ATTENTION: USE WITH CAUTION. IMMIGRATION LAW IS SUBJECT TO CONSTANT CHANGE. REFERENCES SHOULD BE VERIFIED.

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# Introduction

Current Patterns in Canadian Immigration

* In what ways does Canada’s immigration system contribute to equality or human rights?
	+ Through the acceptance of refugees from areas where they would otherwise be harmed
	+ Through quota systems – to ensure a diverse range of individuals based on race, age, culture, etc.
	+ Through the use of H&C grounds; allowing individuals to gain PR based on non-economic grounds (Baker)
* In what ways does Canada’s immigration system contribute to the formation of a closed community (communitarianism)?
	+ Assumption: People cannot enter Canada w/o satisfying the req’ts of the IRPA
	+ Restricted to education and economic criteria – seeking to create a minimum level of welfare for all entrants
		- Explicitly or implicitly excluding individuals from racial, ethnic or economic backgrounds creates a more homogenous community (rather than broadly multicultural)
	+ Tightening of language requirements

Theories: Libertarian vs. Communitarian

* Communitarian Approach
	+ Canadian immigration is not primarily about human rights
	+ Nations should be able to define who gets in however they want
		- Often justified on the basis that it aims to meet economic needs
		- But more challenging when people have been excluded on the basis of race, national origin, gender, etc.
	+ Community should be closed; the idea of “us” and “them”
	+ Moderating through closed doors rather than opening them
* Libertarian Approach (Karens)
	+ Based in the “right to stay” and how that is justified using liberal theory; if we’re really liberal than everyone should get an equal chance irrespective of where we were born
	+ Currently the immigration system excludes on this basis
* **Counter:** Canada’s immigration system has never been about egalitarianism or liberalism; has only grown to encompass elements of those things
	+ Was about economic development, land settlement and labour
	+ More recently, we have considered refugees, H&C grounds, etc. based on international law
* Historical Context
	+ Prior to the development of the social welfare system, there was no detriment to bringing in additional people
	+ However historically, there was a desire to create a “desirable community”
	+ In the 60s, immigration policies became liberalized – sought to avoid specifically racialized policies
		- More focus on the individual economic basis; development of the point system
		- Was also an enlargement of refugee intake; have been several shifts in political thinking since
	+ *Economic based, ethnically based, racially selective and highly discretionary; only recently liberalized*

**

Permanent Immigration Planning Levels for 2012/13 (right)

## Ministerial Instructions – A14.1(1) and A87.3

* Provision of the statute that grants the Minister discretion to create “instructions”
	+ Directions provided by the Minister w/ the same effect as regulations
	+ BUT are subject to less rigorous procedural requirements
* Are a more forceful version of what would have previously been considered immigration policy
	+ Where policy decisions are extremely important in immigration law
* **A14.1** Legal Status of Ministerial Instructions
	+ Allow the Minister sole discretion to:
		- make new classes, eliminate classes and/or modify how they function
		- limit the number of applications processed, accelerate some applications or groups of applications and return applications without processing them to a final conclusion
	+ Key Items:
		- **(9)** An instruction has a five year limitation period
		- **(12)** Instructions must be published in the Canada Gazette
* i.e. **MI1** Limited the processing of FSW application to those applicants w/ an arranged employment offer, work experience in one of the 38 in-demand occupations, and applicants in Canada as students or TFWs
* Note the provisions use of *IRPA* objectives and the *Charter*

Citizenship and Immigration Canada Annual Report to Parliament on Immigration 2013

* *We must ensure our immigration system is designed to best meet our current and future labour market needs*
	+ *We continue to balance our immigration program with family and humanitarian objectives*
	+ *Redesigned program must avoid future backlogs and bear in mind Canada’s generous health-care system and social benefits*
* Government added and changed several classes
* Created designated country of origin provisions (DCO) under which countries that generally respect human rights and do not normally produce refugees are identified for expedited processing and other restrictions
* *Faster Removal of Foreign Criminals Act* amended *IRPA* to:
	+ Make it easier for the gov’t to remove dangerous foreign criminals from Canada;
	+ Make it harder for those who may pose a risk to Canada to enter the country in the first place; and
	+ Remove unnecessary barriers for genuine visitors who want to come to Canada
	+ **Sum:** Tightened up the admission of foreign “criminals” and limited appeal rights for PRs on the basis of criminality
* Data 2012: 160,000 economic class PRs and 213,000 TFWs

Citizen and Immigration Canada (**CIC**)

* Principal federal government body involved in immigration; assess applications and provide decisions
* Are the body to whom you apply if you want to come to Canada
	+ Decide who should be referred to the IRB to apply for refugee protection in Canada
	+ Selection of permanent and temporary residents
	+ Issue visitor, worker and student visas
	+ Issue travel documents
	+ Determine residency obligations
	+ Grant Canadian citizenship
	+ Administer resettlement programs; assist individuals with settling in Canada
	+ Collect and provide data regarding immigration
* Provide immigration policy and legislative leadership (whereas most policy and operational manuals are online)
* Significant research production regarding the status of other countries and prospective immigrants

Canada Border Services Agency (**CBSA**)

* Provide integrated border services such as managing, controlling and securing Canada’s borders. Includes:
	+ Admitting people to Canada
	+ Referring refugee claims made at ports of entry to the IRB
	+ Responsible for removing, arresting and detaining people; CBSA reps appear at detention reviews
* Report to the Minister of Public Safety and Security
* Changed from Canada Customs in 2002; now responsible for enforcement of immigration decisions (“immigration police”)

Immigration and Refugee Board of Canada (IRB)

* Largest administrative tribunal in Canada – apply the law and policy as set out in the *IRPA*
* Make decisions on immigration and refugee matters in Canada:
	+ Decide who needs refugee protection
	+ Hear appeals on certain immigration matters
	+ Conduct admissibility hearings and detention reviews
* Includes 4 divisions:
	1. Refugee Protection Division (20,000 – 30,000 decisions per year)
	2. Refugee Appeal Division (newly established)
	3. **Immigration Division (detention and admissibility issues)**
		+ Admissibility Hearings (3,000 per year)
			- For FNs or PRs who are believed to have contravened and are rendered ‘inadmissible’
		+ Detention Review Hearings (17,000 per year)
			- Decisions regarding whether people should be released from immigration detention
	4. **Immigration Appeal Division – IRPA, ss. 62-67** (12,000 decisions per year)
		+ Staffed by GIC appointees; act as a court of record
		1. Appeals by **family class sponsors** who are Canadian citizens or PRs
		2. Appeals of **‘removal orders’ against PRs**, refugees, other protected persons and FNs with PR visas
		3. Appeals by PRs who have failed to fulfill their **residency requirements**
			+ However, *Fast Removal of Foreign Criminals Act* limits the number of individuals who are able to appeal their removal and the manner in which they are able to appeal
		4. Appeals by CBSA of **ID decisions regarding admissibility**

Opportunities for Judicial Review

* There is a limited appeal process within CIC; must seek judicial review at the Federal Court
	+ Requires leave of the FC; where leave decisions are made quickly and few are heard
	+ Appeal to the FCA requires a certified question of general importance by the FC
	+ Appeal to the SCC requires leave of appeal; no automatic right of appeal (like in criminal law)
* Judicial review is a *discretionary remedy*; no automatic right to judicial review
	+ SOR of reasonableness most likely applies based on *Dunsmuir* criteria and previous jurisprudence
	+ SOR of fairness (correctness) applies to issues of procedural fairness
* Remedy: Sent back to the Officer, ID or IAD for re-consideration with instructions

Underlying Principles of Immigration Law

* State sovereignty
* Minimal constraints at international law
	+ Refugee Convention
	+ Convention on the Rights of all Migrant Workers and Their Families
	+ Where JR based on human rights claims have generally be ineffective
* *Charter* scrutiny is minimal – both ss. 15 and 7 (Khadr) claims have been unsuccessful
	+ Court are unlikely to interfere due to the nature of immigration policy – highly politicized area characterized by a high level of policy malleability

*Immigration and Refugee Protection Act*,SC 2001, c 27 [effective June 29, 2002]

* A type of ‘**framework’ legislation**; expanded via regulations and Ministerial instructions
* **A3** ‘objectives and application’
	+ (c) focus on Canada’s economic prosperity
	+ (f) focus on timely procedures and processing
	+ (g) focus on security since 9/11
	+ (h) focus on bringing in top level foreign students; related to c
	+ N.B. These purposes/objectives are useful for advocacy purposes (i.e. stat interp)
* **Key Idea:** Broad discretion in immigration law; purposes/objectives are often in conflict with one another
* **A94** Requires an annual report to Parlia ment

# Economic Category Admissions: Skilled Workers

Transnationalism (David Ley, *Trans-Pacific Mobility and the New Immigration Paradigm*)

* Term which describes the contemporary hyper-mobility of migrants across national borders; both those who are poor or undocumented and also those who are skilled, wealthy and eagerly solicited by nation states
	+ Discusses the reception of wealthy Asian migrants in Vancouver – “Hong Kong for making money, Canada for quality of life”
	+ Also referred to as “*circular migration*”
		- Present intranationally as well – i.e. work in Fort McMurray but return to their home province
* Idea disrupts the push-pull idea often associated with “traditional migration”
	+ Term implies an *active agency* among migrants (as opposed to the compelled migrants of past generations)
	+ Term gives a sense of migrants as *transgressors* – undercutting the authority of the state in their movements and flexible use of citizenship
* Must consider the balance b/w the economic factors that exist in conditions of globalization and the fact there is still social and geographic specificity
	+ Impossible to achieve perfect, rational movement on the basis of economic means (pure globalization)
	+ Will always be influenced by cultural and geographic shape
* Ley rejects globalization arguments:
	1. The social field stretching from East Asia to Canada is not a uniform surface of sameness
	2. Time-space compression has not exhausted the role of distance even for wealthy migrants
	3. Place matters as migrants embody the cultural traits of their regions of origin in moving across the social field

Types of Residency: Permanent and Temporary

1. *Canadian Citizens* – can always enter the country
	* **A19(1)** Every Canadian citizen…has the right to enter and remain in Canada in accordance with this Act, and an officer shall allow the person to enter Canada if satisfied…that the person is a citizen or registered Indian
2. *Permanent Residents* – are subject to additional requirements that allow/require the government to remove them
	* Have labour mobility; do not need permission to work
	* PR status remains until taken away; an admissibility process is required in order to remove your status
	* **A19(2), 27** Rights of Permanent Residents
		+ **19(2)** An Officer shall allow a PR to enter Canada if satisfied…that they have that status
		+ **27** Right to enter and remain in Canada subject to any conditions imposed by the Act, regulations or MIs
	* **A28(1)** Residency Obligations
		1. Must reside in Canada for 730 days out of a 5 year period by being (i) physically present in Canada or the other situations outlined in (ii)-(v)
		2. Must be able to show that they have met or will be able to meet the obligations w/n 5 years
		3. H&C Considerations: “a determination by an officer that H&C considerations relating to a PR, taking into account the best interests of a child directly affected by the determination, justify the retention of PR status overcomes any breach of the residency obligation prior to the determination.”
	* **A46** Loss of PR Status
		1. when they become a citizen
		2. failure to comply w/ residency obligations in **A28**
		3. when a removal order comes into force
		4. when refugee protection has ceased under **A108** or based on a determination under **A109**
3. *Foreign Nationals* – specific requirements in order to enter Canada
	* Must get visa before arrival, obtain req’d documents, be admissible, arrive at the border (**A21** and **R6**)
4. *Status Indians* [OMIT]

Selection of Permanent Residents – *IRPA*, **12**

1. *Family Reunification:*A FN may be selected as a member of the family class on the basis of their relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or PR
2. *Economic immigration:* A FN may be selected as a member of the economic class on the basis of their ability to become economically established in Canada
3. *Refugees:* A FN, inside or outside Canada, may be selected as a person who under this Act is a Convention refugee or as a person in similar circumstances, taking into account Canada’s humanitarian tradition wrt the displaced and the persecuted

## Federal Skilled Workers Program (FSWP)

Introduction

* A subset of the economic class
* **R75(2),(3)** Defining Requirements of Skilled Workers
	1. Must be able to document 1 year of skilled work; need to be able to demonstrate that your work experience matches the NOC requirements
	2. Must also be able to demonstrate your proficiency in English or French
* Impact of Ministerial Instructions
	+ Used to narrow the FSW class; but also used to create the Federal Skilled Trades class [OMIT]
	+ Sets processing priorities
		- Have prioritized FSWs, investors and entrepreneurs
		- Where FSW applications require O, A or B occupations (w/ some exceptions) and PhD students
* National Occupational Classification and Matrix ([*NOC*](http://www5.hrsdc.gc.ca/NOC/English/NOC/2011/OccupationIndex.aspx))
	+ System of classification based on the skill req’ts of the job and the sector of the economy to which they apply
	+ Way of classifying the labour markets – used for all sorts Human Resources needs
* Skill Classification (Letter)
	+ O – Management occupations
	+ A – Occupations usually requiring university education
	+ B – Occupations usually requiring college education or apprenticeship training [lots of job; consider high skilled]
	+ C – Occupations usually requiring secondary school and/or occupation-specific training
	+ D – On-the-job training is usually provided for occupations
* Job Classification (4 Digit Number)
	+ Based on the type of job (clerical, paralegal, retail manager, etc.)

Selection Criteria: The Points System

* **Basic Eligibility:**
	1. Have 1 year of continuous full-time (or an equal amount of continuous part-time) paid work experience in one of the eligible occupations within the last ten years, **OR**
	2. Have a valid offer of arranged employment, **OR**
	3. Are an international student who is enrolled in a PhD program in Canada (or who graduated from a Canadian PhD program within the past 12 months)
	+ N.B. These function as the “gate” – must fit within one of these streams before your points will be assessed
* **If Basic Eligibility is met, must also have:**
	1. Sufficient points (minimum 67) and;
	2. **R76(1)(b)(i)** Settlement Funds – must have transferable and available funds for settlement or;
		+ Requires an amount equal to ½ of the minimum necessary income applicable in respect of the group of persons consisting of the skilled worker and their family members
	3. **R76(1)(b)(ii)** Arranged employment in Canada as defined in **R82(1)**
* Points Categories
	+ **R78** Education
	+ **R79** Language
	+ **R80** Work Experience (only O, A or B eligible)
	+ **R81** Age [workers aged 18-36 receive additional points]
	+ **R82** Arranged employment [see below]
	+ **R83** Adaptability
* **R76** Substituted evaluation
	+ Discretionary provision that can be utilized where the applicant does not meet the points req’t, but can demonstrate that they are *likely to become economically established in Canada*
		- Entitled to a high degree of deference (Sharma v Canada; Grigaliunas v Canada)
	+ **(3)**Whether or not the skilled worker has been awarded the minimum number of req’d points…an officer may substitute for the criteria set out in para (1)(*a*) their evaluation of the *likelihood of the ability of the skilled worker to become economically established in Canada* if the number of points awarded is not a sufficient indicator of whether the skilled worker may become economically established in Canada
	+ **(4)**An evaluation made under subs (3) requires the concurrence of a second officer

**R82** Arranged Employment

1. Must be a job offer for permanent FT work in O, A or B categories
2. Can get 10 points if:
	1. Hold a *labour market opinion (LMO) based work permit* that is valid at the time of application and time of visa issuance; OR
	2. Same as above but pursuant to international agreement (i.e. NAFTA or GATT); OR
	3. Does not hold work permit but has a permanent job offer *approved by HRSDC*; OR
	4. Holds a non LMO, non GATT/NAFTA work permit AND has a permanent job offer approved by HRSDC

## FSW Federal Court Cases

* If an individual is not awarded 67+ points, they can seek JR by the FC or re-apply
	+ Re-application subject to serious delays and req’ts may have changed (re: MIs)
	+ Requires leave of the FC; only 12% of cases are granted leave
		- When granted leave, negotiations with the DOJ are undertaken whereby they admit to the mistake, the issue stays out of the courts and the application is processed
* Must request JR within 15 days if within Canada or within 60 days if outside Canada
* **SOR = Reasonableness**
	+ Requires that the result be within the range of reasonable possibilities and that the reasons be intelligible and understandable (Dunsmuir)
	+ However, procedural fairness issues will attract a standard of fairness (akin to correctness)
* **Bottom Line:** JR is a discretionary remedy – counsel ought to ensure application is not denied by the CIC Officer

Case Law: JR of refused FSW applications

* Sharma v Canada: No obligation for Officers to provide A’s w/ a ““running score at each step of the interview.” However, PF required the Officer to inform the applicant that negative discretion was going to be exercised notwithstanding the fact that he had obtained 70 points.
* Chowdhury v Canada: Court found Officer’s assessment of education not done reasonably; calculated her education based on extrinsic evidence not made available to the A
	+ Decision lacked “the transparency and justification that are required for the Court to conclude that the decision was reasonable”
* Ismaila/Majid v Canada: A provided only short letter outlining the basic req’ts of NOC. Court held that A is responsible for supplying supporting documents and evidence and that Officer is under no obligation to request further clarification from the applicant if she/she finds there is not enough evidence initially submitted.
	+ Further, Officer must assess applicants based on the evidence put forward by the applicants and not on their own personal knowledge or assumptions (cannot imply based on knowledge of pilots)
* Gurinder Singh v Canada: No existing duty to inform applicants of weakness of application related to deficiency in meeting requirements of legislation
	+ Other documentation provided to A’s is relevant to expectations (i.e. document checklist which indicated that “proof of relationship to your close relatives in Canada, such as birth, marriage or adoption certificates” was req’d)
* Liang & Gurung v Canada: Class action by applicants whose applications had been delayed 5-9 years due to prioritization of Bill-C50 and MI1; court found delay unreasonable
	+ Though Minister is accorded a high degree of deference in determining how long any kind of application will take to process, as a matter of policy, he will be held to the policy he sets
	+ However, there is no onus on the Minister to process applications FIFO; would undoubtedly result in further delay and confusion in an already over-burdened process
* Grigaliunas v Canada: An Officer is not obligated to reconsider an application for PR based on substituted evaluation; Officer provided intelligible reasons in choosing not to do so

BOTTOM LINE

* Discretion is significant in immigration law
* JR likely to afford Officers a large amount of deference – limited by:
	+ the reasonableness of fact based decisions or;
	+ the fairness of the procedure by which the law is applied
* Statutory interpretation is an important of the way in which the courts constrain Officers
	+ Need to understand the limits created by the statute

Accompanying Family Members

* **R72(4)(a)** When you apply for PR, your family members get to come with you provided they are not inadmissible
	+ RE: Different than the family class which defines family more broadly
* **R70(4)** Each family member must be admissible on their own (i.e. no security issues)
	+ Whereas one family member’s security issues can cause issues for the principal applicant; cannot “sever” them
* **R1(3)** Family member
	1. the spouse or common-law partner of the applicant;
	2. a dependent child of the applicant or of the applicant’s spouse or common-law partner; and
		+ **R2** Dependent Child: Under 22, dependent by reason of physical or mental disability, unmarried, or full time student over the age of 22
	3. a dependent child of a dependent child referred to in paragraph (*b*) [grandchild]
* **R117(9)(b)** 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 cannot be sponsored later; no appeal to IAD

# Other Economic Class Admissions

Introduction

* Increasing number of economic class applications in other classes (other than FSW)
	+ Dependent on specific labour attachment in Canada
* Inadmissibility: Criminal, medical, and security inadmissibilities apply similarly to all economic class applicants

Other Economic Classes

1. **R87** Provincial Nomination Program Class (PNP)
2. **R87.1** Canadian Experience Class (CEC)
3. **~~R90(1)~~** ~~Investors~~ [suspended]
	* Requires net worth of $1.6M and willingness to invest $800K into an approved Canadian fund
		+ Has to be ‘clean’ money; must provide documents sourcing their net worth
	* Allows individuals w/ money and interested in investment to obtain PR w/o meeting the language, work experience or education req’ts
	* Temporarily suspended, but “start up” visa now in place
	* 2012 admission numbers (including spouses and dependants): 9359
4. **~~R97-98~~** ~~Entrepreneurs~~ [suspended]
	* Requires control (active management) of at least 33.3% of a qualifying business (must create one job)
	* Provided conditional PR
	* 2012 admission numbers: 479
		+ These applicants may be able to consider similar categories under the PNP
5. **R88(1), 100-102** Self-Employed Persons
	* Must be able to provide a significant contribution to specified economic activities in Canada
		+ Large cultural or athletic contribution
		+ Includes world-class athletes, artists, musicians, and farm managers
	* Extremely limited class; very few individuals qualify
	* 2012 admission numbers (including spouses and dependants): 242
6. **R110-115** Live-in Caregivers (not an economic class per se)
	* Must enter on a LICG work permit (as a TFW) and accumulate 2 years, 22 months or 3900 hourrs of FT work within 4 years in Canada
		+ Must maintain LICG status to be landed (achieve PR) under this class
	* Politically contentious class
		+ Has been associated with issues of human trafficking allegations
		+ Employers have a large amount of control and power over the employees in their home
			- Commonly required to work well beyond the job requirements
		+ Employees have little power against their employers
			- Difficult to enforce minimum wage or overtime requirements
			- Infrequently have connections with people outside of the home
		+ Gendered and racial issue; commonly used by women from poorer parts of Asia
	* What if they change employers?
		+ A must get a new LICG permit for a new family – cannot be involved in authorized work
		+ However, applications take years to process and families may not longer need caregivers
	* 2012 admission numbers (including spouses and dependants): 9012

### Provincial Nominee Program (PNP) – *IRPA*, ss. 8-9 and *IRPR*, s. 87

* Offered through a federal-provincial agreement – allows provinces to select migrants based on provincial policy initiatives
	+ Meant to fulfill local labour market needs – may include workers, entrepreneurs, and investors
* Provides an option to high-skilled workers who don’t fit into the current FSW requirements
	+ Does not affect admissibility
	+ No point system applies
* 2012 admission numbers (including spouses and dependants): 40,899

Legislative Authority

* **A8** Minister may enter into federal-provincial agreement
	+ Creates concurrent jurisdiction via *memoranda* of agreement; this is primarily relevant for PNP
	+ Canada-Quebec Immigration Accord grants Quebec its own economic and refugee standards
* **A9** Allows provinces to determine selection criteria which determine PR
	+ Under the authority of the province to determine its own selection process. The policy is limited only by the terms of the agreement with the federal government.
	+ Substituted evaluation **R87.3** still possible; however CIC commonly concerned only w/ admissibility
* **R87 establishes provincial nominee class**
	+ Must be nominated by province and intend to live there
	+ Where the nomination program/criteria are determined by the provinces (not listed in the regs)

Canada-BC Immigration Agreement

* BC must take into account legislative requirements (i.e. admissibility)
* BC has sole authority to make nomination decisions
* Must be based on economic integration or benefit
	+ Specifically prohibited from considering non-economic factors as primary

BC PNP Requirements

1. Work experience and job offer in NOC O, A or B occupation
2. Offer of full-time ongoing work from an eligible employer\*
	* Must have existing workers, market rate of pay, labour practices, etc.
3. Employer must have attempted to recruit (if not currently employing applicant)
	* Heavy onus on the employer to fill out paperwork and demonstrate that they meet all the requirements
4. All applicants must show sufficient support funds (LICO) (Wai v Canada)
	* LICO = low income cut off based on family size
	* Particularly important for entry level/semi skilled workers
5. No unresolved refugee claims or other status issues
6. Must have legal status – subject to admissibility requirements at CIC

BC PNP Categories

1. Health Care Workers
	* Physicians, Nurses, Midwives, Medical Technicians, Occupational and Physiotherapists
	* Must show job offer or sponsorship from health authorities, depending on specific job role
2. International Graduates
	* Graduate of degree-granting institution
	* No work experience required, but full time job offer in NOC O, A or B occupations
	* *Must be certified if in regulated profession (unlike CEC, which may not require certification)*
3. Entry Level/Semi-Skilled
	* Specified jobs/industries only – i.e. long haul trucking, tourism, food processing, etc.
		+ Allows province to receive PRs without O, A or B skills
		+ Best option for low-skilled workers in specified jobs/industries\*\*
	* Must have worked FT for 9 months
	* Special rules for Northeast BC (energy development) – NOC C and D workers may apply
4. Business Immigration
	* Strategic Projects: investment of $500k+ and 15+ jobs
	* Entrepreneur: investment of $400K+ and 3+ jobs
	* Regional Entrepreneur: investment of $200K+ and 1+ job
	* Regional Business Succession: taking over an existing business in BC
		+ N.B. Add’l options for individuals interested in investing in areas other than the Lower Mainland

PNP Case Law

* Wai v Canada: PNP nominees must still be able to demonstrate ability to become economic established in Canada
	+ Demonstrates deference to Officer; just b/c another decision would have been reasonable, does not make Officer’s decision unreasonable
* Sran v Canada: Provincial decision to issue a nomination certificate must be accorded deference but is not binding on CIC
	+ However, Officer must assess the applicant based on the PNP criteria (in this case, required to assess each over-age dependent independently; Officer did not adequately consider the wife)
* He v Canada: Low threshold of reasonableness applies to findings of misrepresentation (**A40(1)**)

### Canadian Experience Class (CEC) – *IRPR*, s. 87.1

* **R87.1(1)** Based on A’s ability to become economically established in Canada, their experience in Canada and their intention to reside in the nominating province
	+ No point system applies
* Commonly used by TFWs who are already in Canada; can overcome FSW education requirements
* Requires:
	1. Endorsement of an employer
	2. **R87.1(2)(a)** 12 months of full time work in past 3 years in a NOC O, A or B job
		+ Cannot include periods of study, self-employment, non-status or unauthorized work
		+ **(b)** Must have performed the actions described in the lead statement and a substantial number of the main duties of the occupation as set out in the NOC occupational description (incl. all essential duties)
	3. **R87.1(2)(d)** Minimum language levels – assessed according to NOC skill level (type of work)
* Ministerial Instructions have modified – certain NOC B occupations now ineligible for work experience
	+ NOC 1221 – Administrative officers
	+ NOC 1241 – Administrative assistants
	+ NOC 1311 – Accounting technicians and bookkeepers
	+ NOC 6211 – Retail sales supervisors
	+ NOC 6311 – Food service supervisors
	+ NOC 6322 – Cooks
* 2012 admission numbers: 9359, likely to grow
	+ Cap of 12,000; but only 200 for NOC B applications

# Family Class Admissions

Family Class Immigration

* Basic Structure: Allows a citizen or PR to *sponsor a defined family member*(**A13(1)**)
	+ Two divisions:
		- Family
		- Spouse or common law partner in Canada (not part of Family Class)
	+ Driving factor is the genuineness of family relationships
* Approx. 80% of admissions are intimate partners (spouses, common law partners and conjugal partners)
* Notable Differences from Economic Classes:
	1. Have appeal rights to the IAD when sponsorship is denied (does not exist for Economic Class)
		+ Can consider H&C issues if the individual qualifies as a member of the family class per **117(9)(d)**
	2. Inadmissibility applies but it doesn’t apply the same way
		+ Spouse and dependent children not subject to excessive demand on health & social services req’t
	3. Economic potential is important, but not primary
		+ The principal applicant must be able to support the family for a specified period of time; the economic potential of those immigrants is relevant but not being assessed in terms of their labour market potential
		+ **A13.1** Sponsorship undertaking is *central;* creates financial liability

Family Class Inadmissibility

* Criminal, medical, and security inadmissibility etc. all still apply
* **R24** Exception: Spouse and children not subject to excessive demand requirement

### Option 1: Family Class – *IRPR,* ss. 116-122

* **R17(1)**A FN is a member of the family class if, wrt a sponsor, the FN is;
	1. the sponsor's spouse, common-law partner or conjugal partner;
	2. a dependent child of the sponsor;
	3. the sponsor's mother or father;
	4. the mother or father of the sponsor's mother or father;
	5. a person whose parents are deceased, who is under 18 years of age, who is not a spouse or common-law partner and who is [*orphaned relatives*]
		1. a child of the sponsor's mother or father (*siblings and half-siblings*)
		2. a child of a child of the sponsor's mother or father (*nieces and nephews*)
		3. a child of the sponsor's child (*grandchildren whose parents are deceased*)
	6. children the sponsor intends to adopt
	7. “lonely Canadian” provision for individuals without other family
* **117(9)(d)** Importance of Declaring Non-Accompanying Family
	+ **(9)**A FN shall not be considered a member of the family class by virtue of their relationship to a sponsor if **(d)**…the PR sponsor did not declare the FN as a non-accompanying family member and the FN was not examined at the time of the sponsor’s application
	+ **Means:** Undeclared non-accompanying family members are NOT part of the family class – means you cannot sponsor them later or request review by the IAD based on H&C
	+ **Why:** Meant to avoid FNs from securing PR when inadmissible family members would cause problems, and then later sponsor that family based on H&C

**R1-3** Key Terms

* **R1(3)** Family member
1. the spouse or common-law partner of the applicant;
2. a dependent child of the applicant or of the applicant’s spouse or common-law partner; and
3. a dependent child of a dependent child referred to in paragraph (*b*) [grandchild]
* **R1,2** Common-law partner (+ ‘interpretation’)
	+ **1** Requires cohabitation for a period of at least one year
	+ **2** Includes a FN residing outside of Canada who is in a conjugal relationship with the sponsor and has been for a period of 1 year, but is unable to cohabit with the person due to persecution or any form of penal control
		- Designed to accommodate couples where cultural circumstances prevent them from cohabitating
		- Thorton v Canada: Subjective test. Must be emotionally, physically and socially interdependent of one another.
* **R2** Dependent child
	1. a biological or adopted unmarried child under 22 years age or older OR
	2. a child over 22 years of age and dependent b/c they are attending an accredited post-secondary institution, actively pursuing a course of academic, professional or vocational training on a full-time basis, or due to a physical or mental condition
* **R2** Marriage
	+ In respect of a marriage that took place outside Canada, means a marriage that is valid both under the laws of the jurisdiction where it took place and under Canadian law
	+ Creates issues where the marriage is legal in one jurisdiction but not another – i.e. same-sex marriage, proxy marriage or polygamy
* **R2** Relative
	+ Means a person who is related to another person by blood or adoption
* Accompanying family members can be included (see page 8)
	+ If you’re sponsoring a partner or spouse, you can include the children of that partner or spouse as long as they are still dependent on your partner or spouse

Excluded Relationships

* **R4** Creates an exception where the relationship was (a) entered into primarily for the purpose of acquiring status or (b) is not genuine. Applies to romantic relationships and adoption of children.
* **R4.1** Creates a more specific exception
	+ Cannot be a spouse if you left another spouse and married the PR for the purposes of immigration
	+ To avoid individuals who leave their current partner, marry someone else, get sponsored, end that relationship and then bring over their original partner
* **R5(a)** Child marriage (if the spouse or common-law partner is under the age of 16)
* **R5(b)** Polygamy
	+ **Means you** cannot sponsor two partners at the same time
* **R130(3)** If became a PR through spousal sponsorship, cannot sponsor a new spouse for 5 years unless the PR became a citizen within that period of time
	+ Combined w/ R4.1 to avoid spousal sponsorship fraud

### Option 2: Spouse or Common-Law Partners in Canada – *IRPR*, ss. 123-129

* **R124** Three requirements:
	1. Are the spouse or common-law partner of the sponsor and they live together in Canada
	2. Have temporary resident status in Canada\*
		+ Where enforcement action for individuals whose temporary status has expired (i.e. student visa or TWP) will not be exercised until an Officer has assessed the sponsorship application
	3. Are the subject of a sponsorship application
* Same excluded relationships as above (**R125)**
* Same rules for accompanying family members
	+ Must be included in application and be admissible (see page 8)
* N.B. No appeal to IAD as not “family class”

### Qualifications to Sponsor – *IRPR*, s. 133

* **R133** Sponsor must meet the following req’ts and *continuously* until a decision is made
	1. Meets definition of sponsor per **130** (see below)
	2. Intention to meet obligations in the sponsorship undertaking
	3. Not subject to a removal order
	4. Not in detention
	5. No convictions for sexual offences, violent indictable offence, or offence that results in bodily harm to family members (incl. attempts and any foreign convictions – see ss. (2),(3))
	6. No convictions for offences under (e) outside of Canada
	7. Not in default of any undertaking or support payments
	8. No debt to Canada (government debts)
		+ Does this include student loans? Assuming only if you’re in default
	9. Not bankrupt
	10. Has minimum necessary income EXCEPT if sponsoring partners or children
		+ Calculated according to *IRPR*, s. 134
	11. Not in receipt of social assistance for a reason other than disability

Sponsorship and Undertakings – *IRPR*, s. 130

* **R130** Basic definition of a sponsor:
	1. Citizen or PR of least 18 years of age
	2. Living in Canada (with an exception for partners/children)
	3. Has filed a sponsorship application
* **R126** No decision will be made if sponsorship is withdrawn or if sponsor becomes ineligible
* **R131** ‘Undertaking’ is an enforceable promise made by the sponsor with the Minister or a province to reimburse any social assistance payment(s) to the sponsored person under **R132(4)**
	+ Makes the sponsor financially responsible for the individual from the day they become a *PR*; may be required to pay the gov’t back for any burden they place on social programs (i.e. welfare payments)
	+ Required to sponsor under **R133(b)**
* **R132** Duration of the undertaking will vary according to the day PR was gained:
	1. At least 3 years for partners
		+ Exception: Starts the day a TRP enters Canada, but does not end until 3 years after gaining PR
	2. For dependent children:
		+ For 10 years or until the age of 25 (whichever is earlier)
		+ For 3 years for any dependents who are 22 years of age or older at the time they become a PR
	3. For parents, grandparents or other accompany family members:
		+ 20 years
	4. All others: 10 years
* What happens when there is a default?
	+ Begins when a social assistance payment is made or an aspect of the undertaking agreement is breached
	+ Lasts until the government is fully repaid
* Per Mavi v Canada, despite the permissive language found in **A14(2)(e)** and **A145(2)**, there is no requirement for the government to forgive debt acquired through undertakings. Minimal procedural fairness requirements:
	1. Notify a sponsor at his or her last known address of its claim
	2. Afford the sponsor an opportunity within a limited time to explain in writing his or her relevant personal and financial circumstances that are said to militate against immediate collection
	3. To consider any relevant circumstances brought to its attention keeping in mind that the undertakings were the essential conditions precedent to allowing the sponsored immigrant to enter Canada in the first place; and
	4. To notify the sponsor of the government’s decision

Condition Provisions for Partner Sponsorships – *IRPR*, s. 72.1

* **R72.1(1)** Must cohabit in conjugal relationship for continuous period of two years from PR date if the relationship is **(2)(b)** less than 2 years and **(2)(c)** childless
	+ **R72.1(4)** Required to supply ‘evidence of compliance’ at request anytime within the 2 year period
	+ See Nijjar v Canada for genuineness
* Exceptions:
	1. **R72.1(5)** Death of the sponsor and;
	2. **R72.1(6)** Relationships ending due to abuse or neglect (as specified) to partner or child amounting to a “risk of serious harm”
* Creates *conditional permanent residence status* – meaning PR is not finalized until the 2 years is complete
	+ Minister stated it was going to be complaint driven – creates concern that complaints from an irate spouse will trigger investigation
		- Putting the conditional PR’d spouse at a disadvantage in the relationship
		- Alternate: Makes male sponsors subject to unfounded abuse claims in order to get out of relationships
	+ Will force women to remain in abusive relationships
		- Newcomers often unaware of their rights, may not speak English or French and reluctant to leave an abusive situation since they must depend on the Officer “believing” their story
			* “This measure is a gift to an abuser”
		- May cause further problems if divorce impacts a woman’s social status her home country
	+ Invasive to real relationships
	+ Definition of a relationship is cultural; may not be ideal in terms of typical “genuineness”
	+ Will only likely catch a small group of fraudsters who are unable to navigate the program
		- Will just wait out the 2 years
	+ Fails to consider the fact that some marriages just don’t work out

Family Class IRB Decisions

* De Guzman v Canada: **R117(9)(d)** is authorized by **A14**. Government entitled to impose other sanctions beyond removal for misrepresentation. No violation of s. 7 found.
	+ “it would seriously impede the effective administration of immigration to interpret the IRPA as precluding the possibility that, in addition to removal, another sanction may be imposed on a person who misrepresented a material fact in order to gain entry to Canada”
* Nijjar v Canada: Genuineness of the relationship will consider the chronology of events – must be able to demonstrate consistent contact throughout separation period. Credibility is important.
* Thorton v Canada: See definition of conjugal partners
* Abiola-Okanlawon v Canada: Must be able to demonstrate evidence of a current common law relationship. Intervening common law relationships will need to be overcome.
* Mabhena v Canada: Examined H&C considerations re: exception to sponsorship requirements of no previous default under **R133(1)(g)**. Found that undertaking wrt to son was unusual b/c he was accidentally born in the US.

# Temporary Admissions

Temporary Admissions – Four Categories:

1. Visitors
2. Students
3. Temporary Workers (TFWs)
	* Fall under the economic division as means to fulfill genuine and acute labour needs when Canadians not available
	* Includes working holiday permits
4. Other Temporary Residents (e.g. TRP)
	* **A22(1)** A FN becomes a temporary resident if he/she has applied for temporary residence status, has met the obligations set out in 20(1)(b), is not inadmissible and not subject to a Ministerial declaration
	* **A22(2)** Intent by a FN to become a PR does not prevent them from becoming a temporary resident; dual intent OK
	* **A22.1** Allows the Minister to make a declaration that a FN is not a temporary resident (even if admissible)

Requirements Applicable to All Temporary Residents under *IRPR*, Part 9

* **R179** Must have a passport, agree to leave Canada at the end of authorized stay, not be inadmissible, and not subject to a Ministerial declaration under **A22.1(1)** “for public policy reasons”
	+ Where a TRP is required for someone who doesn’t meet **R179**
* **R180** Must meet requirements when visa originally issued and when entering Canada
* **R183** Must leave by end of authorized period (can be extended) and must not work or study unless authorized
	+ Authorization may be based on means of support, intention to stay, expiry of travel docs, etc.
* **R185** Officer can impose conditions on length of stay, type of work, employer, location, type of study, educational institution, travel restrictions, medical examination, and reporting requirements

Temporary Resident Visa (TRV)

* **Basic requirement for all other forms of temporary status**
* **R7(1)** All FNs entering temporarily require a TRV in advance of coming to Canada
	+ Applies to ALL temporary entries (students, workers, visitors, etc.) unless exempt
* **R7(2)** Creates an exemption for:
	1. nationals of certain countries (**R190**) for stays under 90 days
		+ Where **R190** also creates exceptions for diplomats, transit only on flights, crew members etc.
	2. TRP holders

Temporary Residency: Visa vs. Permit\*\*

* TRV = a gateway visa required to enter Canada by foreign nationals
	+ May be used to visit or can have a study permit or work permit added
* TRP = a special mini H&C consideration pursuant to **A24**
	+ An exceptional temporary authorization that is granted to people who would otherwise be inadmissible

## A. Visitors under *IRPR*

* NEED: *temporary resident visa*
* **A191** Visitors established as a class of TR but must comply with requirements set out in Part 9
	+ Residual category of temporary status; must have a return ticket and a bank statement
* **A187** Business Visitors are FNs seeking to engage in international business activities w/o entering the labour market
	+ Such as, purchasing Canadian goods or services for a foreign business, receiving or giving training if production of goods or services only incidental and sales if not to the general public, checking on investments, meeting with other members of their corporation, and here to train/for training
	+ People who are here but are not interacting directly with the labour market; primary source of remuneration must be outside of Canada

## B. Students under *IRPR*

* NEED: *temporary resident visa* + a study permit
* **R210** Establishes students as a class of TR
* **R212** Foreign national cannot study without permit
	+ **R188** Makes an exception for the children of diplomats to study without a permit
* **R214** May apply **when** entering Canada if a resident of: US, Greenland, or St. Pierre & Miquelon
* **R219** Need letter of admission from recognized school unless a family member of FN with existing work permit, study permit or TRP (see **R215**)
* **R215** Family members of FNs can obtain study permit from within Canada if the FN has a work permit, study permit or TRP
* **R220** Need sufficient financial resources (i.e. via bank statements)
* **R221** If the students fails to comply with these req’ts or if unauthorized work or study is reported, they cannot get a new permit unless 6 months has elapsed since the unauthorized thing
	+ i.e. not complying with **R185(c)** re: type of studies and institution
	+ If you get a fact pattern where someone has breached a rule, and have done something they were not authorized to do – need to look into if they can still apply for a permit
* **R222** Study permit invalid on expiry or if removal order issued

## C. Workers – *IRPR*, Part 11, ss. 194-209

* NEED: *temporary resident visa* + a work permit
* Employer Requirements:
	1. Has already employed people in similar job, similar wages, similar conditions for two years prior to applying, AND
	2. Has gone through the LMO process and obtained an opinion from HRSDC
* Worker Requirements:
	1. **R200(3)** Intends and is qualified to perform the work described
	2. **R200(1)** Must leave Canada by the end of the period authorized
* Two types of work permits:
	1. Open – have no labour market or employer restrictions (often for holiday, spousal or post-graduate permits)
		+ **R207** LICGs once they meet the class requirements, spouse or common law partner once approved at first stage, protected persons, and H&C applicants after first stage approval
		+ **R206** No other means of support (refugee claimant or unenforceable removal order only)
			- N.B. *IRPA* s. 202 does NOT confer status; allows someone to temporarily remain in Canada because it is to dangerous to return home; have a refugee claim in process
			- N.B. Need to look carefully at the regs – need to understand how labour markets are formed
		+ **R208** Includes destitute students and TRP holders
			- Due to conditions that are out of their control and could not have been anticipated at the time of application
		+ **R205** Includes postgrad work permits, spouses of WP holders and students, etc.
			- Also includes bridging open work permits
	2. Closed – specific to one employer and one job
		+ Generally require a Labour Market Opinion (LMO) per **R203**
			- Genuine job offer
			- Likely to have a neutral or positive effect on Canadian job market per **R203(3)**
			- Not inconsistent with any federal-provincial agreement
			- Meets live-in-caregiver requirements if relevant
			- Might qualify for an exemption from the **203(1)(e)** ‘two previous years’ requirement
				* i.e. dramatic change in economic conditions
		+ May be given WITHOUT an LMO but will still require a job offer per **R200**
			- **R204** Provides for work permits pursuant to int’l trade agreements, but NOT agricultural workers
			- **R205** Significant social, cultural or economic benefit, related to research education/training or limited access to labour market, or religious or charitable work (i.e. post grad work permits)
			- N.B. PNP applicants can obtain open work permits under this section
* **R186** Working Without a Permit
	+ Includes on campus employment**,** religious leaders, sports participants, emergency service providers, civil aviation inspectors, and other exceptions that generally have short term labour market engagement

Special Worker: Live in Caregivers – *IRPR*, ss. 110-115

* **R112** Must have (a) applied for LICG work permit before arrival, (b) completed the equivalent of secondary school, (c) have training or experience, (d) sufficient English or French skills and (e) have an employment K w/ their future employer
* **R113** Specifies how to achieve PR under this class (see page 7)
* Possible to change employers under LICG – must sign an employment K with a new employer for new LMO
	+ However she will need some documents from “current” employer and this may be difficult to obtain (i.e. her ROE)
* May qualify for emergency processing of a new LICG permit due to the situation of abuse [per CIC website]; does not change applicant’s immigration status

Extension and Implied Status under *IRPR*

* FN can apply for/extend **R215** study permit or **R199** work permit from within Canada if they already:
	1. hold a work permit
	2. are working in Canada under an exception outlined in **R186** (exception **R187** Business Visitor)
	3. hold a student permit
	4. have a TRP
	5. The above applies to accompanying family members of individuals who qualify under **(a)-(d)**
* **R201-217** Outlines the renewal requirements for work and study permits
* **R186(u)/189** May continue to work/study without a permit if have applied for extension of work/study permit *prior to expiry* – grants “implied status”
	+ **Implied Status:** If someone’s permit will expire in 30 days and they have applied for an extension, they get status while the application is being determined
* **R182 Restoration** If the permit expires before a new application is filed, temporary residents are given a 90 day grace period to re-apply

## D. Other Temporary Residence

* Temporary Residence Permits (TRP): Special discretionary category of temporary entry; addresses issue of inadmissibility in the short term and is based on H&C considerations
	+ Must not have any subsequent issues re: inadmissibility
* Newn Shin Li v Minister: No requirement to be given an opportunity to respond to Officer’s concerns, especially where there is no evidence of serious consequences to the applicant (i.e. can easily reapply)
	+ However, exceptions exist.
		1. Where an officer uses extrinsic evidence to form an opinion or forms a subjective opinion that an A could not have known would be used in an adverse way
		2. If the officer has concerns regarding the veracity of documents
	+ Held that PF demanded that the officer give the A an opportunity to respond to his concerns – on the basis of limited evidence and limited guidance from the statutory provisions

Steps by which a TFW enters Canada:

1. Employer must apply to HRSDC to get an LMO regarding the impact the entry of a foreign worker will have on the Canadian Labour Market
	* HRSDC considers the terms and conditions of the recruitment (wage, working conditions)
	* Ensures that the TFW will not be taking a job that a Canadian could perform
	* LMOs for high-skilled workers (O, A or B) are valid for up to 3 years
	* LMOs for lower-skilled workers (C and D) are valid for up to 2 years
2. Prospective employee applies to CIC for a work permit
	* **R200** Immigration Officer must be satisfied that applicant is **(3)** able to perform the work sought (includes ability to speak Eng or Fr) and **(1)** will leave Canada at the end of the authorized period
	* May require a medical exam
3. CBSA officer at the port of entry has the final say on whether an individual can enter Canada – must also satisfy ability and willingness to leave Canada

**Limits on Social Assistance:** Federal Employment Insurance (EI)

* TFWs and their employers make payments into EI just like Canadian workers. However, TFWs must have worked a certain number of hours within the past 52 weeks or since the last EI claim to qualify.
	+ This “qualifying period” is based on the # of hours worked and the regional rate of unemployment
	+ Must also prove that s/he is capable and available for work and unable to obtain suitable employment
* Problems for TFWs:
	+ Unless the worker has been employed during the qualifying period, they are not entitled to benefits
		- Therefore, a TFW laid off shortly after arriving in Canada will not likely qualify for benefits
	+ TFWs may not be entitled to receive EI b/c their “employer-specific”, closed work permit restricts them from being available to work for other employers

**Limits to Successive Work Permits:** Cumulative Duration – *IRPR*, s. 200(3)(g)

* <http://www.cic.gc.ca/english/resources/manuals/bulletins/2013/ob523.asp#appb>
* **R200(3)(g)**An officer shall not issue a work permit to a FN if the FN has worked in Canada for one or more periods totaling 4 years, UNLESS
	1. a period of 48 months has elapsed since [they] accumulated 4 years of work in Canada,
	2. [they] intend to perform work that would create or maintain significant social, cultural or economic benefits or opportunities for Canadian citizens or permanent residents, or
		+ *Includes NOC O and A workers; also extends to spouses*
	3. [they] intend to perform work pursuant to an international agreement between Canada and one or more countries, including an agreement concerning *seasonal agricultural workers* per **R204-205**
* Other Exemptions:
	+ i.e. **R208** applies to students on study permits who becomes “temporarily destitute” through circumstances beyond their control (i.e. their parents die)
* VERY IMPORTANT – only high skilled workers will qualify under **R200(3)(g)(ii)** and for FSW, CEC or PNP; low skilled workers are unlikely to get PR and will be limited to 4 years of temporary work

Bringing your Spouse – Two Options:

1. Spouse can apply separately for his/her own work permit under the above provisions or;
2. Spouse can apply for an *open work permit* under **R205(a)** if the principal applicant is:
	* Option 1:
		+ allowed to work in Canada for at least six months,
		+ doing work in Canada that meets a minimum skill level (usually work that requires a college diploma) and
		+ doing a job listed in NOC 0, A or B, or
	* Option 2:
		+ allowed to work in Canada and
		+ doing work in Canada that is on a list of [eligible occupations](http://www.cic.gc.ca/english/work/occupations.asp) in participating provinces
* Where Option 1 and 2 are based on CIC Policy; not listed in the regulations

## Shifting from Temporary to Permanent

* Foreign workers have 4 ways to change from temporary to permanent resident status from within Canada:
	+ - Live-In Caregivers (LICG Program)
		- FSW
		- CEC
		- PNP (subcategories of the economic class)
	+ N.B. Do not assume all TFWs want PR, but worth knowing the opportunities to get PR

Temporary Foreign Workers – Current Issues

* More TFWs than economic migrants for the first time in 2009
	+ May be a result of the ‘high skilled’ stream of FSW, CEC and PNP
* Seasonal agricultural worker program (SAGW) began just after WWII as a pioneering category
* Review of the program announced November 2012 following:
	+ Tumbler Ridge long wall coal mining issue
	+ Royal Bank IT workers
	+ Tim Horton's service workers

Shifting from Temporary to Permanent – Current Issues

* Both TFW and economic class PRs are permitted to remain in Canada on the basis of Canada's economic need
* Work permits may be extended for years – subject to 48 month limit for certain workers
* Skill level matters – low skilled workers unlikely to obtain PR under economic classes (CEC, FSW, PNP) and unlikely to qualify for exemptions to cumulative duration
	+ BUT divide b/w low and high skill has no relevance to long term labour market needs
* Employer approval and support can be extremely important for obtaining PR for those who qualify
	+ Makes TFWs vulnerable to abusive employers as filing complaints can lead to status problems

**The Canadian Temporary Foreign Workers Program, by Nakache and Kinoshita**

* III important integration mechanisms: Employment, Family Unity and Access to Permanent Residency
* Study concluded that Canada encourages the integration of highly skilled workers, but is indifferent to lower-skilled workers
	+ Restrictive nature of the work permit limits worker’s ability to change employer or to receive EI
* TFW program has been in existence since 1973
* Originally aimed at high skilled jobs, but expanded to lower skilled jobs in 2002
* Lower-skilled groups are growing as a proportion of total TFW
	+ Unlike economic classes of PRs, no quotas for TFWs
* Conclude that Canada is *indifferent to the future social position of TFW*
	+ When abuse happens, there is not a lot of response form the government
* TFW often not eligible for EI even though they pay in – jurisprudence and policy are inconsistent
* Problems with overlapping jurisdiction
	+ Employment Standards (wage, hours or work, etc) is provincial; HRSDC “not party to K”
	+ Workers' Compensation is provincial; workers could claim but often do not, possibly due to concerns over status
	+ Provincial authorities regulate health, education, employment standards and regulation of employment agencies
		- Federal gov’t provides work permits and LMOs, but have limited power to enforce workplace issues
	+ *Results in multiple “players” none of whom are fully responsible*
* Challenges for low-skilled workers:
	+ PR difficult to obtain for low-skilled workers and PNP is not a complete solution
	+ Workers on closed permits do not qualify for EI; not available to other employers
		- If you don’t have status, you’re waiting for work permit to be renewed and a lot of things can happen
	+ Family Unification: often more difficult for TFW, esp. lower skilled jobs
	+ CEC has increased opportunities for some TFWs to become landed PRs, but this has also been criticized as handing over selection authority to employers and educational institutions
* Inappropriate power dynamic:
	+ Workers compensation and employment standards can be used by TFW, but they are afraid of losing their status. Employer has more power. Different power dynamic.
	+ Human rights issues arise in several fields: employment standards, housing, health, family unity, training, language, and immigration status
* Increasing reliance of employers on TFW – are they really 'temporary' when labour need isn't?
* Change in demographics, increasingly Asian workers and reduced US and European workers

**Institutionalizing Precious Migratory Status in Canada, by Golding, Berinstein and Bernhard**

* Take issue with binary of legal/illegal workers
	+ See status as a spectrum instead, could be more or less precarious
	+ Also see status as being institutionally produced: the law creates many opportunities to lose status
* “Precarious status” = marked by absence of work authorization, right to remain, non-contingent status and social rights
	+ Or “in between” status; drawing the line b/w individuals with secure status and the ability to enjoy social rights
* Goldring demonstrates that there are “multiple and potentially variable forms of non-citizen and non-resident status...”. Are several pathways to precarious status:
	1. Sponsorship breakdown/family status changes
	2. Refugee complexity/inland claimants
	3. Temporary workers (including LICG, seasonal agricultural workers and others)
	4. Visitors and students
	5. People without status/or in breach of conditions
* What access is available to social services?
	+ Sponsored Family: Until sponsorship finalized, have few entitlements
	+ Refugee: Have very limited – depending on country of origin
	+ TFW: Varies – though education and health care generally available
	+ Students/Visitors: Usually fewer entitlements; some provinces offer more than others
	+ No Status: Difficult to get anything at all
	+ N.B. Education for children is available based on the parent’s status

Summary:

* No quotes or cap on TFW policy; has lead to influx of TFWs for economic reasons
* Federal government has not adequately supervised employers; HRSDC does not see themselves as responsible for provincial employment standards or as party to the K
* Not really “temporary” as individuals have remained on 1 year work permits for 20+ years
	+ More likely a qualitative labour shortage
	+ Work that Canadians are willing to do, just not at the lower rate of pay

# Humanitarian and Compassionate Applications/Temporary Resident Permits

## Temporary Resident Permit – *IRPA*, s. 24 & *IRPR*, s. 64

* Special discretionary category of temporary entry; addresses failures to comply with the requirements of the Act and issues of inadmissibility in the short term
	+ Based on H&C style considerations
	+ **R63** Maximum length of 3 years
* Can be granted to an individual who is otherwise inadmissible or does not meet requirements – can get temporary residence if “justified in the circumstances”
	+ N.B. Might apply for both a TRP and PR via H&C at the same time; TRP would grant temporary status if H&C failed
* What do they consider? From IP1 Operational Manual:
	1. the factors that make the person’s presence in Canada necessary;
	2. the type/class of application and pertinent family composition;
	3. if medical treatment is involved, whether or not the treatment is reasonably available/effective;
	4. the tangible or intangible benefits which may accrue to the person concerned and to others;
	5. identity of sponsor or employer
* IS NOT available to:
	+ **A24(4)** FNs who have applied for refugee status if < 12 months have passed since their application was refused, withdrawn or abandoned claim
	+ **A24(5)** Designated foreign nationals (DFNs) cannot apply for five years from designation – see **A20.1(2)**
* Can later apply for PR as part of the **Permit Holder Class** under *IRPR*, ss. 64-65
	+ **R64** TRP holders are a prescribed as a class of FNs who may become PRs on the basis of the requirements of [Div 4]
	+ **R65** TRP holders may become PR after:
		- **(b)(i)(A)** 3 years (health concerns) or **(B)/(C)** inadmissibility of a family member
		- **(b)(ii)** 5 years (other any other grounds)
			* i.e. might use while FN waits out rehabilitation period
			* BUT cannot obtain PR w/ outstanding inadmissibility issues under **A34** (security), **A35** (international HR), or **A36(1)** and **A37** (serious or organized criminality)
		- **(c)** Cannot have any new inadmissibility issues

## H&C Grounds Admissions – *IRPA*, s. 25 and *IRPR*, ss. 66-69

* The capacity to make exceptions is a feature of almost every Western immigration regime
* Discretionary tool intended to uphold Canada’s humanitarian tradition; viewed as a complementary provision
* Role of discretion, amorphous concept of ‘deserving’ individuals
	+ Residual immigration category; *consider this category when all other options fail*
* Written into both the capacity of the Minister and of the IRB
* Accounts for between 4,000 and 11,000 entries per year over the past 10 years

Onus and Standard of Proof

* Onus on the applicant to demonstrate that a refusal to grant the request for an exemption would result in **unusual, undeserved or disproportionate hardship on a BoP**
	+ Whereas inadmissibility requires only reasonable grounds to believe
	+ Does not include concerns that would be raised under **R96/97** for refugee claims
* Based on:
	+ Hardship for the A to leave Canada in order to apply for PR abroad or;
	+ Hardship the applicant would suffer if the requested exemption was not granted
* ***Unusual/Undeserved*** = a hardship not anticipated or addressed by the *Act* or *Regs* and that is so undeserved, that in most cases, the result will be due to circumstances beyond that person’s control
* ***Disproportionate***= would have an unreasonable impact on the A due to their personal circumstances
	+ Negative effects ≠ to disproportionate hardship (Caine)

Humanitarian and Compassionate Applications – *IRPA*, s. 25

* **A25** 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 the Minister is of the opinion that it is justified by H&C considerations taking into account the best interests of the child
	+ Requires a “compelling reason” to stay or be in Canada
		- H&C decisions are highly discretionary and ‘require significant deference’ (Caine; Agraira)
	+ **A25(1.1)** Minister only required to consider if fees are paid
		- N.B. Toussaint v Canada is no longer good law; has been overridden by this amendment
	+ **A25.1** Minister can consider FNs or waive fees at his/her own initiative
	+ **A25.2**Minister can justify on the basis of public policy considerations in the absence of H&C factors
	+ **EXCEPT:** Inadmissibility under **A34, 35, 36(1)** or **37**
* **Applicant must identify any known inadmissibilities and clearly state the reasons why they should be exempted from the requirements of the IRPA**
* Minister must consider applications made by individuals within Canada
	+ However, Minister has no obligation to consider applications made for individuals outside of Canada; they “may” consider this request (de Guzman)

Humanitarian and Compassionate Applications – *IRPR*, ss. 66-69

* Grants PR to individuals would otherwise be inadmissible under other classes (i.e. family or economic)
	+ Operates as an exception to the requirements of **R70(1)(a), (c), (d)**
* **R66** Request under **A25(1)** must be made in writing w/ an application to remain in Canada as a PR
* **R67(c), 68(b)** Applicant and their family must not be inadmissible (see above)
	+ Applicant must identify any known inadmissibilities and clearly state the reasons why they should be exempted from the requirements of the IRPA
* **R69** Applicant can bring admissible accompanying family members

How H&C’s Apps are Made – IP5 Section 5.11 (<http://www.cic.gc.ca/English/resources/manuals/ip/ip05-eng.pdf>)

* Applicants may base their requests for H&C consideration on any number of factors including, but not limited to:
	1. Establishment in Canada;
	2. Ties to Canada;
	3. The best interests of any children affected (see Baker, Caine and Sylvester);
		+ Applies when there is a child under the age of 18 who would be directly affected by the decision; does not have to be a relative or blood relation
		+ Officers must consider the BIOTC; while a major consideration, it is not necessarily determinative
		+ Decision makers must be ‘alert, alive and sensitive’ to the best interests of any child affected by the decision, and must give the interest of any child ‘substantial weight’ (Baker)
	4. Factors in their country of origin (exclusion factors consider under R96-97);
		+ persecute: a serious and persistent violation of fundamental human rights
		+ discriminate: a distinction based on the personal characteristics of an individual that results in some disadvantage to that individual (Andrews)
			- Officers entitled to consider what avenues for recourse or forms of prevention/redress exist in A’s country of origin; and possibility that A could relocate to another locality w/n the country
	5. Health considerations;
		+ Officer must be satisfied that A requires the treatment and that the treatment is not available in the A’s country of origin
	6. Family violation considerations;
	7. Consequences of the separation of relatives;
	8. Inability (i.e. not their fault) to leave Canada has led to establishment; and/or
	9. Any other relevant factor they wish to have consider and not related to **R96-97**
		+ Meant to exclude “refugee like” considerations under this section; H&C should not be treated as a lower standard for refugee claims
* **Exception:** Refugee Claimants & DFNs
	+ **A25(1.2)** FNs who have applied for refugee status if < 12 months have passed since their application was refused, withdrawn or abandoned
		- Exception: **A25(1.21)(a)** Issues of the adequacy of health or medical care in their home country
		- Exception: **A25(1.21)(b)** There is a child whose needs must be considered
	+ **A25(1.01)** DFNs under **A20.1(2)** cannot apply within five years of refugee application

OB 542 – Failed H&C

* Referred for further action
* Basically means CIC is now aware of the person, may lead to removal order and enforcement action

H&C Case Law

* Baker v Canada:
	+ Striking facts to test the role of H&C
	+ Dual role of H&C factors and public policy considerations has not changed
	+ Unimplemented international law used as an interpretative source for statute, helps in understanding the nature of Canada’s humanitarian and compassionate tradition
	+ Decision makers must be ‘alert, alive and sensitive’ to the best interests of any child affected by the decision, and must give the interest of any child ‘substantial weight’
* Caine v Canada (deported to St. Vincent)
	+ Negative effects ≠ to disproportionate hardship
	+ Officer’s role “is to determine the likely degree of hardships caused to the child by the parent’s removal and balance that hardship together with other factors”
	+ [BAD] Officer found that her ability to establish in Canada was exemplary of her ability to re-establish in St. Vincent; A argued it should have been a favourable consideration as it demonstrated her ties to Canada
	+ Court notes that individuals must not be ‘rewarded’ for spending time in Canada w/o a legal right to be here
	+ Criticisms:
		- Does not seem to consider what is in the child’s BI; as staying in Canada is most assuredly in their best interest. Not the same as hardship.
		- “inevitability of harm” is not the standard of BIOTC; we do not subject children to a risk of serious harm
* Sylvester v Minister (JR successful; Grenada)
	+ *Onus on applicant to provide evidence of adverse effects on children*
	+ “Rather than considering whether the child would suffer “unusual, undeserved or disproportionate hardship”, the officer should have considered whether removal would be in his best interest and how these interests relate to other hardship factors assessed in the H&C application”
		- “the best interests analysis operates as a separate consideration”
	+ Officer “must demonstrate an awareness of the child’s best interest by noting the ways in which those interests are implicated”

# Inadmissibility

## Health Inadmissibility – *IRPA*, s. 38(1)

* **A38(1)** FN is inadmissible on the basis of health grounds if:
	1. Likely to be a danger to public health
	2. Likely to be a danger to public safety
	3. Might reasonably be expected to cause excessive demand on health or social services
		+ **A38(2) Exception:** Family members and refugees exempt from **38(1)(c)**
* Evidentiary Requirements: *IRPR*, ss. 31-34
	+ Officers must consider:
		- **R33(a),34(a)** reports of physicians, nature of disease, info appearing on immigration medical exams
		- **R33(b)** any condition identified by the medical examination
* RE: medical inadmissibility of an accompanying family member may cause inadmissibility of entire family, including the principal applicant under *IRPR*, s. 72

Who needs a medical exam? *IRPR*, s. 30

* **Assume that all PR applicants and their family members need a medical exam**
* TRs will only need for work or study permits 6+ months and if they have been flagged on arrival
* **R30(a**) Says that FNs do not need a medical exam except:
1. PR applicants and their family members
2. FNs working in areas where the protection of public health is essential (i.e. daycare workers, schools, and health professionals),
3. FNs who:
	1. Are entering or renewing work or study permits for more than 6 months,
	2. Have lived in an area with a high disease incidence in the last year
4. Anyone that an officer or the Immigration Division “has reasonable grounds to believe” may be inadmissible on health grounds under **A38(1)** (i.e. upon entry at customs)
5. Refugee claimants,
6. People seeking protection under **A112(1)**
* Standard Process:
	1. A undergoes special examination by a qualified Medical Officer (must be concurred in by at least 1 other)
	2. Medical Officer prepares a *medical notification* which provides the Officer their opinions & the A’s medical profile
		+ Officer relies upon this info to issue a decision on A’s admissibility
	+ Where both the Medical Officer and Officer’s decisions are subject to JR

What is excessive demand under **A38(1)(c)**?

* **A1(1)** A demand on health or social services for which the anticipated costs would likely exceed average Canadian per capita health and social services costs over a period of 5 consecutive years...unless there is evidence that significant costs are likely to be incurred beyond that period, in which case the period is no more than 10 consecutive years; OR;
	+ By policy, this amounts to: $31,425 over five years (see OB 504)
* **A1(a)** A demand on health or social services that would add to existing waiting lists and would increase the rate of mortality and morbidity in Canada as a result of an inability to provide timely services to Canadian citizens or PR
* A’s normally given a chance to refute the evidence or demonstrate that they can manage the expenses
	+ i.e. can show proof that they’ll pay for it themselves (works better for social services)
* Where health and social services includes primarily government paid services

Health Inadmissibility Cases:

* Hilewitz/DeJong v Canada: Should the financial resources of individuals/families be disregarded in determining whether their disabled children would create an undue burden on Canada’s social services?
	+ Both families had a child w/ intellectual disabilities; sought to prove that they had the financial resources to support and provide for whatever social services needed; PR applications rejected
	+ “It is incongruous to interpret the legislation in such a way that the very assets that qualify investors and self-employed individuals for admission to Canada can simultaneously be ignored in determining the admissibility of their disabled children”
	+ “Families’ ability and willingness to attenuate the burden on the public purse that would otherwise be created by their intellectually disabled children are relevant factors in determining whether those children might reasonably be expected to cause excessive demands on Canada’s social services”
		- Individualized assessment of the principal applicant and his/her ability to pay is required
* Cuarte v Canada:
	+ Must assess the services that the patient is expected to require and receive; NOT what will be available or allocated on his behalf
	+ Affirms the individualized approach required by Hilewitz/DeJong

## Criminal Inadmissibility – *IRPA*, s. 36

Serious Criminality – *IRPA*, s. 36(1)

* Applies to both foreign nationals and permanent residents
1. Convicted in Canada of an offence under Act of Parliament where max sentence is 10+ years OR 6 months jail imposed;
	* Where this can include offences under the *IRPA* (Alzehrani)
2. Convicted outside Canada for offence equivalent to one under an Act of Parliament with max sentence of 10+ years; or
3. “Committing an act” outside Canada where it would be equivalent to one under an Act of Parliament with maximum sentence term of 10+ years

Criminality – *IRPA*, s. 36(2)

* Applies to foreign nationals ONLY
1. Convicted in Canada of any ONE offence under Act of Parliament which is punishable by way of indictment OR of TWO [summary] offences not arising out of a single occurrence (Act)
2. Convicted outside Canada where it would be equivalent to either situation in (a) above OR
3. “Committing an act” outside of Canada where it would be an indictable offence under an Act of Parliament OR
4. Committing, on entering Canada, any prescribed offences under **R19** – including the *Criminal Code, IRPA, Firearms Act, Customs Act, and CDSA*

Definitions Governing (1) and (2) – IRPA, s. 36(3)

1. Whereas hybrid offences are always treated as indictable; irrespective of how Crown proceeded
	* Where “6 months of jail time imposed” applies irrespective of the sentencing options available
	* Where the max sentence refers to the sentencing options available to Parliament
2. Does not apply to convictions that have had record suspensions (pardons) or where the A was acquitted
	* A record suspension from a foreign country is helpful, but may not be necessary (see Rehabilitation)
3. Does not apply where rehabilitation has been made out for convictions or acts outside of Canada
4. A determination of whether a PR has **committed an act** described in para (1)(c) must be based on a **balance of probabilities**
	* Per Policy Manual ENF 02, “committing an act”:
		+ Used where officer possesses “credible information” indicating the person committed an offence
			- Significant discretion available here
		+ Should use if charged but not tried
		+ Should not use if charges dropped, acquittal, discharge, deferral issued, record expunged or suspended
	* Three ways to determine equivalency (Abid v Minister):
		1. by a comparison of the precise wording in each statute both through documents and, if available, through the evidence of an expert or experts in the foreign law and determining there from the essential ingredients of the respective offences
			+ However expert evidence not required; entitled to rely on the statutory provisions and the totality of the evidence (Park v Canada)
		2. by examining the evidence adduced before the adjudicator, both oral and documentary, to ascertain whether or not that evidence was sufficient to establish that the essential ingredients of the offence in Canada had been proven in the foreign proceedings, whether precisely described in the initiating documents or in the stat provisions in the same words or not;
		3. by a combination of one and two
	* N.B. SOR seems to vary on these questions – Park applied correctness while Abid applied reasonableness
5. Does not apply to youth offences under the *Youth Criminal Justice Act* or offences under the *Contraventions Act*
	* Criminal acts committed when the individual was under the age of majority do not apply to immigration issues
	* *Contraventions Act* includes minor administrative and regulatory offences

Inadmissibility due to Inadmissible Family Members – *IRPA*, s. 42

* An A and his/her **family members** will all be made inadmissible on the basis of one 1 family member’s inadmissibility
	+ Assume non-accompanying family members will be an issue unless you can make a compelling argument re: breakdown of the relationship or a non-custodial parent
* Does not apply to protected persons

## Rehabilitation – *IRPA*, s. 36(3)(c)

* Effect is to resolve inadmissibility based on a number of criteria
* “the matters referred to in paras (1)(*b*) and (*c*) and (2)(*b*) and (*c*) do not constitute inadmissibility in respect of a PR or FN who, after the **prescribed period**, satisfies the Minister that they have been rehabilitated or who is a member of a prescribed class that is deemed to have been rehabilitated”
	+ NOT available for indictable/hybrid offences committed and convicted in Canada
	+ NOT available for 34, 35, 36(1)(a) or 37

Deemed Rehabilitation – *IRPR*, s. 18

* Need only prove that a minimum 5 years has passed since sentence completion; subsequent offences “reset the clock”
* Operates to exclude all serious criminality b/c offences must have max sentences less than 10 years
* **18(2)** The following persons are a class of persons deemed to have been rehabilitated:

Four Options:

1. **(2)(a)** Convicted of one indictable/hybrid offence outside of Canada IF:
	1. Max punishment is less than ten years (means non-serious)
	2. **Min 10 years have passed since completion of sentence**,
	3. Not convicted of indictable/hybrid offence in Canada,
	4. No conviction of summary offence in Canada w/n last 10 years OR convicted of more than one summary offence before the last 10 years,
	5. No conviction of any kind of offence outside Canada,
	6. No conviction of more than one summary offence outside Canada before the last 10 years,
	7. Has not “committed an act” w/n the meaning of para 36(2)(c) [indictable offence outside of Canada]
	* N.B. Only applies where it is one non-serous indictable offence; if you commit a subsequent offence, then deemed rehabilitation is not available to you. Must apply for individual rehabilitation.
2. **(2)(b)** Convicted of two summary offences outside of Canada IF:
	1. **Min 5 years have passed since completion of sentence,**
	2. Not convicted of indictable/hybrid offence in Canada,
	3. No conviction of any kind of offence *in Canada* in past 5 years
	4. No conviction of any kind of offence *outside Canada* in past 5 years
	5. No conviction in Canada of more than one summary offence in past 5 years
	6. Has not “committed an act” w/n the meaning of para 36(2)(c) [indictable offence outside of Canada]
3. **(2)(c)** “Committed an act” outside of Canada that is equivalent to an indictable/hybrid offence IF:
	1. Max punishment is less than ten years (means non-serious),
	2. **Min 10 years have passed since the day after the commission of the “offence”,**
	3. Not convicted of indictable/hybrid offence in Canada,
	4. No conviction of summary offence in Canada w/n last 10 years OR convicted of more than one summary offence before the last 10 years,
	5. No conviction of any kind of offence *outside Canada* in past 10 years,
	6. No conviction of more than one summary offence outside of Canada before the last 10 years,
	7. No conviction of an indictable/hybrid offence outside Canada
4. **AND under R18.1**, individuals who would have been convicted in Canada of two or more summary offences are deemed rehabilitated once five years have passed since the completion of the imposed sentence
* N.B. “completion of sentence” means all aspects of sentence (fines, community service, counseling etc.)
* Where YCJA and Contravention Act charges don’t count

Individual Rehabilitation – *IRPR*, s. 17

* **Only applies:**
	+ **WHEN:** Prescribed period under **A36(3)(c)** has passed (5 years) with no intervening offences AND;
	+ **TO:** Criminality arising from convictions or “acts” outside of Canada [under 36(2)(b) and (c) and 36(1)(b) and(c)]
		- Does not apply to indictable offences committed/convicted in Canada
		- Does not apply to serious criminality under 34, 35, 36(1)(a) or 37
* What kind of factors would demonstrate rehabilitation?
	+ Sentencing issues (i.e. was an indictable offence, but served only 5 months)
	+ Remorse
	+ Similar factors to H&C applications
* If H&C reasons exist but w/n prescribed period, could pursue a TRP in the meantime

Appeals to IAD – *IRPA*, s. 63

* **R63(2)** An FN holding a PR visa can appeal inadmissibility decisions
* **R63(3)** A PR or protected person can appeal inadmissibility decisions
* **R63(4)** A PR can appeal re: residency obligations under **A28**
* **R63(5)** Minister can appeal admissibility decisions
* **R64(1)** CANNOT appeal b/c inadmissible under **A34, 35, 36(1)(a)** or **37**
	+ **A64(2)** Where serious criminality only includes 36(1)(a) if 6 months imprisonment imposed
* **R64(3)** CANNOT appeal on the ground of misrepresentation unless the FN in question is the sponsor’s spouse, common-law partner or child
* Role of the IAD per Canada v Khosa
	+ [66] The issue before the IAD was not the potential for rehabilitation for purposes of sentencing, but rather whether the prospects for rehabilitation were such that, alone or in combination with other factors, they warranted special relief from a valid removal order. The IAD was required to reach its own conclusions based on its own appreciation of the evidence.
	+ Court finds that the IAD is entitled to let one factor outweigh the other – to let prospects for rehabilitation outweigh other H&C factors

## Special Inadmissibility: 34, 35, 37

Why is it special?

* Cannot appeal to IAD **A64(1)** and ineligible for consideration of H&C **A25**
* Two options:
	+ TRP – only exclusion is DFNs; however does not resolve for permanent stays
	+ Seek Minister’s Declaration under **A42.1**
		- The Minister may, on application by a FN, declare that the matter referred to in 34, 35(1)(b) and 37(1) do not constitute inadmissibility in respect of the FN if they satisfy the Minister that it is not contrary to the national interest
		- Subsection has not yet been judicially interpreted; may serve as an exemption (since H&C not available)

Inadmissibility on Security Grounds – *IRPA*, s. 34

* Applies to both permanent residents and foreign nationals
1. Espionage against or contrary to Canada
2. Engaging or instigating subversion by force of any government and **(b.1)** any subversion against a democratic government
3. Terrorism (definition from Suresh at para 98)
	* Committed an act whose intent was to caused serious or bodily harm to civilian(s)
	* To compel a population or government to do abstain from doing any act
4. Danger to security
5. Engaging in acts of violence that would or might endanger the lives or safety of persons in Canada
6. Being a *member* of an organization that is, has, or will engage in subversion or terrorism
	* “must be given a broad and unrestricted interpretation since the type of organizations involved do not necessarily provide formal documentation of membership”
	* **“formal** or **actual** **membership** **is** **not** a **prerequisite** for finding that someone is a member”
	* [44] The factors a decision-maker should consider in assessing membership include, but are not limited to, the nature of the person's involvement, the length of time involved and the degree of commitment to the organization and its objectives (Perez Villegas v Canada 2011 FC 105)

Inadmissibility for Violating Human or International Rights – *IRPA*, s. 35

* Applies to both permanent residents and foreign nationals
* **A35** PR or FN who have committed one of the following:
1. Crimes defined in the *Crimes Against Humanity and War Crimes Act,* ss. 4-7*:* genocide, crime against humanity, war crime, attempts, including military leadership, reference to IL standards: committing an act outside Canada
2. Being a *prescribed senior official* in the service of a gov’t engaged/engages in terrorism, “gross HR violation”, genocide, crime against humanity etc.
3. Person (FNs only) pursuant to international sanctions [to which Canada has signed onto]
* **R16** defined “senior official” as:
1. heads of state or government;
2. members of the cabinet or governing council;
3. senior advisors to persons described in paragraph (*a*) or (*b*);
4. senior members of the public service;
5. senior members of the military and of the intelligence and internal security services;
6. ambassadors and senior diplomatic officials; and
7. members of the judiciary

Organized Criminality – *IRPA*, s. 37

* Applies to both permanent residents and foreign nationals
* **(a)** When “on reasonable grounds”, the Officer believes the applicant or accompanying family member(s) to have been a member of a group involved in a pattern of criminal activity, convicted or otherwise
* **(b**) Engaging in activities “such as” people smuggling, trafficking in persons, or money laundering
* **R37(2)**Para (1)(*a*) does not lead to a determination of inadmissibility by reason only of the fact that the PR or FN entered Canada with the assistance of a person who is involved in organized criminal activity
	+ Does not apply to those themselves smuggled or trafficked

**Aside:** Conclusive Findings of Fact under *IRPR*, s. 15

* For the purposes of determining admissibility of FNs or PRs, the findings of fact by the following are deemed conclusive in the immigration context:
	+ 1. a decision concerning the FN or PR that is made by **any international criminal tribunal** that is established by resolution of the UN Security Council, or the ICC as defined in the *Crimes Against Humanity and War Crimes Act*;
		2. a **determination by the Board**, based on findings that the FN or PR has committed a war crime or a crime against humanity, that the FN or PR is a person referred to in section F of Article 1 of the *Refugee Convention*; or
		3. a **decision by a Canadian court** under the *Criminal Code* or the *Crimes Against Humanity and War Crimes Act* concerning the FN or PR and a war crime or crime against humanity committed outside Canada

## Security Certificates

Why are Security Certificates Contentious?

* 27 certificates have been issued since introduction in 1991
* Their use often coincides with circumstances when a person is ‘unremovable’
	+ List of countries that Canada doesn’t remove people to (send them back) (ex. Afghanistan)
* Are not judicial but rather ‘administrative detentions’
* At odds with key principles of the criminal justice system:
	+ Are “secret trials” which prevent the A from making full answer and defense
	+ Allow government to detain FNs for a long period of time without trial

Security Certificate*s: IRPA, Division 9: Certificates and Protection of Information*, ss. 76-87.2

* Procedure most commonly utilized when the government has information it wants to protect
	+ “information” means security or criminal intelligence information and information that is obtained in confidence from a source in Canada, the government of a foreign state, an international organization of states or an institution of such a government or international organization
* **A77** Applies to both foreign nationals and permanent residents; can be used for **A34, 35, 36(1)** and **37**
	+ However is most commonly used for **A34** and **A35**

How does the Process Work?

1. **A77** The Minister of Public Safety and the Minister of Citizenship and Immigration sign a certificate and refer it to the FC
	* Info provided to the A “does not include anything that, in the Minister’s opinion, would be injurious to national security or endanger the safety of any person if disclosed”
	* **(c)** Halts other immigration proceedings wrt to the A
2. **A78** Judge determines if the certificate is ‘reasonable’; shall quash if it is not
	* FC judge is able to view all of the information and evidence adduced by the government
3. **A79** Appeals to the FCA can only be made if the FC certifies a question of general importance
	* Re: administrative detention, not criminal
4. **A80** If a certificate is found to be reasonable, it is conclusive proof of inadmissibility and a removal order is in force immediately

Detention Under this Scheme

* Detention is not required by the process, but it has never been used w/o detention
	+ **A81** …may issue a warrant for the arrest and detention…if they have reasonable grounds to believe that the person is a danger to national security or to the safety of any person or is unlikely to appear at a proceeding or removal
* **A82** FC judge must review detention:
	+ 1. within 48 hrs
		2. every 6 months following if **A78** determination has not been concluded
		3. on application, after 6 months following the **A78** reasonableness determination
		4. If released on conditions, can apply for review 6 months after **A78** reasonableness determination
		5. On review, judge can either affirm the grounds in the certificate under **A81** or can set aside the detention and release the FN/PR on any conditions he/she deems appropriate
* **A82.3** FCA can only review FC judges determination if a certified question of general importance is established
* SCC has signaled that at some point indefinite detention would constitute a s. 12 *Charter* breach (Charkaoui)

How the Person’s Interests are Protected – *IRPA*, s. 83

* **A83** During any of the above security certificate/detention proceedings, the judge **shal**l:
	+ - 1. proceed as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit;
			2. appoint a special advocate from the list established under **A85.1**
			3. hear information or other evidence in the absence of the public and of the PR or FN and their counsel if… its disclosure could be injurious to national security or endanger the safety of any person;
			4. ensure the confidentiality of information and other evidence
			5. ensure that the PR or FN is provided with a summary of information and other evidence that enables them to be **reasonably informed of the case made by the Minister** in the proceeding but that **does not include** anything that…would be injurious to national security or endanger the safety of any person if disclosed;
			6. ensure the confidentiality of all information or other evidence that is withdrawn by the Minister;
			7. provide the PR or FN and the Minister with an opportunity to be heard;
* **A83** During any of the above security certificate/detention proceedings, the judge **may**:
1. receive into evidence anything that…is reliable and appropriate, even if it is inadmissible in a court of law, and may base a decision on that evidence;
2. base a decision on information or other evidence **even if a summary of that information or other evidence is not provided to the PR or FN**; and
* **A83** During the above security/detention proceedings, the judge **shall not**:
1. base a decision on information or other evidence provided by the Minister, and shall return it to the Minister, if the judge determines that it is not relevant or if the Minister withdraws it

Role of the Special Advocate – *IRPA*, ss. 85, 85.1

* **A85** Requires the Minister of Justice to established a list of special advocates; are paid by the DOJ
	+ **(3)** The minister must ensure they are provided w/ adequate administrative support and reasons
* **A85.1(1)** Role is to protect the interests of the PR or FN when info or other evidence is heard in the absence of the public and the PR/FN/their counsel
* **A85.1(2)** May challenge Minister’s claim that:
	+ the information needs to be kept secret (i.e. is harmful to the national interest and public safety) AND;
		- See Agraira v Canada for definition of national interest
	+ the relevance, reliability and sufficiency of the information/evidence
* **A85.1(3)** NOT a solicitor-client relationship
	+ **A85.1(4)** However, communications b/w the special advocate and the PR/FN are subject to privilege and the special advocate is not a compellable witness
* **A85.5** Once the special advocate has seen the protected information, communication with the A is ONLY with the judge’s authorization and subject to any conditions the judge considers appropriate

Charkaoui v Canada

* Section 7: Old IRPA provisions provided for the issuance of a certificate of inadmissibility based on secret material w/o providing independent agent at the stage of JR to protect the named person’s interest
	+ Liberty: detention pending deportation
	+ Security: removal may be to a place where life or freedom is threatened
* POFJ: Review procedure violated the POFJ b/c it denied the named person a fair hearing
	+ Some of the time limits in the provisions for continuing detention of a FN violate ss. 9 and 10(c) b/c they are arbitrary
	+ The distinction made b/w FNs and PRs was also arbitrary
* Section 12: Not violated since a meaningful detention review process offers relief against the possibility of indefinite detention
* Section 15: Not found; PRs and FNs intentionally have different status than citizens
	+ Judges can still do their job independently of the system
* Section 1: Justification not met. TJ cannot properly assess the certificate in light of the removal of the traditional safeguards of the judicial system; no way for the person named to “know the case to be met”.
	+ ‘right to know the case against oneself’ is infringed and infringement is not justified
* Declaration suspended and Parliament given one year to amend the law

**Post *Charkaoui* Changes**

* Removal of distinctions between FN and PR
* Detention is not mandatory
* Bill C-31 (2008)—introduction of Special Advocates in security certificate cases along UK model
	+ This procedure can be mirrored in other proceedings which attract the special advocate or during judicial review, which *may* attract a special advocate

# Immigration Detention

Immigration Facilities and Detention Data

* There are 3 immigration detention facilities in Canada: Montreal, Toronto and YVR (Richmond)
	+ Otherwise, individuals are kept in remand centres or prisons
* Peak in 2008-09 of 14,347 persons detained, for an average of 17 days
	+ Meanwhile, people who arrive on boats have been detained for disproportionately long amounts of time (10 to 15 times longer) despite very little difference in their circumstances
* Canada has no exit controls; difficult to determine what effect removal/deportation orders have
* Data on detention are not transparent (per AG Report) – difficult to determine:
	+ Days in detention
	+ Immigration categories of persons detained
	+ Sex disaggregated detention statistics
	+ Children in detention
		- Children can be detained with their parents
		- In 2012, 289 children were detained – average was 3.1 days, longest was 70 days
* Reasons for Detention:
	+ Less than 5% of all people in immigration detention are there because of a security concern
	+ Primary reasons include lack of identity documents or concern about non-attendance at immigration proceedings
	+ SUMMARY: Not about locking up criminals
* Detention of refugee claimants is not authorized by international law (cannot punish for refugee status)
	+ Cannot remove refugees during their pre-risk assessment, individuals who come from designated countries whom we do not deport to, and individuals who can show they would be deported to torture or other refugee like circumstances
* Mass arrivals and people found to be un-removable pose challenges to current system

Legislative Framework – *IRPA*, ss. 54-61

* Responsibility for detention lies with the CBSA
* **A54** Detention reviews go through the Immigration Division (ID)
* **A55** 3 ways the detention can begin:
	1. Arrest a **PR or FN** with a warrant if Officer has reasonable grounds to believe s/he is:
		+ inadmissible and is a danger to the public; or
		+ is unlikely to appear for examination, for an admissibility hearing, for removal from Canada or at a proceeding that could lead to the making of a removal order under **A44(2)**
	2. Arrest a **FN** without a warrant when the conditions are met if Officer has reasonable grounds to believe:
		+ inadmissible and is a danger to the public; or
		+ is unlikely to appear for examination, for an admissibility hearing, for removal from Canada or at a proceeding that could lead to the making of a removal order under **A44(2)**; or
		+ is not satisfied of the FNs identity
	3. Detain a **PR or FN** on entry if the Officer considers it necessary to do so:
		1. considers it necessary to do so in order for the examination to be completed; or
		2. has reasonable grounds to suspect that the PR or the FN is inadmissible on grounds of 34, 35, 36(1) or 37
* **A56** Officer can release prior to ID hearing if:
	1. Reasons for detention no longer exists
		+ Can impose any conditions he/she considers necessary – incl. payment of deposit or posting of guarantee
	2. Except DFNs: Can only be released after refugee claim processed, by the ID **A58** or by Ministerial order **A58.1**
* **A57 Detention Reviews**
	1. Requires that the ID review the reasons for detention within 48 hours
	2. within 7 days following the initial review and
	3. every 30 days after
	+ *De novo* hearings – adjudicator can review all of the evidence and come to a fresh conclusion (Thanabalasingham)
		- However, they are *sui generis* in that the adjudicator must consider the previous decision
		- Earlier review does not receive deference, BUT the adjudicator must provide clear and compelling reasons for diverging from previous decisions
		- In light of s. 7 rights, Minister must establish, on a BoP, that the PR or FN is a danger to public. Once a *prima facie* case has been made out, the practical burden shifts to the respondent to lead some evidence or risk continued detention. Ultimate burden lies with the Minister.
	+ **A57.1** Exception: DFNs only receive review within 14 days
* **A58** Upon review, the ID “shall order” the release of the PR/FN unless satisfied of the prescribed factors:
	1. Danger to the public
	2. Unlikely to appear
	3. Minister is inquiring regarding ss. 34, 35, 36(1) or 37
	4. Identity not established, but could be with cooperation
* **A58(1.1) and 58.1** Requires that ID keep DFNs in detention if any of the above factors exist and that, DFNs must establish that exceptional circumstances warrant their release
* **A58(3)** ID can release on any conditions it deems necessary

Ending Detention

* **A56** Officer has discretion to release prior to hearing if the reasons for detention no longer exist
	+ EXCEPT designated foreign nationals, who can only be released in the circumstances listed in **A56(2)**
* **A58** Release by the Immigration Division or by Minister through detention review
* Deportation
* May also be released if found to have protected status (i.e. refugee status)

Other Relevant Definitions for Detention Review under **A58** (*IRPR*, ss. 244-248)

* **R245 Flight Risk** factors are:
	1. being a fugitive from justice in a foreign jurisdiction in relation to an offence that, if committed in Canada, would constitute an offence under an Act of Parliament;
	2. voluntary compliance with any previous departure order;
	3. voluntary compliance with any previously required appearance at an immigration or criminal proceeding;
	4. previous compliance with any conditions imposed in respect of entry, release or a stay of removal;
	5. any previous avoidance of examination or escape from custody, or any previous attempt to do so;
	6. involvement w/ a people smuggling or trafficking in persons operation that would likely lead the person to not appear for a measure referred to in **R244(a)** or to be vulnerable to being influenced or coerced by an organization involved in such an operation to not appear for such a measure; and
		+ Meant to be a protective provision; don’t want trafficked individuals to be picked back up
	7. the existence of strong ties to a community in Canada
* **R246 Danger to the Public** factors are:
	1. the fact that the person constitutes…a danger to the public in Canada or a danger to the security of Canada;
	2. association with a criminal organization within the meaning of **A121(2)**;
	3. engagement in people smuggling or trafficking in persons;
	4. conviction in Canada for **(i)** a sexual offence, or **(ii)** an offence involving violence or weapons;
	5. conviction for an offence in Canada under CDSA, ss. 5, 6 or 7;
	6. conviction outside Canada, or the existence of pending charges outside Canada, for an offence like in **(d)**
	7. conviction outside Canada, or the existence of pending charges outside Canada, for an offence that, if committed in Canada, would constitute an offence under CDSA, ss. 5, 6 or 7
* **A247(1) Identity not established** factors are:
	1. FNs *cooperation\** in providing evidence of their identity, assisting CIC in in obtaining evidence
		+ Where cooperation tends to be a near determinative factor
	2. FNs claiming refugee protection – the possibility of documents forthcoming
	3. The destruction of identity/travel documents or the use of fraudulent documents in order to mislead CIC
	4. Giving of contradictory info wrt identity on arrival
	5. Existence of documents that contradict info provided by the FN wrt to their identity
	+ N.B. Where CIC is able to get an opinion on the validity of identity documents
* **A248 Other factors** on subsequent reviews:
	+ **(a)** Reasons for detention, **(b)** length of time detained, **(c)** whether any elements can help determine the likely end time, **(d)** delays that can be attributed to person’s own actions, and **(e)** existence of alternatives to detention
* **A249 Special factors to consider in relation to children**
	+ **(a)** Availability of alternative arrangements, **(b)** anticipated length of detention, **(c)** risk of trafficking, **(d)** type of detention facility and **(e)** the possibility of separating them from the general inmate population, and **(f)** the availability of services w/n the detention facility

**Special Case:** Designated Foreign Nationals – *IRPA*, s. 20.1

* **A20.1** Grants the Minister the capacity to ‘designate’ certain FNs on the basis of irregular mode of arrival in Canada
	+ **(1)** If the Minister has reasonable grounds to suspect the persons in the group:
		- have or will be a contravention of the section pertaining to criminal organization or smuggling OR;
		- that they cannot conduct investigations into the identity of the individuals in a timely manner
	+ **(2)**When a designation is made, the FNs become DFNs…unless, on arrival, they hold a visa or other document required under the regs and, on examination, the officer is satisfied that they are not inadmissible
	+ **(3)** An order made under (1) is not a statutory instrument – however it must be published in the Canada Gazette
* **A55(3.1)** Detention is mandatory on arrival or on designation
	+ N.B. Prior to the Minister’s designation, individuals are often detained on other grounds. However, imposition of a designation provides for differential treatment.
* **A57.1** Detention Schedule: Looks more like security certificates
	+ Reviewed initially within 14 days and then within each subsequent 6 months; court not able to review
	+ **A56** Cannot be released on the same grounds as other FNs – may be released if found to have protected status
* Defines the “age of majority” for children as 16 years of age
* Criticism of DFN Program
	+ Detention of refugee claimants is not authorized by international law
	+ Per **A60** and **R249**, children should only be detained as a measure of last resort, taking into account the other applicable grounds and criteria including the best interests of the child
		- However, Dauvergne’s research suggest children are often detained w/ their parents b/c no other reasonable alternatives exist for their care

# Removals, Enforcement, Offenses

Discussion: Deportation, non-deportability and ideas of membership (*Paoletti*)

* In liberal states, capacity for ‘closure’ defines them, but deportation is often administratively difficult
	+ Deportation mechanics are a key aspect of state power
* Why is closure important for a state?
	+ Allocation of scarce/limited resources
	+ General communitarian view – in order to define who is a member, need to be able to define who is not
		- Sense of nationality
	+ Need to define the population for the purpose of governance
* What about universal citizenship?
	+ Theoretically the opposite of state closure; proponents argue the only consistent option is open borders
	+ *Rights are held inherently as a human* – not b/c you belong to a specific state or community
	+ National borders are arbitrary; must be consistent with human rights
* What is the “**deportation turn**”?
	+ Prosperous Western states have ramped up levels of deportation markedly since the early 1990s
		- Have shifted away from deportation as a means of defining a national community
	+ Idea of enforcement remains important symbolically
		- Issue: Queue jumping – necessary to deport to prevent this practice
	+ Though the state still does not fully exploit its power to deport
		- Why? B/c despite active enforcement mechanisms, they still may be significant delays
		- Multiple procedural safeguards exist even for people who are deportable
	+ **Current Targets:** PRs/FNs who have committed crimes while in Canada, failed refugee claimants and FNs w/o migration status

Deportation vs. Deportability

* *Deportation:* Actual removal from the country
* *Deportability:* PRs/FNs who are up for deportation but who are not deported either b/c their home country won’t recognize them as a citizen or other administrative reasons
* Deportation decision making is marked by high levels of discretion
* Removals from Canada – substantial increase since 2003 (from 8,000 to 15,000)
	+ However, in 2007, approx. 63,000 ‘enforceable removal orders’ were issued
* Why such a backlog?
	+ Resources – expensive to deport
	+ Lack of will – unwelcome but untolerated FNs
		- Symbolic power of enforcement; deportation of the few is used to regulate the many
	+ Administrative delays – procedural safeguards exist to protect human rights; BUT appeals and reviews take time
		- Consider international human rights documents which prevent deportation to torture
	+ Lack of foreign station cooperation
	+ Infrastructure issues

Process of Removal – *IRPA*, Division 5, ss. 44-52

* **A44(1)** Preparation of Report – If an Officer is “of the opinion” that any PR or FN is inadmissible, must prepare a report and transmit to Minister
1. If Minister is “of the opinion” report is well founded, he/she refers to ID OR proceeds directly to removal order if:
	* + PR residency requirements under **A28**
		+ FN exceptions found under **R228** – means most FNs do not go before the ID; simply issue removal order
2. ID Officer can impose conditions on the PR or FN (including payment of deposit or posting of a guarantee) who is the subject of the report
* **A45** Decision of admissibility hearing – ID must make one of the following decisions:
	1. Recognize right to enter Canada by a citizen, Indian or PR
	2. Grant PR status or TR status to FN if req’ts of IRPA met
	3. Authorize a PR or FN to enter Canada for further examination (w/ or w/o conditions)
	4. Make the applicable removal order
		+ FN = either had authorization to enter, but Officer not satisfied they are not inadmissible OR lacked authorization to enter and Officer is satisfied they are inadmissible
		+ PR = if Officer is satisfied they are inadmissible
* **A48(1)** Enforcement – Order remains enforceable as long as it is not stayed
	+ **(2)** FN must leave Canada immediately and the order must be “enforced as soon as possible”
* **A49(1)** Enforceable if it is has come into force on the latest of the following dates:
	1. Day made if no right to appeal
	2. Day appeal expires if there is a right to appeal and no appeal is made
	3. Day of the final determination of the appeal if an appeal is made
* **A50(1)** Staying – A removal order is stayed:
	1. If a decision made in a judicial proceeding would be directly contravened
		+ Where the FCA rejected the validity of a temporary custody order issued by the Ont Ct Justice – however, may be different where order was validly sought (Idahosa)
	2. Until a FN has completed their sentence (imprisonment)
	3. By the IAD or any other court of competent jurisdiction
	4. Where the FN or PR is in need of protection (cannot be returned) per **114(1)(b)**
	5. By the Minister
* **A51** Removal orders become void if the FN becomes a PR
* **A52(2)** If a removal order has been enforced and the order set aside on JR, the FN is entitled to return to Canada at the expense of the Minister\*\*
	+ Unusual provision; not sure if it has ever been used or not

Types of Orders and Consequences – *IRPR*, Part 13, ss. 223-227

1. Departure Order – “Please leave”
	* Must get a certificate of departure (re: no exit controls) w/n 30 days; if not, converts to deportation order
	* No need to get an ‘authorization’ to return
2. Exclusion Order – “I don’t want to see you for one or two years”
	* Requires written authorization to return within the 1 year (or 2 years if s. 40)
	* Applies to issues of health inadmissibility, financial inadmissibility, most misrepresentations and most IRPA breaches under **A229**
3. Deportation Order – “I never want to see you again”
	* Requirement to receive written authorization to enter the country endures
	* Applies to all criminal inadmissibilities, misrepresentation that led to loss of citizenship per **A229**, second or subsequent removal orders, and for second or subsequent criminal offences
* **R227** Where removal orders usually extend to family members; same type of order applies

Role of the IAD – *IRPA*, Division 7, ss. 62-71

* **A63** Hear appeals from PRs and TRs holding PR visas only; FNs have no right of appeal to the IAD
	1. FN holding PR visa may appeal against removal order decisions (at examination or admissibility hearing)
	2. PR or protected person may appeal against removal order decisions (at examination or admissibility hearing)
		+ Must consider all of the evidence before the court; subject to review by the FC if findings of fact made in a perverse or capricious manner (Abdallah v Canada)
		+ See Fox v Canada
	3. PR may appeal against decision re: residency obligation under **A28**
	4. Minister may also appeal ID decisions
* **A64(1)** Exception: No appeal for PRs with serious criminality if punished by 6 months or more (means that PRs charged w/ indictable offences in Canada but with less jail time could potentially appeal)
	+ Includes pre-trial detention (Jamil v Canada 2005 FC)
* **A67** Considerations by the IAD
	+ Can consider **(a)** issues of fact, law, or mixed fact and law, **(b)** principles of natural justice or **(c)** H&C considerations
		- Limited by **A65** – limits H&C consideration to family class appeals only where members recognized as a member of the family class (i.e. can not appeal finding that he/she is not w/n family class)
* Staying Removal Order
	+ **A68** If satisfied, taking into account the BIC, that sufficient H&C considerations warrant relief (see **A50(c)**)
	+ **A68(4)** However, stay automatically cancelled if A is convicted of a subsequent offence

Role of the Federal Court (IRPA)

* **A50(1)(a)** Removal order stayed based on judicial proceeding where enforcement would contravene judicial order
	+ In Practice: Ask CBSA to defer removal. When they say no, request JR of that decision. Submit 'urgent stay' application to Court to stay removal order until JR can be heard (interlocutory).
	+ Where the FCA rejected the validity of a temporary custody order issued by the Ont Ct Justice – however, may be different where order was validly sought (Idahosa)
* **A72(2)** JR by the FC possible for any matter under the IRPA/R, with leave (even if ID or IAD not available)
	1. Must exhaust all appeal options first
	2. Must file JR application w/n 15 days of notice of decision if inside Canada and w/n 60 days if outside of Canada

Chiarelli – focus on *Charter* challenge

* Issue: Do the provisions leading to deportation violate ss. 7, 12 or 15 of the *Charter*?
* Section 7:
	+ Threshold question of whether deportation *per se* engages s. 7 need not be answered because there is no breach of principles of fundamental justice
		- Deportation for a serious offence is not a deprivation of liberty (Hoang v Canada 1990 FC)
	+ Contextual analysis required – identifies the ‘immigration context’ for the first time
		- Where the most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country
	+ Differential appeal rights for PRs vs. FNs are not a s. 7 infringement b/c H&C considerations are discretionary, and beyond a ‘true appeal’
		- Draw on the distinction between citizens and non-citizens in s. 6 of the *Charter*
	+ Re: Certificate issued by GIC – Crown reserves the right to determine that a FN’s continued presence in Canada would not be conducive to the public good
	+ Per Idahosa, the deportation of parents of Canadian born children violates neither the rights of the parents nor the children (Langer)
* Section 12:
	+ Deportation cannot be cruel and unusual punishment because it is not punishment
	+ Further, though deportation may be treatment, it is not cruel and unusual b/c it is appropriate authorized by law:
		- *The deportation of a PR who has deliberately violated an essential condition of his or her being permitted to remain in Canada by committing a criminal offence punishable by imprisonment of 5 years or more, cannot be said to outrage standards of decency. On the contrary it would tend to outrage such standards if individuals granted conditional entry into Canada were permitted, without consequence, to violate those conditions deliberately.*
	+ NOTE: Cruel and unusual punishment must be “so excessive as to outrage standards of decency”
* Section 15: Impossible b/c of s. 6 of the *Charter*
	+ While PRs are given various mobility rights in s. 6(2), only citizens are accorded the right to enter, remain in and leave Canada in s. 6(1)

Fox v Canada (CIC)

* Issue: Can the ID consider H&C factors when considering adjournment applications in admissibility hearings?
* Decision: ID Officers presiding over an admissibility hearing concerning an allegation of serious criminality for an offence committed in Canada do not have the jurisdiction to adjourn the hearing for the purpose of providing the FN w/ H&C relief
	+ Finds that ID is required only to determine whether the FN or PR is inadmissible and that it must, where practicable, hold a hearing and “hear the matter without delay”
* Criticism: Under IRPA, s. 45, the ID is able to consider “any relevant factors” and “whether allowing the appl would unreasonably delay the proceedings or likely cause an injustice”. Should be able to consider other factors.

# Non-Status Residents

Toussaint v Canada (CIC)[example of someone who doesn’t have status]

* Does **A25(1)** require the Minister to consider a request for an exemption from the req’t in **R10(1)(d)** to pay a fee for processing an application under **A25(1)**?
* By virtue of IRPA, 2(2) the obligation to pay the fee is indeed an “obligation”
* N.B. This decision was overturned by amendment – see **A25.1(1)**