note - \*\* this creates difficult standard, hard to meet (how can they have shared connection if not in the same country?)

Same Sex Relationships

#### Morel v Canada (MCI) (2012 FC)

Facts: Gay couple met on the Internet. He met a man from China, and visited him multiple times. There was a large age gap, and it was first gay relationship for young man. He had also previously applied to Canada and been rejected. Man transferred money to him and briefly visited him. CIC Officer denied PR, (not genuine, entered into for purpose of acquiring status). IAD granted PR to him in family class as conjugal partner. Minister applied for JR.

Issue: Did the IAD err in its finding of a conjugal relationship? Decision unreasonable?

Outcome:

* Money transfer and brief visitation wasn’t enough to create marriage like relationship
* DM maybe thought he was taking advantage of older man
* Found that the panel ignored some evidence before the officer (applicant wanted to come to Canada, he was just looking for friend, not gay, lack of knowledge about life)
* Panel’s decision set aside and to be re-determined by new panel

Polygamous Relationships

#### Gure v Canada (2002 IAD)

Facts: Couple were married w/ children in Somalia. He left country, had second wife in Canada. Applied to bring first wife but was married to 2 ppl so it failed. He divorced his second wife and then tried again to bring original wife to Canada.

Issue: Does his wife fit into the category of spouse?

Outcome:

* Because he was bigamist before, he couldn’t apply to bring his wife
* They divorced after the application was made

Basically, anyone who has ever been in a polygamous relationship barred from family reunification in Canada, even f no longer in polygamous relationship. R117(9)(c)(i) changes to state a spouse not member of family class if the sponsor was already married at the *time of their marriage*.

Marriages of Convenience (“Bad Faith”)

* Change to R4 in 2012 – “and” changed to “or”
* Now in bad faith if entered into for immigration purposes, or not genuine
* Takes away groups of relationships who are genuine, but married for immigration purposes (large group capture than ever before)
* Use of word “or” is very clear – if either of two elements (genuineness of marriage and intention of the parties) is not met, exclusion set out in R4 applies (***Keo***)
* Intention of the sponsored spouse regarding the relationship is fixed in time at time of marriage and can’t be changed
* Challenging b/c requires officers ot assess purposes for relationship (complex issue)
* Many factors other than love play a role – wealth, security, status, appearance, etc
* Factors for determining bad faith: inconsistent or contradictory statements regarding origin/development of relationship, evidence of previous marriage for immigration purposes, parties’ knowledge of each other, contact btw them, family ties, gifts, financial support, history of previous attempts to enter Canada (***Keo***)
* Probity of children varies (***Singh***, not enough, ***Gill*** – great weight)
* Arranged marriages challenging, but even if couple incompatible w/in customs/practices of community, may still be genuine (***Brar***)

## Sponsorship and Undertakings

* R130 – who gets to be a sponsor – (1) to be a sponsor, must be citizen or PR who:
  + (a) is at least 19
  + (b) lives in Canada (exception for spouse and children (R130(2))
  + (c) has filed a sponsorship application
* R130(3) – if sponsored, need to wait 5 yrs (or be citizen) before can be a sponsor
* R131 – sponsor’s undertaking to the Minister
* R132 – (1) undertaking is an enforceable promise made w/ Minister or a province to reimburse for any social assistance payment to the sponsoree and their family
  + (a) time period varies:
    - (i) at least 3 yrs for partners (longer if temp resident first)
    - (ii) for children under 19: 10 yrs, or to age 22 (whichever first) or (iii) over 19: 3 yrs (+ temp period)
    - (iv) parents/g-parents (and those who accompany): 20 yrs
    - others: 10 yrs
  + (4) sponsor (and co-signor) and sponsoree must enter a written agreement that (a) statement that sponsor will provide basic requirements (b) declaration by sponsor that their financial obligations don’t prevent them from honouring agmt and undertaking **AND** (c) statement by person they will make everyone reasonable effort to provide own basic requirements
* Note- no decision will be made if sponsorship is withdrawn; PR status will not be granted unless sponsor continues to be eligible
* Undertaking default: Begins when a social assistance payment made or aspect of the undertaking agreement is breached - Lasts until the government is fully repaid
* Per *Mavi*, despite permissive language in IRPA s. 14(2)(e) and s. 145(2), there is no requirement for gov’t to forgive debt acquired through undertakings (see *Mavi* below for minimal PF requirements)

### Who is Eligible?

* R133 Sponsor must meet the following req’ts and continuously until decision made:

1. Meets def’n of sponsor in R130
2. Intends to meet obligation of sponsorship undertaking
3. Not subject to removal order
4. Isn’t in detention / in jail
5. No convictions for (i) sexual offences, (i.1) indictable violent offence w/ max term 10 yrs), (iii) family violence (includes attempt and foreign convictions), but see ss. (2) pardons, or (3) 5 yrs passed
6. Not convicted outside Canada, but would constitute offence in Canada
7. Not in default of any undertaking or support payments
8. No debt to Canada (gov’t debt)
9. Not bankrupt
10. Has minimum necessary income EXCEPT if sponsoring partners or children (4)

* Calculated according to R134 (LIPO cutoff)

1. Not in receipt of social assistance for reason other than disability

### Conditional Provisions for Partner Sponsorships

* R72.1 – must cohabit in conjugal relationship for continuous period of 2 yrs from PR date if relationship is (2)(b) less than 2 yrs and (2)(c) childless
* (4) Requirement to supply ‘evidence of compliance’ at request anytime w/in the 2 yr period
* Exceptions for death of the sponsor (5) and for relationships ending b/c of abuse or neglect (as specified) to partner or child amounting to “risk of serious harm”
* This is the ‘new relationship’ rule – creates *conditional permanent residence status* – PR not finalized until 2 yrs is complete

**Concerns**

* Complaint driven – complaints could come from irate spouse, trigger investigation
  + Puts conditional PR spouse at disadvantage in relationship, force women to remain in abusive relationships (may not know rights, speak English)
* Definition of relationship is cultural, may not be ideal for typical “genuine”
* Fails to consider fact that some marriages just don’t work out

#### Mavi v Canada (SCC

**Facts:** 8 sponsors who defaulted on sponsorship requirements for various reasons. The ppl they sponsored collected social assistance. Asked the Crown to relieve them of debt by not enforcing the collection. For a few, the sponsored person had left the relationship. For one, both sponsor and sponsoree needed welfare. One left the relationship due to abuse. This was test case litigation, so compelling facts/circumstances.

**Issue:** What are the parameters for enforcement of sponsorship debt?

**Outcome:**

* Nature of the debt is both contractual and statutory – statutory nature of debt gives rise to duty of procedural fairness (for the debt collection part)
* Crown has the discretion to delay collecting sponsorship debt, but not to simply forgive it – take into account sponsor’s submissions re: their circumstances
* No duty to inform when a sponsored relative begins collecting public assistance
* Duty of PF when enforcing sponsorship debt:
  + Notify sponsor of claim
  + Provide opportunity to explain personal/financial circumstances
  + Consider any relevant circumstances
  + Notify sponsor of decision
  + No need to provide reasons

## Appeals to the IAD

* Sponsor may appeal if PR visa isn’t issued: no appeal if reason for denial was one of four serious criminality inadmissibilities
* IRPA s.63(1) right to appeal
* S. 64(1) can’t appeal if inadmissible on grounds of security, violating human or int’l rights, serious criminality or organized criminality (2) describes
* 64(3) No appeal if rejected b/c of misrepresentation, unless partners/children
* IAD can allow on the basis of:
  + Error in fact, law or mixed (normal appeal **(s. 67(1)(a))**
  + Failure of natural justice (like JR) **(s. 67(1)(b)**
  + H&C considerations **(s. 67(1)(c) and s. 65)**
* S. 65 H&C Considerations – only if FN is member of family class and sponsor is sponsor w/in meaning of Regs
  + Note \*\*\* - only available for ppl that fit into family class (as member)
  + Can’t help w/ decision of whether in family class (eg. Officer didn’t believe someone was your child)
  + But can help w/ admissibility (eg. Husband turned down for criminality, or mother turned down b/c diabetic) – able to look beyond the law

# Humanitarian and Compassionate Admissions

* A capacity to make exceptions is a feature of almost every Western immigration regime
* Role of discretion – amorphous concept of ‘deserving individual’
* written into the capacity of both the Minister and the IRB
* Accounts for btw 4000 – 11,000 entries / yr over past 10 yrs
* Applies in circumstances where the IRB doesn’t want to apply its own law
* ‘Humanitarian’ not really true – ppl not needy, but actually economically established – Canada more likely to benefit from this legally framed humanitarianism
* Significant way to get PR into country, and can recognize social change (eg. CL relationships before this was allowed)
* Note onus is on application and standard of proof is balance of probabilities

**What does this entail?**

* IRPA s. 25 gives the Minister and delegates the authority to use discretion to **grant an exemption** to any applicable criteria or obligations or **grant PR status** if of the opinion that it’s justified by H&C consideration taking into account the BIC
* Compellable if applicant in Canada – person has right to decision (optional if outside Canada)
* Applies to inability to meet all requirements of Act and most kinds of inadmissibility
  + Eg. Timeline, substantive, definitional requirements, etc.
* Can exempt, grant PR status, or anything else they’ve asked for
* H&C consideration includes accounting for BIC (since *Baker*, 1999)
* Doesn’t apply to most serious categories of criminal inadmissibility (s. 34, 35, 37)
* S. 25(1.1) only required when fees are paid – Minister can waive fee (s. 25.1(2))
* Minister can attune to public policy consideration in the absence of H&C

factors (s. 25.2)

* Minister can act without application, on own initiative (s. 25.1(1)
* If the H&C request is granted, PR visa is issued: R67/68, for accompanying family members R69

**Factors DM can take into account**

1. Establishment Factors
   * How well is the person and family established w/in the Cnd community?
   * Do they have a job
   * How long been here
   * Children thriving here?
2. Undue Hardship Factors

* Would sending back ppl cause undue hardship?
* Hardship especially difficult for this particular individual?
* Health/disability issues, family circumstances at home
* Refugee like features

A25(1.3) Minister can’t consider s. 96 or 97, but must consider elements related to hardships that affect FN – also see ***Caliskan*** (not about risk – about hardship)

#### Baker v Canada (1999 SCC)

**Facts:** She had 8 children, 4 who are Cnd citizens. She stayed in Canada illegally a long time. She had post partum depression, then became schizophrenic. Worked as a housecleaner. She wanted to become PR to have access to health care. In denial of PR, no reasons were given, but there was email from officer. This is JR of that decision.

**Issue**: Did the officer err in not taking into account the int’l obligations re: BIC?

**Outcome:**

* Even though Convention on Rights of the Child not implemented in domestic law, it can influence statutory interpretation – understand what H&C means
* DMs must be ‘alert, alive and sensitive’ to the best interests of any child affected by the decision, and must give the BIC ‘substantial weight’
* Dual role of H&C factors and public policy considerations hasn’t changed
* Decision returned to trial level, JR – she was eventually granted PR

Note – now BIC is written into s. 25 and s. 67/69 – effect is that writing about children is very important when making H&C applications

## H&C as Way of Contesting Removal (for inadmissibility)

* Inadmissible FNs not entitled to an appeal before IAD or those whose appeal has been denied may to minister’s delegate under s. 25 for PR status or exemption for applicable criteria under Act
* What does hardship entail

#### Caliskan v Canada (2012 FC)

**Facts:** C was Turkish FN who applied for refugee status (religious and ethnic persecution), denied. Applied for PR on H&C grounds, and was denied – applied for JR of decision on basis that officer relied upon incorrect interpretation of s. 25

**Issue:** What is the meaning of s. 25

**Outcome:**

* DM should consider hardship without regard to risks that would otherwise be found in refugee claim – shouldn’t be appeal of final refugee decision
* Examples of hardships: lack of critical medical care, systemic discrimination not amounting to persecution, adverse country conditions that have a direct negative impact on the applicant
* Also look at BIC, and relationships in Canada
* Officer erred in performing risk analysis, so decision quashed

#### Hinzman v Canada (2010 FCA)

**Facts:** H left the US army after finding out he was going to be deployed to Iraq. He was deemed AWOL by the army, and denied refugee status in Canada. He said he left due to sincere moral/religious beliefs against war.

**Issue:** What amounts to unusual, undeserved or disproportionate hardship in context of application for PR on H&C grounds?

**Outcome:**

* Re: certified question – court can treat it as true appeal, and don’t just have to answer certified question (this is almost affirmed in *Baker*)
* The officer erred – didn’t consider hardship, just looked at risk assessment
* Hardship should consider the impact of the process on the person – beliefs and motivations of person important

# Temporary Admissions

* Covers majority of ppl entering the country, and is highly discretionary
* There are 3 main categories: visitors, students, and temporary workers
* If there is reasonable evidence they will leave at end of time, they can stay
* IRPA s. 20 FN who seeks to enter/remain in Canada must establish (b) to become temporary resident, they hold visa and will leave by end of authorized stay period
* S. 22 – officer must be satisfied that meets obligations in 20(1)
  + BUT – dual intent rule: ok for FN to come to Canada w/ temporary permission, but with some intention to stay permanently (S. 22(2))
  + Test: whether person is likely to leave when told to, even if evidence shows they would like to stay forever
* If temporary visa application is refused, can apply for JR
  + Practically difficult from abroad
  + Fed Ct. view – FNs have weak claim to PF
  + But it is possible – see *Khatoon* (p. 492)
* R180 – person doesn’t acquire status of TR until officer has examined FN at port of entry
  + So TRV doesn’t guarantee admission – port-of-entry officer must be satisfied FN still meets all requirements for entry/inadmissibility

## Visitors

* All visitors must meet basic requirements: have passport, not be inadmissible – R179
* Visa usually required to enter, or transit through – except visa exempt countries
* R191 – visitor class is prescribed as persons who may become temporary residents
* R192 – FN is member of visitor class if FN authorized to enter/remain in Canada as visitor
* R193 visitor is subject to conditions imposed under Part 9
* If visa is required, this may be:
  + Tourist visa
  + Parent/grandparent visitor visa (multiple entry, 2 yr, renewable
    - Can’t work, and need to have private health insurance
    - “super visa”
  + Business visitor
  + Special categories from time to time (eg. Olympic athletes/officials)

## Students

* IRPA s. 30 – FN may not work or study in Canada unless authorized to do so in this Act - (1.1) Officer may authorize them to work/study if they meet conditions in Regs
* R9 – FN may not enter Canada to study w/o a study permit
* Most students will need a temporary resident visa + a study permit
  + Basic rules for study permit:
    - Admission to recognize program
    - Sufficient funds
    - Not inadmissible
  + Study w/o permit: for short courses (<6 mos) diplomat families
* Temporary resident visas – set out in R179 to R190
  + Eg. Applied, will leave at end of time, not inadmissible, has req’d docs

### Rules for all temporary residents:

**Conditions** – note, all TRs are subject to conditions in R183, some of which may be varied by the officer R185

**Extension** – TR status can be extended R181 or restored w/in 90 days of loss R182

**Work without permit**: generally can’t work w/o permit (R196). But some can (R186/7)

**Study without permit:** generally can’t study w/o permit (R212). But FN may study w/o permit if (R88) family of diplomats, study less than 6 mos, etc.

Minor children may attend school, if parent is authorized to work/study: S. 30(2).

## Temporary Foreign Workers

* Usual formula is temporary resident visa + work permit
* See Part 11 of IRPR regs 194-209
* Two types of work permits: open and closed, 4 yr limit
* Typical process begins w/ employer – has already employed ppl in similar job, w/ similar wages/conditions for 2 yrs prior to applying, AND
* Must go through LMIA process – Labour Market Impact Assessment
  + Must post the job, keep records, show plan for transition to national worker
* Worker must: intend to perform the work described, and if already has a job offer, certain conditions must be met (time period, wage, etc).

Note \*\* - Caregivers and SAWP (Seasonal Agricultural Worker Program) are sub-programs of temporary foreign worker program

### Policy Considerations re TFWP

* Politically attractive –can attract ppl to niche areas where there is demand for workers – almost like a disposable work force
* It’s controversial – perception that TFW taking jobs that could be performed by Cnd
* Rights – in theory, have same rights and protections
* BUT capacity to access rights is impaired by temporary nature of status
  + May be susceptible to employer abuse
  + If fired, can’t wait around to complain
  + Individuals reluctant to lose their jobs and fight for rights
* Divide btw high and low skilled workers- problem with food services industry (tim hortons)
* Many complaints mean they are no longer allowed for food services
* So now TFW program looks more like FSW program – it includes the people the Cnd gov’t wants to keep anyways
* Poor ppl don’t have the same opportunity to migrate
* TFW overwhelmingly men

**Changes to Program – June 2014**

* Major reform – 2 categories – TFW and IMP (Int’l Mobility Program)
  + 2013: 88,740 TFWs
  + 2013: 221,273 IMPs (based on high skills)
    - often already have jobs, but get open work permits
* low-wage restrictions of various sorts
* new enforcement commitments
  + max time for stay is 4 yrs
  + what will happen for enforcement
* Food services sector moratorium ended, but still hard w/ low-skilled work restrictions
* Outstripped permanent economic category entries for first time in 2009

## Other Temporary Residents – TRP

* IRPA s. 24 – allows officer to grant TRP to FN who doesn’t meet requirements of Act or is inadmissible – if officer is of opinion that it’s justified in the circumstances
  + TRP may be cancelled at any time
* Very flexible category
* Not possible if one is a DFN

# Enforcement: Sovereignty and Border Control

* Immigration control as the last bastion of sovereignty
* Walzer – Carens debate
* Walzer (closed border) – BUT mutual aid exception (eg. After Vietnam War)
* Carens – national security exception – wouldn’t work in 2015
* Both are liberal, neither are absolute positions
* Caren – current state is similar to feudal privilege (accidental – where you are born)
  + Most debate assumes otherwise, that the right to be here is moral

**“Illegal” Migration**

* + undocumented, irregular, unauthorized, extra-legal, etc
  + 2008 figure: 60 million ppl, ¼ of all migrants in the world
  + How law increases illegal migration; ways of becoming “illegal”
    - More legal requirements
    - More enforcement mid-90s, and after 9/11
  + “crimmigration” – criminology of mobility
* **Border Securitization**
  + Visas
  + Carrier sanctions
    - Against airlines who bring person w/o documentation
  + Migration integrity officers (MIO)
    - Pushing border out – ppl overseas to bolster checking before boarding plane
    - Countries where we don’t want ppl (refugees)
  + Smart Border Accord
    - Increased security for US border (2001)
    - Eg. Safe Third Country Agmt
  + Biometrics
  + Information Sharing
* **The Deportation Turn**
  + Deportation as a power that flows from the right to control immigration
  + 2 dimensions: extended border control & a sanction for non-citizens who break the law…’eternal guesthood’
  + deportation and the liberal state
    - difficult to achieve – very coercive power – need to take serious measures – do ‘illiberal things’
    - ugly exercise of state power
  + Citizenship stripping: UK and Canada
    - Strip categories of criminals – deportation as criminal punishment (not yet used in Canada)(UK deported 27 ppl)
  + What can explain it? Why strong rise in deportation?
    - Increasing sovereign control
    - Fear
* US – deportation increasing since 1990 (not based on politics)
* Canada – increased since 2004 (high in 2012)
* **Human Trafficking**
  + Trafficking protocol to UN Convention Against Transnational Organized Crime
  + In force 2000
  + IRPA s. 118 – abduction, fraud, deception, use of threat or coercion. – to move across int’l border
    - Fine of up to $1M or life imprisonment (also parallel CCC provisions)
  + Link to Smart Border Accord (RCMP task force)
    - Concentrated on sex work area at first, now other labour
  + Labour exploitation, enforcement history
  + Little human trafficking into Canada
* **Human smuggling** – assisting ppl to move across border in clandestine way, in absence of abduction, fraud, deception
  + Ie. ppl want to be smuggled, not trafficked
  + These ppl are most at risk to be trafficked at some pt
  + Similar protocol
  + S. 117 IRPA: organize, induce, aid, abet
    - Same max penalty, also has statutory minimum
  + Line blurring at both sides of this offence
  + Link to refugee admission
    - Ppl need to arrive in country to claim status
* *R v Appulonappa* (2014 BCCA 163)
  + Overbreadth challenge to s. 117 IRPA
  + Smuggling and refugees
  + Sovereignty is front and centre in this ruling:
    - Quote: “goal of Cnd sovereignty, integrity of Cnd immigration/refugee regime, protect health/security of Cnds, promote int’l justice/security”

Facts: 76 Tamils on Ocean Lady. 4 workers (Captain, engineer, other) are plaintiffs. Categorized as smuggling – ppl wanted to come to Canada. All claimed refugee protection. Offshoot of criminal trial of men running boat. Challenged s. 117 – overbroad (POFJ from s. 7 Charter).

* + Overbreadth test: offence serves legitimate objective but interferes w/ conduct that bears no connection to that objective
  + S. 7 infringement bc is ‘arbitrary in part’
  + Looks at scope of law; its objectives; whether it is broader than necessary
  + At issue here: what is the objective of the legislation
  + Counter hypotheticals – captures ppl gov’t doesn’t want to criminalize
    - 1) s. 117 criminalizes ppl who bring others across border –
      * eg. Mother who brings child to claim refugee status
      * eg. NGO workers who help refugees that can’t in US come to Canada – Janet Hinshaw Thomas (church)
* Trial level – successfully challenged
  + DOJ lawyers – says objective was to implement smuggling protocol (int’l law)
  + Plaintiffs could easily say overbroad – protocol doesn’t criminalize helping refugees
* BCCA – decision overturne on appeal – gone to SCC
  + DOJ lawyers – said objective was to keep ppl w/o authority outside of Canada, securing secondary goals – sovereignty, security, etc.
    - Makes overbreadth argument much harder to win – bigger objective
* Most significant issue: what is the objective of s. 117?

# Inadmissibility

* S. 45(d) Burden of proof for admissibility hearings:
  + For FN not yet authorized to enter – burden of proof lies on FN to show that not inadmissible
  + For FN authorized to enter Canada, or for PR, burden of proof lies on government to show they are inadmissible

## Criminal Inadmissibility

* Distinction btw FN and PR
* Standard of proof issues
* Category often divided into more and less serious groupings
* S. 36 most common
* applies to PR and visitors – consider for everything
* **Standard of Proof**: S. 33 IRPA – “facts” for s 34-37 include facts arising from omissions and facts for which there are **reasonable grounds of belief**
  + Threshold test (rather than SOP) which Ministers’ evidence must meet at a minimum – weigh the evidence and consider one side over another (***Almrei)***
  + More than mere suspicions, less than BOP
* Note – inadmissibility of family members – s. 42!!!

## Security

* S. 34(1) A PR or FN (**both**) is inadmissible on security grounds for:

1. Engaging in espionage against or contrary to Canada
2. Engaging or instigating subversion by force of any gov’t and (b.1) any subversion against a democratic gov’t
3. Terrorism
   * R14 – findings of fact from (a) determination by IRB that engaged in terrorism or Article 1(f) Convention **OR** (b) Cnd court under Criminal code – considered conclusive finding of fact
   * Terrorism not unconstitutionally vague - definition: “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, is to intimidate a population, or to compel a gov’t or int’l org to do or to abstain from doing any act” ***(Suresh)***
   * BUT see new definition (CCC s. 83.01 “terrorist activity”)– armed conflict exception – act/omissions must be during conflict in accordance w/ intl’l law ***(Khajawa****)*
4. Danger to security
5. Engaging in acts of violence that would or might endanger lives or safety of persons in Canada
6. Being member of organization that there are reasonable grounds to believe engages in (a, b, b.1 or c).
   * For member in org, give broad interpretation – age relevant – apply reasonableness standard **(*Poshteh)***
   * Whether person had view to contributing to objectives of the organization – and different factors ***(TK)***

#### Poshteh v Canada (2005 FCA)

**Facts:** P was not a member of MEK, but was involved in distributing pamphlets when 15-17 yrs of age. He asked to join, was denied membership.

**Issue:** How to determine membership in a terrorist group – the relevance of age.

**Outcome:**

* S. 34(1)(f) has a unrestricted and broad interpretation
* Age is relevant, but should be decided on a case by case basis
* S. 7 Charter doesn’t apply to inadmissibility (not engaged)
* Reasonableness standard applied –and finding of membership was reasonable

Note \* - s. 34(2) repealed (Minister’s ability to waive) BUT new s. 42.1(1) exemption provision applies to FN only (is this an error in legislation?)

#### TK v Canada (FC 2013)

**Facts:** TK was member of taxi union. Compelled to be involved w/ Tamil Tigers in some ways. He drove them around, went to training camp. He said he only did to keep his job as a tax driver.

**Issue:** What constitutes membership in an organization, and the issue of volition.

**Outcome:**

* The criteria for whether a person is a member in an organization are:
  + Person’ involvement w/ org
  + Length of time associated w/ org
  + Degree of commitment to org and its objectives
  + Whether coercion, duress, compulsion involved
* Summary: whether person had a view to contributing to objectives of the org
* Here, weighed different factors – found it reasonable that trib found him member
* Said if it’s wrong provision, the Minister can exercise power under s. 34(2) to make exception (NOTE – this no longer applies) but still must assess under s. 34(1)

## Human Rights or International Rights Violations

* S. 35(1) A PR or FN **(both)** is inadmissible for

1. Committing an act outside Canada that falls within 4-7 of Crimes Against Humanity and War Crimes Act
   * R15 allows findings made by ICC/IRB/Cnd court to be conclusive
   * Crimes against humanity – 4 part test from CCC s.7(3.76) ***(Mugesera)*** below
2. Being a prescribed senior official in service of a gov’t that engages in terrorism, systemic human rights violations, genocide, war crimes, crimes against humanity
   * R16 -Senior official who, by virtue of position they hold/held, was able to exert significant influence on the exercise of gov’t power or able t obenefit from their position
   * Includes R16(a) heads of state/gov’t (b) members of cabinet (c) senior advisors to those ppl (d) senior members of public service (e) senior members of military/intelligence/security services (f) ambassadors/senior diplomats and (g) members of judiciary
3. Only applies to FN, if entry into Canada restricted by international organization due to imposing sanctions against another country.

#### Mugesera v Canada (2006 FC)

**Facts:** M came to Canada as a refugee from Rwanda, and facts that he was a war criminal came to light when he applied for PR status. Gave speech against Tutsi.

**Issue:** Are there reasonable grounds to determine if M is a war criminal?

**Outcome:**

* Look at how CCC provisions s. 7(3.76-77) and analyze
* 4 part analysis for crimes against humanity:

1. Criminal act (MR + AR)
2. Part of a widespread or systemic attack
3. Directed against civilian population/identifiable gropu
4. Accused must’ve known of the links to this attack

## Serious Criminality and Criminality

Serious Criminality – IRPA, s. 36(1)

\* applies to both foreign nationals and permanent residents

* S. 36(1) PR or FN **(both**) inadmissible for serious criminality if:

1. Convicted in Canada of an offence with max term of 10+ yrs, or actual term of 6 +mos
2. Convicted outside Canada of an offence that, if committed in Canada, would have max term of 10+ yrs
3. Committing an act outside Canada that falls within (b)
   * Based on BOP **(s. 36(3)(d))**

Criminality – IRPA, s.36(2)

\* applies to foreign nationals only

* S. 36(2) **FN (not PR)** inadmissible for criminality if:

1. Convicted in Canada of an indictable offence, or two other offences
   * R18.1(2): if only two+ summary offences, and 5 yrs passed since completion of sentence, then no longer inadmissible
2. Convicted outside of Canada of something that would be one of the above in Canada
3. Committed an act that would have been one of the above
4. Committing, **on entering** Canada, a prescribed offence
   * R19: any indictable offence under CCC, IRPA, Firearms, Customs, CDSA

Application of S.36(1) and S. 36(2)

* S. 36(3) the following provisions govern subsections (1) and (2):

1. Hybrid offences are deemed to be indictable, even if prosecuted summarily
2. Can’t base inadmissibility on conviction where there has been record suspension (pardon), or if there has been an acquittal
3. Does not apply where rehabilitation has been made out for convictions or acts outside of Canada (so for (1)(b)&(c) and (2)(b)&(c)

**Rehabilitation**

* + R17: can apply for rehabilitation:
    - (a) 5 yrs after completion of sentence, if 36(1)(b) or (2)(b) applies or
    - (b) 5 yrs after committing the offence, if 36(1)(c) or (2)(c) applies.
    - In either case, can’t have any subsequent offences
    - Facts to make argument for rehab: family ties, econ contribution, remorse and admitting things, compliance w/ conditions
  + R18: Deemed to be rehabilitated if: (these also require cleanish record):
    - (2)(a): convicted of indictable offence committed outside Canada; max term in Canada less than 10 yrs, at least 10 yrs passed since completion of the sentence (see others)
    - (2)(b): convicted of 2+ summary offences outside Canada, at least 5 yrs passed since completion of sentence (see others)
    - (2)(c): committed offence referred to in 2(a), at least 10 yrs passed since day after the commission of the offence (see others)
  + Note: Rehabilitation not available for indictable/hybrid offences committed/convicted within Canada
  + Also not available for 34, 35, 36(1)(a) or 37

1. Determination of 1(c) based on BOP
2. Can’t base inadmissibility on “contraventions”, Young Offenders or youth sentences
   * Criminal acts committed when individual was under age of majority don’t apply to immigration issues
   * Contraventions Act includes minor administrative and regulatory offences

## Organized Criminality

\* applies to both foreign nationals and permanent residents

* S. 37(1) PR or FN inadmissible on grounds of organized criminality for: (unless 42.1 declaration by minister)

1. Being a member of an organization that is believed to be engaged in a pattern of criminal activity, planned and organized by a number of persons, to commit indictable offences
   * Membership in org – term broadly understood – (read alongside *Poshpeh*) – factor driven ***(Chiau)***
2. Engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or money laundering
   * Defined in IRPA s. 117 - material benefit is not required – Cnd law can be defined more broadly than int’l law ***(B010)***

* Exception: s. 37(2) - 1(a) doesn’t apply if the only association is entering Canada with the assistance of a person involved in organized criminal activity
  + Doesn’t apply to those themselves smuggled or trafficked

#### Chiau v Canada (2001 FCA)

**Facts:** C was actor who worked for studio thought owned by Chinese triad in HK. Officer refused entry based on confidential info.

**Issue:** 1) Breach of PF to refuge visa on basis of confidential info? 2) Reasonable grounds to belief that he was member of a criminal org?

**Outcome:**

* Membership in org – term broadly understood – includes ppl intending to commit crime, and whose presence in Canada used to strengthen criminal org or advance its purposes (read alongside *Poshpeh*) – factor driven
* Can’t always draw line btw criminal and legitimate business activities – so participation in legit activity, controlled by crim org, may be included
* For confidential info – must balance individual interest against national security – always skewed against the person (especially interest in a visa – low)

Note \* - under s. 87, Minister may apply for non-disclosure of info or other evidence during JR – then s. 83 applies (but this case was pre *Charkaoui*)

#### B010 v Canada (2013 FCA)

**Facts:** B010 was passenger on boat from Sri Lanka/Vietnam (Sun Sea). They asked him to be a crew member – and he received perks (he denies). He had knowledge about engines and contributed. Under intl’l law, human smuggling is done for material benefit. He had his own room, and got clean veggies.

**Issue:** Was he engaging in human smuggling under s. 37(1)(b)?

**Outcome:**

* Court finds material benefit is not required – Cnd law can be defined more broadly than int’l law – defined in IRPA s. 117
* Standard of review = reasonableness (reading law but interpreting home statute) – the finding that no material benefit required was reasonable

### Equivalency of Crimes

* Question of equivalency always a matter of law – correctness standard on JR
* Expert evidence often used – about foreign law, and how provision works in practice
* Test: Look at essential elements of each provision, then compare with the facts to see if similar (***Karchi)***
* For essential elements of a crime, should include prescribed defences, but exclude procedural rules and general principles of local criminal law ***(Li)***
  + Eg. Standard of proof, presumption of innocence: beyond the scope of comparison
* Foreign pardons: evaluate on case by case basis
  + Test = 1) similarity of legal system 2) similarily of pardon law 3) no valid reason not to recognize (eg. Gravity of offence) ***(Saini)***

#### Karchi (2006 FC)

**Facts:** Algerian woman inadmissible b/c her husband convicted of vehicular (involuntary) manslaughter. Algerian offence included “carelessness.”

**Issue:** How Cnd law uses criminal equivalency

**Outcome:**

* Elaborates the 3 part test from Hill:

1. Compare the precise wording
2. Examine the evidence
3. Combine the two

* Try to find the closest offence in Canada, compare the facts, and put the whole picture together (straightforward, logical test)
* Should combine “essential elements” of each crime, and looks at alleged/proven facts
* Court identified gap in wording of the Algerian provision – carelessness vs. negligence, then considered facts – he was at low end of spectrum
* He likely wouldn’t have been convicted in Canada, so not criminally inadmissible

#### Li (1997 FCA)

**Facts:** Li convicted of bribery in securities case – number of statutory offences.

**Issue:** How far out does one go in considering the essential elements of a crime?

**Outcome:**

* Include prescribed defences
* Exclude procedural rules (eg. Standard of proof/evidentiary rules)
* Issue is whether a Cnd equivalent exists for the offence he was convicted of outside Canada – not whether he would’ve been convicted in Canada

#### Saini v Canada (2002 FCA)

**Facts:** S was convicted of hijacking an airline in Pakistan, was granted a pardon. Trial heard in Sept. 2001. IRPA – says if someone granted a pardon in Canada, then they will have record correction – deemed never to have been convicted.

**Issue:** Does the foreign pardon operate to negate inadmissibility through equivalency?

**Outcome:**

* Foreign pardons granted on case by case basis
* Test: 3 elements to recognize a foreign pardon:

1. Foreign legal system similar to ours?
2. Aim, content and effect of specific pardon law is similar?
3. No valid reason not to recognize foreign law

* Must consider gravity of offence and weigh different factors
* Legal system in Pakistan and pardoning provisions different than Canada, and hijacking very serious offence – can’t give effect to foreign pardon

### Criminal Inadmissibility – Appeals

* IAD has limited jurisdiction (see below) – PR can appeal if actual sentence less than 6 months
* H&C capacity under s. 25(1) – Minister can waive serious criminal inadmissibility
* Note \*\* - H&C not available for s.34, 35 or 37
* S. 42.1 – can apply to the Minister (or he can on his own initiative) – if Minister is of the opinion that, on a basis of public safety and national security, the FN is not inadmissible

# Other Grounds of Inadmissibility

## Health Concerns

* S. 38 – (1) FN is admissible on basis of health grounds if health condition:

1. Is likely to be danger to public health
   * R30 to assess if danger to public health, officer shall consider (a) report from health practitioner/med lab (b) communicability of disease (c) impact of disease on others
2. Is likely to be danger to public safety
   * R33 to assess if danger to public safety, officer shall consider (a) report by health practitioner/med lab (b) risk of sudden incapacity or of unpredictable or violent behaviour that causes danger to public
3. Reasonably be expected to cause excessive demand on health or social services
   * R34 to assess if excessive demand, officer shall consider (a) report by health practitioner/med lab (b) condition identified by med exam
   * S. 38(2) Exception: 38(1)(c) doesn’t apply for (a) member of family class and partner or child of sponsor (b)(c) refugee/protected (d) family member of person in (a) to (c)
   * Reg. 24- exception to excessive demand – includes (a) sponsor’s conjugal partner, dependent child, or adopted child or (b) spouse’s dependent child

* R20 – officer determines FN inadmissible for health if assessment of health condition made by officer responsible for application of R29 – R34 and reached conclusion
* R32 Officer may impose conditions – like (a) reporting for exam, (b) provide proof
* S. 16(2)(b) discretion for officer to require medical exam upon entry
* Requirements for medical exam – R30, A38(1) – see Rochelle’s CAN

### Definitions

R1(1)

* “health services”: majority of funds contributed by gov’t, including family physicians, med specialists, nurses, chiro/physio, lab services, pharma, etc
  + Note - includes some things that ppl pay for themselves)
* “social services”: social services including home care, specialized residence/residential services, special ed services, social/vocational rehab, personal support services that (a) intended to assist person physically, emotionally, socially, vocationally **AND** (b) majority of funding from gov’t (directly or through publicly-funded agencies)
  + BOTH health and social services defined broadly
* “excessive demand”: (a) anticipated cost is more than average per capita cost of Cnds (5 yrs after the medical exam), unless evidence that longer, so then 10 yrs **OR** (b) demand on health/social services that adds to existing waiting lists and increase rate of mortality in Canda b/c unable to provide timely services
  + In assessing excessive demand of social services, an officer should consider medical and non-medical factors, like money (***Hilewitz)***
* Note – health inadmissibility is one of most common uses of s. 25 (H&C)

#### Hilewitz/De Jong v Canada (2005 SCC)

**Facts:** Wealthy family applied to come to Canada under investor and self-employed category. They had intellectually disabled children. Never used social services in SA (and built a school there for disabilities. Other family was not wealthy, but Dutch reform Christians joining a small isolated community, and wouldn’t leave.

**Issue:** Interpretation of “excessive demand” – should officer consider all relevant factors, both medical and non-medical?

**Outcome:**

* incongruous to value financial resources (for good migrant) and then disregard them in same process (for inadmissibility)
* Excessive demand – involves medical and non-medical consideration – should consider ability to pay for social services
* Assessment must be individual, must weigh ‘might reasonably be expected’ (so open to reasonable expectations)
* Note \*\* - applies to social services, not health services

Dissent (deschamps) – uses s. 15 equality rights to conclude that they shouldn’t be admissible – shouldn’t take money into account

* Majority ignored b/c immigration based on discrimination

## Financial Concerns

* s. 39 – FN is inadmissible for financial reasons if they are or will be unable or unwilling to support themselves or any other person who is dependent on them, and haven’t satisfied officer that adequate arrangements for care and support, other than those that involve social assistance, have been made
  + R21 doesn’t apply to protected persons

## Misrepresentation

* S. 40 – (1) FN **OR** PR inadmissible for misrepresentation for:

1. Directly or indirectly misrepresenting or withholding material facts to induces or could induce error in admin of Act
2. Been sponsored by person determined inadmissible for misrepresentation
3. If refugee claim is vacated
4. Citizenship obtained by fraud and it’s taken away

* S. 40 (2)(a) PR or FN continues to be inadmissible for misrep for period of 5 yrs after final determination (if outside Canada) (b) provision 1(b) doesn’t apply unless Minister satisfied that facts of the case justify the inadmissibility

## Non-compliance with Act

* S. 41 person inadmissible for failing to comply with Act

1. For FN: act/omission - failure to comply directly/indirectly w/ provision of Act
2. For PR: failure to comply w/ s. 27 and 28 (residency obligations)

## Inadmissible Family Member

* S. 42(1) FN is inadmissible for inadmissible family member if:

1. Accompanying family member or prescribed non-accompanying family member is inadmissible **OR**
   * R23 – s. 42(1)(a) includes non-accompanying family members if (a)FN is TR or in Canada **and** (b) non-accompanying FM is (i) spouse of FN, except where broken down (ii) CL partner of FN (iii) dependent child of FN – extends parental relationship beyond custody (iv) grandchild of FN
2. They are accompanying family member of inadmissible person

* S. 42(2) Exception: for FN who is TR and within Canada, only inadmissible if the family member is inadmissible for s. 34, 35 or 37

## Appeals to IAD

* S. 63(2) FN who holds PR visa can appeal inadmissibility decisions
* S. 63(3) PR or protected person can appeal inadmissibility decisions
* S. 63(4) PR can appeal re: residency obligations under s. 28
* S. 63(5) Minister can appeal admissibility decisions
* S. 64(1) CAN’T appeal if inadmissible under s. 34, 35, 36(1) or 37
* S. 64(2) where serious criminality only includes 36(1)(a) if 6 months sentence given
* S. 64(3) CAN’T appeal on ground of misrepresentation unless the FN in question is the sponsor’s spouse, CL partner or child

# The Process of Removal

* Issues re: removal: procedural issues, human rights, cost, infrastructure, foreign state cooperation
* S. 44 gives 2 part process for removal proceedings
* Gives discretion to officer and minister- how much discretion is reviewed on correctness standard – “may” actually means “shall” ***(Cha)***
* Minister may have some discretion to consider H&C factors ***(Monge Monge)***
* Actual decision reviewed on reasonableness standard

### Types of Removal Order

R223 – there are 3 types of removal orders:

R224 Departure Order – “please leave”

* (1) Exempt from S. 52(1) – don’t need authorization to return
* (2) must get a certificate of departure w/in 30 days of DO becoming enforceable, or it becomes a deportation order
* (3) if detained w/in 30 day period, or removal order stayed, then suspended
* for PR inadmissible b/c of failure of residency requirements (R229(1)(k)

R225 Exclusion Order – “don’t want to see you for 1 or 5 yrs”

* (1) Need written authorization to return for 1 yr,
* (2) after one yr, the FN exempt from 52(1) – no written auth needed
* (3) 5 yrs if s.40 (misrep),
* (4) exemption for s. 42(1)(b) (accompanying family member of inadmissible ppl)
* Used for health/financial/ most misrep inadmissibility, most IRPA breaches
  + R229 – (1)(f)(g)(h)(j)(l)(m)(n)

R226 Deportation Order – “never want to see you again”

* (1) requirement for written authorization forever
* (2) exemption for s. 42(1)(b) (accompanying family member of inadmissible ppl)
* (3) must always obtain written auth if removed for 81(b) (security cert)
* For all criminal inadmissibilities, misrep that leads to loss of citizenship (per R229), second/subsequent removal orders, and for second/subsequent criminal offences
  + R229 – (1)(a)-(e)(i)

R227 – removal orders are usually extended to family members – same order type

#### Sahakyan (2004 FC)

**Facts:** He was from Armenia, came to Canada on visitor’s visa for wedding. Claimed redfugee status, but failed. Applied for JR, but not granted leave. Remove order became enforceable, but left 3 months late. Later selected for PR in Quebec. Was told needed Minister’s authorization to enter country - equest to enter Canada denied – reasons were that his refugee claim was w/o merit and that he stayed past date.

**Issue:** Was the officer’s discretion exercised reasonably? Was an appropriate level of procedural fairness given?

**Outcome:**

* He wasn’t given fair hearing – had no opportunity to address the officer’s concerns – if he had, we would’ve given good reason (quebec had his passport)
* Discretion not exercised properly – officer failed to weight important factor, the reason for his later departure (and other stuff)

## Enforcement

* People may have removal order not yet enforceable
* Or people may have enforceable removal orders, but gov’t hasn’t taken steps to enforce it yet
* S. 48(1) removal order is enforceable if in force and not stayed
* S. 48(2) Person against whom order made must leave Canada immediately and order must be enforced as soon as possible
  + Note – new mandatory language - reduces discretion of officer
* S. 49 Removal order in force – (a) day removal order made, if no appeal (b) day appeal period expires, if no appeal made (c) day of final determination of appeal
* S. 51 – removal order voided if unenforced when FN becomes PR
* S. 52(1) - if removal order enforced, FN shall not return to Canada unless authorized (or exceptions – see above)
* S. 52(2) – if removal order enforced and is later set aside by court in JR, then gov’t has to pay to bring you back
  + Note – application for JR doesn’t stay removal order
* R238 FN can voluntarily comply – appear before officer, who decides (a) they have sufficient means to enter new country and (b) they will voluntarily comply
  + (2) may give choice of country unless (R239 – don’t comply)
* R240 Removal order enforced if FN (need all 4):

1. Appears before officer at port of entry to leave Canada
2. Obtains certificate of departure
3. Departs from Canada **AND**
4. Is authorized to enter country of destination

## Removal Procedure

* S. 44(1) If officer finds inadmissibility, they write a report to the Minister
  + This report also applies to FN’s family members (R227(1))
* S. 44(2) Minister is of opinion report is well-founded, may refer to ID for admissibility hearing, except for certain cases:
  + Departure order for PR inadmissible for residency obligations in s. 28 **(R228(2))**
  + Deportation order, due to (a) FN’s 36(1)(a) or (2)(a) serious criminality **OR** (b) FN’s 40(1)(c) misrepresentation **(R228(1)(a)&(b))**
  + If FN’s s. 42, same order as against the inadmissible family member **(R228(1)(d))**
* Otherwise, the report must be first forwards to the ID (s. 44(2))
* S. 44(3) The ID can make conditions (payment of deposit, guarantee of compliance)
* S. 45 at conclusion of admissibility hearing, ID may make decision:

1. Recognize right of citizen or PR to enter Canada
2. Grant PR or TR to FN, if meets requirements of Act
3. Authorize PR or FN to enter Canada for further exam, w/ or w/out conditions
4. Make an applicable removal order against an unauthorized FN, or an inadmissible PR or FN

**Loss of Status**

* General rule: when you lose one status, you ‘drop’ into the next least desirable status
* S. 46(1) A person loses PR status when:

1. They become Cnd citizen
2. Final determination made that failed residency obligation
3. Removal order comes into force (so we never remove PRs)
4. Refugee claim vacated (c.1) refugee claim ceased
5. Person renounces

* S. 46(1.1) If renounce PR, become TR for 6 months unless not in Canada, or renounce at port of entry

#### Cha (2006 FCA)

**Facts:** Cha was FN from SK in Canada w/ student visa for 7 yrs, not completed program. Convicted for driving offence w/ max penalty 5 yrs. Asked to meet immigration officer to discuss conviction. After interview, officer wrote s. 44(1) report, then immediately had interview w/ Minister’s delegate who said it was well-founded. Same day, he issued deportation order.

**Issue:** What is scope of Minister’s discretion under s. 44(2) for making removal order? What is required by the duty of procedural fairness?

**Outcome:**

* “may” means “shall” here – not really discretion to not make removal order (just fact finding mission, then if find criminality, prepare a report and act on it)
* He was not given proper notice of the purpose of meeting, so breach of PF
* In this case, it wouldn’t have made a difference, so decision not set aside

#### Monge Monge (2009 FC)

**Facts:** M was Polish, PR in Canada 16 yrs – he was 29, had 27 convictions, no family in Poland, threatened to kill adoptive parents in Canada, addicted to drugs. They are trying to deport him based on criminality. Minister’s delegate had considered H&C factors.

**Issue:** Discretion allowed by Minister – should take into account Rubic H&C factors?

**Outcome:**

* Approves the Minister’s decision, and said discretion was exercised reasonably (within range of reasonable outcomes) –
* gets around *Cha* decision because this deals with PR and also involves serious criminality (notes that case law is mixed) – also court likes the decision
* Suggests maybe Minister should consider *Ribic* factors, but doesn’t make it mandatory – ie. very serious criminality, minimal rehabilitation

## Appeals to the IAD re: Removal (IRPA s 62-71)

* IAD hearings are *de novo* and can consider any evidence up until the time of the hearing

Who can appeal

* A63 – IAD hears appeals from:

1. FNs holding PR visas – against removal order decision (exam/hearing)
2. PR or protected person - removal order (exam/hearing)
3. PR who loses status while outside Canada (residency obligation s. 28)
4. Minister against ID admissibility hearing

* A64(1) Exception: no appeal for PRs found inadmissible for security, violating HR, serious criminality, or organized criminality
  + (2) ‘serious criminality’ refers to crime punished in Canada by term of at least 6 months
  + Means PR charged w/ indictable offence in Canada but w/ less jail time could potentially appeal)

Considerations by the IAD

* A66 IAD shall either:

1. Allow the appeal (re: s. 77)
2. Stay the removal order (re: s. 68)
3. Dismiss the appeal (re: s. 69)

* A67 IAD can decide on:

1. Issues of law, fact, or mixed law and fact
2. Principles of natural justice
3. H&C considerations (not from appeal by Minister) – take into account BIC
   * Note \*\* limited by A65 – For family class appeals, H&C only considered if applicant is found to be member of family class and sponsor is sponsor (ie. Can’t appeal a finding the he does not fit w/in the family class)

* A68 – staying a removal order: (1) to stay RO, IAD must be satisfied, taking into account BIC, H&C considerations warrant relief (see IAD’s ability under A50(c))
* A68(2) IAD can (a) impose conditions (b) cancel conditions of ID, (c) vary/cancel conditions (d) cancel the stay, on application or own initiative
* A68(3) If IAD stayed RO, it may reconsider appeal under this division
* A68(4) stay automatically cancelled if A convicted of subsequent offence
* A69 IAD shall dismiss the appeal if it doesn’t allow the appeal or stay
* R251 – if IAD grants stay of removal, mandatory conditions apply: inform of address, give copy of passport, not commit crime (report if do)

Ribic Factors

* IAD has equitable jurisdiction under s. 68 to review H&C grounds when reviewing removal orders
* If person appealing removal order for inadmissibility based on criminality, IAD should consider *Ribic* factors:
  + Seriousness of the offence
  + Possibility of rehabilitation
  + Circumstances surrounding failure to meet conditions
  + Length of time in Canada
  + Degree of establishment
  + Dislocation of family
  + Support in the community
  + Degree of hardship faced on return to country

#### Chieu (2002 SCC)

**Facts:** C was from Cambodia/Vietnam, married Vietnamese women and had child. His sister sponsored the family, including him, to come to Canada. On PR app, he misrepresented his marital status (said single and no dependents) to be sponsored as accompanying dependent of his father. He became PR in Canada, then applied to sponsor wife and child. Officer said he became PR by reason of misrep of material fact, and ordered removal. C appealed under s. 68.

**Issue:** What is the meaning of H&C considerations “in light of all the circumstances” in s. 68?

**Outcome**:

* Court uses statutory interpretation – all circumstances suggests IAD is obliged to consider every relevant circumstance, including potential foreign hardship
* The IAD should consider the *Ribic* factors – illustrative, not exhaustive, and different weights can be afforded to factors

## Temporary Resident Permit – Minister’s Permit

* Special discretionary category of temporary entry; addresses failures to comply w/ requirements of the Act and short term issues of inadmissibility
* Based on H&C style considerations
* Broader discretionary power than s. 25
* A24 – inadmissible FN (according to officer) becomes TR if officer is of opinion it’s justified in the circumstances and issues TRP, which may be cancelled at any time
* Can be the basis of a PR application – R64-65 (see Rochelle’s CAN for details)
* R63 maximum length of 3 yrs
* A94(1(d)) Minister must report annually on number of these permits granted
* Not available to failed refugees for 1 yr (A24(4)) or DFNs for 5 yrs (A24(5))

#### Betesh v Canada (2008 FC)

**Facts:** B came from Israel with family as visitors, sought refugee protection and PRRA. Denied b/c no real risk found. H&C grounds PR also rejected. Made application for TRP. He had set up successful business in Canada, and if had to leave would shut and fire all employees. Also argued his life was in danger in Israel and police couldn’t help him. Officer didn’t issue TRP b/c he had already applied under H&C grounds and it was still being considered – trying to avoid a duplication of proceedings.

**Issue:** Did the officer err by not granting TRP because duplication of proceedings didn’t consider BIC, and insufficient reasons?

**Outcome:**

* The officer’s decision was reasonable – he considered relevant hardships and BIC and decided B didn’t present enough evidence to warrant new hearing. He didn’t show the result would be different w/ additional docs
* Note – making an H&C application doesn’t keep you in the country necessarily, so this can be used – but rare!

## Pre-Removal Risk Assessment (PRRA)

* Most individuals issues a removal order have option of applying to Minister for PRRA – if will face serious risks if removed to their country of origin
* Based on Canada’s int’l obligations – prohibition on *non-refoulement*
* It is a paper process w/ a low success rate – there may be option for a hearing
* Not limited to refugee context, but predominantly used there (b/c if your argument is good enough for PRRA, you’ve likely already made a refugee application & failed)
* Must have been in country for a while, 1 yr after rejection of refugee status
* 2 possibilities: 1) person gets protected status or 2) stay of removal for bad categories (in limbo)
* A112(1) person may apply to Minister for protection if subject to in force removal order, or subject security certificate
* (2) doesn’t apply if (a) extradited (c) less than 12 months for refugee (d) 36 months for DCOs
* (3) Refugee protection may not be conferred for applicant inadmissible for (a) security/HR/org crime (b) serious criminality (c) Article 1(F) Covention
* A113 Consideration of an application is:

1. New evidence that was not reasonably available or not able to present
2. Hearing at Minister’s discretion – based on factors in regs
3. Except for A112(3), consideration is based on s. 96-98 (same as refugee and protected person)
4. For ppl in A112(3), consideration on basis of factors s. 97 and
   1. If inadmisslbe on grounds of serious criminality, whether they are danger to the public
   2. For others, if should be refused due to nature and severity of acts, or danger to security of Canada
5. In case of following applicants, consideration based on s. 96 to 98 and (d)(i) or (d)(ii), whichever applies
   1. If inadmissible for serious criminality for conviction in Canada w/ max term 10 yrs for which imprisonment of 2 yrs or less was imposed
   2. If inadmissible for serious criminality for conviction outside Canada, w/ similar offence here w/ max term 10 yrs, unless Article 1(F) person

* Note – s. 97 is for torture/cruel/unusual punishment, s. 96-98 includes persecution
* Even if successful, person who falls under s. 112(3) won’t be granted protected person status, but his removal order will stayed (A114)

#### Varga v Canada (2007 FCA)

**Facts:** This was an appeal by the Minister from decision of FC that granted JR, setting aside negative decision of PRRA officer. It was Hungarian family (mother, father, children) w/ 2 Cnd-born children.

**Issue:** Does the PRRA have to consider the best interests of child of Cnd-born children?

**Outcome:**

* Difference between removal officer and PRRA officer – removal officer has limited but undefined discretion to consider short term interests of Cnd born children wrt travel arrangements including timing (s. 48)
  + Note – changed wording now to “as soon as possible” so less discretion?
* PRRA officer should only consider what they can under statute – s. 96-98
* H&C considerations should be saved for H&C app under s. 25 – shouldn’t be confused nor duplicated

## Danger Opinion

* S. 115 is framed as the final protection for the non-refoulement principle
* Doesn’t extend to those inadmissible on the set of ‘serious’ criminalities IF the minister is of the opinion that (which confers broad discretion to minister):
* Person is ‘danger to the public in Canada’
* On the basis of ‘nature & severity of acts committed (anywhere in the world) OR danger to security of Canada’
* Danger opinions not very common (approx. ½ a dozen)
* Once it’s been issued, it is a discretionary decision, not delegated, done by the Minister, then a person who is at a known risk of persecution/torture can then be removed

## Judicial Review

Note – JR at each juncture is by way of the usual leave provision in federal court

* S. 72(1) JR by FC wrt any matter (decision, determination, order, measure taken) under Act is commenced by making application for leave to the Court
* S72(2)(a) All appeals under Act must be exhausted
* S74(b) hearing shall be btw 30 – 90 days after leave granted
* S74(d) appeal to FCA only made if judge certifies serious question of general importance

## Staying a Removal Order

### Statutory Stays

* S. 50 – a removal order is stayed if:

1. Decision that was made in judicial proceeding would be contravened by enforcement of RO – must be ruling in which Minister had opportunity to make representations
   * R234 Not contravened if agmt w/ AG of Canada/province that on removal (a) criminal charge withdrawn/stayed (c) summons subpoena cancelled
2. Until a FN has completed their prison sentence in Canada
3. By the IAD or any other court of competent jurisdiction (see A68(1))
   * Includes through operation of PRRA
4. Where the FN or PR is in need of protection (cannot be returned) - s. 114(1)(b)
5. By the Minister

* R130 Minister may impose stay on removal orders for moratorium countries (eg. Afghanista, Democratic Republic of Congo, Iraq) – risk to civilian population
* R232 Stay of removal when applicant notified under R160(3) that they are allowed to make PRRA under s.112(1)
* R233 Stay of removal if Minister thinks it’s justified on H&C grounds, or public policy considerations, until decision made to grant or not grant PR

### Judicial Stays

* *Federal Courts Act* s. 18.2 grants FC the jurisdiction to stay a removal order whil application for JR is determined
* FC has jurisdiction to grant stay of removal where there is an application before the court for JR of validity of removal order***(Toth)***
* Toth test applies:
  + Serous issue to be tried
  + Irreparable harm
  + Balance of convenience
* Toth test – unpredictable, but essential and old part of immigration practice

#### Omar v Canada (2009 FC)

**Facts:** O is FN from Somalia, 24 yrs w/ no dependents. In Canada, granted refugee status in 2000. Has lengthy criminal record, including aggravated assault and possession of weapon. History of misconduct while incarcerated, including assault/weapon. The Minister rendered an opinion that he was danger to public in Canada (IRPA s. 115). He brought motion for stay of removal until his JR application determined.

**Issues:** 1) What evidence needed for conclusion about irreparable harm? 2) When will balance of convenience favour Minister 3) What is the public interest in removal orders?

**Outcome:**

* 1) Evidence needed for conclusion that applicant will suffere irreparable harm can’t be based on speculation or mere possibility – must be clear and non-speculative
  + Difficult branch to meet – more than just risk
  + This is inconsistent w/ evidence (he said he wouldn’t mind going to Hargeisa)
* 2) Balance of convenience favours Minister in cases where the applicant has a criminal record
* 3) Public interest in enforcing removal orders in efficient, expeditious and fair manner
  + Cnd gov’t has interest in protecting health and safety of Cnd and to maintain security of Cnd society
* Fails to meet Toth test, so motion for stay of removal dismissed

#### Ghahremani v Canada (2009 FC)

**Facts:** Husband and wife from Iran asking for stay of removal order. Refugee status was dismissed and PRRA was unsuccessful. There was general election in Iran and they were opponents of the current regime – many protestors had been killed. They feared prosecution based on political beliefs.

**Issue:** Did they meet the Toth test?

**Outcome:**

* Serious issue to be tried – how they will actually be treated if returned to Iran
* Evidence shows the couple will face irreparable harm, persecution, punishment, torture, and maybe death
* Balance of convenience favours the applicants b/c there is great uncertainty as to what the current situation in Iran is

#### Mauricette v Canada (2008 FC)

**Facts:** Woman from St. Lucia was subject to removal order. She was afraid to go back – her ex-partner was terrorizing her there and she feared physical violence. Her 3 kids have medical problems and might not get adequate care there, and might be deported (not born in St. Lucia). Failed refugee claim and PRRA, and missed removal before (scared).

**Issue:** Does she meet the requirements of the Toth test?

**Outcome:**

* Serious issue: 2 possible thresholds
  + 1) Generally low threshold – something before court that’s not vexatious or frivolous
  + 2) Higher threshold (whether reasonable) – if decision being JR’d is not to defer a removal order
* Officer should exercise discretion whether to defer removal using the practicably reasonable test: a) practicality of the removal b) reasonableness of the removal
  + Consider any relevant factors and circumstances – including, is it reasonable to defer removal pending a risk assessment?
* Balance of convenience will flow to the applicant where the first 2 steps of Toth test are met
  + So basically test has 2 prongs
* She is granted stay – court thinks she faces risk in home country, including losing her son

## Security Certificates

* Supplementary regime for determining inadmissibility – effects removal of non-citizens considered serious criminals, security threats, HR abusers, or org crimers
* Initiated by Minister of immigration, and Minister of public safety – exercise authority granted by s. 77 and sign security certificate – often based on info shared w/ foreign gov’t
* Often coincides w/ circumstances where person is ‘unremovable’
* Federal Court judge must determine its reasonableness
* Procedures are controversial b/c they allow for reliance on evidence not made available to person named in certificate
* At odds w/ key principles of criminal justice system – secret trials and long term detention w/o trial (administrative detention)
* Original procedures declared unconstitutional in *Charkaoui* – new procedural provisions brought – upheld in *Harkat*
* Since 1997, every one has ultimately been found reasonable – question of trust in gov’t

### Process

* A77 – 2 Ministers sign a certificate stating that PR or FN is inadmissible on grounds of security, violating HR, serious criminality or organized criminality, and refer it to the Federal Court
* A88 – Chief Justice, or designated judge, determines if the certificate is reasonable – if not, shall quash the certificate
* A79 Appeal from determination may be made to FCA only if judge certifies a serious question of general importance
  + Note – the question is almost always certified b/c these SC cases go against core principles of CL/crim law (always of national importance)
* A80 if certificate found reasonable, it is conclusive proof of inadmissibility and transforms into a removal order in force immediately

### Detention Under Scheme

* A81 ministers may issue warrant for arrest/detention of person in certificate if reasonable grounds to believe person is danger to national security or safety of any person, or unlikely to appear at a proceeding or for removal
  + Note, detention not required, but it has never been used without detention
* A82 Detention reviews are: (1) initially w/in 48 hrs then (2) after 6 months (3) every 6 months after that
* A82(4) Can be released with conditions – similar to ‘house arrest’
* A82(5) On review, judge can either affirm grounds in certificate under A81 or can set aside the detention and release FN/PR on conditions
* SCC has signaled that at some point indefinite detention would constitute Charter breach ***(Charkaoui)***
  + Even if detained for 5 yrs w/o being charged, it’s not viewed as indefinite detention b/c it’s reviewed every 6 mos)

### New Procedures (post-Charkaoui)

* A83 (1) Protection of Information – following procedures apply:

1. Judge shall proceed as informally/expeditiously as circumstances and considerations of fairness and natural justice permit
2. Judge appoints special advocate from list (s. 85(1)) to hear summary of all info
3. Judge can hear evidence in secret
4. Judge provides person w/ summary of info and other evidence throughout proceeding, but not injurious to national security
5. Ensures confidentiality of info withdrawn by Minister
6. Provide PR/FN and Minister opportunity to be heard
7. Rules of evidence relaxed – if reliable and appropriate, even if inadmissible (just can’t be obtained from torture (1.1)

* A85(1) Minister of Justice creates special advocate list
* A85.1(1) role is to protect interests of the PR/FN when info heard in their absence
  + (2) they may challenge (a) claim that disclosure of info needs to be kept secret and (b) claim that evidence is relevant/reliable/sufficient
  + (3) not a solicitor client relationship, and SA not party to proceedings
  + (4) but soliticotr client privilege applies (SA not compellable witness)
* A85.2 Powers of special advocate: (a) oral/written submissions (b) cross-examine (c) exercise any powers w/ judge’s authorization – to protect person’s interests
* A85.5 Disclosure/communication: with exception of communication authorized by judge, no person shall (a) disclose info/evidence (b) communicate content of any part of proceeding
* A86 – procedure can be mirrored in other proceedings (admissibility hearing, detention review, IAD appeal) – may attract special ado
* A87 IRB can make decision w/o immediately involving SA
* A87.1 on JR, if judge thinks there is secrecy concern, judge must consider if SA needed

#### Charkaoui

* Procedures regarding security certificates found to be Charter violation
* Security context for Charter s. 7 (stronger interest than immigration) – more like criminal law (detention incidental to removal)
* Right to know case against oneself infringe and not justified under s. 1
* Extended detention is not Charter violation b/c of periodic review (not indefinite)

Result:

* Removal of distinction btw FN and PR
* Detention isn’t mandatory
* Special advocate introduced
* Now procedure can be mirrored in other proceedings

Note – *Belmarsh* (HOL 2004) – found indefinite detention provisions are breach of human rights – citizens can pose equally dangerous risks (max 2 yr detention)

#### Harkat (2014 SCC)

**Issue:** Testing constitutionality of post-Charkaoui changes

**Outcome:**

* Role of designated judge is ‘gatekeeper’ and SA are to act as substantial substitute for personal participation
* Some info will always be disclosed – summary mustn’t be empty – person must receive info about personal allegations and nature/type of evidence
* If reasonable disclosure not possible, then withdraw certificate
* S. 7 doesn’t guarantee perfect process, just fair – unlimited amount of info can flow one way from person concerned (and their public lawyer)

## Immigration Detention

* Responsibility for detention is w/ CBSA
* 3 basic reasons for detention:
  + danger to the public
  + identity is in question
  + risk of failure to appear for next immigration proceedings
* 3 immigration detention facilities in Canada: Montreal, Toronto, and YVR
* 2008-09 peak: 14,347 persons detained, average of 17 days
* Primary reasons: lack of ID docs / concern about attendance
* Detention of refugee claimants not authorized by int’l law
* Legislative scheme for detention is strong, but problem is at implementation stage
* Mass arrivals and ppl found to be un-removable pose challenges to current system
* Detention reviews are *sui generis* – must consider previous decision, but come to a fresh conclusion every time ***(Thanabalasingham)***
* Detention review – Minister must establish on BOP – danger to the public, but once *prima facie* case made out, person must lead evidence ***(Thanabalasingham)***

Legislative Framework

* A54 – ID is competent division wrt review of detention
* A55 – 3 ways for detention to begin:

1. Arrest with warrant for PR/FN – officer issues, requires 2 factors: person inadmissible + danger to public/unlikely to appear
2. Arrest without warrant for FN (not protected person) (a) person inadmissible + danger to public/unlikely to appear **OR** (b) ID of FN in question
3. Detention on entry for PR/FN if:
   1. Necessary to complete exam
   2. Reasonable grounds to suspect inadmissible for security, violating HR, serious crime, crime, or organized crime

3.1) Must detain DFN over 16 yrs age (a) upon entry (b) after entry and designated

* 3 ways detention can end
  + A56(1) Officer can release if reasons for detention no longer exist – can impose conditions like pay deposit or post guarantee (2) not DFNs!
  + Release by ID or by Minister (hearing)
  + Deportation
* A57 – Review after (1) 48 hrs (2) 7 days then every 30 days after that
* A57.1 Review for DFN (1) within 14 days (2) after 6 mos
* A58 Presumption of release – ID shall release PR/FN unless:

1. Danger to public
2. Unlikely to appear for hearing
3. Minister inquiring into suspicion inadmissible for security, violating HR, criminality, org crime

* Minister must prove this – is the evidence reasonably capable of supporting their suspicion of potential inadmissibility -good faith (IRB GL 2.3.3)

1. Person not reasonably cooperated by providing info for establishing identity
2. DFN and identity not established

* Note, DFNs must actually establish identity – not enough to try to prove who they are – (according to Minister’s opinion – IRB GL 2.5.2)
* A59 – if warrant for detention for person in prison, when their sentence ends, they will be delivered from prison to detention
* A60 Minor child should only be detained as measure of last resort

Factors to Consider

* R244(a) for unlikely to appear for exam, consider R245 factors:

1. Fugitive from justice in foreign jurisdiction for equiv. Cnd offence
2. Voluntary compliance w/ previous departure order
3. Voluntary compliance w/ previous appearance at any proceeding
4. Previous compliance w/ any condition for entry/release/stay of removal
5. Previous avoidance of exam or escape from custody (or attempt)
6. Involvement w/ ppl smuggling/trafficking, vulnerable to being influenced or coerced by org. to not appear
7. Strong ties to community in Canada

* R244(b) for danger to public, consider R246 factors:

1. Previous danger opinion
2. Organized crime (A121(2))
3. Engagement in ppl smuggling/trafficking
4. Conviction in Canada for (i) sex offence or (ii) violence/weapon offence
5. Conviction in Canada for drug (i) trafficking (ii) importing (iii) production
6. Same as (d) for outside Canada
7. Same as (e) for outside Canada

* R244(c) for identity not established, consider R 247(1) factors:

1. Cooperation in providing evidence of ID, eg. Birth date/place, parents’ names, itinerary in coming to Canada
2. For refugees, possibility of obtaining ID docs in home country/gov’t
3. Destruction of ID/travel docs, use of fraud to mislead, how they acted
4. Contradictory info given re: ID
5. Contradictory docs for ID

R247(2) – 1(a) re: cooperation won’t have adverse affect to minor children

* R248 Factors to consider for subsequent detention reviews: **(*Sahin* factors IRB GL 3.1.2))**

1. Reason for detention
2. Length of time in detention
3. Elements to assist to find likely end time of detention
4. Unexplained delays/lack of diligence by CBSA or person concerned (can it be attributed to person’s own actions)
5. Existence of alternative to detention

* R249 Special factors to consider for children:

1. Availability of alternative arrangements (child-care/protection)
2. Anticipated length of detention
3. Risk of further control by human smugglers/traffickers
4. Accommodation for segregation of children from other adults (not parents)
5. Services in detention facility: education, counseling, recreation

### Immigration and Refugee Boards of Canada, Guidelines: Detention

* When deciding to continue detention or release, public interest must be balanced with the liberty interest of the individual
* For assessing danger to public, see if they represent a “present or future danger to the public” (2.1.5)
  + More serious the crime and more number, and possibility of reoffending – more likely danger to public
    - Also consider age, circumstances around crime, drug/alcohol addiction, rehab, member of gang, Minister’s opinion
  + Weight given to each fact left to discretion of member
  + Not bound by National Parole Board, or court of law (bail/sentence)
  + For DFNs, only consider factors relating to ground for detention (2.1.6)
* Flight risk – other factors:
  + Access to large amt $, previous use false ID docs or aliases, prior attempt to hide in Canada, or lack of credibility (2.2.3)
  + Not bound by court decision re: bail (2.2.4)
  + For DFN, only consider factors in regs (2.2.5)
  + If release DFN, must impose any condition in regs (2.2.6)
* Other factors to consider (**The *Sahin* Factors):** (3.1.2)
  + The reason for detention
  + Length of time in detention
  + Whether there are any elements to assist in determining length of time in detention is likely to continue
  + Whether unexplained detaly/lack of diligence caused by CBSA or by person
  + Alternative to detention
    - 3.1.4 Detention not for purpose of punishment – not indefinite b/c must be reviewed regularly
* Alternatives to detention (3.6) – release on undertaking to comply w/ conditions, payment of deposit, posting of guarantee for compliance
  + Conditions: periodic reporting, confinement to particular location/geo area, req’t to report change of address/phone #, less restrictive detention (house arrest) – (3.6.3)
  + Appropriate bondsperson – BP willing to supervise/influence, monitor activities, length known person, knowledge of history – for amount of bond, impact for compliance(3.6.4)
  + For long detention, can risk be neutralized w/ strict terms: curfew, no cell phone/computer, house arrest, electronic bracelet, restricting contact w/ certain ppl, officials able to enter home (3.6.6)

#### Thanabalasingham v Canada (2006 FCA)

**Facts:**JR of detention review after approx. 2 yrs in custody.

**Issue:** 1) Is detention review hearing *de novo*? 2) Who bears the burden of proof?

**Outcome:**

* Detention review is *sui generis* – not fresh, nor does earlier review conclusion receive deference
* Must consider the previous decision, but come to a fresh conclusion very time
* Burden of proof – must consider s. 7 Charter, Minister must establish on BOP than respondent is danger to public,
  + once a *prima facie* case been made out, person must lead some evidence or risk continued detention

### Designated Foreign Nationals

* Capacity to designate certain FN on the basis of irregular mode of arrival
* Detention mandatory on arrival or designation
* Detention review schedule looks more like security certs
* Courts not able to review this detention, Minister has additional powers
* Children – age of majority is 16 for this provision
* Result – ppl more likely to go underground
* No Charter challenge yet – no test case litigants willing

Delphine Nakache, *The Human and Financial Cost of Detention of Asylum-Seekers in Canada*

* 27% of refugees detained in penal institutions (less than 6% of them suspected of criminality/danger to public/security
* refugees detained significantly longer than in immigration holding centre
* regional policy variations play significant role in likelihood of being detained/remaining in detention
* Req’ts for DFNs arriving on boats – more arguments for inadmissibility on security grounds, and more proof of ID – impact their ability to make refugee claims
* Reasons for detention communicated to person in language they understand?
* In Montreal and GTA ,they receive pamphlets, have right to lawyer, meet w/ NGOS – but in other parts of Canada, in prov. Jails, often not given this info
* Barriers to legal rep in BC and those in non-CBSA facilities
* Maybe detained in penal institutions – subject to unnecessary/disproportionate restrictions on liberty – impedes ability to seek protection (also max security prisons not necessary!)
* If behavioural/mental health problems, or suicidal, sent to penal instit – but w/ punitive purpose? – prisons used to compensate for CBSA’s lack of experience/expertise in this area
* Communication gaps btw prov and fed gov’t – for day-to-day custody of ref seekers in penal instit.