Let's Clean Up Our Act

A Report on Legislative Reform of *The Immigration and Refugee Protection Act*

May 2024

Canadian Immigration Lawyers Association

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"Let's Clean Up Our Act!"

Recommendations from the Canadian Immigration Lawyers Association (CILA) on Legislative Reform of the *Immigration and Refugee Protection Act* (IRPA)

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Introduction:

CILA was conceived in 2020 by a group of leading immigration lawyers to provide a national organization focused exclusively on immigration law. CILA's Founding Members recognized the need to create an organization capable of effectively representing the immigration bar, fostering an independent community of immigration lawyers, law students and academics, providing professional resources, mentorship and affordability for our members, while engaging with stakeholders to promote the rule of law, access to justice and improvements to the Canadian immigration system.

Advocacy is deeply ingrained in CILA. Our advocacy work centers on promoting fairness and inclusiveness in immigration law through active engagement in public discourse. Our advocacy is based on the expertise of approximately 500 immigration and refugee lawyers across Canada who have daily experience of the impact of IRPA on people from around the world who look to us for advice and support. As such, we strive to be the clear voice of our clients in advocating for reform. Our work includes collaboration with government officials, members of parliament, cabinet members, and front-line officers who administer Canada's immigration system.

This report, developed by the CILA Committee on Legislative Reform, was drafted in this same spirit of collaboration, with the goal of providing policy makers with a comprehensive view of the legislative changes that Canadian immigration lawyers have deemed most urgent.

This is a historically significant time for a comprehensive review of IRPA. In the decades since World War II, Parliament has introduced new immigration legislation in intervals of approximately 25 years – first in

1952, then 1976, then IRPA in 2001. Yet IRPA has not been comprehensively reviewed and amended since its proclamation. Over this period, Canada's demographic, social and economic circumstances and priorities have changed, and relevant developments have occurred in administrative and Charter jurisprudence. The passage of time enables us to evaluate the legislation's practical application in light of these changes.

We recommend strategic reform rather than entirely new legislation in recognition of the existing pressures on Immigration, Refugees and Citizenship Canada due to new technology and staff, and processing backlogs. New legislation would compound these pressures, and less drastic solutions exist to streamline processes and ensure better client outcomes.

The recommendations that follow are intended to reflect the very values identified in the legislation: equity, financial growth, family support, compassion, flexibility, due process and fairness. These legislative values are best administered by the values described by the Supreme Court of Canada in *Vavilov*[1]: transparency, intelligibility, and justification.

The report is divided into sections reflecting the type of action recommended. The section "Repeal" contains recommendations aimed at sections that are outdated, serve limited purpose, and perpetuate discrimination. The section "Amend" contains recommendations addressed at inconsistencies in the legislation which perpetrate injustice, inefficiency, and lack of accountability. Finally, the section "Add" reflects necessary additions to the legislation to address gaps.

Process Overview

The process of drafting this report began in August 2023, involving consultation of CILA's membership across Canada. Through successive rounds of feedback from CILA Members and the CILA Board of Directors, the Committee is confident that this report contains a comprehensive list of recommendations, generally endorsed by CILA's broad membership of immigration lawyers across Canada.[2] A brief overview of the process follows.

1) The Committee formed in August 2023 to develop a strategy for garnering member feedback on recommended changes to IRPA.
2) In September 2023, two emails were sent to the CILA membership soliciting the opinions of members suggested changes.
3) Feedback from members was compiled into a comprehensive list of proposed amendments.
4) The Committee met in late September to discuss the merits of recommendations.
5) Research was conducted on each recommendation and a refined shortlist of proposed changes was drafted and presented to the CILA Board in October 2023.
6) After incorporating feedback from the CILA Board, the report was circulated to the CILA Membership to garner feedback on the final list of proposals in January 2024.
7) Feedback from the membership was incorporated into the report, which was drafted and presented to the CILA Board for approval at their February 2024 meeting.

[1] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65
[2] Despite broad consultation with our membership, we recognize not all recommendations will necessarily be reflect the view of all CILA members.

Table of Contents – Recommendations

Section I: Repeal

s. 38(a),(b) – Danger to public health and safety inadmissibility

Legislation

38 (1) A foreign national is inadmissible on health grounds if their health condition

(a) is likely to be a danger to public health;

(b) is likely to be a danger to public safety

Recommendation and rationale

These subsections should be repealed since other tools to protect public health and safety exist, and they risk stigmatizing people in need of medical care.

Background

Section 38(1)(a) concerns the transmissibility of an applicant's health condition, and the impact that the health condition could have on other persons living in Canada.[3] IRCC policy guidelines on this section state:

> Active Pulmonary Tuberculosis (TB) and untreated Syphilis are considered a danger to public health. If the foreign national has either or both of these conditions, they will likely be found inadmissible on the grounds of danger to public safety, unless the foreign national is treated according to Canadian standards.[4]

Section 38(1)(b) concerns an applicant's health condition and the potential risk of sudden incapacity or unpredictable or violent behaviour that would create a danger to the health or safety of persons living in Canada.[5] IRCC policy guidelines on this section state:

> Health conditions that are likely to cause a danger to public safety include serious uncontrolled and/or uncontrollable mental health problems such as:
> - certain impulsive sociopathic behaviour disorders;
> - some aberrant sexual disorders such as pedophilia;
> - certain paranoid states or some organic brain syndromes associated with violence or risk of harm to others;
> - applicants with substance abuse leading to antisocial behaviours such as violence, and impaired driving; and
> - other types of hostile, disruptive behaviour.[6]

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[3] *Immigration and Refugee Protection Regulations,* SOR/2002-227, ss. 31(b), (c) [*IRPR*].
[4] IRCC, "Danger to Public Health and Safety", 15 May 2013, available online at: www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/standard-requirements/medical-requirements/refusals-inadmissibility/danger-public-health-public-safety.html.
[5] *IRPR, supra* note 3, s. 33(b).
[6] *Ibid*.

In 2015, IRCC conducted an evaluation of its health screening and notification policies.[7] With respect to sections 38(1)(a) and (b), IRCC acknowledged:

- *Danger to Public Health*: The current policy on Danger to Public Health was found to be restrictive and unable to adapt quickly to conditions that may become more prevalent; or conditions that may temporarily pose a risk to public health.
- *Danger to Public Safety*: While the objectives of the policy on Danger to Public Safety remain relevant, it is difficult to apply during assessment because public safety-related health concerns are often hard to detect and can overlap with inadmissibility issues related to criminality.

These concerns are relevant today, and they illustrate why inadmissibility under section 38 of the *IRPA* is not the appropriate mechanism to address anticipated risks posed by health conditions.

The provisions are ineffective

There is a very low rate of refusals under both provisions, which illustrates the limited utility of addressing public health concerns through immigration inadmissibility. As noted above, section 38(1)(a) does not have the capacity to address unprecedented, rapidly developing transmissible conditions. It is also not an effective response for conditions which temporarily pose a health concern. Notably, immigration inadmissibility was not used during the COVID-19 pandemic due to the temporary nature of transmissibility of the disease. Orders-in-Council limiting entry to Canada were found to be sufficiently effective to respond to the risk.

Section 38(1)(b) is engaged when future threats are anticipated based on previous history. None of the conditions described in the policy guidelines inherently or inevitably lead to public danger. An officer assessing an applicant's medical records would find it almost impossible to identify a public danger stemming from a health condition. IRCC's 2015 evaluation noted:

> … many visa officers interviewed and approximately half of all visa officers surveyed found assessing public safety cases difficult, noting that very few applications related to public safety are identified through the IME (immigration medical examination) process. In addition, [IRCC] visa officers, medical officers and [IRCC] NHQ interviewees noted the difficulty of identifying or assessing public safety cases, primarily due to the fact that the assessment relies on clients to self-identify mental health conditions and if the condition(s) are not obvious or present at the time of the IME, it is very difficult for the panel physician to detect.[8]

The provisions are not necessary given the presence of other tools

The only conditions identified as dangers to public health are active tuberculosis and untreated syphilis. Both are detectable and treatable, and therefore any "danger" they pose is temporary.

IRCC's online instructions acknowledge that either of these conditions can lead to inadmissibility based on section 38(1)(a), "unless the foreign national is treated according to Canadian standards". The primary

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[7] IRCC, "Evaluation of the Health Screening and Notification Program," November 2015, available online at: https://www.canada.ca/en/immigration-refugees-citizenship/corporate/reports-statistics/evaluations/health-screening-notification-program.html#es.

[8] *Ibid*, s. 3.2.2.

goal, therefore, should be to ensure that the conditions are detected and treated — not to bar entry to individuals with these health conditions. This is the role of IRCC's Medical Surveillance protocol, through which IRCC notifies provincial health authorities to ensure that the health condition is treated. Currently, only active tuberculosis is subject to the protocol.[9] If the provisions is repealed, medical surveillance would continue overseas, by requiring the commencement of treatment prior to passing a medical examination and in Canada with the cooperation of provincial health authorities.

A finding under s. 38(1)(b) requires an individualized assessment of an applicant's behaviour. If the behaviour was sufficiently dangerous prior to the application to move to Canada, it would likely have resulted in criminality which would be addressed through subsections 36(1) or (2). If the behaviour became evident after arrival in Canada, there are other tools in the criminal or public health systems that can be used to respond to the threat.

There is a high risk of stigmatization under the provisions

The provisions do not reflect the current societal view of the appropriate manner to respond to health conditions. Section 15 of the *Charter* prohibits discrimination on the basis of mental or physical disability, and commitments under the *Convention on the Rights of Persons with Disabilities* obligate Canada to ensure full and effective participation and inclusion for people with health conditions.[10] By contrast, subsections 38(1)(a) and (b) perpetuate an exclusionary and stigmatizing view of people with health conditions as threats to society which can only be managed through abject exclusion. This view is inaccurate and outdated.

s. 38(1)(c) – Excessive demands medical inadmissibility

Legislation

> **38 (1)** A foreign national is inadmissible on health grounds if their health condition
>
> ……..
>
> > **(c)** might reasonably be expected to cause excessive demand on health or social services.

Recommendation and rationale

This subsection should be repealed because there is no evidence demonstrating that its purpose is being achieved. In addition, the subsection perpetuates discrimination by viewing people with health conditions solely as potential financial burdens and ignoring their potential contributions. Finally, in 2018, then-Minister of Immigration, Refugees and Citizenship, Ahmed Hussen promised to repeal the regime entirely

[9] IRCC, "Medical Surveillance," 9 May 2014, available online at: www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/standard-requirements/medical-requirements/surveillance-notifications/medical-surveillance.html.

[10] United Nations General Assembly, *Convention on the Rights of Persons with Disabilities,* 24 January 2007, A/RES/61/106, available online at: www.refworld.org/docid/45f973632.htm.

in response to a Parliamentary subcommittee report recommending repeal. [11] That promise remains unfulfilled.

Background

As described by the Supreme Court, Canada's exclusion of people based on their health conditions has evolved from an expansive approach to an increasingly narrow one. Indeed, prior to *IRPA*'s enactment, the *Immigration Act* authorized "excessive demands" refusals to sponsored spouses, dependent children, and refugees, which were regularly successfully appealed to the Immigration Appeal Division.[12] *IRPA* introduced a blanket medical inadmissibility exemption for all applicants in those categories, based on "compelling humanitarian and compassionate reasons".[13]

The legislative narrowing of medical inadmissibility, along with records documenting Parliament's concerns about fairness, led the Supreme Court to remark upon s. 38(1)(c)'s legislative history as demonstrating an intention "to shift from an approach based on categorical exclusion to one calling for individualized assessments."[14] The Supreme Court extended that trend in *Hilewitz* by finding that medical inadmissibility findings on excessive demand require an examination of an applicant's ability to mitigate the anticipated costs of the specific health condition.[15]

The House of Commons Standing Committee on Citizenship and Immigration studied the provision at the end of 2017, hearing from government, expert witnesses, and members of the public. In December 2017, the Committee issued its final report on the matter [CIMM Report], recommending the full repeal of s. 38(1)(c), along with interim measures until the repeal could take place.[16]

In response, the government implemented a temporary policy which severely curtailed refusals under the provision.[17] First, the government tripled the cost threshold on which health conditions are assessed, from the average per capita cost of health care, to three times the average per capita cost of health care. Second, the government eliminated certain social services from s. 38(1)(c) consideration, specifically, special education, social and vocational rehabilitation services, and personal support services. That policy is now reflected in *IRPR*.[18]

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[11] See IRCC, "Government of Canada brings medical inadmissibility policy in line with inclusivity for persons with disabilities," news release, 16 April 2018, available online at: www.canada.ca/en/immigration-refugees-citizenship/news/2018/04/government-of-canada-brings-medical-inadmissibility-policyin-line-with-inclusivity-for-persons-with-disabilities.html "the Government agrees with the Standing Committee's recommendation to eliminate the policy and will collaborate with provinces and territories towards its full elimination"; see also Canada, Parliament, House of Commons, Standing Committee on Citizenship and immigration, *Building an Inclusive Canada: Bringing the Immigration and Refugee Protection Act in Step with Modern Values*, 42nd Parl, 1st Sess (December 2017) (Chair: Robert Oliphant).

[12] *Hilewitz v. Canada (Minister of Citizenship and Immigration*); *De Jong v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 SCR 706, para. 53.

[13] *IRPA* s. 38(2); Canada Gazette, Volume 135, No. 50, p. 4497, December 15, 2001.

[14] *Hilewitz*, *supra* note 58, para. 53

[15] *Hilewitz*, *supra* note 58, para. 53

[16] "Building an Inclusive Canada: Bringing the Immigration and Refugee Protection Act in Step with Modern Values", Report of the Standing Committee on Citizenship and Immigration, December 2017.

[17] Temporary Public Policy Regarding Excessive Demand on Health and Social Services,

[18] IRPR, R. 1(1).

In April 2018, the government committed to repeal of s. 38(1)(c), stating that "[…] the Government agrees with the Standing Committee's recommendation to eliminate the policy and will collaborate with provinces and territories towards its full elimination."[19]

The provision does not serve a purpose

Evidence demonstrates that actual savings from s. 38(1)(c) are insignificant at best, and uncertain at worst.[20] Specifically, in 2017, the government's own evidence was that only 900 to 1,000 of all applicants (0.2%) considered under s. 38(1)(c) were refused annually, with an estimated total savings of $135 million nationally[21], or $27 million for each province and territory. This accounted for 0.1% of provincial and territorial healthcare budgets.[22] It is difficult to claim that 0.1% of anything is "excessive".

The anticipated savings from this provision is now even smaller, given that in 2018 the government tripled the excessive demand threshold and removed certain treatment costs from the determination of excessive demand, namely costs related to special education, social and vocational rehabilitation services and personal support services.[23]

Moreover, any healthcare savings from this provision should be offset by the cost of administering the medical inadmissibility regime. This includes the cost of panel physicians, extended application processing times, appeals, and judicial review applications.

The provision discriminates on the basis of disability

While the analysis under s. 38(1)(c) is individualized thanks to *Hilewitz*, it is focused solely on the potential financial cost of an applicant with a disability and does not consider their potential economic or non-economic contributions.[24] Pursuant to this provision, Stephen Hawking or Terry Fox would likely be inadmissible without any consideration of their ability to contribute to Canada.

Viewing people solely through the lens of their potential costs on the public healthcare system perpetuates harmful and inaccurate stereotypes, including that people with disabilities are burdens on society and that migrants are simply here to abuse public resources. This is the essence of discrimination, contrary to the guarantees under s. 15 of the *Charter*[25] and Canada's obligations under the *Convention on the Rights of Persons with Disabilities*.

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[19] Government of Canada News Release: "Government of Canada brings medical inadmissibility policy in line with inclusivity for persons with disabilities", April 18, 2018.
[20] CIMM Report, *supra* note 64, p. 14.
[21] Canada's annual health care spending in 2022 was $331 billion: https://www.cihi.ca/en/national-health-expenditure-trends-2022-snapshot
[22] Standing Committee on Citizenship and Immigration, Evidence, Tuesday October 24, 2017, at 0859,
[23] Regulations Amending the Immigration and Refugee Protection Regulations (Excessive Demand): SOR/2022-39, Canada Gazette, Part II, Volume 156, Number 6, SOR/2022-39 March 4, 2022,.
[24] CIMM Report, *supra* note 64, page 14.
[25] *Granovsky v. Canada (Minister of Employment and Immigration*), [2000] 1 SCR 703, para. 28-30

s. 40.1 (1) and (2) Inadmissibility following cessation of refugee protection

Legislation

Cessation of refugee protection — foreign national

> **40.1 (1)** A foreign national is inadmissible on a final determination under subsection 108(2) that their refugee protection has ceased.

Cessation of refugee protection — permanent resident

> **40.1 (2)** A permanent resident is inadmissible on a final determination that their refugee protection has ceased for any of the reasons described in paragraphs 108(1)(a) to (d).

Recommendation and rationale

These sections add immigration inadmissibility to the consequences of cessation of a refugee claim. These consequences appear unjustified, unjustifiably harsh and do not reflect the variety of circumstances in which refugee protection can be subject to cessation.

Loss of permanent residence was made a consequence of cessation based on an unfounded assumption that cessation implies fraud. However, the main reasons for cessation - change in country conditions and a refugee's return to their country – do not imply fraud.

Refugee protection is distinct from permanent residence. A refugee may no longer need or want protection, but still want to continue as a permanent resident. Under these subsections individuals who have been settled in Canada for decades are subject to removal because they returned to their home country.

When the pathway to permanent residence for refugees was created, it was meant to grant security through "permanent" residence, recognizing the long-term conditions can change in the home country. By contrast, these provisions inject insecurity through the revocation of permanent residence based on circumstances beyond a person's control.

R. 117(9)(d) – Exclusion from the family class for previously undisclosed family

Legislation

R. 117(9)(d) - A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.

Recommendation and rationale

This provision should be repealed as it is over-broad, has very limited remedial recourse, and is a violation of the objective of "family reunification" as stated in section 3 of the *IRPA.* The repeal of s. 38(1)(c), as recommended above, also justifies the repeal of this section because the section's purpose is to enforce medical inadmissibility.

Background

Section 117(9)(d) was added to the *IRPR* in 2002 under the Liberal government of Jean Chrétien. It was introduced to prevent "fraudulent abuse"[26], despite the fact that this term was not defined. The application of this regulation imposes a lifetime bar on the ability of a Canadian citizen or permanent resident to sponsor a non-accompanying member of the family class (primarily spouses and children) who was not declared at the time of the sponsor's application, and thus was not examined.

On September 9, 2019, when a public policy was put in place to allow an exception to this provision, the intention of the regulation was stated as ensuring that the officer making a decision on a sponsor's initial permanent residence application can ensure family members would not make the principal applicant ineligible or inadmissible. The regulation, according to the public policy, was put in place to "encourage full disclosure by immigrant applicants, to enhance the overall integrity of Family Class immigration, and to protect the health, safety, and security of Canadians."[27]

It is clear that the primary purpose of R. 117(9)(d) is to serve as an enforcement mechanism for medical inadmissibility under s. 38(1)(c). The harm targeted by the regulation is the non-disclosure of an inadmissible family member in a permanent residence application, and the subsequent sponsoring of that family member in a category to which the inadmissibility does not apply. Medical inadmissibility is the only inadmissibility avoided in a family class sponsorship. All other inadmissibilities would apply regardless of whether the family member was originally disclosed or not.

Repeal of s. 38(1)(c) should lead to repeal of R. 117(9)(d)

Because of the connection between s. 38(1)(c) and R. 117(9)(d), the repeal of the former (recommended above) leaves the latter purposeless, justifying repeal.

Severe impact of R. 117(9)(d) justifies repeal

The primary impact of this regulation is that it prevents family reunification, without a review of the unique circumstances of each case. There are many factors that result in non-disclosure that affect almost all sponsors, such as a lack of knowledge about the requirement to disclose, a misunderstanding of what qualifies (culturally and legally) as a "dependent", language barriers, inadvertent mistakes, and relying on bad advice or representation.[28] However, certain groups have been disproportionately impacted by the application of this law. These groups unfortunately include some of the most vulnerable individuals worldwide.

Children: The most concerning aspect of the application of this provision is that over 50% of the applications found to violate s. 117(9)(d) were sponsorships of children.[29] Children were not declared for a variety of reasons, including that the parent did not have custody, the parent feared they would be exposed

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[26] Regulatory Impact Analysis Statement (2002) Canada Gazette II, Vol 138, No 16 at 1100.

[27] Government of Canada, "Public Policy to facilitate the immigration of certain sponsored foreign nationals excluded under paragraph 117(9)(d) or 125(1)(d) of the Immigration and Refugee Protection Regulations" (July 5, 2019), online: https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/excluded.html.

[28] Liew, Jamie et. al. "Troubling Trends in Canada's Immigration System Via the Excluded Family Member Regulation: A Survey of Jurisprudence and Lawyers." *Journal of Law and Social Policy* (2017) at 123-125.

[29] Liew, Jamie et. al. "Troubling Trends in Canada's Immigration System Via the Excluded Family Member Regulation: A Survey of Jurisprudence and Lawyers." *Journal of Law and Social Policy* (2017) at 114.

to their family or community for having a child out of wedlock or an extra-marital affair, they feared for the child's safety in their home country, or the parent did not know of their existence or the child was born while the application was pending.[30] Regardless of these reasons, the child is punished for an error made by their parent, in circumstances outside of their control. The lengthy waiting times of H&C applications are especially impactful for children and their mental and physical health, as they must spend much of their childhood without their family. Many children are in the care of families in their home country who cannot support another child, or in a third country with no or insecure status.

Women and victims of gender-based violence: Research reveals that the reasons sponsors do not disclose their family members are particularly gendered. Many have had children outside of wedlock or from an extra-marital affair or have children from a previous relationship they did not want their current partners to know about. Likewise, cultural stigma and a fear of being exposed by society or to their families (who are often applying as a group and therefore would have access to a list of the woman's dependents) stop them from declaring their children born in these circumstances, or the existence of a common-law relationship. Victims of gender-based violence are either pressured by their parents to not reveal children born out of another relationship, or do not disclose after fleeing an abusive partner, especially if they require custody documents signed by the partner to bring their children to Canada.[31]

Refugees: As stated in the public policy, refugees are amongst the most vulnerable members of Canadian society. A fear that their claim will be rejected, and they will be returned to their country of persecution is a primary reason many refugees do not disclose their dependents. Moreover, many refugees arrive in Canada with limited language skills, few resources, and no connections to legal representation or guidance in making their claims. A distrust of public authorities and government as well as concerns about confidentiality are often well-founded from their experiences. It is common for them not to disclose their dependents in their home countries for fear of their safety, and that they will be exposed to the authorities.[32] Refugees are more likely than others to suffer the long-term impacts of separation resulting from R. 117(9)(d), as they cannot go to their home countries to reunite with their families like other kinds of newcomers.

Limited relief from R. 117(9)(d) combined with severe consequences leads to overbreadth

This provision is needlessly restrictive and leaves the potential sponsor with extremely limited if any recourse to overcome the regulation. There is no right of appeal to R. 117(9)(d), and the ban is lifelong. Compare this to section 40(1) of the *IRPA*, where misrepresentation (a provision also dedicated to preventing fraudulent abuse and protecting the integrity of the immigration system) is limited to a five-year period and can be appealed by spouses, partners and children to the IAD where humanitarian and compassionate (H&C) factors can be considered. The misrepresentation provision also only applies when the officer believes that the decision would have been different if accurate information was disclosed. There is no similar requirement for R. 117(9)(d).[33]

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[30] Liew, Jamie et. al. "Troubling Trends in Canada's Immigration System Via the Excluded Family Member Regulation: A Survey of Jurisprudence and Lawyers." *Journal of Law and Social Policy* (2017) at 123-125.
[31] Liew, Jamie et. al. "Troubling Trends in Canada's Immigration System Via the Excluded Family Member Regulation: A Survey of Jurisprudence and Lawyers." *Journal of Law and Social Policy* (2017) at 123-125.
[32] Liew, Jamie et. al. "Troubling Trends in Canada's Immigration System Via the Excluded Family Member Regulation: A Survey of Jurisprudence and Lawyers." *Journal of Law and Social Policy* (2017) at 123-125.
[33] See *Immigration and Refugee Protection Act*, SC 2001, c 27, s. 40 and Liew, Jamie et. al. "Troubling Trends in Canada's Immigration System Via the Excluded Family Member Regulation: A Survey of Jurisprudence and Lawyers." *Journal of Law and Social Policy* at 114-115.

R. 117(9)(d) has been criticized as a "strict liability regime" where the bar is automatic, and does not consider issues of intent and fault on the part of the sponsor.[34] This is particularly troubling because studies have found that 92% of those found to violate the provision have no fraudulent intent.[35] Instead, the main causes of a failure to declare a member of the family class were primarily misunderstanding, a failure to update their application, was unaware a child existed at the time of the application, a fear of exposure and a lack of knowledge about the application or bad advice.[36]

While the sponsor can apply for a s. 25(1) H&C exception to the provision, this process is lengthy, expensive, discretionary, and is only effective in 47% of the cases. 23% of successful applications were the second or third H&C application the sponsor had submitted.[37]

According to a 2017 lawyer survey, the length of time of separation to approve a sponsorship application in this way was between four months and thirteen years. 45% of these cases had a wait time of over 5 years.[38] This is not consistent with the *IRPA* objective of family reunification. The Canadian Council of Refugees has expressed serious concern about the transparency and consistency of H&C decision-making and found that the best interest of the child was applied arbitrarily in H&C considerations around an excluded child.[39] 55% of the cases had no interaction with the Federal Court, where a legal professional will review the application.[40]

The Consecutive Public Policy to Facilitate the Immigration of Certain Sponsored Foreign Nationals Excluded under Paragraph 117(9)(d) or 125(1)(d) of the Immigration and Refugee Protection Regulations[41]

This public policy facilitates permanent residence for family members excluded under s. 117(9)(d). The policy was introduced as a pilot in 2019 and was renewed in 2021, and 2023, remaining in force until 2026.[42]

The policy applies to applications in which sponsors originally received permanent residence as sponsored spouses/partners or as refugees. Justification for exemption from R. 117(9)(d) is that their undisclosed dependents were exempt from the "excessive demand" provision and would have minimal impact on the functioning of Canada's immigration system. The policy does not apply in situations where the inclusion of the dependent at the time of their permanent residence application would have made them ineligible.

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[34] Canadian Council for Refugees, "Excluded Family Members: Brief on R. 117(9)(d)" (May 2016).
[35] Canadian Council for Refugees, "CCR's comments on CIC's R117(9)(d) Excluded Relationships Report" (14 April 2010); Canadian Council for Refugees, "Excluded Family Members: Brief on R. 117(9)(d)" (May 2016).
[36] Liew, Jamie et. al. "Troubling Trends in Canada's Immigration System Via the Excluded Family Member Regulation: A Survey of Jurisprudence and Lawyers." *Journal of Law and Social Policy* (2017) 123-126.
[37] Amy Colbourne and Rachel Brule for CIC, *Regulation 117(9)(d) Excluded Relationships Report* (February 25, 2010).
[38] Liew, Jamie et. al. "Troubling Trends in Canada's Immigration System Via the Excluded Family Member Regulation: A Survey of Jurisprudence and Lawyers." *Journal of Law and Social Policy* (2017) at 129.
[39] Canadian Council for Refugees, "Excluded Family Members: Brief on R. 117(9)(d)" (May 2016).
[40] Liew, Jamie et. al. "Troubling Trends in Canada's Immigration System Via the Excluded Family Member Regulation: A Survey of Jurisprudence and Lawyers." *Journal of Law and Social Policy* (2017) at 129.
[41] Consecutive public policy to facilitate the immigration of certain sponsored foreign nationals excluded under paragraph 117(9)(d) or 125(1)(d) of the Immigration and Refugee Protection Regulations - Canada.ca
[42] Government of Canada, "Program delivery update: Pilot program to exempt permanent residence applicants in the family class or the spouse or common-law partner in Canada (SCLPC) class from paragraph R117(9)(d) or R125(1)(d) exclusion", October 30, 2023, online: https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/updates/2023-pilot-exempt-family-sclpc.html.

The policy's renewal on two occasions indicates that it has met with significant success in addressing concerns related to the disproportionate impact of the lifetime bar on family reunification. Full repeal of the provision would be a more effective means of achieving this goal.

R. 55 – Issuance of permanent resident cards

Legislation

R. 55 A permanent resident card shall only be provided or issued in Canada.

Recommendation and rationale

The wording of this provision is ambiguous and has been interpreted to mean that applicants must be physically present within Canada in order to apply for their permanent resident card. There seems to be no valid policy rationale supporting this requirement, which can be onerous and unjust for some applicants, often those who are with a Canadian spouse, employed abroad.

Permanent resident cards are travel documents, and therefore, should be treated the same way as an application for a renewal of a Canadian passport which is also a travel document. Permanent residents should be able to apply from abroad through the trade section of a Canadian visa office, like a Canadian citizen applying for a passport from abroad. In Canada permanent residents should be able to go to a Service Canada Office to request a new permanent resident card and should get 10-day processing and have the option of urgent processing based on the same criteria provided to Canadian citizens for renewal of passports. If there is a residence or enforcement issue related to the permanent resident card renewal, Service Canada could issue a short term 6 or 12-month permanent resident card, and have the application referred to IRCC for review of the residence obligation.

R. 5 and R. 117(9)(c.1) Excluded relationships (marriage by proxy)

Legislation

R. 5 For the purposes of these Regulations, a foreign national shall not be considered

- (c) the spouse of a person if at the time the marriage ceremony was conducted either one or both of the spouses were not physically present unless the person was not physically present at the ceremony as a result of their service as a member of the Canadian Forces and the marriage is valid both under the laws of the jurisdiction where it took place and under Canadian law.

R. 117(9)(c.1) the foreign national is the sponsor's spouse and if at the time the marriage ceremony was conducted either one or both of the spouses were not physically present unless the foreign national was marrying a person who was not physically present at the ceremony as a result of their service as a member of the Canadian Forces and the marriage is valid both under the laws of the jurisdiction where it took place and under Canadian law;

Recommendation and rationale

If a proxy marriage is allowed for members of the Canadian Armed Forces, it should be acceptable for others. Given advances in video technology such as Zoom, FaceTime, and Teams, other areas of the law have recognized the ability to conduct business and personal affairs remotely. IRCC regularly conducts citizenship ceremonies remotely through video technology as well as virtual landings; marriages conducted in this format should also be recognized.

The ability to conduct proxy marriages over video would also be helpful for individuals without financial means, or the legal ability to travel and be physically present with their spouse in order to marry them. There are also benefits to refugees, displaced persons, and religious groups where certain pre-marriage processes are enforced. Further, existing provisions regarding misrepresentation and criminal misrepresentation would protect against the abuse of this.

s. 31.1 Refugee Travel Document

Legislation

31.1 For the purposes of Article 28 of the Refugee Convention, a designated foreign national whose claim for refugee protection or application for protection is accepted is lawfully staying in Canada only if they become a permanent resident or are issued a temporary resident permit under section 24. 2012, c. 17, s. 16.

Recommendation and rationale

This punitive section should be repealed because it denies lawful status to persons deemed to be designated foreign nationals even if they require protection and increases the risk of *refoulement*.

The effect of this section is that designated foreign nationals will not benefit from Article 28 of the Refugee Convention, which requires contracting states, such as Canada, to issue travel documents to refugees lawfully staying in their territory. Put in simpler terms, designated foreign nationals will not have the ability to travel outside of Canada for at least five years after acceptance of their refugee claim.

If the protection and resettlement of refugees or persons in need of protection are one of the core objectives/intents of parliament, the existence of s. 31.1 runs contrary to those objectives and Canada's obligation under the 1951 Refugee Convention and the 1967 protocol.

This is the position stated by the United Nations High Commission on Refugees (UNHCR) in its May 2012 submission on this section:

> *The new section 31.1 is at variance with Article 28 of the 1951 Convention, which provides that "Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory unless compelling reasons of national security or public order otherwise require...." Although the term "lawfully staying" has no universally consistent meaning, it is UNHCR's view that "stay" means a permitted regularized stay of some duration – including either permanent or temporary residence, while "lawful" normally is to be assessed against prevailing national laws and regulations.19 A judgment as to lawfulness should nevertheless take into account all the prevailing circumstances, including the fact that the stay in question is known and not prohibited. Formally*

> *recognized refugees whose status in the country has been permitted by the granting State should be considered to be "lawfully staying" in their host country, and consequently, be entitled to benefit from the right to Convention Travel Documents per Article 28 of the 1951 Convention, unless there are compelling reasons of national security or public order to deny a Convention Travel Document in the individual case.*[43]

UNHCR recommends deleting Section 31.1 of Bill C-31 or alternatively, bringing it in line with the wording and meaning of Article 28 of the 1951 Convention. We agree.

Section II: Amend

s. 40(2)(a) and 40 (3) – Consequences of misrepresentation inadmissibility

Legislation

Section 40 of the Immigration and Refugee Protection Act deals with inadmissibility on grounds of misrepresentation. Subsection (2) and (3) of this section reads as follows:

> **(2) (a)** the permanent resident or the foreign national continues to be inadmissible for misrepresentation for a period of five years following, in the case of a determination outside Canada, a final determination of inadmissibility under subsection (1) or, in the case of a determination in Canada, the date the removal order is enforced; and
>
> **(3)** A foreign national who is inadmissible under this section may not apply for permanent resident status during the period referred to in paragraph (2)(a).

Recommendation and rationale

These provisions should be amended because they impose severe consequences in circumstances in which the alleged misrepresentation was based on an innocent mistake, misunderstanding, or bad advice.

Background

Prior to 2014, the period of ban for misrepresentation inadmissibility was two years. This was changed when an amendment to the *Faster Removal of Foreign Criminals* Act (FRFCA) resulted in the inadmissibility period being raised from two years to five years.

Harsh consequences of the provision justify amendment

The prohibition on even filing an application for five years after a finding of misrepresentation, combined with the processing time of the application subsequently filed, amounts to a *de facto* permanent ban on

[43] UNHCR Submission on Bill C-31 Protecting Canada's Immigration System Act, May 2012, para. 27: https://www.unhcr.ca/wp-content/uploads/2014/10/RPT-2012-05-08-billc31-submission-e.pdf

applicants. Few applicants would persevere after a delay of six years or more in their immigration aspirations.

While the goal of protecting the integrity of the immigration system is valuable, many misrepresentations occur in the context of inexperienced, self-represented applicants who do not understand multiple highly technical requirements or are misadvised. As such, there is a high risk of inappropriate or overly broad application of the section.

A finding of inadmissibility for misrepresentation makes the applicant ineligible to apply to enter Canada for a period of 5 years. This leaves the applicant with very limited options:

1) Challenging the decision – The applicant may choose to challenge the decision in the Federal Court by way of Judicial Review. This is a very expensive option with a very low likelihood of success. Since misrepresentation can either be direct or indirect and intent (malicious or *bona fide*) is not taken into account, a finding of misrepresentation can only be overturned in the very rare and exceptional circumstances where an applicant honestly and reasonably believes that they were not misrepresenting a material fact and knowledge of the misrepresentation was beyond the applicant's control.[44]

2) Applying for an Authorization to Return to Canada (ARC) together with a Temporary Resident Permit (TRP) – The applicant may apply for these two applications simultaneously to try to overcome inadmissibility. However, these discretionary processes offer no guarantee of a positive outcome and largely depend on the circumstances of the case.

3) Waiting until the five-year ban ends to apply – Lastly, the applicant may choose to wait until the five-year ban period ends and reapply. This is the least efficient option, but is one that most applicants are forced to take. This results in applicants having to wait an unduly long period and may have harsh consequences. In many cases minor children and dependent spouses are also forced to endure the lengthy ban. Additionally, indirect and/or innocent misrepresentation is given no separate treatment. These are considered misrepresentations too and attract the same penalty of a five-year ban, often catching applicants who either had no knowledge of the misrepresentation or were an innocent party. This is exacerbated by the lengthy processing times for the applications which, in many cases, run into years. All the above combined have the effect of imposing unnecessarily harsh consequences.

Alternative recommendations

Given the excessively punitive and harsh consequences of the misrepresentation ban, we propose the following:

a) Cap – Instead of the five-year ban, the bar could be capped at one year which would be a more proportionate penalty to a finding of misrepresentation.
b) Officer's discretion – If justified in the circumstances, especially in cases of an indirect or innocent misrepresentation, officers could be given additional discretion to waive the bar with an explicit acknowledgement of their authority to do so.
c) Provide a scale that gives the officer discretion based on the seriousness of the misrepresentation, e.g., no bar for innocent misrepresentation, no more than a 1-year bar for

[44] *Wang v Canada (Citizenship and Immigration)*, 2018 FC 368.

serious misrepresentation. This would be complemented by policy or a manual that provides guidance for exercising discretion. It would send a message to officers that misrepresentation requires flexibility and justification. Waivers of the bar should be explicitly acknowledged in the legislation.

d) Allow applications to be filed during the ban – Lastly, we propose that the amendment could allow applicants to file an application during the barred period, with the caveat that the application will not be finalized until the bar expires.

s. 14.1 – Ministerial instructions for economic immigration

Legislation

14.1 (1) For the purpose of supporting the attainment of economic goals established by the Government of Canada, the Minister may give instructions establishing a class of permanent residents as part of the economic class referred to in subsection 12(2) and, in respect of the class that is established, governing any matter referred to in paragraphs 14(2)(a) to (g), 26(a), (b), (d) and (e) and 32(d) and the fees for processing applications for permanent resident visas or for permanent resident status and providing for cases in which those fees may be waived.

Recommendation and rationale

This section should be amended to create a 60-day notice period allowing for commentary of Ministerial Instructions regarding the economic class. If such an amendment was accepted, we would eventually recommend further amendments that establish a notice period, which would also require the Minister to provide reasons for the change. In some urgent cases, this notice period could be waived. In essence, this is equivalent to a Regulatory Impact Analysis Statement accompanying ministerial instructions in this area.

If this amendment is accepted, it would provide the basis for extending this procedure to all ministerial instructions – not just those regarding the economic classes. This recommendation will increase transparency, predictability, and accountability in a class that is crucial to Canada's economic performance.

s. 22(1) – Temporary resident

Legislation

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

Recommendation and rationale

The section should be updated to remove the reference to "will leave Canada by the end of the period authorized for their stay" and instead state that a temporary visa holder will leave "if and when they are required to do so."

Many temporary residents apply to extend or change their status at the end of the period authorized for their stay, and the strict wording of the current provision penalizes them for doing so. The appropriate

legislative goal is to define a temporary resident by their intention to comply with the requirement to leave when required to do so, and the suggested language more accurately reflects this.

s. 33 Inadmissibility - Rules of interpretation

Legislation

33 The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.

Recommendation and rationale

The Committee was of the view that the standard of proof under this section is too low, capturing many applicants who are not threats, and it recommended that the standard be elevated. The Board acknowledged this concern, but no consensus could be reached on the Committee's recommendation given widespread concerns regarding the threats covered by sections 34 to 37. As such, CILA recommends that a system for appropriate redress for inadmissibility findings be put into place, such as specially trained officers to review findings of inadmissibility covered by s. 33.

s. 39 - Financial reasons

Legislation

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

Recommendation and rationale

This basis of inadmissibility should require consideration of broader financial support from family members or organizations prior to a finding of inadmissibility. Additions should be made to this provision to allow consideration of the broader contributions of family members or organizations, similar to the inclusion of a co-signer within the sponsorship process.

This provision can create barriers by requiring foreign nationals to have sufficient funds for care and support. This ignores the reality that many families rely on a broader network of support from siblings, aunts, uncles, or even non-profit organizations for financial support. These wider familial contributions to the care and support of foreign nationals should be considered instead of rendering them inadmissible.

ss 34, 35, and 37 - Exemption from security inadmissibility

Legislation

34 (1) A permanent resident or a foreign national is inadmissible on security grounds for

- (a) engaging in an act of espionage that is against Canada or that is contrary to Canada's interests;

(b) engaging in or instigating the subversion by force of any government;
(b.1) engaging in an act of subversion against a democratic government, institution or process as they are understood in Canada;
(c) engaging in terrorism;
(d) being a danger to the security of Canada;
(e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or
(f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b), (b.1) or (c).

(2) [Repealed, 2013, c. 16, s. 13]

35 (1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for

(a) committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*;
(b) being a prescribed senior official in the service of a government that, in the opinion of the Minister, engages or has engaged in terrorism, systematic or gross human rights violations, or genocide, a war crime or a crime against humanity within the meaning of subsections 6(3) to (5) of the *Crimes Against Humanity and War Crimes Act*; or
(c.1) having engaged in conduct that would, in the opinion of the Minister, constitute an offence under section 240.1 of the *Criminal Code*.

(2) [Repealed, 2023, c. 19, s. 5]

37 (1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for
(a) being a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern; or

(b) engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or laundering of money or other proceeds of crime.
(2) Paragraph (1)(a) does not lead to a determination of inadmissibility by reason only of the fact that the permanent resident or foreign national entered Canada with the assistance of a person who is involved in organized criminal activity.

Exception — application to Minister
42.1 (1) The Minister may, on application by a foreign national, declare that the matters referred to in section 34, paragraph 35(1)(b) and subsection 37(1) do not constitute inadmissibility in respect of the foreign national if they satisfy the Minister that it is not contrary to the national interest.
Exception — Minister's own initiative
(2) The Minister may, on the Minister's own initiative, declare that the matters referred to in section 34, paragraph 35(1)(b) and subsection 37(1) do not constitute inadmissibility in respect of a foreign national if the Minister is satisfied that it is not contrary to the national interest.
Considerations
(3) In determining whether to make a declaration, the Minister may only take into account national security and public safety considerations, but, in his or her analysis, is not limited to considering the danger that the foreign national presents to the public or the security of Canada.
……..

Delegation of powers

6(2) Anything that may be done by the Minister under this Act may be done by a person that the Minister authorizes in writing, without proof of the authenticity of the authorization.
(3) Despite subsection (2), the Minister may not delegate the power conferred by subsection 20.1(1), section 22.1 or subsection 42.1(1) or (2) or 77(1).

Recommendation and rationale

CILA recommends that the protection from inadmissibility within s. 34, 35, and 37 for those who satisfy the Minister that their presence in Canada would not be detrimental to the national interest should be restored. This would reflect the wording which was removed from ss. 34, 35 and 37 in 2013 in the *Faster Removal of Foreign Criminals Act*.[45] CILA also recommends that subsection 42.1 be repealed.

While s. 42.1 currently allows for Ministerial relief from ss. 34, 35, and 37, the Minister is just one individual and has a limited capacity to exercise relief due to his/her competing duties. Furthermore, as the Minister is an elected representative, decisions may be heavily influenced by public opinion, or other political factors such as party discipline. Applications under s. 42.1 experience excessively lengthy processing times, if they are decided at all. Incorporating the current relief provision as part of the determination of inadmissibility is just and expeditious.

In addition, the versions of the *IRPA* included built-in provisions under sections 34, 35 and 37 to avoid inadmissibility if a foreign national's presence was not detrimental to the national interest. Furthermore, s. 25 of the *IRPA* also did not include a bar on inadmissibility under sections 34, 35 or 37. In June 2013, the Harper government's Minister of Immigration Jason Kenney passed the *Faster Removal of Foreign Criminals Act* which sought to tighten restrictions on curing inadmissibility. Section 25 was amended to preclude foreign nationals inadmissible on security grounds to make a claim for humanitarian and compassionate relief and sections 34(2), 35(2) and 37(2) were repealed.

CILA recommends the restoration of relief provisions within ss. 34, 35 and 37. These determinations should be made by specially trained officers similar to those that currently operate within the Ministerial Relief Unit.

s. 40 (1) (a-c), (2)(a) and 40 (3) – Misrepresentation

Legislation

40 (1) A permanent resident or a foreign national is inadmissible for misrepresentation

> (a) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;
>
> (b) for being or having been sponsored by a person who is determined to be inadmissible for misrepresentation;
>
> (c) on a final determination to vacate a decision to allow their claim for refugee protection or application for protection; or

[45] Each section had a subsection stating: "(2) The matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest."

(d) on ceasing to be a citizen under

(i) paragraph 10(1)(a) of the *Citizenship Act*, as it read immediately before the coming into force of section 8 of the *Strengthening Canadian Citizenship Act*, in the circumstances set out in subsection 10(2) of the *Citizenship Act*, as it read immediately before that coming into force,

(ii) subsection 10(1) of the *Citizenship Act*, in the circumstances set out in section 10.2 of that Act, or

(iii) subsection 10.1(3) of the *Citizenship Act*, in the circumstances set out in section 10.2 of that Act.

(2) The following provisions govern subsection (1):

(a) the permanent resident or the foreign national continues to be inadmissible for misrepresentation for a period of five years following, in the case of a determination outside Canada, a final determination of inadmissibility under subsection (1) or, in the case of a determination in Canada, the date the removal order is enforced; and

(b) paragraph (1)(b) does not apply unless the Minister is satisfied that the facts of the case justify the inadmissibility.

(3) A foreign national who is inadmissible under this section may not apply for permanent resident status during the period referred to in paragraph (2)(a).

Recommendation and rationale

CILA recommends amending the wording in section 40 to restrict the provision to instances where a misrepresentation has induced or is likely to induce an error. One way of doing this could be to change the wording from 'could' to 'would', i.e., "…. relevant matter that induces or would induce an error ….".

The law around misrepresentation is overly broad, covering innocent mistakes and instances where the information left out has no relevance to the person's admissibility. Our recommendations narrow the provision's broad application.

In addition, as stated above, the harsh consequences of this provision are out of proportion to the wide variety of circumstances in which the provision is applied. The five-year bar is punitive, especially given the excessive delays in processing. We recommend a scale that provides the officer with discretion based on the seriousness of the misrepresentation, e.g., a 0-year bar for innocent misrepresentation, no more than a 1-year bar for serious misrepresentation. This would be complemented by policy or a manual that provides guidance for exercising discretion. It would send a message to officers that misrepresentation requires flexibility and justification. Waivers of the bar should be explicitly acknowledged in the legislation. A one year cap on inadmissibility may is also recommended.

R. 12 – Return of application

Legislation

R. 12 Subject to section 140.4, if the requirements of sections 10 and 11 are not met, the application and all documents submitted in support of it, except the information referred to in subparagraphs 12.3(b)(i) and (ii), shall be returned to the applicant.

Recommendation and rationale

The regulation should be amended to add the words "if the completeness check is conducted within 30 days of the application". This puts a time limit on the IRCC, barring them from delaying a completeness check then returning the whole application at significant hardship to the applicant. If IRCC takes longer than 30 days, the officer would be required to establish contact with the applicant to provide them with an opportunity to correct the deficiency.

We have encountered situations in which a child ages out and turns 22 in the time it takes to hear back from IRCC that the application is incomplete; a new law is introduced that is detrimental to the individual; the applicant's birthday passes and they lose CRS points and miss the next draw cutoff; or, the applicant applied for an open bridging work permit based on pending sponsorship or permanent residence application and now is out of status and can't work and isn't eligible for another type of work permit.

R. 130(2) – Sponsor not residing in Canada

Legislation

R. 130(2) A sponsor who is a Canadian citizen and does not reside in Canada may sponsor a foreign national who makes an application referred to in subsection (1) and is the sponsor's spouse, common-law partner, conjugal partner or dependent child who has no dependent children, if the sponsor will reside in Canada when the foreign national becomes a permanent resident.

Recommendation and rationale

CILA recommends the removal of the words "who is a Canadian citizen" so that permanent resident sponsors may also reside outside of Canada as long as they meet s. 28 residence requirements.

It is arbitrary and unfair to make a distinction between citizens and permanent residents in this context. There are scenarios where Canadian permanent residents must wait years to sponsor their spouses due to sponsorship residency requirements, or spend significant time apart, creating significant hardship including relationship breakdown.

R. 181 – Extension of status

Legislation

R. 181 (1) A foreign national may apply for an extension of their authorization to remain in Canada as a temporary resident if

(a) the application is made by the end of the period authorized for their stay; and

(b) they have complied with all conditions imposed on their entry into Canada.

Recommendation and rationale

The provision should be amended so that someone seeking extension of status inland can also obtain a temporary resident visa through a single application. Currently the process requires applicants to go through a two-step process. It is time-consuming and unnecessary.

R. 183(5), R. 186(u) –Maintained status

Legislation

R. 183(5) Subject to subsection (5.1), if a temporary resident has applied for an extension of the period authorized for their stay and a decision is not made on the application by the end of the period authorized for their stay, the period is extended until

- **(a)** the day on which a decision is made, if the application is refused; or
- **(b)** the end of the new period authorized for their stay, if the application is allowed.

R. 186 A foreign national may work in Canada without a work permit

u) until a decision is made on an application made by them under subsection 201(1), if they have remained in Canada after the expiry of their work permit and they have continued to comply with the conditions set out on the expired work permit, other than the expiry date;

Recommendation and rationale

The provisions should be amended to allow people to travel outside of Canada without interrupting maintained status. Currently temporary residents extending or changing status are trapped in Canada at the mercy of unpredictable processing timelines.

Division 6 – Penalties on employers for failure to comply

Legislation

Division 6 contains regulations authorizing monetary penalties and other consequences designed to encourage employers' compliance with provisions of the Act.

Recommendations and rationale

We recommend an amendment to section 124 (1)(c) of IRPA to read as follows:

"Every person commits an offence who… (c) employs directly or indirectly a foreign national in a capacity in which the foreign national is not authorized under this Act to be employed".

The rationale for this change is to address the many situations where companies avoid liability under section 124 or the Administrative Monetary Penalties (AMPs) by virtue of the fact that they are not the employer of record (i.e. the foreign workers are not on the company's payroll) but instead an agency is directly paying the foreign national and is the employer of record. Consequently, companies can and do avoid ensuring that temporary foreign workers are legally able to work for their business by hiding behind

the employment agency. This would level the playing field for all employers employing foreign workers and provide protection to all foreign workers, not just those on closed/employer specific work permits.

We also recommend that section 209, Division 6 of the Regulations dealing with AMPs be amended to include companies that employ any foreign workers including foreign workers that are not legally authorized to work in Canada. This would require section 209 to be re-written. The rationale is that employers that hire individuals on open work permits and mistreat foreign workers, or that hire individuals that do not have legal authority to work in Canada are not prosecuted under section 124 except in the most egregious circumstances and these companies/employers avoid all consequences because they are not subject to Reg 209, Division 6 dealing with AMPs. Currently, Division 6 only applies to those employers that secure closed/employer specific work permits for foreign workers under the TFWP or IMP.

R. 209.9 – Entry to verify compliance

Legislation

R. 209.8 (1) Subject to subsection (5), if any of the circumstances set out in section 209.5 exists, an officer may, for the purpose of verifying compliance with the conditions set out in section 209.2, enter and inspect any premises or place in which a foreign national referred to in that section performs work.

Recommendation and rationale

The provision should be amended so that employees are informed of their right to be notified of their right to counsel and their right to refuse to answer questions. Employment and Social Development Canada (ESDC) should provide questions they intend to ask the employee to both the employer and employee in advance so that the employer and employee can fairly determine if the questions are relevant and be provided an opportunity to object. Not all employees understand that they do not have to answer all questions and they are not always aware of their right to counsel when ESDC is assessing employer compliance, especially when reviews do not take place at the workplace. Further, given the consequences to employers, the process should be transparent and fair.

R. 205 – Canadian interests work permits

Legislation

R. 205 A work permit may be issued under section 200 to a foreign national who intends to perform work that

> (a) would create or maintain significant social, cultural or economic benefits or opportunities for Canadian citizens or permanent residents;
>
> (b) would create or maintain reciprocal employment of Canadian citizens or permanent residents of Canada in other countries;
>
> (c) is designated by the Minister as being work that can be performed by a foreign national on the basis of the following criteria, namely,
>
> > (i) the work is related to a research program,

(i.1) the work is an essential part of a post-secondary academic, vocational or professional training program offered by a designated learning institution as defined in section 211.1,

(i.2) the work is an essential part of a program at the secondary level

- (A) that is a vocational training program offered by a designated learning institution in Quebec, or
- (B) that is a program offered by a designated learning institution that requires students to work in order to obtain their secondary or high school diploma or certificate of graduation, or

(ii) limited access to the Canadian labour market is necessary for reasons of public policy relating to the competitiveness of Canada's academic institutions or economy; or

(d) is of a religious or charitable nature.

Recommendation and rationale

The provision should be amended to allow spouses and partners of Canadians and permanent residents to obtain an open work permit regardless of whether a sponsorship application is filed.

Spouses and partners of Canadians and permanent residents should have access to open work permits outside of the sponsorship process. Work permits are already available to the spouses of temporary foreign workers, yet spouses/partners of Canadians and permanent residents are inexplicably deprived of this benefit. This creates a disproportionate hardship for spouses and partners who may not be eligible for health coverage, banking services and other benefits that flow from holding a work permit.

R. 182 - Restoration

Legislation

R. 182 (1) On application made by a visitor, worker or student within 90 days after losing temporary resident status as a result of failing to comply with a condition imposed under paragraph 185(a), any of subparagraphs 185(b)(i) to (iii) or paragraph 185(c), an officer shall restore that status if, following an examination, it is established that the visitor, worker or student meets the initial requirements for their stay, has not failed to comply with any other conditions imposed and is not the subject of a declaration made under subsection 22.1(1) of the Act.

Recommendation and rationale

The provision should be amended to:

1) clarify that temporary status is not required to be restored to the status previously occupied by the temporary resident. and
2) allow the temporary resident to continue to work or study while their restoration application is in process.

Currently, applicants are confused about whether they are restricted in restoring their status to the status they had before they fell out of status. The recommended change should reflect that a foreign national may apply to restore their temporary resident status directly in any of the temporary classes: visitor, worker, or

student. A student should be able to restore their status to be a worker instead of being required to restore their status to a student before making an additional application for a work permit.

The Federal Court has taken opposing views on this point. In cases like *Nookala*, *Ofori* and *Ntamag,* the Court found that an applicant could only be restored to the status one previously had.[46] The DOJ has taken this position in litigation. On the other hand, however, cases like *Udobong*, *Abubacker and Stanislavsky* consider it possible that a restoration can be for a different class, or for a different temporary purpose than the original visa or permit.[47] There is no Federal Court of Appeal jurisprudence that provides definitive clarity on this point.

All of these cases, with the exception of *Stanislavsky*, centre around applications for the Post-Graduate Work Permit. Although there is debate on restoration to a different status, these cases found that those who had graduated and allowed their permit to lapse were no longer students, and therefore could not apply for the PGWP under s. 179. This creates a great difficulty for recent graduates who experience confusion about their graduation dates and unknowingly allow their study permit to lapse.

In addition, an application to restore status should authorize the worker or student to continue to study or work while the restoration application is in process. Currently, a student or worker must cease those activities until restoration is granted. It serves little purpose to grant the ability to restore status, if there is no corresponding ability to continue to work or study while the application is under consideration.

R. 4(1): Family relationships

Legislation

R. 4 (1) For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner or a conjugal partner of a person if the marriage, common-law partnership or conjugal partnership

> (a) was entered into primarily for the purpose of acquiring any status or privilege under the Act; or
>
> (b) is not genuine.

Recommendation and rationale

The section should be restored to its initial version, imposing a conjunctive test by replacing "or" with "and". The current disjunctive test allows for the refusal of applications based on genuine marriages and adoptions. A particular legal relationship may be genuine despite the fact that it is motivated by a reunification through immigration to Canada.

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[46] See *Nookala v Canada (Citizenship and Immigration)*, 2016 FC 1019 at paras 8-9, 11-12; *Ofori v Canada (Citizenship and Immigration)*, 2019 FC 212 and *Ntamag v Canada (Immigration, Refugees and Citizenship)*, 2020 FC 40 at para 22.

[47] See *Udobong v Canada (Citizenship and Immigration),* 2018 FC 234 at para 24; *Abubacker v Canada (Citizenship and Immigration)*, 2016 FC 1112 at para 10 and *Stanislavsky v Canada (Citizenship and Immigration)*, 2003 FC 835 at para 15.

s. 37 (1) - Organized criminality

Legislation

37 (1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for

> **(a)** being a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern; or
>
> **(b)** engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or laundering of money or other proceeds of crime.

Recommendation and rationale

CILA recommends that the following definition of 'organized criminality' be added to the legislation:

'Organized criminality' means a group that

(a) is composed of three or more persons in or outside Canada; and

(b) has as one of its main purposes or main activities the facilitation or commission of more than one serious offence that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by all members of the group.

Many offences may be carried out by more than one actor who together do not constitute an organized crime group. Even so, multiple offenders are caught by this provision, for example, in the case of a brother of one member of a couple who commits fraud. The provision should not capture a group of friends or family members, lacking a formal organization, who come together for the commission of an offence.

s 30(2): Study Permit for Minor Child

Legislation

S. 30 (2) Every minor child in Canada, other than a child of a temporary resident not authorized to work or study, is authorized to study at the pre-school, primary or secondary level.

Recommendation and rationale

This section should be amended to refer to a "dependent child" or a "child under the age of nineteen" in place of a "minor child". Many students turn eighteen in the middle of their senior year of high school, and this section requires them to apply for and receive a study permit to complete the year. This needlessly interrupts a student's secondary education. The legislation is also arbitrarily prejudicial, applying to students who were born in the first half of the year, while schools only offer a September start date for all students born within that same year.

Moreover, the definition of a "minor child" creates confusion amongst applicants. While the age of majority for federal laws is eighteen, the age of majority in the provinces varies between eighteen and nineteen. These differences mean that students in British Columbia, New Brunswick, Newfoundland, Northwest Territories, Nova Scotia, Nunavut, and the Yukon may all reasonably believe they do not need to obtain a study permit to complete high school, only to find this is a requirement under the federal legislation. Amending this section to read "Every child under the age of nineteen", instead of "Every minor child" will allow students to finish their secondary education and provide clarity on when a study permit is required for an individual student to continue their studies.

Section III: Add

R. 117: Fiancé relationships

Recommendation and rationale

The fiancé category of relationship in the family classes should be restored.

Operational difficulties created by the fiancé category led to its removal from IRPA. The conjugal partner category was meant to be an alternative for applicants who were in relationships of permanence but who could not or decided not to marry. However, there are situations where there is no evidence of conjugality, but there is an intention to marry despite the extenuating circumstances that have made it difficult to have both parties physically present for the wedding. An example is an arranged marriage that lack evidence of conjugality but they intend to marry.

For clarity, CILA supports the addition of fiancé relationships to the family class in addition to common law and conjugal partner relationships.

s. 64: Appeals

Legislation

No appeal for inadmissibility

64 (1) No appeal may be made to the Immigration Appeal Division by a foreign national or their sponsor or by a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of security, violating human or international rights, sanctions, serious criminality or organized criminality.

Serious criminality

(2) For the purpose of subsection (1), serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least six months or that is described in paragraph 36(1)(b) or (c).

Recommendation and rationale

We recommend the restoration of a right of appeal for foreign nationals and permanent residents under Section 64(2) as it existed prior to the 2013 amendments made by the *Faster Removal of Foreign Criminals Act.*

Since the *Faster Removal of Foreign Criminals Act* passed in 2013, the IRPA appeal grounds for criminality at the Immigration Appeal Division have been restricted. Previous versions of the legislation provided more opportunity for permanent residents and foreign nationals to appeal criminal convictions. Prior to the enactment of the *Faster Removal of Foreign Criminals Act*, section 64 prescribed:

> No appeal for inadmissibility
>
> **64 (1)** No appeal may be made to the Immigration Appeal Division by a foreign national or their sponsor or by a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality.
>
> Serious criminality
>
> **(2)** For the purpose of subsection (1), serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least two years.

The current legislation restricts the rights of appeal by defining serious criminality more broadly.

First, the current IRPA defines serious criminality as a term of imprisonment of at least six months instead of a term of imprisonment of two years. Second, inadmissibility described under sections 36(1)(b) and (c) are added to section 64 and cannot be appealed. CILA submits that the current restrictions in place are unduly harsh to foreign nationals and permanent residents who can demonstrate rehabilitation and pose no threat.[48]

With respect to the term of imprisonment, the reduction to six months is unduly harsh compared to two years. Terms of imprisonment that are two years or longer are served in federal institutions whereas imprisonment for less than two years are served in provincial institutions. Federal institutions are therefore reserved for more serious crimes.

Furthermore, in sentencing, it is common for judges to prescribe terms of imprisonment of "two years less a day" to allow applicants to remain in provincial institutions. The previous version of IRPA mirrored the intent of the sentencing scheme. However, this is no longer the case as foreign nationals may be sentenced to a provincial institution but still not be allowed to appeal their inadmissibility if their sentence was longer than 6 months. In other words, a lighter term of sentencing that is served within a provincial institution may still not be appealed.

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[48] For example, one of the unintended consequences of legalizing cannabis in Canada was the increase in sentencing provisions under the Criminal Code for impaired driving, which is now punishable by a sentence of a maximum of 10 years imprisonment. This increase in the sentencing provisions has resulted in an impaired driving conviction after December 18, 2018 equating to a serious offence under section 36(1) of IRPA. As such, a permanent resident of Canada could be found inadmissible under section 36(1) for impaired driving and not have a right to appeal under section 64. We do not minimize the seriousness of the offence of impaired driving, but the wide range of circumstances leading to the commission of this offence justifies an appeal in order to fully consider mitigating circumstances and avoid injustice.

As noted above, convictions outside of Canada under section 36(1)(b) and (c) may not be appealed. The relevant provision provides the following:

> **36 (1)** A permanent resident or a foreign national is inadmissible on grounds of serious criminality for ….
>
> **(b)** having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or
>
> **(c)** committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

Section 36 attributes serious criminality for crimes that have a term of sentencing of at least 10 years. Paragraphs (b) and (c) pertain to equivalency for offences committed outside of Canada. As it stands, being unable to appeal convictions that arose outside of Canada can lead to injustices and inconsistencies in the application of the law.

Another issue is the relatively low burden of evidence. Section 33 of IRPA provides that facts arising out of inadmissibility from sections 33 to 37 may be established on a reasonable grounds to believe basis. This standard of evidence is lower than the traditional burden of proof of balance of probabilities and much lower than the criminal standard of beyond a reasonable doubt. The low burden of evidence coupled with the deference owed to decision makers means that foreign nationals have more difficulties to respond to decision makers. As a result, a finding of inadmissibility may well be reasonable due to deference and the reasonable grounds to believe standard despite the fact that an applicant may not have actually been convicted.

Moreover, mitigating facts surrounding the conviction are not taken into account in the removal process.[49] Foreign nationals and permanent residents also cannot present facts establishing rehabilitation due to the lack of appeal. Furthermore, procedures of securing a conviction can vary based on various legal traditions and systems. CILA submits that the low burden of evidentiary proof and the impossibility to appeal findings of inadmissibility on humanitarian and compassionate grounds is fundamentally unjust. Therefore, CILA recommends reinstating the previous version of this section.

Immigrant Bill of Rights and Ombudsperson for IRCC and CBSA

Recommendation and rationale

CILA recommends that regulations and policies be developed to establish a "Bill of Rights" and an Office of the Ombudsperson for those who use the programs and processes of Immigration Refugees Citizenship Canada ("IRCC") and the Canada Border Services Agency ("CBSA").

A number of government department and agencies throughout Canada have an office of the ombudsperson and/ or a bill of rights. For example, a Taxpayer Bill of Rights[50] was created several years ago in response

[49] The Federal Court of Appeal recently determined that the "particular circumstances of the person, the offence, the conviction and the sentence" are beyond the reach of officers in making removal orders or referring s. 44 reports to the Immigration Division: *Obazughanmwen v Canada (Public Safety and Emergency Preparedness)*, 2023 FCA 151

[50] Canada Revenue Agency, Taxpayer Bill of Rights, https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/rc17/taxpayer-bill-rights-guide-understanding-your-rights-a-taxpayer.html#toc1

to the recognition that the Canada Revenue Agency (the "CRA") needed to develop a guide on the rights of those who interact with the CRA. These rights identify expectations of service provided to those who interact with CRA and include the right to representation. By regulation, a Taxpayers' Ombudsperson[51] was established with the mandate to assist, advise, and inform the Minister of National Revenue about matters relating to the CRA's service.

Other examples include the Air Passenger Protection Regulations, which allow complaints to be made to Canadian Transport Agency, the Veterans Bill of Rights that allows for complaints to the Office of the Veterans Ombudsman, and, also, the National Defence & Canadian Armed Forces Ombudsperson.

As departments within the Government of Canada, IRCC and CBSA serve the public. They are distinct among Canadian agencies because they serve both the Canadian public and foreign nationals. However, as the only agencies authorized to administer Canadian immigration law, IRCC and CBSA must be held to the same service standards as domestic agencies.

Those who rely on IRCC and CBSA do reasonably have an expectation of fairness, transparency, and responsiveness. Moreover, those who apply to access the various immigration programs pay significant application fees and have the right to receive a corresponding level of service.

Many members of Parliament devote significant resources - including the time of staff members - to trying to resolve immigration issues on behalf of their constituents. The issues are often not necessarily complicated, but rather result from a lack of service or responsiveness on the part of IRCC. This is not an efficient use of resources.

The inconsistent and low level of responsiveness within the current system results in multiple inquiries from multiple sources, and has resulted in a dramatic increase in Federal Court mandamus applications, most of which are resolved through the involvement of Department of Justice counsel.

Currently, IRCC's only official way of communication is to use webforms. However, that system does not work much of the time. Webforms may be helpful in allowing some updated information to be communicated to IRCC, but it is not an effective way for those who have legitimate queries as to how their applications are being managed. Responses are subject to lengthy delays and often do not address the specific issues.

It is critical to public confidence in the immigration system to ensure that those who are making applications to IRCC and / or their representatives to have more transparent, formalized processes and procedures outlining responsibilities and service levels. This would provide the public with a meaningful process and structure.

The government has proposed legislation (Bill C-20: An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments) that would establish a Public Complaints and Review Commission as an enhanced independent review body for CBSA (and the RCMP). CBSA does have existing processes for complaints and requests or reviews in addition to important formal legal processes. While much of CBSA's mandate involves border services, it includes immigration. Consideration should be given to how a proposed Bill of Rights and Office of the Ombudsperson would work with CBSA operations and existing mechanisms.

[51] Office of the Taxpayers' Ombudsperson, https://www.canada.ca/en/taxpayers-ombudsperson.html

Right to Legal Counsel

Recommendation and rationale

It is CILA's position that there is already a right to legal counsel generally in immigration matters under the common law and the Charter. Nonetheless, to avoid any doubt, we recommend an amendment to IRPA to recognize this right.

The right to counsel is inherent in the concept of access to justice, which in turn is inherent in the rule of law. Introducing the right to counsel in IRPA will strengthen access and protect people subject to the Act and assist in the administration of Canadian immigration law.

In countries governed by the rule of law, lawyers are officers of the courts, including administrative tribunals. Lawyers represent members of the public, corporations and agencies. An important role fulfilled by lawyers is to be present and defend the rights of members of the public while applying the facts and interpreting applicable legislation, regulations, and policies. Lawyers are not regular members of the public. Lawyers are counsel, privileged professionals who give legal advice and opinions on applicable legislation and policies to persons who need them who are often vulnerable people. Legal assistance is often critical in order for people to understand the legal issues they face as well as their rights and obligations in the judicial system.

The right to counsel is of fundamental importance. As the Supreme Court of Canada has said in the Charter context: "an individual should "not only be informed of his rights and obligations under the law but, equally if not more important, to obtain advice as to how to exercise those rights."[52] The Federal Court of Appeal has recognized that "[w]ithout representation, an individual may not be able to participate effectively in the decision-making process, especially when facing a more powerful adversary, such as a government department."[53]

Yet in immigration law, the established right to counsel applies in only some circumstances. These circumstances include where a person is detained or arrested in relation to an immigration proceeding (under s. 10(b) of the Charter), as well as if they are of proceedings before the Immigration and Refugee Board." (IRPA section 167). In addition, the Federal Courts Rules (including the Federal Courts Immigration Rules) specifically reference the right to be represented by a lawyer (see Federal Court Rule 122). Similarly section 167 of IRPA provides for right to counsel for anyone who is the subject of proceedings before the Immigration and Refugee Board. However in practice there is a discrepancy between the underlying principles inherent in immigration law which should justify a right to counsel as well and the actual practice and legal recognition.

The Federal Court and the Federal Court of Appeal have given some guidance on when there are "proceedings" before a division of the board. For example, in *Canada (Citizenship and Immigration)* v. *Paramo de Gutierrez*, the Federal Court of Appeal confirmed that "proceedings" can mean more than just hearings before a Division of the Board . They can also include "the right to have counsel present at an interview held in respect of a refugee claim" [54]

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[52] *R. v. Taylor*, 2014 SCC 50, at para, 21, citing *R. v. Manninen*, [1987] 1 S.C.R. 1233, at pp. 1242-43.
[53] *Hillary v. Canada (Citizenship and Immigration)*, 2011 FCA 51 at para. 34
[54] *Canada (Citizenship and Immigration) v. Paramo de Gutierrez*, 2016 FCA 211, aff'g *Canada (Citizenship and Immigration) v. Gutierrez*, 2015 FC 1198

A legislative provision recognizing a right to counsel should be established in IRPA. Such a provision would ensure access to justice for people subject to IRPA, who are often vulnerable, inexperienced with Canadian administrative and legal proceedings, with neither English nor French as their first language. CILA members regularly witness situations in which the lack of counsel was prejudicial to applicants. Given high personal stakes involved with immigration law it is appropriate that IRPA be amended to allow for an explicit right to counsel in immigration matters and related fields.

The problems resulting from not recognizing the important role of counsel can have significant consequences for people who are advised through government and other sources that immigration processes are straightforward, when the reality is that they are not.

When applicants represent themselves, the likelihood of misrepresentation is increased. It is often unclear to clients what information needs to be provided or how to interpret questions. This can have serious consequences for those applicants and as well take up considerable resources of IRCC, CBSA, and ESDC. CILA members regularly report instances in which IRCC, CBSA, and ESDC have not recognized the important role counsel can play in the immigration process. At times they have tried to curtail the representation of counsel or block it entirely through various means.

Members report instances when IRCC program managers have refused to communicate with counsel, eliminating effective mechanisms or processes to address issues, even where administrative errors were made which could be quickly resolved. Too often it means having to begin proceedings in Federal Court, with the inefficiencies and costs that that entails.

There are also instances when IRCC, CBSA, and ESDC meet with applicants as part of an application process or investigation. Officials often will allow representatives to be present, but that is often done under the characterization that agreeing to such participation is being done as a courtesy. Some officers will offer unsolicited comments about the limited role or efficacy of counsel. Although parts of IRCC's manuals acknowledge that a person may in some instances be given the opportunity to have counsel present, this is not the same as a right to counsel. A legislated right to counsel ensures that all officers recognize the importance that counsel can play in ensuring the fairness of a process with consequences may not be understood by the person involved.

Another example of restricting the involvement of counsel arises from the design of new forms and technical platforms. In the introduction of new electronic platforms, initial versions of the following applications did not allow representatives to submit applications: grant of citizenship, permanent resident card renewals, COPR landing portals, new PR pathways and PR digital intake platforms. This raised many practical and professional issues. Ultimately IRCC did change many of the online platforms so that representatives could be part of the process, but currently online applications for grant of citizenship or proof of citizenship are only for those without counsel. Those who are represented by counsel are therefore obliged to only submit applications by paper when permitted which is less efficient and disadvantages them.

A broad right to counsel outlined in the IRPA (and related policies) would have prevented such potential problems at the design stage.

In doing so, the Canadian government would publicly sanction the right to counsel as an undeniable part of the rule of law in our democracy and increase efficiency and fairness in the Canadian immigration system.

Appendix I: Summary of Recommendations

Repeal	
Section	**Why Repeal?**
s. 38(a)(b) – medical inadmissibility (danger to public health and safety)	Refusals are rare, they are difficult for officers to administer, there are other tools to protect public health.
s. 38(1)(c) – medical inadmissibility (excessive demands)	The government promised to repeal this provision in 2018 after a Standing Committee report recommended repeal. The provision saves minimal health costs and perpetuates discrimination.
s. 40.1 (1) Cessation of refugee protection — foreign national A foreign national is inadmissible on a final determination under subsection 108(2) that their refugee protection has ceased. (2) Cessation of refugee protection — permanent resident A permanent resident is inadmissible on a final determination that their refugee protection has ceased for any of the reasons described in paragraphs 108(1)(a) to (d). 2012, c. 17, s. 18.	Loss of permanent residence was made a consequence of cessation based on an unfounded assumption that cessation implies fraud. However, the main reasons for cessation – change in country conditions and refugee's return to their country – do not imply fraud. Refugee protection is distinct from permanent residence. A refugee may no longer need or want protection but still want to continue as a permanent resident. Individuals who have been settled in Canada for decades face removal because they returned to their home country. When the pathway to permanent residence was created, it was meant to grant security through "permanent" residence, recognizing that in the long-term conditions can change in the home country. This punitive provision warrants repeal.
R. 117(9)(d) – permanently blocks membership in the family class for previously undeclared family members.	This provision is draconian and serves no purpose other than to enforce s. 38(1)(c), which should also be repealed (see above). This provision permanently bars applicants from reuniting with family members, contrary to one of IRPA's overarching objectives – family reunification. It has a particularly harsh impact on children, women and refugees.
R. 55 – permanent resident cards only	The wording of this provision is ambiguous and has been interpreted to mean that applicants must be physically present within Canada in order to apply for their Permanent Resident card. There seems to be no legitimate

provided or issued in Canada	policy rationale supporting this requirement, which can be onerous and unjust for some applicants, including those with a Canadian citizen spouse employed abroad. In the alternative to a full repeal, the provision should be amended to allow people outside Canada to apply for their PR card unless there are legitimate extenuating circumstances that require them to return (e.g., for an assessment of residence compliance).
R. 5 and R. 117(9)(c): Excluded relationships - For the purposes of these Regulations, a foreign national shall not be considered ..... (c) the spouse of a person if at the time the marriage ceremony was conducted either one or both of the spouses were not physically present unless the person was not physically present at the ceremony as a result of their service as a member of the Canadian Forces and the marriage is valid both under the laws of the jurisdiction where it took place and under Canadian law. SOR/2015-139, s. 1	Given advances in video technology, other areas of the law have recognized the ability to conduct business and personal affairs remotely. If a proxy marriage is allowed for members of the Canadian Armed Forces, it should be acceptable for others. Ceremonies as important as Canadian citizenship ceremonies are conducted remotely. The recognition of proxy marriages conducted remotely would also be helpful for individuals without financial means or the legal ability to travel and be physically present with their spouse to marry. There are also benefits to refugees, displaced persons, and religious groups where certain pre-marriage processes are enforced. Further, existing provisions regarding misrepresentation and criminal misrepresentation would protect against the abuse of this.
s. 31.1 Refugee Travel Document Designated foreign national - For the purposes of Article 28 of the Refugee Convention, a designated foreign national whose claim for refugee protection or application for protection is accepted is lawfully staying in Canada only if they become a permanent resident or are issued a temporary resident permit under section 24. 2012, c. 17, s. 16.	This section punitively denies lawful status to persons deemed to be designated foreign nationals even if they require protection. It increases the risk of *refoulement*.

Amend	
Section	**Why amend & preliminary suggestions for amendment**
s. 14.1 – Ability to issue Ministerial Instructions regarding economic classes.	This section should be amended to provide for a 60-day notice period for Ministerial Instructions to allow for commentary. In some urgent cases, this notice period could be waived. In essence, this is equivalent to a Regulatory Impact Analysis Statement accompanying ministerial instructions in this area. If this amendment is accepted, it would provide the basis for extending this procedure to all ministerial instructions – not just those regarding the economic classes.
s. 22(1) – temporary resident	The language should be updated to remove the reference to "will leave Canada by the end of the period of authorized for their stay" and instead state that a temporary visa holder will leave "if and when they are required to do so."
s. 33 Inadmissibility Rules of interpretation The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.	Due to the low standard of proof imposed by this section, CILA recommends the review of inadmissibility findings made pursuant to ss. 34 to 37 by specially trained officers.
s. 39 - Financial reasons A foreign national is inadmissible for financial reasons if they are or will be unable or unwilling to support themself or any other person who is dependent on them and have not satisfied an officer that adequate arrangements for care and support, other than those that involve social assistance, have been made.	Amendments should be made to this provision to allow consideration of the broader contributions of family members, akin to the inclusion of a co-signer, found within the sponsorship process. This provision can create barriers by requiring foreign nationals to have sufficient funds for care and support. This ignores the reality that many families rely on a broader network of support from siblings, aunts, uncles, etc. to support parents and grandparents. These wider familial contributions to the care and support of foreign nationals should be considered instead of rendering them inadmissible.

ss. 34, 35, and 37 – Exemption from security Inadmissibility	CILA recommends that the protection from inadmissibility within s. 34, 35, and 37 for those who satisfy the Minister that their presence in Canada would not be detrimental to the national interest should be restored within the provisions themselves. Accordingly, CILA recommends that subsection 42.1 be repealed. The restoration of relief provisions with ss. 34, 34 and 37 will remove the risk of injustice by the overly broad application of these provisions. These determinations should be made by specially trained officers.
s. 40 (1) (a-c), (2)(a) and 40 (3) – five-year bar on applying for permanent residence for people inadmissible for misrepresentation.	The wording in s.40 should restrict the provision to instances where a misrepresentation has induced or is likely to induce an error. One way of doing this could be to change the wording from 'could' to 'would', i.e., "…. relevant matter that induces or would induce an error ….". Regarding consequences, we recommend a scale that provides the officer with discretion based on the seriousness of the misrepresentation, e.g., a 0-year bar for innocent misrepresentation, no more than a 1-year bar for serious misrepresentation. This would be complemented by policy or a manual that provides guidance for exercising discretion. It would send a message to officers that misrepresentation requires flexibility and justification. Waivers of the bar should be explicitly acknowledged in the legislation. A one-year cap on inadmissibility is also recommended. The application of misrepresentation is too broad, covering innocent mistakes and instances where the information left out has no relevance to the person's admissibility. In addition, the harsh consequences of this provision are out of proportion to the wide variety of circumstances in which the provision is applied. The five-year bar is punitive, especially given the excessive delays in processing.
R. 12 – return of incomplete applications	The provision should be amended to add the words "if the completeness check is conducted within 30 days of the application". This puts a time limit on the IRCC, barring them from delaying a completeness check then returning the whole application. If they take longer than 30 days, the officer would be required to reach out to the applicant to provide them with an opportunity to correct the deficiency. This provision creates undue delays that can be onerous for applicants.
R. 130(2) – only Canadian sponsors can reside outside of Canada at the time of sponsorship	Remove the words "who is a Canadian citizen" so that permanent resident sponsors may also reside outside of Canada. It is arbitrary to make a distinction between citizens and permanent residents in this context.

R. 181 - extension of status as temporary resident	The provision should be amended so that someone seeking extension of status inland can also obtain a TRV through a single application. Currently the process requires applicants to go through a two-step process.
R. 183(5), R. 186(u) - Maintained status	The provision should be amended to allow people to travel outside of Canada without interrupting maintained status. CILA has already taken this position.
Division 6 – Penalties on employers for failure to comply	The consequences for anyone (including employers and their agents) taking advantage of temporary foreign workers or foreign nationals should be strengthened by an amendment to s. 124. An amendment to s. 209 is also recommended Sections 124 and 125 of the Act are too general and never enforced in practice.
R. 209.9 – Entry to verify compliance	The provisions should be amended so that employees understand their right to be notified of their right to counsel and their right to refuse to answer questions. Not all employees understand that they do not have to answer all questions and they are not always aware of their right to counsel when ESDC is assessing employer compliance, especially when reviews do not take place at the workplace.
R. 205 - Canadian interests work permit	The provision should be amended to allow spouses and partners of Canadians to obtain an open work permit regardless of whether a sponsorship application is filed.
R. 182 - Restoration	The provision should be amended to clarify R.182, so that there is no room left for questionable interpretations regarding "status immediately prior". The change should reflect that a foreign national may apply to restore their temporary resident status directly in any of the temporary classes: visitor, worker, or student. In addition, an application to restore status should authorize the worker or student to continue to study or work while the restoration application is in process. Applicants are confused about whether they are restricted in restoring their status to what they had before they fell out of status. A student should be able to restore their status to be a worker instead of being required to restore their status to a student before making an additional application for a work permit.

R. 4(1): Family relationships	The section should be restored to its initial version, imposing a conjunctive test by replacing "or" with "and". The current disjunctive test allows for the refusal of applications based on genuine marriages and adoptions.
s. 37 (1)- Organized criminality A permanent resident or a foreign national is inadmissible on grounds of organized criminality for (a) being a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern; or	It is recommended that a definition of 'organized criminality' be added to the legislation: 'Organized criminality' means a group that (a) is composed of three or more persons in or outside Canada; and (b) has as one of its main purposes or main activities the facilitation or commission of more than one serious offence that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by all members of the group. It does not include a group of friends or family members, lacking a formal organization, who come together for the commission of an offence.
s 30(2): Study Permit for Minor Child	This section should be amended to refer to a "dependent child" or a "child under the age of nineteen" in place of a "minor child". Many students turn eighteen in the middle of their senior year of high school, and this section requires them to apply for and receive a study permit to complete the year.

Add	
Section	**Proposed addition and its rationale**
Fiancé Sponsorship	The fiancé category of relationship in the family classes should be restored. The conjugal partner category was meant to be an alternative for applicants who were in relationships of permanence but who could or would not marry. However, there are situations where there is no evidence of conjugality, but there is an intention to marry despite the extenuating circumstances that have made it difficult to have both parties physically present for the wedding. e.g., Arranged marriages that lack evidence of conjugality.
s. 64 appeals	Reinstate the Right of Appeal for Foreign Nationals under Section 64(2) prior to the 2013 Amendments
Immigrant Bill of Rights & Ombudsperson for IRCC	Legislation should create a public facing Ombudsperson for the IRCC similar to what exists in many government departments. This would minimize the use of MP's offices and the Federal Court for remedies.
Right to Counsel	Amend IRPA to allow for the right to legal counsel generally in immigration matters in order to enhance access to justice and fairer application of the legislation.