

# CHAPTER EIGHTEEN: IMMIGRATION LAW

## TABLE OF CONTENTS

<b>I.</b>	<b>IMPORTANT LEGISLATIVE CHANGES</b> .....	<b>1</b>
<b>II.</b>	<b>RESOURCES</b> .....	<b>1</b>
<b>III.</b>	<b>IMPORTANT ADDRESSES AND PHONE NUMBERS</b> .....	<b>1</b>
<b>IV.</b>	<b>SOURCES OF IMMIGRATION LAW</b> .....	<b>3</b>
<b>V.</b>	<b>IMMIGRATION “PLAYERS”</b> .....	<b>3</b>
<b>VI.</b>	<b>CATEGORIES OF PERSONS UNDER THE <u>IRPA</u></b> .....	<b>3</b>
A.	CITIZEN.....	3
B.	PERMANENT RESIDENT OR LANDED IMMIGRANT .....	4
C.	FOREIGN NATIONAL.....	4
1.	<i>Visitors</i> .....	4
2.	<i>Students and Workers</i> .....	4
3.	<i>Temporary Resident Permit</i> .....	5
4.	<i>Convention Refugee Claimants</i> .....	5
<b>VII.</b>	<b>APPLYING FOR PERMANENT RESIDENCE</b> .....	<b>5</b>
A.	ECONOMIC CLASS APPLICANTS .....	5
1.	<i>Skilled Worker Class</i> .....	6
2.	<i>Investor Class</i> .....	6
3.	<i>Entrepreneur Class</i> .....	7
4.	<i>Self-Employed Persons Class</i> .....	7
5.	<i>Provincial Programs</i> .....	7
6.	<i>Canadian Experience Class</i> .....	7
B.	FAMILY CLASS APPLICANTS.....	7
1.	<i>Sponsors</i> .....	7
2.	<i>Family Members</i> .....	8
3.	<i>Procedure</i> .....	8
C.	FAMILY CLASS APPLICANTS (“IN CANADA”) .....	8
D.	LIVE-IN CAREGIVERS.....	9
E.	HUMANITARIAN OR COMPASSIONATE APPLICATIONS.....	10
F.	CONVENTION REFUGEES (THE PROCESS) .....	10
1.	<i>Entry/Initiation</i> .....	10
2.	<i>Eligibility</i> .....	11
3.	<i>Personal Information Form (PIF)</i> .....	11
4.	<i>Refugee Hearing</i> .....	11
G.	PRE-REMOVAL RISK ASSESSMENT (PRRA).....	12
1.	<i>Process</i> .....	12
2.	<i>Status Conferred</i> .....	12
<b>VIII.</b>	<b>THE IMMIGRATION AND REFUGEE BOARD</b> .....	<b>12</b>
A.	IMMIGRATION DIVISION.....	12
1.	<i>Detention Reviews</i> .....	12
2.	<i>Admissibility Hearings</i> .....	13
B.	IMMIGRATION APPEAL DIVISION.....	13
C.	REFUGEE PROTECTION DIVISION .....	13
D.	REFUGEE APPEAL DIVISION.....	13
<b>IX.</b>	<b>LOSS OF PERMANENT RESIDENT STATUS</b> .....	<b>14</b>

A.	RESIDENCY REQUIREMENT .....	14
1.	<i>Permanent Resident Cards ("PR Cards")</i> .....	14
B.	INADMISSIBILITY .....	14
<b>X.</b>	<b>REMOVAL ORDERS</b> .....	<b>14</b>
A.	DEPARTURE ORDER .....	14
B.	EXCLUSION ORDER .....	15
C.	DEPORTATION ORDER .....	15
<b>XI.</b>	<b>APPEALS</b> .....	<b>15</b>
A.	SPONSORSHIP APPEALS .....	15
B.	REMOVAL ORDER APPEALS .....	15
C.	RESIDENCY OBLIGATION APPEALS .....	16
D.	FEDERAL COURT (LEAVE AND JUDICIAL REVIEW) .....	16
<b>XII.</b>	<b>OFFENCES UNDER THE ACT</b> .....	<b>16</b>
<b>XIII.</b>	<b>IMMIGRATION ISSUES AT SENTENCING</b> .....	<b>17</b>

## CHAPTER EIGHTEEN: IMMIGRATION LAW

### I. IMPORTANT LEGISLATIVE CHANGES

The Immigration and Refugee Protection Act, R.S.C. 2001, c. 27 [IRPA] came into force on June 28, 2002, replacing the former Immigration Act of Canada, 1976. Although it is unlikely that LSLAP clinicians will be assisting any clients who are still subject to the former Act, it is important to note which legislation governs a client's case. Please refer to Part 5 of the IRPA and Part 20 of the Immigration and Refugee Protection Regulations, SOR/2002-227 [IRP Regulations] for the transitional provisions if your client may be subject to the old Act.

### II. RESOURCES

H.M. Goslett & B.J. Caruso eds., The 2009 Annotated Immigration and Refugee Protection Act of Canada, (Toronto: Carswell, Legal Publications). Available on reserve in the UBC Law Library..

#### **Citizenship and Immigration Canada**

Web site: [www.cic.gc.ca](http://www.cic.gc.ca)

- An excellent resource for information, downloadable forms, and links to the IRPA, Regulations, and Policy Manuals.
- Operational Manuals and Bulletins published by Citizenship and Immigration Canada, are available online at [www.cic.gc.ca](http://www.cic.gc.ca) under the Publications heading. These explain the policies and procedures used by immigration officials to interpret the IRPA.

#### **Immigration and Refugee Board**

Web site: [www.irb-cisr.gc.ca](http://www.irb-cisr.gc.ca)

### III. IMPORTANT ADDRESSES AND PHONE NUMBERS

#### **Canada Immigration Centre (CIC)**

1148 Hornby Street  
Vancouver, B.C. V6Z 2C3

Website: [www.cic.gc.ca](http://www.cic.gc.ca)

#### **Immigration and Refugee Board of Canada**

1600 - 300 West Georgia Street,  
Library Square  
Vancouver, B.C. V6B 6C9

Telephone: (604) 666-5946

Website: [www.irb-cisr.gc.ca](http://www.irb-cisr.gc.ca)

#### **Canada Border Services Agency (Enforcement)**

Library Square (7th Floor), 300 W. Georgia Street  
Vancouver, B.C. V6B 6C9

#### **Documentation Centre (Immigration and Refugee Board)**

Library Square, 300 West Georgia Street,  
17th Floor  
Vancouver, B.C. V6B 1T4

Telephone: (604) 666-1285 or (604) 666-5945

- Open to the public: provides useful information in preparing for a refugee hearing.

**Amnesty International**

490 - 319 West Pender Street  
Vancouver, B.C. V6B 1T3

Telephone: (604) 294-5160  
Fax: (604) 294-5130

- Provides materials on human rights helpful in preparing for refugee hearings.

**Vancouver Association for Survivors of Torture (VAST)**

2618 East Hastings Street  
Vancouver, B.C. V5K 1Z6

Telephone: (604) 299-3539  
Fax: (604) 299-3523

E-mail: [care@vast-vancouver.ca](mailto:care@vast-vancouver.ca)

- Provides medical/psychological assistance to refugee claimants who were victims of torture, as well as services to family members of survivors.

**MOSAIC Settlement Services**

1720 Grant Street (2nd Floor)  
Vancouver, B.C. V5L 2Y7

Telephone: (604) 254-9626  
Fax: (604) 254-3932

Web site: [www.mosaicbc.com](http://www.mosaicbc.com)  
E-mail: [mosaic@mosaicbc.com](mailto:mosaic@mosaicbc.com)

**Immigrant Services Society of B.C.**

504H – 333 Terminal Avenue  
Vancouver, B.C. V6A 2L7

Telephone: (604) 684-2561  
Fax: (604) 684-2266

Web site: [www.issbc.org](http://www.issbc.org)  
E-mail: [immserv@issbc.org](mailto:immserv@issbc.org)

- ISS is a non-profit organization committed to identifying the needs of immigrants and refugees and to developing and providing programs which meet those needs.

**Inland Refugee Society of B.C.**

101 – 1720 Grant Street  
Vancouver, B.C. V5L 2Y7

Telephone: (604) 251-3360  
Fax: (604) 254-2321

- The Society facilitates the landing in Canada of people whose refugee claims are in process or who need to file a claim. Their services include assisting in the claim process, providing counseling during the claim period, and providing basics like shelter, food, and clothing.

**S.U.C.C.E.S.S.**

Head office: 28 West Pender Street  
Vancouver, B.C. V6B 1R6  
Web site: [www.success.bc.ca](http://www.success.bc.ca)

Telephone: (604) 684-1628

- S.U.C.C.E.S.S. is a non-profit social service agency that provides assistance to newly-arrived immigrants and refugees. The agency provides instructions in Cantonese and Mandarin on how to fill out citizenship forms and study for the citizenship test.

**Legal Aid (Legal Services Society) Vancouver Regional Centre**

Suite 425 (intake); Suite 400 (administration)  
510 Burrard Street  
Vancouver, B.C. V6C 3A8

Telephone: (604) 601-6206 (intake)  
Fax: (604) 601-6000

Website: [www.lss.bc.ca/legal\\_aid](http://www.lss.bc.ca/legal_aid)

## IV. SOURCES OF IMMIGRATION LAW

There are five general sources of immigration law: the IRPA, the IRP Regulations, the Manuals, the Operational Bulletins, and case law. The Canadian Charter of Rights and Freedoms (Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982 c. 11 [Charter]) is also applicable to immigration matters; the IRPA and IRP Regulations must be consistent with Charter provisions.

The IRPA is the primary source and should be referenced first. However, the IRPA is “framework” legislation, i.e. the provisions are general and principled.

The IRP Regulations are more detailed than the IRPA and give specific guidance to applicants. Case law in immigration law operates in the same manner as it does in other areas of law. Case law interprets the IRPA and the IRP Regulations.

The IRPA is a federal statute, and cases generally go to the Federal Court, the Federal Court of Appeal and the Supreme Court of Canada. Cases are also handled by a tribunal called the Immigration and Refugee Board (which consists of three separate tribunals).

Operational Manuals are drafted by Citizenship and Immigration Canada and are excellent resources giving applicants details on how the Ministry interprets the IRPA and IRP Regulations. Immigration Officers and Visa Officers turn to the Manuals when determining a case. Operational Bulletins are recent developments by Citizenship and Immigration Canada that have not yet been incorporated into the Manuals. Find these resources online at [www.cic.gc.ca](http://www.cic.gc.ca) under the Publications heading.

**NOTE:** The Manuals and Operational Bulletins do not have the force of law and must be consistent with the IRPA and the IRP Regulations.

## V. IMMIGRATION “PLAYERS”

Citizenship and Immigration Canada (CIC) (under the Minister of Citizenship and Immigration) is generally responsible for processing immigrant and temporary visa applications. The Canada Border Services Agency (CBSA) under the Minister of Public Safety and Emergency Preparedness is generally responsible for enforcement, removals, and hearings. The difference between the CBSA and CIC is more complicated than what is outlined here, and roles often change.

The Immigration and Refugee Board is an independent tribunal with three distinct divisions, and one inactive division. These are outlined below in **Section VIII: The Immigration and Refugee Board**.

Immigration lawyers are lawyers who have been called to the bar and are members of a law society of a province of Canada. Immigration Consultants are people registered with the Canadian Society for Immigration Consultants (CSIC). CSIC is a relatively new organization whose role is to govern Immigration Consultants in a manner similar to the way that law societies govern lawyers. Immigration Consultants are permitted to represent immigration clients with some limitations.

## VI. CATEGORIES OF PERSONS UNDER THE IRPA

There are three general types of persons under the IRPA: citizens, permanent residents and foreign nationals.

### A. *Citizen*

A citizen is a person who was born in Canada, or who has been granted citizenship after filing an application for citizenship under the Citizenship Act, R.S.C. 1985, c. C-29. Various types of people can apply for citizenship. See **Chapter 17: Citizenship**.

## ***B. Permanent Resident or Landed Immigrant***

A permanent resident (synonymous with “landed immigrant”) is a person who has been granted admission as an immigrant, but who has not become a Canadian citizen. Permanent residents have the same rights as Canadian citizens with a few exceptions. One of the most important exceptions is that a permanent resident can be deported from Canada under certain circumstances, most notably, for having committed a serious criminal offence or for not fulfilling their “residency requirements” (outlined below).

## ***C. Foreign National***

A foreign national is the term used by the IRPA to designate any person who is not a Canadian citizen and not a permanent resident. There are many types of foreign nationals. Foreign nationals include visitors, people with a Study Permit, people with a Work Permit, Convention refugee claimants, people with no status (i.e. “illegal immigrants”), and many others. Some classes of foreign nationals are described below:

### **1. Visitors**

Visitors are foreign nationals who enter Canada lawfully as a visitor. Foreign nationals from certain countries require a temporary resident visa under the visitor class (“visitor’s visa”) before entering Canada, while foreign nationals from other countries do not require a visitor’s visa (see IRP Regulations s.190). Examples of “visa-exempt” countries are the United States, the United Kingdom, Australia, Japan, and most European countries. Foreign nationals with visitor’s status can apply to extend their visitor’s status from within Canada. A visitor **cannot work or study** in Canada, with very few exceptions. Visitors must prove that they will leave Canada at the end of their visit.

**NOTE:** Beginning July 14, 2009 nationals from Mexico and the Czech Republic seeking to come to Canada to visit, study or work, are required to obtain a Temporary Resident Visa. These had previously been visa-exempt countries.

Visitors can stay in Canada for six months unless they obtain an extension, or unless the immigration officer specifies a different period of time (IRP Regulations s.183). This includes foreign nationals from visa exempt countries. It is possible to apply for an extension with Citizenship and Immigration Canada from within Canada. Thus, a citizen of the United States is allowed to enter Canada and stay for 6 months only, after which he or she must leave Canada. If such a person stays in Canada for over six months, the person has overstayed his or her visit and is subject to the issuance of a removal order. Of course, the visitor can always apply for a new visa and, if granted, re-enter the country at a later date.

### **2. Students and Workers**

A foreign national who wishes to study or work in Canada must apply for a temporary resident visa under the student class or worker class and a study permit or work permit **from outside** Canada at a visa office. There are several exceptions to this general rule: in some circumstances a foreign national can study or work in Canada without a permit (see IRP Regulations ss.186 to 189); and in some circumstances a foreign national can apply for a work or study permit from within Canada (see ss. 199 and 215). If a Study Permit expires, there is a provision that allows a foreign national to reinstate or restore their status from within Canada. The foreign national must apply for restoration within 90 days of the expiry of their permit (see s. 215(1)(b)).

To acquire a study permit, a foreign national must have an acceptance letter from a valid academic institution, sufficient funds, and the intention to leave Canada once their permit expires (see ss.210 to 222 of the IRP Regulations).

To acquire a work permit, a foreign national must have an employer in Canada who must first obtain a “validation” from Service Canada (formerly Human Resources and Skills Development Canada). Obtaining a Service Canada validation is difficult. The Canadian employer must show that no Canadian or permanent resident of Canada can fulfil the duties of employment offered to the foreign national. The employer must also show that he or she has made “reasonable” efforts to fill the job vacancy with a Canadian or a permanent resident of Canada. (see ss.194 to 209 of the IRP Regulations).

### 3. Temporary Resident Permit

A foreign national is granted a Temporary Resident Permit (a “TRP”) (formerly called a Minister’s Permit, and not to be confused with a Temporary Resident Visa) only under **exceptional circumstances**. Generally, a TRP is issued to a foreign national who is otherwise inadmissible but who has a compelling reason for either entering or remaining in Canada. The TRP can be applied for from either outside or inside Canada (IRPA s.24).

### 4. Convention Refugee Claimants

A Convention refugee claimant is a foreign national who enters Canada and who requests protection but who has not yet had their refugee hearing. Canada is obligated to grant protection to refugees and other persons in need of protection under the IRPA; the obligation originates from various United Nation Conventions and Treaties. Details of the Convention refugee process are outlined in **Section VII.F: Convention Refugees**, below.

## VII. APPLYING FOR PERMANENT RESIDENCE

All applications for permanent residence must be made **from outside** of Canada, with a few exceptions. Immigrant applicants can be broken down into three general categories (these categories are extremely broad): (i.) economic class applicants, (ii.) family class applicants, and (iii.) humanitarian or refugee applicants. There are several subclasses or subcategories within each of these general headings.

All applicants and their dependent family members are subject to medical, criminal, and security checks. These are referred to as “statutory requirements” in the legislation.

Amendments to the Act that came into force June 18<sup>th</sup>, 2008 give the Minister the authority to establish an order of priority for incoming applications (s.87.3), and relieve CIC from the obligation to process all application to a full decision (s.11). For example, priority processing amongst Family Class applications is given to spouses and dependent children; these are commenced immediately upon receipt. See the Operational Manuals for more details.

### A. *Economic Class Applicants*

Foreign nationals who apply under one of the economic classes must prove that they will become financially established in Canada. This general requirement is reflected through a series of criteria. There are four general sub-classes within the economic class: the skilled worker class, entrepreneur class, investor class, and the self-employed class. Please note that there are Provincial Nominee Programs in operation throughout Canada, including British Columbia. Under these programs, the province nominates an immigrant for Federal screening (see s.87 of the IRP Regulations). Nomination by a province provides strong evidence of an applicant’s ability to become economically established in Canada as required by IRPA s. 12(2). A detailed discussion of these programs is beyond of the scope of this Manual.

## 1. Skilled Worker Class

After meeting the threshold criteria set out in s.75 of the IRP Regulations, foreign nationals who apply under the skilled worker class are assessed on a point system designed to evaluate their ability to become successfully established in Canada. Applicants are given points on the following criteria: education, language, experience, age, adaptability, and arranged employment. The point structure is set out in the IRP Regulations in ss.78 to 83. The minimum number of points required is set by the Minister of Citizenship and Immigration from time to time. The current passing mark is 67. Clinicians are advised to check the CIC website, [www.cic.gc.ca](http://www.cic.gc.ca), for the latest information.

**EDUCATION (s.78):** Maximum of 25 points. For example, 25 points for Ph.D. or Masters degree, 20 for a two-year university degree, 20 for a two-year trade or non-university degree, 5 for a high-school diploma, etc.

**OFFICIAL LANGUAGES (s.79):** Maximum of 24 points. Applicants are rated on their ability to speak, listen, read, and write in English and French. A maximum of 16 points are awarded for an applicant's ability to communicate in one of the two official languages and up to 8 points for their proficiency in the second official language. Applicants are assessed using the framework established by the Centre for Canadian Language Benchmarks, (see [www.language.ca](http://www.language.ca)).

**EXPERIENCE (s.80):** A maximum of 21 points for years of work experience in an applicant's field of work. Note that the type of employment is significant, as the employment must fall under type A, B, or O of the National Occupation Classification system ([www.hrsdc.gc.ca](http://www.hrsdc.gc.ca)). Also, for part time work, the number of "years" experience calculation is discounted on a pro-rated basis that assumes a 37.5 hour work week.

**AGE (s.81):** Maximum of 10 points. Ten points are granted if the applicant is between 21 and 49 years of age at the time of application, less two points for each year over 49 or under 21 years.

**ARRANGED EMPLOYMENT IN CANADA (s.82):** Ten points may be granted if the applicant has employment pre-arranged. This is very difficult to obtain and is not assessed on the applicant's ability to get a job in Canada alone – other considerations include the likely impact of the labour market in Canada. Note that the type of employment must fall under type A, B, or O of the National Occupation Classification system (i.e. managerial, professional, or technical occupations).

**ADAPTABILITY (s.83.):** Maximum of 10 points. Various factors include the applicant's spouse's level of education, whether the applicant has worked or studied in Canada on a valid permit, and whether the applicant has any family in Canada.

There are modified point systems for the investor, entrepreneur, and self-employed categories. Legal issues surrounding the immigration of skilled workers, investors, entrepreneurs, and the self-employed can be quite complicated. **Clinicians are advised to refer clients to an immigration lawyer in these situations.**

## 2. Investor Class

To be eligible as an investor, a foreign national must have business experience and have legally obtained a net worth of \$800,000 CDN. They must further undertake a \$400,000 investment into the Federal Immigrant Investor Fund. Please refer to IRP Regulations Part 6 Division 2 (ss. 90 to 96).

### **3. Entrepreneur Class**

To immigrate as an entrepreneur, a foreign national must, for a minimum period of one year within a three-year period following the receipt of the application, have business experience and have legally earned a minimum net worth of \$300,000 CDN. Upon receiving permanent resident status, the entrepreneur must for one year of the first three years control at least one third of the equity of a qualifying Canadian business, provide active and ongoing management of the business, and create at least one additional full-time job in that business for Canadian citizens or permanent residents, other than the entrepreneur and their family members. Please refer to the [IRP Regulations](#) Part 6 Division 2 (ss. 97 and 99).

### **4. Self-Employed Persons Class**

This category is designed for individuals who have the intention and ability to be self-employed in Canada in cultural activities, athletics, or in managing a farm. It is not necessary that the applicant actually be self-employed before coming to Canada, so long as he or she has participated at a world-class level in their field of endeavour. Please refer to [IRP Regulations](#) Part 6 Division 2 (ss. 100 and 101).

The Self-Employed class is designed for foreign nationals with exceptional skills, such as Olympic athletes, world-renowned artists and/or musicians, etc.

### **5. Provincial Programs**

All provinces, including British Columbia, have their own selection systems and criteria for new immigrants. Applicants who apply under these classes must still comply with the statutory requirements under the federal legislation (see s.87 of the [IRP Regulations](#)). Section 87(3) permits the federal immigration officer to substitute his/her own evaluation of the applicant's ability to become economically established in Canada for that of the nominating province.

### **6. Canadian Experience Class**

This relatively new class is designed to recognize the value of having experience in Canada, and the positive impact this experience is likely to have on a newcomer's prospects of success. Applicants under this class must be either (i.) a temporary skilled worker with two years of authorized full time work experience in Canada or (ii.) a foreign graduate from a Canadian post-secondary institution with at least one year of full time authorized skilled work experience in Canada. The type of employment must fall under type A, B, or O of the National Occupation Classification system (i.e. managerial, professional, or technical occupations). The analysis is not as rigid as the points-based inquiry used for the Skilled Worker class. If the applicant has the requisite educational/ employment background, and the necessary language proficiency, they may be admitted notwithstanding the fact that they might not obtain a passing score under a Skilled Worker class application. (See Operational Manual "OP 25 – Canadian Experience Class".)

## ***B. Family Class Applicants***

Foreign nationals can have their applications for permanent resident status "sponsored" under the family class by a Canadian citizen or permanent resident. See the [IRP Regulations](#) Part 7)

### **1. Sponsors**

The sponsor must meet certain eligibility requirements. For example, the sponsor must be 18 years old, must generally reside in Canada, must not be bankrupt or on welfare, must not be

in default of a previous immigration undertaking, etc. (see ss. 130 - 137 of the IRP Regulations for the precise requirements).

In some circumstances, the sponsor must prove he or she earns a specific amount of money, depending on his or her family size and the city he or she is living in. The definition of “minimum necessary income” can be found in s.2 of the IRP Regulations. This is also known as the “low-income cut-off” figure (“LICO”). Generally speaking, the LICO does **not** apply to sponsors who are sponsoring their spouse or children (s.133(4)).

## 2. Family Members

Only certain family members are considered members of the family class under the IRPA and IRP Regulations. Specifically, an eligible sponsor can **only** sponsor his or her:

- a) spouse, common-law or conjugal partner (these are specifically defined terms);
- b) dependent child, including a child adopted abroad (adoption is difficult);
- c) child under 18 to be adopted in Canada;
- d) parents or grandparents;
- e) brother, sister, niece, nephew, or grandchild who is an orphaned child under 18 and is not a spouse or common-law partner, or
- f) relative of any age if the sponsor does not have an aunt, uncle, or family member from the list above who he or she could sponsor or who is already a Canadian citizen, registered Indian, or permanent resident. This is known as the “lonely Canadian” provision.

**NOTE:** As of June 28, 2002 same-sex partners of Canadian citizens can apply to immigrate under the Family Class Status. For support and information about same-sex immigration, students and clients may wish to contact LEGIT at [vancouver@legit.ca](mailto:vancouver@legit.ca) or visit the web site: [www.legit.ca](http://www.legit.ca). Another helpful resource is the Qmunity Resource Centre at 1170 Bute Street (604-684-5307).

## 3. Procedure

To sponsor a family class member, a potential sponsor must fill out an application to sponsor, and the relative being sponsored must fill out an application for permanent residence. The sponsor must also provide a written undertaking that he or she will support the prospective immigrant and accompanying dependants, if necessary, for three years if the applicant is a spouse or conjugal/common-law partner, or ten years for most other categories of applicants (see IRP Regulations Part 7 Division 3). If an application for sponsorship is refused, the **sponsor** may (in most cases) appeal the refusal to the Immigration Appeal Division.

Generally, all sponsorship application must be filed at visa application offices outside Canada. However, there is also an “in-Canada” class.

### ***C. Family Class Applicants (“In Canada”)***

The statutory “in-Canada” family class sponsorship provisions are outlined under ss. 123 - 125 of the IRP Regulations.

Prior to February 18, 2005, a Canadian citizen or permanent resident could sponsor a spouse (including married couples, common law couples, and conjugal couples) from within Canada **only if** the foreign national was “in status” from the date of the application until the application was complete; i.e. the spouse seeking permanent residence needed to already possess valid temporary immigration status at the time of application (IRP Regulations, s.124(b)). This prevented, for example, failed Convention refugee claimants from marrying a Canadian and being sponsored from within Canada.

Following the introduction a public policy directive (issued under the Minister’s authority to exempt certain applicants from some requirements of the Act on humanitarian or compassionate grounds as per IRPA s.25), as of February 18, 2005, a Canadian citizen or permanent resident can sponsor a spouse regardless of the spouse’s status in Canada; i.e. the s. 124(b) requirement is effectively suspended in some cases. **This represents a significant change in policy.** However, it does not mean that every foreign national in Canada married to a permanent resident or Canadian citizen can apply for permanent resident status from within Canada. There are several important factors to note. First, this is a policy and not a law. Therefore, it is subject to change at any time. Second, as the policy reads today, foreign nationals without status can apply under this class **only** if the foreign national:

- a) has overstayed a visa, visitor record, work permit or study permit;
- b) has worked or studied in Canada without authorization under the IRPA;
- c) has entered Canada without the required visa or other document required under the IRP Regulations; and/or,
- d) has entered Canada without a valid passport or travel document (provided valid documents are acquired by the time Citizenship and Immigration Canada seeks to grant permanent resident status).

This means that foreign nationals who are inadmissible to Canada, entered Canada without permission after having been deported, and foreign nationals who have misrepresented themselves are not permitted to apply under this class. Always look to the most recent version of this policy. (See the Operational Manual, “IP 8 — Spouse or Common-law Partner in Canada”.)

**NOTE:** Under both “in-Canada” classes, there is **no appeal** to the Immigration Appeal Division of a failed sponsorship. The only redress is to file an overseas application.

#### ***D. Live-In Caregivers***

A live-in caregiver is a hybrid class between temporary status and permanent status. A foreign national who applies for a Work Permit under the live-in caregiver class must meet certain eligibility requirements before applying. The foreign national must have:

1. applied for a Work Permit before entering Canada;
2. completed the equivalent of secondary school;
3. completed six months full-time training in a classroom or one year full time paid experience and at least six months continuous employment within three years prior to applying for the Work Permit;
4. the ability to speak, read, and listen in English or French at a level sufficient for communication; and,
5. a contract with future employer (see IRP Regulations, s. 112).

A foreign national must first obtain a Service Canada validation before applying for a Work Permit. Once a foreign national has a Service Canada validation, the foreign national can apply for a Work Permit under the live-in caregiver class.

Please see **Chapter 6: Employment Law** for further information on live-in caregivers. You may also refer to the Live-in Caregiver Program, administered by the federal government via Citizenship and Immigration Canada. Information on the Program is available on the CIC website ([www.cic.gc.ca/english/work/caregiver/index.asp](http://www.cic.gc.ca/english/work/caregiver/index.asp)), and also through the West Coast Domestic Workers' Association:

**WCDWA**  
302-119 W Pender Street  
Vancouver, B.C. V6B 1S5  
Telephone: (604) 669-4482  
Fax: (604) 669-6456  
Web site: [www.wcdwa.ca](http://www.wcdwa.ca)  
E-mail: [info@wcdwa.ca](mailto:info@wcdwa.ca)

Once a live-in caregiver is admitted into Canada on a Work Permit, she or he must work for two of three years before applying for permanent resident status in Canada (see IRP Regulations, s. 113).

### ***E. Humanitarian or Compassionate Applications***

Humanitarian and compassionate (“H&C”) applications are generally applied for from within Canada under s. 25(1) of the IRPA, but they can also be applied for from abroad. This is a highly discretionary category.

The test is whether the foreign national would face “undeserved or undue hardship” if they were forced to return to their country of habitual residence or citizenship. The primary concern is “the best interest of any child” affected by the decision, but an immigration officer will also consider: personal risk, level of establishment in Canada, family ties in Canada, ties to community, and any other considerations. Unlike applications made under a Pre-Removal Risk Assessment, a person who applies under H&C considerations **may be removed from Canada before the decision on the application is made.**

### ***F. Convention Refugees (the Process)***

Foreign nationals who apply for Convention refugee protection or “protected persons” status are assessed by the Refugee Protection Division (“RPD”).

The definition of a Convention refugee is found at s. 96 of the IRPA. Generally, the person must: (a) have a well-founded fear of persecution; (b) the fear must be objective and subjective; (c) the fear must be linked to a Convention ground (i.e. race, nationality, religion, political opinion or membership in a particular social group); (d) there must be no Internal Flight Alternative, i.e. a place in the country of feared persecution where the person can reasonably live safely; (e) there must be no state involvement or state complicity. This is not an exhaustive list; refer directly to the IRPA ss.95 to 111.

**NOTE:** A “person in need of protection” has a different definition, outlined under s. 97 of the IRPA. **Review the Convention Refugee and Protected Persons classes in the IRPA carefully if dealing with such a case.** The Refugee Protection Division has the jurisdiction to consider both ss. 96 and 97 of the IRPA.

#### **1. Entry/Initiation**

A foreign national generally requests Convention refugee protection at the Port of Entry upon arrival, i.e. at the airport, land border or sea border. However, if a foreign national

wishes to make a Convention refugee claim after being admitted into Canada, the person should go to the Citizenship and Immigration Office at 1148 Hornby Street, Vancouver, British Columbia and enter a claim for protection. The first step is the eligibility interview.

## 2. Eligibility

Once a foreign national makes a claim for protection, an immigration officer will interview him/her and determine if the person is eligible to make a claim. There are several classes of ineligible people listed at s. 101 of the IRPA. For example, if a foreign national has previously made a Convention refugee claim in Canada, and the claim was accepted, refused, withdrawn or abandoned, that person is “ineligible” to make another claim. If a foreign national is determined “ineligible,” the process stops.

At the eligibility interview, the interviewing immigration officer will obtain the detailed reasons why the foreign national fears persecution. A foreign national should be prepared to **accurately outline the details** of his or her account of events leading to the claim for protection.

## 3. Personal Information Form (PIF)

Once a foreign national is determined to be eligible to submit a Convention refugee claim, the foreign national will be given a Conditional Departure Order. This is a removal order that only comes into effect if the person loses the claim for protection.

The foreign national is now a Convention refugee claimant. The claimant has 28 days to file a document called the Personal Information Form (PIF). This is the most important obligation on a Convention refugee claimant, with the exception of attending their hearing.

Claimants will require help in preparing their PIF. In the PIF, a claimant must outline the precise reason(s) for their well-founded fear of persecution. This includes a narrative outlining the dates, incidents of persecution, why they are afraid, etc. **The PIF should include facts that support the claimant’s fear, and that address the requirements set out in the IRPA.** For example, the PIF should address why the claimant has no internal flight alternative, how the state is involved or complicit, etc. This account of events will form the basis of the request for protection at the hearing.

## 4. Refugee Hearing

The Convention refugee claimant will be scheduled for an oral hearing to assess their claim. This hearing is not open to the public. The Presiding Member and Refugee Protection Officer will question the claimant regarding the PIF. The Minister may also intervene in the hearing and question the claimant.

Note that if the claimant wishes to rely on documents, he or she must file/serve those documents not less than 20 days before the hearing.

Claimants may represent themselves at the hearing or be represented by counsel. Representation by counsel is always preferable. Interpreters are provided if required. Claimants may request that a family member or friend be present at the hearing for emotional support.

**NOTE:** **Claimants (and their counsel) must be very familiar with the content of their PIF before the hearing.** Claimants must be prepared to elaborate on the details outlined in the PIF.

## **G. *Pre-Removal Risk Assessment (PRRA)***

A PRRA is new to the IRPA, and is a last resort risk assessment application. With some exceptions and some restrictions (see ss. 112(2) and 112(3) of the IRPA), every person who is being removed from Canada can submit a paper application describing why they would suffer persecution or danger in the country of destination if returned to that country. The risk(s) are assessed under ss. 96 and 97 of the IRPA. Very few applications succeed under the PRRA.

### **1. Process**

Once a claimant has received a removal order and has been given **notification**, he or she has 15 days to apply for a PRRA and another 15 days to make submissions and include documentary evidence. If the person is a failed Convention refugee claimant, the evidence supporting the PRRA must be new or must have not reasonably been available on the date of the hearing.

Once a person has applied for a PRRA, the person cannot be removed from Canada until a decision is made regarding their case. This is called a “stay of removal”.

A person who has been given notice of removal can apply for the PRRA later than the 15-day deadline. However, that person could be removed from Canada before the decision is made (i.e. no stay of removal is issued).

A person who loses the PRRA will be removed. The only redress to a PRRA refusal is to apply for leave and appeal to the Federal Court. The deadline to apply for leave to the Federal Court is 15 days. In such cases, the claimant should contact a lawyer immediately.

### **2. Status Conferred**

If the PRRA is granted, the person will receive the same protection as a Convention refugee. The person will be considered a “protected person” and can apply for permanent resident status from within Canada (the application must be filed within 180 days).

## **VIII. THE IMMIGRATION AND REFUGEE BOARD**

The Immigration and Refugee Board (the “IRB”) is made up of three tribunals with distinct jurisdictions. There is a fourth tribunal established by the IRPA but it has not yet been implemented (and may never be). In Vancouver, the three active divisions of the IRB are located at 300 West Georgia Street, Vancouver, British Columbia on the 16<sup>th</sup>, 17<sup>th</sup> and 18<sup>th</sup> floors. If you encounter a person who has a hearing before one of these tribunals, contact an immigration lawyer.

### **A. *Immigration Division***

The Immigration Division deals with (i) detention reviews and (ii) admissibility hearings.

#### **1. Detention Reviews**

If a foreign national or permanent resident is “detained” under the IRPA, that person is entitled to a detention review before the Immigration Division. The “judge” is called the “Presiding Member,” and the opposing side to the person concerned is called the “Minister’s Counsel”. The Minister’s Counsel presents the case to detain the person concerned, unless an alternative to detention exists.

A person arrested under the IRPA provisions is entitled to a detention review within 48 hours after arrest, or as soon as practicable. If the person is ordered detained, he or she receives another detention review in 7 days, then again in 30 days, then again every 30 days thereafter until he or she is either removed or released.

## **2. Admissibility Hearings**

If an immigration officer alleges a foreign national or permanent resident of Canada is “inadmissible” under a provision of the IRPA, the Immigration Division conducts admissibility hearings to determine whether or not the allegation is founded.

**NOTE:** There are exceptions where an immigration officer can determine inadmissibility without redress to the Immigration Division. For inadmissibility provisions, please refer to Division 4 of the Act.

The hearings are conducted as adversarial tribunals. Persons subject to such a hearing may represent themselves, or they may choose to retain counsel. It is always preferable for such persons to retain counsel.

If a person is found inadmissible, a removal order will be issued. A determination of inadmissibility can be appealed to the Immigration Appeal Division in certain cases. The Minister can also appeal in some circumstances. It is important to note that only permanent residents or Convention refugees can appeal, with very few exceptions.

### ***B. Immigration Appeal Division***

The Immigration Appeal Division (“IAD”) hears appeals from the Immigration Division, and some decisions from visa officers and immigration officers. The three most common types of appeals are as follows: (i) permanent residents who have been determined inadmissible by the Immigration Division for serious criminality; (ii) Canadian citizens or permanent residents appealing a negative decision on a sponsorship application under the family class; and (iii) permanent residents determined inadmissible for not having met the “residency requirements”.

The IAD is a court of competent jurisdiction. Charter issues can be raised. Also, the IAD, in most circumstances, can deal with issues of equity. For example, if a permanent resident is “lawfully” determined inadmissible by the Immigration Division for having committed criminal acts in Canada and lawfully given a deportation order, the IAD can allow an appeal because there are sufficient “humanitarian and compassionate” grounds warranting relief. This is discussed below in **Section XI: Appeals**.

### ***C. Refugee Protection Division***

The Refugee Protection Division (“RPD”) deals exclusively with determining claims for Convention refugee protection. The RPD also deals to a lesser extent with “vacation hearings,” i.e. hearings where an allegation is made that Convention refugee protection should be taken away from someone.

### ***D. Refugee Appeal Division***

The Refugee Appeal Division (“RAD”) is an appeal division for failed Convention refugee claimants, established by the IRPA. However, the provision of the IRPA that actually permits an appeal to be made to the RAD (s.110) has not yet been proclaimed in force by the Governor in Council (see s.275). It appears that implementation of the RAD may, in fact, be delayed indefinitely; according to the CIC website, the Government of Canada considers the availability of judicial review, pre-removal risk assessment, and applications on humanitarian and compassionate grounds to afford a sufficient procedural “safety net”.

## IX. LOSS OF PERMANENT RESIDENT STATUS

A permanent resident (and in very rare circumstances a Canadian citizen) can lose their permanent resident status, and can even be removed from Canada.

### *A. Residency Requirement*

A permanent resident must meet the residency requirements as outlined in the IRPA. Generally, a permanent resident must be physically present in Canada for **730 days out of every five years**. The residency requirements can be met in a few different ways. See s. 29 of the IRPA for full details.

#### 1. Permanent Resident Cards (“PR Cards”)

All permanent residents who intend to travel outside of Canada require a PR card. The PR card is a document that indicates the holder’s permanent residence status. A PR card must be renewed before its expiry date. PR cards must be issued within Canada.

**NOTE:** A permanent resident without a PR card is still a permanent resident. If a permanent resident is outside Canada without a PR card, that person can apply for travel documents to re-enter Canada.

### *B. Inadmissibility*

A foreign national or permanent resident can be determined “inadmissible” to Canada for several reasons. If a permanent resident is determined inadmissible, he or she may lose their permanent resident status. The inadmissibility provisions relating to foreign nationals and permanent residents overlap for the most part, but there are some differences.

Inadmissibility simply means that a foreign national or permanent resident has contravened the IRPA in some way, and will be issued a removal order. There are three types of removal orders, which are discussed below. Specific grounds of inadmissibility can be found in ss. 34 - 43 of the IRPA.

## X. REMOVAL ORDERS

There are three types of removal orders: (i.) departure orders, (ii.) exclusion orders, and (iii.) deportation orders (IRP Regulations, Part 13). The IRPA does not give discretion to decision makers as to the appropriate removal order. For example, if a foreign national is determined inadmissible for having committed a serious criminal offence, the foreign national will automatically receive a deportation order. Similarly, if a foreign national has worked without a Work Permit and without authorization, the foreign national will be issued an exclusion order. Removal orders vary in seriousness and repercussion. See Operational Manual ENF 6 and ENF 10 for more details.

### *A. Departure Order*

A departure order requires the individual to leave Canada voluntarily within 30 days. The person must sign a “certificate of departure” at the Port of Entry (i.e. border or airport) when leaving. If a person under a departure order legitimately leaves Canada, he or she may return to Canada at any time without any specific permission from the Minister, so long as they meet requirements of the IRPA.

**NOTE:** If a person under a departure order does not leave Canada within 30 days of the order coming into effect, the departure order becomes a deportation order.

### ***B. Exclusion Order***

An exclusion order requires the individual to leave Canada; otherwise the person is removed from the country. The person cannot re-enter Canada for one year without consent from the Minister, and cannot return for two years without permission if the ground of inadmissibility is misrepresentation under s. 40(2)(a) of the IRPA. After the period of one or two years has passed, the person can apply to re-enter Canada so long as they meet the requirements of the IRPA.

### ***C. Deportation Order***

A deportation order is the most serious type of removal order. A person under a deportation order is generally removed, but in some circumstances, may leave voluntarily. A person removed on a deportation order can never return to Canada unless they obtain permission from the Minister.

If a person who has been removed from Canada by CIC wishes to return to Canada, and is permitted to do so, they must pay a fee.

**NOTE:** If a person, who has been removed from Canada under a deportation order or an exclusion order that is still in effect, returns to Canada without permission from the Minister, that person can be charged with offences under s.124 of the IRPA.

## **XI. APPEALS**

The Immigration Appeal Division (IAD) may allow an appeal and set aside an original decision: (i.) based on the grounds of an error in law or fact; (ii.) if there are sufficient humanitarian grounds (in some cases); or (iii.) if a breach of a principle of natural justice has occurred. Principles of equity are generally of greater concern in appeals concerning removal orders. In certain cases, the IAD may also give special relief on the basis of humanitarian and compassionate grounds (i.e. equitable grounds), considering all the circumstances of the case and especially in taking into account the best interests of a child. The IAD can (i.) allow an appeal, (ii.) dismiss an appeal, or (iii.) stay an appeal and impose terms and conditions.

### ***A. Sponsorship Appeals***

If a Canadian citizen or permanent resident (PR) tries to sponsor a member of the family class and the application is refused, the citizen or PR can appeal the refusal to the immigration appeal division. Appeals must be made within **30 days** of the refusal. A member will hear the appeal following the tribunal process. Some sponsorship appeals follow an Alternative Dispute Resolution (ADR) process, which can be applied for by the appellant (generally in less difficult cases). IAD's jurisdiction is limited to errors in law, fact, or mixed law and fact. IAD cannot override a negative sponsorship application on grounds of equity. Sponsorship applications made from within Canada, i.e. "in-Canada" class applications, **cannot** be appealed to the IAD.

### ***B. Removal Order Appeals***

Permanent residents, Convention refugees, and protected persons who have been ordered removed from Canada may file an appeal with the IAD. These appeals may be based on either legal or equitable grounds. A person **cannot** appeal an order to IAD if he or she (i.) has been convicted and sentenced to two or more years, or (ii.) in other exceptional circumstances as listed below. Removal orders may **not** be appealed if the permanent resident has been found inadmissible because of:

1. serious criminality with a sentence of two years or more;
2. organized criminality;

3. security grounds; or
4. violations of human or international rights.

Appeals must be filed within **30 days** of the removal order being issued.

**NOTE:** Because of the exclusion from appeal for people sentenced to two years or more, advocates in criminal trials where this may become an issue should ensure that the judge is aware of the immigration status of the accused, as it may affect sentencing (e.g. the judge may reduce the sentence to two years less a day, in which case an appeal of the removal order would be possible). For further details see **Section XIII: Immigration Issues at Sentencing**, below.

### ***C. Residency Obligation Appeals***

Permanent residents outside of Canada who are determined by a CIC officer not to have fulfilled their residency obligation have a right of appeal before the IAD.

Appeals must be made within **60 days** of receiving the written decision. Upon application, the IAD can issue an order that the person must physically appear at the hearing. Once the order is given, a travel document will be issued by CIC allowing the person to enter Canada for the hearing. If the appeal is allowed, the person will not lose permanent resident status. If it is dismissed, the person will lose permanent resident status, and the IAD will issue a removal order.

### ***D. Federal Court (Leave and Judicial Review)***

Always contact an immigration lawyer in cases where Federal Court is, or might be involved. Decisions by the IAD (or the Refugee Protection Division and the Immigration Division, where no administrative appeal exists) may be challenged by judicial review in the Federal Court of Canada. In the process of judicial review, the court does not try the case *de novo*; the role of the court is not to substitute its own discretion for that of the tribunal, but rather to ensure that the tribunal did not exceed its statutory authority. The court simply reviews the case to verify: that it was procedurally fair; that the decision-maker did not make any errors of law or unreasonable findings of fact; and that the decision itself was reasonable. See **Chapter 20: Public Complaints** for a more thorough treatment of judicial review.

An application for leave and judicial review must be filed with the Federal Court and served within **15 days** of the date of the decision (IRPA s. 72).

On a leave application, all arguments and evidence are submitted to the judge in written form without a personal appearance. The judge reviews the material and, if satisfied that the applicant has made an arguable case, grants leave. If the judge decides there is no arguable case, leave will be denied and there can be no further argument in the Federal Court. A decision made by the Federal Court may be appealed to the Federal Court of Appeal only if the Trial Division judge “certifies” a question as being of serious and general importance (s. 74(d)).

## **XII. OFFENCES UNDER THE ACT**

Part 3 of the IRPA outlines various offences and penalties for breaches of the Act. Offences of human smuggling and trafficking in persons have penalties of up to life in prison and fines of up to one million dollars. Other offences created by the Act include:

1. disembarking a person or group of people at sea for the purposes of entering Canada illegally;
2. possession, use, import/export, or dealing in passports, visas and other documents to contravene the Act;

3. entering Canada at any place other than a Port of Entry without reporting to an immigration officer;
4. gaining admission to Canada through the use of a false or improperly obtained passport, visa or other documents;
5. violating the terms or conditions under which admission was granted;
6. knowingly making false or misleading statements at an immigration examination or admissibility hearing;
7. remaining in Canada after ceasing to be a visitor; and
8. working illegally.

For lesser offences, s. 144 of the IRPA provides that offenders may be ticketed. This provides officers with an alternative to using the other procedures set out in the IRPA or the Criminal Code, R.S.C. 1985, c. C-46. Fines of up to \$10,000 may be assessed under such offences.

**NOTE:** It is an offence for a Canadian employer to hire any temporary resident knowing that he or she is not authorized to work in Canada.

### **XIII. IMMIGRATION ISSUES AT SENTENCING**

Since 2005, the Court of Appeal has heard a number of sentence appeals involving the effect of a 2 year sentence on a permanent resident's ability to appeal a deportation order. These decisions underscore the importance of ascertaining a client's immigration status and advising the sentencing judge accordingly.

If a permanent resident has been convicted of an offence in Canada for which a maximum term of imprisonment of more than 10 years could be imposed, he or she becomes inadmissible to Canada and will be issued a deportation order. A permanent resident has the right to appeal a deportation order to the IAD under s. 63(3) of the IRPA. This right of appeal is lost if the permanent resident actually receives a sentence of 2 years or more. The calculation of 2 years includes pre-trial custody, so an individual who receives a 1 year sentence in addition to double credit for 6 months pre-trial custody, has received a 2 year sentence.

*R. v. Kanthasamy*, [2005] B.C.J. No. 517, BCCA 135 appears to be the first case involving this 2 year issue at the appellate level in British Columbia. In that case, a 2 year sentenced was reduced on appeal to 2 years, less two days, in order to avoid the serious, "unintended collateral effect" on the offender's immigration status. *Kanthasamy* has been followed in a number of decisions, including *R. v. Leila*, [2008] B.C.J. No. 30 and *R. v. Q.A.M.*, [2005] B.C.J. No. 2700.

**NOTE:** Offenders who receive sentences well in excess of 2 years may not expect reductions in sentence as a result of the risk of deportation. In *R. v. Worrell*, [1989] B.C.J. No. 236, an appeal against a 6 year sentence, Mr. Justice Seaton noted "The likelihood, or possibility, of deportation might be a proper factor for consideration in the case of a minor offence... but I think it not a factor of significance in a serious offence and I think this to be an extremely serious offence." The Court reached a similar conclusion in *R. v. Fuentes* (1994), 51 B.C.A.C. 164 and *R. v. Dhillon*, 2006 BCCA 531.