

CHAPTER EIGHTEEN: IMMIGRATION LAW

Edited By: Mu Xin
With the Assistance of Juliana Dalley of Embarkation Law Corporation
Current as of June 18, 2018

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CHAPTER EIGHTEEN: IMMIGRATION LAW

I. INTRODUCTION

This chapter is designed to assist with the following questions pertaining to immigration law in Canada:

- What is my status?
- How do I obtain a Work / Study Permit?
- How do I obtain Permanent Residence?
- How do I appeal an immigration matter?

It is advised that you reference outside sources in addition to this manual if your question is beyond the scope of the questions listed above. It is also important to refer to the main sources of immigration law (listed below) when researching a legal issue as the law may have changed since the printing of this manual. Notes advising users of potential changes to immigration law have been placed throughout the chapter as a warning that further research may be needed.

It is recommended that you contact an immigration lawyer if you require further assistance. Legal advocacy is recommended for appellate proceedings due to the complex nature of this area of law. Furthermore, several programs in British Columbia offer assistance with Temporary and Permanent Residence applications. If you cannot obtain the services of an immigration lawyer, the Law Students' Legal Advice Program and the services listed in Section XII of this chapter may be able to provide assistance if you meet their qualifications.

II. GOVERNING LEGISLATION AND RESOURCES

A. *Main Sources of Immigration Law*

Immigration law is a very dynamic area, and it has undergone significant change in the recent past. For this reason, it is imperative to refer to the following sources, for the most up to date information about immigration law:

- *Immigration and Refugee Protection Act, RSC 2001, c 27 [IRPA]*
<http://canlii.ca/t/7vwq>
- *Immigration and Refugee Protection Regulations, SOR/2002-227 [IRP Regulations]*
<http://canlii.ca/t/7xsp>
- *Operational Bulletins and Manuals*
<http://www.cic.gc.ca/english/resources/manuals/index.asp>

There are six general sources of immigration law and policy: the IRPA, the *IRP Regulations*, the Manuals, the Operational Bulletins, the Ministerial Instructions and case law. The *Canadian Charter of Rights and Freedoms* (Part I of the *Constitution Act*, 1982, is also applicable to immigration matters; the IRPA and *IRP Regulations* must be consistent with *Charter* provisions.

1. *The Immigration and Refugee Protection Act and Regulations*

The *Immigration and Refugee Protection Act* 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. The Immigration and Refugee Board has jurisdiction to hear certain immigration matters (consisting of four separate divisions).

The *Immigration and Refugee Protection Act*, RSC 2001, c 27 (“IRPA”) came into force on June 28, 2002, replacing the former *Immigration Act of Canada*, 1976. It is important to note which legislation governs a matter. 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 you may be subject to the old Act.

NOTE: The key legislation in this area of law changes frequently. Make sure to check the most recent version of the IRPA and Regulations, and to check the IRCC website for policy changes.

2. *Operational Manuals and Bulletins*

However, much of the operation of law in the Canadian immigration context takes place through the decision-making apparatus of IRCC, which is a large spatially-distributed administrative bureaucracy. IRCC “officers” make decisions on written applications, without significant applicant input, and often without any opportunity to clarify evidence, and so it is **vital** that applications contain all the evidence required for the status being sought. Much of the law itself is interpreted through the policy of IRCC, which is publically available through IRCC’s Operational Manuals (<http://www.cic.gc.ca/english/resources/manuals/index.asp>) and between manuals, Operation Bulletins (a link to these bulletins can be found on the Operational Manuals page).

Operational Manuals are drafted by IRCC and provide details on interpretation of the IRPA and *IRP Regulations*. Immigration Officers and Visa Officers usually consider themselves bound to the Manuals when determining a case. Operational Bulletins are recent developments by Immigration, Refugees and Citizenship Canada that have not yet been incorporated into the Manuals.

NOTE: The Manuals and Operational Bulletins do not have the force of law and must be consistent with the IRPA and the *IRP Regulations*. Cases that do not fit the factors listed in the Manuals and Operational Bulletins may therefore still be arguable at law. However, you may never have an opportunity to argue the legal case due to the limited and narrow appeals and review options, and so it is essential that applicants try to confirm to the policy requirements as much as possible in the circumstances.

3. *Ministerial Instructions*

The Ministerial Instructions are provided for in s 87.3 of IRPA, and are created through Order in Council. The Ministerial Instructions drive current immigration policy. The Minister uses Ministerial Instructions to make fast, sweeping changes to the immigration system, and so it is very important to ensure that you are working with the most current information on requirements.

B. Resources

Immigration, Refugees and Citizenship Canada (“IRCC”)

Website: www.cic.gc.ca

- Canadian immigration law is changing constantly and sometimes unpredictably. To ensure that you are using the most up to date forms, and the most current policies and procedures, it is important to always check the web site of Immigration, Refugees and Citizenship Canada: Here you can find information, downloadable forms, and links to the IRPA, Regulations, and Policy Manuals. Operational Manuals and Bulletins published by IRCC are available online under the Publications heading (<http://www.cic.gc.ca/english/resources/manuals/index.asp>). They explain the policies and procedures used by immigration officials to interpret the IRPA.

NOTE: The Operational Bulletins section of the IRCC Publications site is currently undergoing a reformatting and restructuring effort wherein static Portable Document Format (“PDF”) manuals are being replaced with HTML policy documents that can be changed as soon as IRCC policy changes. There is no indication at this time as to where “legacy” policies will be stored or archived, and it is quite possible that previous policies will not be accessible once a policy has changed.

Immigration and Refugee Board (“IRB”)

Website: <http://www.irb-cisr.gc.ca>

H.M. Goslett & B.J. Caruso eds., *The 2018 Annotated Immigration and Refugee Protection Act of Canada*, (Toronto: Carswell, Legal Publications). Available on reserve in the UBC Law Library.

L. Waldman, *Canadian Immigration Law and Practice 2018* (LexisNexis).

III. IMMIGRATION “PLAYERS”

A. Immigration, Refugees and Citizenship Canada (“IRCC”) and Canada Border Services Agency (“CBSA”)

Immigration, Refugees and Citizenship Canada (“IRCC”) (under the Minister of Immigration, Refugees and Citizenship Canada) is generally responsible for processing permanent resident 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 IRCC is more complicated than what is outlined here, and roles change.

B. Immigration and Refugee Board (“IRB”)

The Immigration and Refugee Board is an independent tribunal with four distinct divisions. These are outlined below in **Section VIII: The Immigration and Refugee Board**.

C. Immigration Representatives, Consultants, and “Shadow” or “Ghost” Consultants

Under section 91 of the IRPA, the only persons permitted to offer immigration advice or to appear before the Immigration and Refugee Board for consideration (i.e. pay) in relation to an application, are lawyers (and articulated students) and members of the Immigration Consultants of Canada Regulatory Council (“ICCRC”).

The ICCRC is a relatively new organization that replaced the Canadian Society of Immigration Consultants. A person who is not paid may legally provide assistance and advice to an applicant.

Any party appearing as a representative to an applicant must complete an IMM5476E "Use of a Representative" form. This includes both unpaid and paid parties.

For any proceeding in Federal Court, i.e. judicial review of an IRB decision, only lawyers and the applicants themselves may appear.

“Shadow” or “ghost” consulting refers to the practice of offering immigration-consulting services without the proper accreditation. While these consultants are not authorized players in the immigration process, their presence is nevertheless significant, and often harmful. Whether acting within Canada or outside Canada, ghost consultants will never appear in the official record of an application. Since many immigrants are unaware of the regulatory requirement for authorized representation, those immigrants are exposing themselves to censure and even findings of "misrepresentation" if they employ ghost consultants, and IRCC and CBSA will aggressively pursue such findings if given the opportunity. Advocates should be entirely sure of their suspicions of the use of a ghost consultant before revealing this fact to IRCC and prejudicing their client. There are methods for pursuing and censuring ghost consultants provided in the IRPA and *IRP Regulations*, and clients may also have civil remedies against them in certain situations. Refer to the “small claims” chapter for more information on filing complaints or small claims actions against consultants.

IV. CATEGORIES OF PERSONS UNDER THE IRPA

There are three legal categories of persons under IRPA: citizens, permanent residents and foreign nationals. “Status” is the term commonly used to describe the category under which someone falls. Every person physically present in Canada falls into one (and only one) of these categories. “Indians” under the *Indian Act* may enter and remain in Canada in ways that are similar to, but not the same as, a permanent resident, and Indians may also apply for citizenship under certain circumstances. However, Indians may also still be foreign nationals even though they are also Indians, and as such are under the legal requirements of foreign nationals.

A. *Citizen*

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

Dual Canadian citizens (persons with multiple citizenships, including Canadian citizenship) travelling to or through Canada are required to enter Canada on a Canadian passport. Canadian citizens should always try to have a passport that will remain valid well beyond any time they plan to spend outside Canada.

B. *Permanent Resident*

A permanent resident (historically called a “landed immigrant”) is a person who has been granted permanent admission as an immigrant, but who has not become a Canadian citizen. Under IRPA section 2, “permanent resident” means a person who has acquired permanent resident status and has not subsequently lost that status under section 46.

Permanent residents have the same rights as Canadian citizens, with a few exceptions. One important exception is that a permanent resident can lose their permanent resident status and be removed from Canada under certain circumstances, most notably, for having committed a serious criminal offence or for not fulfilling their “residency requirements” (see below).

C. *Foreign National*

Under IRPA s 2, a foreign national is any person who is not a Canadian citizen or a permanent resident, and includes a stateless person. Foreign nationals with Temporary Resident status have conditions attached that the foreign national must abide by, such as visitor, person with a Study Permit or a Work Permit, Convention refugee claimant and many others. Foreign nationals may also have no status – however, they are still Foreign Nationals even if their status has expired.

Upon losing their Temporary Resident status for allegedly failing to comply with conditions imposed (a list can be found in *IRP Regulations* 185(a)), a foreign national can apply within 90 days to have this reviewed. If the officer finds that the foreign national has not failed to comply with any conditions and meets the initial requirements for their stay, the officer shall restore their Temporary Resident status.

Some types of foreign nationals and their associated conditions 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 (“TRV”) under the Visitor Class (sometimes known as a “visitor’s visa”) before entering Canada; others do not (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 has the condition that they **cannot work or study** in Canada, with very few exceptions. Visitors must prove that they will leave Canada at the end of their visit.

Visitors who are exempt from requiring a Temporary Resident Visa will still be required to attain an Electronic Travel Authorization (“ETA”). The sole exception to this requirement is for individuals from the United States and individuals with a valid Canadian visa. Applications to obtain an ETA are made through the IRCC website and applicants will be required to pay a \$7.00 surcharge. Electronic Travel Authorizations are not guaranteed and may be denied to travellers with criminal records or existing inadmissibility to Canada. For more information on the ETA process and to apply online visit www.cic.gc.ca/english/visit/eta.asp

Visitors can only stay in Canada for the duration of time granted when they first enter Canada unless they obtain an extension. The default amount of time granted upon entry is six months, although an immigration officer may specify 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 Immigration, Refugees and Citizenship Canada from within Canada. However, a person may apply for an extension without having to leave the country if they apply **before the temporary resident status expires**. If such a person stays in Canada beyond the amount of time granted, the person has “overstayed” his or her visit and is subject to the issuance of a removal order for non-compliance (which would result in a mandatory 1-year exclusion from Canada). A successful applicant must prove that they will leave at the end of the visitation period, and that they will have sufficient funds during their visit. Most foreign nationals can apply for Restoration (*IRP Regulations* s 182) within 90 days of expiry, but person’s status is not actually restored until a decision is made, and so they remain at risk of potential enforcement.

NOTE: In response to the 2011 two-year-pause on the sponsorship of parents and grandparents, a parent and grandparent “supervisa” was introduced. The supervisa is a category of temporary resident status that allows for the foreign national to remain in Canada continuously for 24 months, rather than the default 6 months, and can also facilitate the issuance of a multiple entry TRV for up to

ten years. The parent or grandparent must not reside in Canada for more than 24 months at a time. To apply for a parent and grandparent supervisa, additional documentation such as a letter of invitation from the child, evidence of the parent or grandparent relationship and proof of private medical insurance from a Canadian insurance company are required. For more information, see www.cic.gc.ca/english/visit/supervisa-how.asp.

2. Students

A foreign national who wishes to study in Canada must apply for their initial study permit **from outside** Canada at a visa office under authorization of the Student Class. There are several exceptions to this general rule: in some circumstances a foreign national can study in Canada without a permit (see *IRP Regulations* ss. 188 to 189); and in circumstances such as extending an existing study permit a foreign national can apply for a study permit from within Canada (see s. 215).

International students enrolled in courses in Canada for six months or less do not need a study permit, as long as those studies began and will end within six months of their entry to Canada. However, they must still have valid temporary resident status in Canada to perform these studies.

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*).

Registered Indians (as defined under the Canada *Indian Act*) who are also foreign nationals are allowed to study in Canada without a study permit. However, those persons must still have valid temporary resident status in Canada.

3. Workers

A foreign national who wishes to work in Canada must apply for authorization under the Worker Class, and a work permit **from outside** Canada at a visa office. There are several exceptions to this general rule: in some circumstances a foreign national can work in Canada without a permit (see *IRP Regulations* ss. 186 to 187); and in some circumstances a foreign national can apply for a work permit at a Port of Entry (see *IRP Regulations* s 198), or from within Canada (see s. 199).

The most common variety of work permit is based on an employer in Canada applying to obtain a Labour Market Impact Assessment (LMIA), or “validation,” from Service Canada (Employment and Skills Development Canada). Obtaining an LMIA is often difficult. There are several criteria the employer must meet, including evidence of efforts to hire Canadians or permanent residents; that a government-determined minimum wage (not the same as the provincial minimum wage) will be paid; and that the employer is able to demonstrate it can pay the wages offered. There are additional rules associated with whether the position pays less than or more than the provincial average wage (again, not the same as the provincial minimum wage).

Information on the LMIA process (currently called the “Temporary Foreign Worker Program”) can be found at the Employment and Social Development Canada website (http://www.esdc.gc.ca/eng/jobs/foreign_workers/index.shtml).

There are other, less common kinds of work permit such as a professional pursuant to NAFTA; inter-company transfers; and “significant benefit” permits where the foreign national can demonstrate that they will contribute significantly to Canadian culture or the

economy. Work permits authorizing self-employment are technically possible, but rarely granted. Please see sections 204 and 205 of the *IRP Regulations*.

In some instances, no work permit is required in the first place (see sections 186 and 187 of the *IRP Regulations*).

4. Temporary Resident Permit

When a person is determined by IRCC or CBSA to be inadmissible to Canada (see below), a Temporary Resident Permit (“TRP”) (formerly called a Minister’s Permit, and not to be confused with a Temporary Resident Visa) can be 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). A foreign national is granted a TRP only under **exceptional circumstances**.

5. 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.

Foreign nationals who enter “irregularly” in a group (2 or more persons), or whose identities cannot be determined in a timely manner, may be designated by the Minister as “**designated foreign nationals.**” Designated foreign nationals are subject to mandatory detention, do not have a right of appeal to the RAD, and must wait at least 5 years before applying for permanent residence in Canada, even if their claim is accepted.

Details of the Convention refugee process are outlined in **Section VII.F: Convention Refugees**, below.

V. APPLYING FOR PERMANENT RESIDENCE

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 18th, 2008 give the Minister authority to establish an order of priority for incoming applications (s. 87.3), and relieve IRCC from the obligation to process all applications 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 details.

NOTE: It is important to inform IRCC about any changes in the application, such as a birth or adoption of a child, marriage or divorce, death of an applicant or dependent.

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 three general sub-classes within the economic class: the skilled worker 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 the scope of this Manual.

NOTE: As of January 1, 2015, IRCC implemented an online screening and selection process for persons who wish to be considered for permanent resident status in Canada under the Economic Classes of Federal Skilled Worker, Canadian Experience Class, and Federal Skilled Trades Class. This process is called Express Entry ("EE"):
<http://www.cic.gc.ca/english/immigrate/express/express-entry.asp>

EE is a system whereby applicants create an online profile (there is no paper process for creating an EE profile) that assigns points according to "Human Capital Factors" and "Skill Transferability Factors" under a "Comprehensive Ranking System". An applicant can obtain a maximum score of 600 points based on these factors in combination, and a possible extra 600 points by obtaining a special EE-related Provincial Nomination (see Provincial Nominee Programs) or an LMIA (see Workers). These factors and selection criteria were established through Ministerial Instructions, and can be reviewed in detail on the IRCC website (<http://www.cic.gc.ca/english/department/mi/express-entry.asp>).

Once the person has created an active EE profile, they may be selected for an Invitation to Apply ("ITA") for permanent resident status under one of the three aforementioned Classes of permanent residence. They will be issued an ITA if their profile score equals or exceeds the score chosen by IRCC at a particular selection pass. Consequently, potential immigrants do not know if they are able to apply for permanent resident status until they receive an ITA.

Upon receiving an ITA, the applicant has 60 days to submit the application for permanent resident status. The application is made entirely online, without written forms, and requires scans of all relevant documents. The applicant will not know exactly what documents are required until they actually receive the ITA, and the documents required may change according to other evidence provided as part of the application. The online submission is often referred to as the "e-APR".

Once the e-APR is submitted, they will be contacted by IRCC with instructions on where to send original documents that may be required (such as original police clearances).

1. Federal Skilled Worker Class (Express Entry Required)

The Federal Skilled Worker Program ("FSW") selects immigrants based on their ability to succeed economically in Canada. 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. For information on how points are allocated, refer to www.cic.gc.ca/english/immigrate/skilled/apply-factors.asp.

For complete information of the Federal Skilled Worker Program, please refer to: <http://www.cic.gc.ca/english/immigrate/skilled/index.asp>

2. Canadian Experience Class (Express Entry Required)

This 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 able to demonstrate two things:

- 1) 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). "Full time" work in this context means 30 or more hours of work per week, and can be made up of work in more than one skilled job, but any hours beyond 30 during that week are surplus and are not counted.
- 2) Depending upon the dominant type of skilled work they are claiming, the applicant must show a minimum proficiency in either English or French, through providing a test result report from the TEF, IELTS or CELPIP testing systems.

See the IRCC Program Delivery Instructions for the Canadian Experience Class (<http://www.cic.gc.ca/english/resources/tools/perm/econ/cec/index-post.asp>) and the IRCC website (<http://www.cic.gc.ca/english/immigrate/cec/apply-who.asp>).

3. Federal Skilled Trades Class (Express Entry Required)

This class is meant to facilitate the permanent residence of skilled tradespersons in Canada. In order to be eligible for the Federal Skilled Trades Program ("FSTP"), an applicant must

- a) Plan to live outside the province of Quebec,
- b) Meet the required levels in English or French for each language ability (CLB 5 for speaking, and listening, and CLB 4 for reading, writing),
- c) Have at least two years of full-time (30 hours per week) work experience (or an equal amount of part-time work experience) in a skilled trade within the five years before applying,
- d) Meet the job requirements for their predominant skilled trade as set out in the National Occupational Classification ("NOC"), (except for needing a certificate of qualification),
and
 - a. Have an offer of full-time employment for a total period of at least one year (up to 2 employers can commit to offer employment, but all offers of employment must be associated with an LMIA).
or
 - b. A certificate of qualification in their predominant skilled trade issued by a Canadian provincial or territorial authority (such as a Red Seal).

Applicants who are applying from outside of Canada must also show that they have sufficient settlement funds for their family upon arrival in Canada. See <http://www.cic.gc.ca/english/immigrate/trades/apply-who.asp>

4. Provincial Nominee 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. B.C.'s Provincial Nominee Program ("BCPNP") has its own categories, which can be different from the federal requirements.

After you are nominated for permanent residence by the BC PNP, both you and your employer must tell the BC PNP about any employment changes by

emailing PNPPostNom@gov.bc.ca. This includes a promotion, lay-off, termination or a potential new job with a new employer. Please note that failing to inform BC PNP of a change in your employment status could lead to the withdrawal of your nomination. It could also lead to questions from IRCC when they process your application. All post-nomination requests, including requests for work permit support letters, change of employers, and re-nominations, must now be emailed to PNPPostNom@gov.bc.ca.

On 01 February 2017, the BC Provincial Immigration Programs Act and Regulations came into effect. This legislation provides a framework for the operation of the BCPNP, including direction concerning what factors can serve as the basis for a nomination, how fees are set, provides investigatory powers to the Director of the PNP, and allows for an appeal process for refused nominations. Clinicians assisting with PNP applications should familiarize themselves with the “interpretive guidelines” provided on the BCPNP site: <https://www.welcomebc.ca/Immigrate-to-B-C/B-C-Provincial-Nominee-Program/Documents>.

Where a BCPNP applicant is refused their application for a nomination certificate, the ability to appeal the decision is provided within their BCPNP online profile, and so it is important for the applicant to log into their profile as soon as possible upon receiving a refusal. They must pay a fee of \$200, and provide submissions and evidence as part of the appeal process.

NOTE: A BCPNP nomination can be cancelled after being issued, and this cancellation does not receive consideration under the appeal process. Instead the nominee is given basic procedural fairness protections in the form of an opportunity to be heard before the nomination is cancelled. There is no appeal to the cancellation decision and so it is important to make the best case possible at that time.

The BCPNP program is currently using an online registration and selection process similar to that of Express Entry (see the NOTE in Section V. A. “Economic Class Applicants”). Enrolment in the program is free. Once an applicant has enrolled in the program they wait to be issued an invitation to apply for a provincial nomination. No time estimate for waiting periods can be provided as they vary and depend on the strength of the application. Consolidated guides with all the details necessary to assist with a BCPNP application can be found under: <http://www.welcombc.ca/Immigrate-to-B-C/B-C-Provincial-Nominee-Program/Documents>. For more information about BC’s programs generally, see: <http://www.welcomebc.ca/pnp>.

5. 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. While it is not explicitly stated on the IRCC website, applicants with exceptional skills, such as Olympic athletes, world-renowned artists and/or musicians, etc. are more likely to be successful under this class. 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 endeavor for at least 2 years. However, persons not actually participating at a “world-class” level may still be successful if they can demonstrate they were self-employed in Category 5 of the Canadian National Occupational Classification (“NOC”) (occupations in art, culture, recreation, and sport) for at least 2 years before coming to Canada, and that they are likely to become economically established in Canada.

Please refer to *IRP Regulations* Part 6 Division 2 (ss. 100 and 101), and to the IRCC website (<http://www.cic.gc.ca/english/immigrate/business/self-employed/apply-who.asp>).

6. Investor Class

The Investor Program and the Federal Entrepreneur Program has been closed since July 1st 2012.

As of April 1st 2013, IRCC opened up a Start-Up Visa Program under the Business Immigration Program, which is geared at attracting experienced business people to Canada who will support the development of a strong and prosperous Canadian economy. Individuals are advised to check the IRCC website for the latest information.

B. Family Class Applicants

Foreign nationals can be “sponsored” under the Family Class by a Canadian citizen or permanent resident. See the *IRP Regulations*, Part 7.

NOTE: Sponsored foreign nationals **must** declare any of their non-accompanying family members (i.e. dependent children, spouses, and parents) in their initial application if they wish, at some point, to sponsor these individuals themselves. Under *IRP Regulation* 117(9)(d), if a foreign national fails to declare a non-accompanying family member in their application for permanent residence, **that family member cannot EVER be sponsored by the foreign national** (except in rare circumstances).

1. Sponsors

a) Eligibility Requirements

The sponsor must meet certain eligibility requirements. For example, the sponsor must be at least 18 years old, must reside primarily in Canada, must not be bankrupt or receiving provincial welfare benefits, must not be in default of a previous immigration undertaking, etc. (see ss. 130 - 137 of the *IRP Regulations* for the requirements).

The requirement to reside in Canada only applies to permanent resident applications. Canadian citizen sponsors may reside outside of Canada when they submit the sponsorship, but must demonstrate their intention to return to Canada when the sponsored person becomes a permanent resident (see *IRP Regulations* 130(2)).

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 just sponsoring their spouse or children (*IRP Regulations* s. 133(4)).

2. Members of the Family Class

The family class is the group of family members that can be sponsored to immigrate to Canada. Family members who are not included in *IRP Regulation* s. 117(1) cannot be sponsored. Below is a list of members of the family class:

- a) Spouse, common-law partner or conjugal partner,
- b) Dependent child,
- c) Parents or grandparents,
- d) Brother, sister, niece, nephew, or grandchild who is an orphaned child under 22 and is not a spouse or common-law partner, or
- e) 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.

A dependent child is defined as a child, both biological and adopted, of the sponsor or sponsor’s spouse who is below the age of 22. Exceptions can be made for children who are above the age of 22 but are substantially dependent on their parent due to a mental or physical condition (*IRPA* s. 1).

NOTE: There is a new requirement that sponsors meet an increased income level for sponsoring parents or grandparents.

NOTE: A major issue that arises in many spousal sponsorship applications is whether the marriage is genuine. Under *IRP Regulations*, s. 4, a foreign national will not be considered a spouse if the marriage is not genuine or was entered into primarily for the purposes of acquiring any status or privilege under the Act. Applicants must prove that their marriage is valid, both in Canada, and in the country in which it took place (*IRP Regulations*, s. 2). While an arranged marriage is not inherently less credible, prior acquaintance to the marriage can pose some evidentiary challenges.

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 signed undertaking with the federal government that he or she will support the prospective immigrant and accompanying dependents, 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 under the Family Class is refused, the **sponsor** may (in most cases) appeal the refusal to the Immigration Appeal Division.

C. ***“In Canada” Spouses, Common-law Partners, and their dependents (Spouse or Common-Law Partner in Canada Class)***

The statutory “in-Canada” family class sponsorship provisions are outlined under ss. 123 - 125 of the *IRP Regulations*. The requirements from the sponsor are generally the same, but the Class of persons able to be sponsored through this route is limited to spouses, common-law partners, and the children or grandchildren of those persons. The entire application is processed inside Canada, and the applicants are generally landed at an IRCC office in Canada. It is important to note that, aside from the question of the genuineness of the relationship, in-Canada applications are only successful if the sponsored person resides in Canada with the sponsor.

Out of status spouses in Canada – Public Policy

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. After the sponsored spouse (applicant) receives first stage approval of their application (that is, approval in principle), they are entitled to an Open Work Permit under *IRP Regulations* s. 207. This means the applicant is entitled to work in Canada in any capacity; in other words, unlike most temporary foreign workers, this work permit is not tied to a particular form of employment with a particular employer.

NOTE: An applicant will be granted a sixty (60) day period in which IRCC should determine whether the relationship is genuine if the applicant is out of status. If it is determined that the relationship is genuine then the removal order will be ceased.

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.** Note that this is a policy and not a law, and therefore it is subject to change at any time. Also, 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 Immigration, Refugees and Citizenship Canada seeks to grant permanent resident status).

Consequently, 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 Appendix H of the Operational Manual, “IP 8 — Spouse or Common-law Partner in Canada”.)

NOTE: Under “in-Canada” classes, there is **no appeal** to the Immigration Appeal Division of a failed sponsorship. The only redress is to file a new application, file an overseas family class application, or if possible, to file for judicial review of the refusal.

NOTE: As of December 22, 2014, IRCC will issue open work permits to certain spouse or common-law partner in Canada class applicants at the initial stage of processing. For more information, see:
<http://www.cic.gc.ca/english/department/media/notices/2015-12-11.asp>

D. Caregiver Program

As of November 30, 2014, the Caregiver Program (formerly the Live-in Caregiver Program) was changed to eliminate the live-in requirement, and to introduce two pathways to permanent residence: the Caring for Children Pathway, and the Caring for People with High Medical Needs Pathway. The

government is now reviewing the Caring for Children and Caring for People with High Medical Needs pilot programs to determine how caregivers will apply for permanent residence after the pilots expire on November 29, 2019. **To be eligible for under these programs, applicants must meet the requirements and submit an application for permanent residency before that date.**

Those who were already working as live-in caregivers or who had submitted applications through the old program may choose to submit a new application under one of the two new pathways, or to remain in the Live-in Caregiver Program and apply for permanent residence under the old requirements.

Caregiver for Children Program:

The Applicant must have at least **24 months** of full-time work experience in Canada as a home child care provider in the four years (48 months) before they apply.

Caring for People with High Medical Needs class

You can apply through the [Caring for People with High Medical Needs class](#) if you have been working in Canada for at least two years as a:

- registered or licensed practical nurse
- nurse aid or orderly
- home support worker

Live-in Caregiver Program:

You may be eligible to [apply for permanent residence](#) in Canada after you have had the following work experience under the Live-in Caregiver Program:

- 24 months of authorized full-time live-in employment, or
- 3,900 hours of authorized full-time employment. You can complete these hours within a minimum of 22 months. When calculating your hours, you can also include up to 390 hours of overtime; and
- The work experience must be acquired within four years of your date of arrival.

A foreign national must have first obtained a Service Canada Labour Market Impact Assessment/validation before applying for a Work Permit. Once a foreign national had a Service Canada validation, the foreign national could apply for a Work Permit under the live-in caregiver class. Overseas applications are being processed inside Canada.

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 Immigration, Refugees and Citizenship Canada. Information on the Program, including the November 2014 changes, is available on the IRCC website (www.cic.gc.ca/english/work/caregiver/index.asp), and also through the Migrant Workers Centre:

Migrant Worker's Centre (formerly WCDWA)

302-119 W Pender Street
Vancouver, B.C. V6B 1S5
Website: www.wcdwa.ca

Telephone: (604) 669-4482
Fax: (604) 669-6456
E-mail: info@wcdwa.ca

Once a live-in caregiver is admitted into Canada on a Work Permit, she or he must work for two of four years before applying for permanent resident status in Canada (*IRP Regulations*, s 113(1)(d)).

NOTE: The Caring for Children and Caring for People with High Medical Needs Pathways can be changed without normal regulatory requirements as they are established under Ministerial Instructions. Refer to the IRCC website

(<http://www.cic.gc.ca/english/work/caregiver/index.asp>) for the most current information on this program.

E. Humanitarian and Compassionate Applications

Section A25(1) of the *Immigration and Refugee Protection Act* (IRPA) allows foreign nationals who are inadmissible or who are ineligible to apply in an immigration class, to apply for permanent residence, or for an exemption from a requirement of the Act, based on humanitarian and compassionate (H&C) considerations.

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, **and generally only exceptional circumstances will result in an H&C exception.** The Supreme Court of Canada in *Kanthasamy v Canada (Citizenship and Immigration)* 2015 SCC 61 established a broad and comprehensive assessment of all the applicants’ circumstances in an H&C application. The former test, which considers whether the foreign national would face “undue, undeserved, or disproportionate hardship” if they were forced to return to their country of habitual residence or citizenship, should be only treated as descriptive, not as creating three new thresholds for relief separate and apart from the humanitarian purpose of s. 25(1). As a result, what officers should not do, is look at s. 25(1) through the lens of the three adjectives as discrete and high thresholds, and use the language of “unusual and undeserved or disproportionate hardship” in a way that limits their ability to consider and give weight to *all* relevant humanitarian and compassionate considerations in a particular case. The three adjectives should be seen as instructive but not determinative, allowing s. 25(1) to respond more flexibly to the **equitable** goals of the provision.

Under the previous test the primary concern is “the best interest of any child” affected by the decision, but an immigration officer will also consider: level of establishment in Canada, family ties in Canada, ties to community, and any other relevant considerations. Review the Program Delivery Instructions on H&C applications (<http://www.cic.gc.ca/english/resources/manuals/>) for more information.

NOTE: In 2010, s. 25 of the IRPA was amended, such that “... the Minister may not consider the factors that are taken into account in the determination of whether a person is a Convention refugee under section 96 or a person in need of protection under subsection 97(1) but must consider elements related to the hardships that affect the foreign national”. In other words, officers do not determine whether a well-founded fear of persecution, risk to life, danger of torture and risk of cruel and unusual treatment or punishment has been established, but they may take the underlying facts into account in determining whether the applicant will face hardship if returned to their country of origin.

Subsection 25(1.3) applies only to H&C applications made in Canada.

As of June 29, 2012, refugee claimants who have had their claim denied **will be subject to a 1-year bar on submission of an H&C application as well as a bar on concurrent applications.** There are some exceptions to the bar. The bar does not apply if:

- you have children under 18 who would be adversely affected if you were removed from Canada, or
- you have proof that you or one of your dependents suffers from a life-threatening medical condition that cannot be treated in your home country.

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)

The Refugee Protection Division (“RPD”) assesses foreign nationals who apply for Convention refugee protection or “protected persons” status.

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, and
- f) The state must be unable or unwilling to protect.

If a person has more than one place of citizenship, they must have exhausted options in both of their countries of citizenship (see *Canada v Ward* [1993] 2 SCR 689). This is not an exhaustive list; refer directly to the IRPA, ss. 95 to 111.

The IRB Chairperson has issued special interpretation guidelines for determining Convention refugee claims of women refugees. Individuals should review these “Gender Guidelines” when assisting women refugee claimants. The Gender Guidelines can be found on the IRB’s website, www.irb-cisr.gc.ca, under the heading “Legal and Policy References.”

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.

Significant changes to the refugee determination process have been implemented over the last several years by the *Balanced Refugee Reform Act, SC 2010, c 8 (BRR)*, and, the *Protecting Canada’s Immigration System Act, SC 2012, c 17*.

Key Changes:

- People who make a refugee claim at an office in Canada must submit their completed Basis of Claim form (“BOC”) during their eligibility interview. Those who make a refugee claim at a port of entry must submit their BOC to the IRB no later than 15 days after referral of their claim to the IRB.
- Hearings at the independent Immigration and Refugee Board of Canada (“IRB”) will be conducted by public servant decision-makers rather than people appointed by the Governor in Council (“GIC”).
- Hearings for most claimants will be held no later than 60 days after the refugee claim is referred to the IRB.
- For claimants from Designated Countries of Origin (see below), hearings will be held no later than 45 days after referral to the IRB for those who make a refugee claim at a port of entry, and no later than 30 days after referral for those who make a claim at an inland IRCC or Canada Border Services Agency (“CBSA”) office.

In general, refugee claimants have an initial intake interview with an officer, followed by a hearing with a public servant. Due to the increased volume of claims, the RPD has moved to a “first-in, first out” model where claims are heard in the order they are referred. **If the claimant fails, they will have 15 days to make an appeal to the Refugee Appeal Division (“RAD”). Claimants whose claims are decided by the IRB to be “manifestly unfounded” or have “no credible basis,” designated foreign nationals, and those falling under an exception to the Safe Third Country agreement have no right of appeal to RAD but may be able to file for Judicial Review.**

Please note that the timelines for BOC, Hearings, Document Disclosure and Postponement Requests are different for Inland claimants and Port of Entry claimants.

Any person midway through the application process should consult the Immigration, Refugees and Citizenship Canada website for the latest information: www.cic.gc.ca.

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 Immigration, Refugees and Citizenship 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 or 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. **Basis of Claim Form (“BOC”)**

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 will have **15 days to file the BOC**. This is the most important obligation on a Convention refugee claimant, apart from attending their hearing.

Claimants will require help in preparing their BOC. In the BOC, 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 **BOC should include facts that support the claimant’s fear, and that address the requirements set out in the IRPA**. For example, the BOC should address why the claimant has no internal flight alternative, how the state is involved or complicit in the persecution, 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 will question the claimant regarding the BOC. The Minister may also intervene in the hearing and a Hearings Officer

may question the claimant if they allege the claimant should be excluded from refugee protection under IRPA s. 98 or if they have concerns about the claimant's credibility.

Note that if the claimant wishes to rely on documents, he or she must file or serve those documents not less than 10 days before the hearing. If the Minister intervenes, they must also be served within the same time frame. If there are documents in other languages, they must be translated (Rule 28).

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 BOC before the hearing**. Claimants must be prepared to elaborate on the details outlined in the BOC. A decision maker may interpret inconsistencies with the facts as stated in the BOC as weakening the claimant's credibility.

5. Refugee Appeal Division

The Refugee Appeal Division ("RAD") considers appeals against decisions of the *Refugee Protection Division* ("RPD") to allow or reject claims for refugee protection. In most cases there will be no hearing, as the RAD will base its decision on the documents provided by the parties involved and the RPD record.

a) Appealing the RPD's decision to the RAD

For appeals of a **decision of the RPD** to the RAD, the following information may be helpful:

- There are **only 15 days** to file a Notice of Appeal after receiving the written reasons for the decision from the RPD,
- After a claimant receives the written reasons from the RPD decision, the claimant has 30 days to file an Appellant's Record,

For a detailed compilation of necessary steps and information for a claimant's appeal, please refer to the Appellant's Guide and Kit:

<http://www.irb-cisr.gc.ca/Eng/RefApp/Pages/RefAppKitTro.aspx>

b) Responding to the Minister's Appeal of the RPD's Decision

The Minister can appeal the RPD's decision to accept a claimant's refugee claim subject to the following exceptions:

- a) The claimant is a designated foreign national,
- b) The claimant is from a country that was a DCO at the time of their RPD decision,
- c) The claimant made their claim at a land border with the United States and the claim was referred to the RPD as an exception to the Safe Third Country Agreement, and/or
- d) The claimant's claim was referred to the RPD before the relevant provisions of the new system came into force.

When responding to the Minister's appeal of their RPD decision to the RAD, the following should be considered:

1. A claimant will know the Minister is appealing the RPD decision when the Minister gives the claimant and the RAD a document called a ‘notice of appeal’. The Minister has 15 days after they have received the RPD’s written decision to take this action.
2. The Minister will then give the claimant any supporting documents that they will be submitting as evidence. The Minister has 30 days after receiving the RPD’s written reasons to take this action.
3. After this is done, the claimant will have to submit a “**Notice of Intent to Respond**” and provide the Minister and the RAD with a copy, **no later than 15 days** after the claimant receives the supporting document from the Minister.

For a detailed compilation of all necessary components when responding to an appeal, please refer to the Respondent’s Guide:

<http://www.irb-cisr.gc.ca/Eng/RefApp/Pages/ResIntKitTro.aspx>

G. Pre-Removal Risk Assessment (“PRRA”)

A PRRA is a risk assessment application before removal of a foreign national from Canada. 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. However, very few applications succeed under the PRRA process.

NOTE: Under the *IRPA* those claimants who have a failed or abandoned refugee claim will generally be ineligible to make a PRRA claim for **12 months** from the date that their claim is refused, while DCOs will be ineligible for a PRRA for **36 months** after their negative decision.

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; in other words, only “new evidence” is considered.

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.

VI. THE IMMIGRATION AND REFUGEE BOARD

The Immigration and Refugee Board (the “IRB”) is made up of four tribunals with distinct jurisdictions. In Vancouver, the active divisions of the IRB are located at 300 West Georgia Street, Vancouver, British Columbia on the 16th, 17th and 18th floors.

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 adjudicator is called the “Presiding Member,” and a CSBA officer called “Minister’s Counsel” (representing the Minister for Public Safety) 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.

To keep a person in detention, the onus is on the Minister to prove that there are reasonable grounds to believe that the detainee’s identity cannot be ascertained, and that the detainee is either a danger, or unlikely to appear for his or her detention review hearing (see IRPA, s. 55 and *IRP Regulations* ss. 244 to 250).

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 IRPA.

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. Only permanent residents or Convention refugees can appeal, with very few exceptions. Foreign nationals who are not Convention refugees, generally, cannot appeal the removal order to the IAD, but can apply for judicial review or a stay from Federal Court.

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:

- a) Permanent residents who have been determined inadmissible by the Immigration Division for serious criminality,
- b) Canadian citizens or permanent residents appealing a negative decision on a sponsorship application under the family class, and
- c) 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. See **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 some failed Convention refugee claimants, established by the IRPA. Under s.110, the IRPA provision that actually permits an appeal to be made to the RAD, only some refugee claimants will have access to RAD. Designated foreign nationals, those whose claims are deemed to be “manifestly unfounded” or to have “no credible basis” and those whose claims are considered under an exception to the Safe Third Country agreement will have no right of appeal to the RAD. All other claimants will have 15 days to submit an appeal to RAD. The appeal will largely be paper-based; hearings will be held only in exceptional cases.

VII. LOSS OF PERMANENT RESIDENT STATUS

It is possible for a permanent resident to lose their permanent resident status, and can even be removed from Canada in certain circumstances.

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 28 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 should be renewed before its expiry date. PR cards must be issued within Canada.

The following link may act as a useful reference:

<http://www.cic.gc.ca/english/helpcentre/answer.asp?q=057&t=10>

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, including, but not limited to, committing a serious crime or being found to have misrepresented information in their immigration application. Inadmissibility 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.

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. For example, permanent residents will be inadmissible for serious criminality if they commit an indictable offence, while foreign nationals will be inadmissible for committing a less serious summary offence. Refer to the IRPA directly for specific grounds of inadmissibility (ss. 34 – 43).

NOTE: Convention refugees are not inadmissible on the same health and criminality grounds as most other kinds of applicants, but they may be excluded in cases of serious criminality or crimes against humanity.

NOTE: A permanent resident sentenced to 6 months or more of incarceration (including time in custody awaiting trial) is inadmissible to Canada and **does not have an appeal to the IAD** of their removal. This means that permanent residents who are arrested and charged with crimes, even relatively minor ones, must ensure their criminal counsel are aware of this consequence from the beginning of criminal process. A conditional sentence does not equal imprisonment for the purposes of this provision and sentencing must be considered at the time of conviction (see *Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50). Users of this manual should check for developments in this area of the law as it is undergoing continued legal development. See also *XII Immigration Issues at Sentencing*.

VIII. 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 sets out certain types of removal orders that are associated with certain offences created under IRPA. 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. However, officers retain a measure of discretion in deciding whether to issue an exclusion order, restrict entry or allow entry for examination. See Operational Manual ENF 6 and ENF 10 for more details.

Removal orders can also be stayed, either by asking CBSA to defer the removal, or by applying for a stay to the Federal Court pending determination of a judicial review or H&C application. Those who are seeking a stay should contact a lawyer for assistance.

A. *Departure Order*

A departure order requires the individual to leave Canada “voluntarily” within 30 days. The person may be required to 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. An exact date should be requested from CBSA before administering any time calculation.

B. *Exclusion Order*

Under an exclusion order, the individual must leave Canada, and cannot re-enter Canada for one year without consent from the Minister in the form of an Authorization to Return to Canada (an “ARC” under s. 52 of the *IRP Regulations*). If the ground of inadmissibility is misrepresentation under s. 40(2)(a) of the IRPA, the exclusion order will be in effect for **five years** from the date of departure or removal. After the period of inadmissibility has passed, the person can apply to re-enter Canada so long as they meet the requirements of the IRPA. During any period an order is in effect, the person concerned can apply for an Authorization to Return to Canada – for more information, see “Deportation Order” below.

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 authorization from the Minister (See *IRP Regulations*, s 226(1)); this is also known as an “Authorization to Return to Canada”, or “ARC”).

If a person who has been removed from Canada by IRCC 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.

IX. APPEALS

The Immigration Appeal Division (“IAD”) may allow an appeal and set aside an original decision:

- a. Based on the grounds of an error in law or fact,
- b. If there are sufficient humanitarian grounds (in some cases), or
- c. 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:

- a. Allow an appeal,
- b. Dismiss an appeal, or
- c. Stay the removal and impose terms and conditions (IRPA s. 68).

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 day the sponsor is informed of the refusal. A member will hear the appeal following the tribunal process. Section 63 of IRPA specifies that the IAD can consider H&C applications only if the applicant is a confirmed family member.

Some sponsorship appeals follow an Early Resolution (“ER”) process. The appellant can always request ER. The ER process at the IAD usually involves a one-hour, in-person meeting with a CBSA hearings officer who will review the facts and question the Appellant sponsor. The IAD assigns a member to act as a Early Resolution Officer (“ERO”) for each appeal that is selected for the ER process. Counsel should also attend, but does not make submissions, and is primarily there to assist the Appellant. Despite this process, many of the cases that go through ER will have a final result without the parties having to attend a full oral hearing, so applicants may wish to request ER if they believe the Appeal case is strong, is not especially complex, can be resolved without the direct testimony of the principal applicant (sponsored person), and that it can be dealt with about an hour.

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. Spouse and Common-law Partner 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.

NOTE: If a person has been convicted and sentenced in Canada to six months imprisonment or more, they will not be able to appeal an order to the IAD. A conditional sentence order (“CSO”) is included in ‘imprisonment’.

Removal orders may **not** be appealed if the **permanent resident** has been found inadmissible because of:

- a) Serious criminality with a sentence of 6 months or more,
- b) A foreign conviction (or committing an act outside Canada) carrying a maximum sentence of 10 years or more in Canada,
- c) Organized criminality,
- d) Security grounds, or
- e) Violations of human or international rights.

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

For a comparison of the former inadmissibility regime to the new inadmissibility regime, please refer to: <http://www.cic.gc.ca/english/department/media/backgrounders/2013/2013-06-20a.asp>

NOTE: Because of the exclusion from appeal for people sentenced to six months 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 six months 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 an IRCC 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 IRCC 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. **There is a 15 day filing deadline to apply for leave for judicial review of matters decided within Canada, and a 60 day deadline for matters decided overseas (IRPA, s. 72), so an applicant must act quickly if they seek leave for judicial review.** 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.

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)).

X. 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:

- a) Disembarking a person or group of people at sea for the purposes of entering Canada illegally,
- b) Possession, use, import/export, or dealing in passports, visas and other documents to contravene the Act,
- c) Entering Canada at any place other than a Port of Entry without reporting to an immigration officer,
- d) Gaining admission to Canada through the use of a false or improperly obtained passport, visa or other documents,
- e) Violating the terms or conditions under which admission was granted,
- f) Knowingly making false or misleading statements at an immigration examination or admissibility hearing,
- g) Remaining in Canada after ceasing to be a visitor, and
- h) Working illegally or employing a person who is not authorized to work.

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, RSC 1985, c C-46. Fines of up to \$10,000 may be assessed under such offences.

XI. IMMIGRATION ISSUES AT SENTENCING

In June 2013, changes to the IRPA came into force that severely altered the **permanent residence** consequences of a term of imprisonment of 6 months or more, including credit for time served. Such permanent residents will be issued a deportation order with **no appeal** of the deportation order to the IAD. Previously, the period of imprisonment required before there was no appeal to the IAD of a removal was 2 years. This change is retroactive, and any permanent resident who had not already been referred to the IAD for an appeal of the removal order will not have that option even if the sentence was imposed before the law changed.

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. As noted above, this right of appeal is lost if the permanent resident actually receives a sentence of 6 months or more, and the calculation of 6 months includes pre-trial custody, so an individual who receives a 2 month sentence in addition to double credit for 2 months pre-trial custody, has received a 6 month sentence. A conditional sentence of imprisonment imposed pursuant to the regime set out in ss. 742 to 742.7 of the *Criminal Code* "is not a term of imprisonment" under s. 36(1)(a) of the IRPA. "punishable by a maximum term of imprisonment of at least 10 years" in s. 36(1)(a) of the IRPA refers to the maximum term of imprisonment under the law in force at the time admissibility is determined.

NOTE: The accused should actively raise these immigration considerations with criminal defence counsel at the earliest opportunity, and make sure that counsel are engaging these issues whenever the accused is in custody, or faces a possible custodial sentence.

XII. IMPORTANT ADDRESSES AND PHONE NUMBERS

Immigration, Refugees and Citizenship Canada (IRCC)

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

Website:

www.cic.gc.ca

Immigration and Refugee Board of Canada

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

Telephone: (604) 666-5946
Website: www.irb-cisr.gc.ca

Canada Border Services Agency (Enforcement)

Library Square, 700 - 300 West Georgia
Street
Vancouver, B.C. V6B 6C9

Vancouver Association for Survivors of Torture (VAST)*

2610 Victoria Drive
Vancouver, B.C. V5N 4L2
E-mail: care@vast-vancouver.ca

Telephone: (604) 255-1881

- Provides medical and/or 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)

Telephone: (604) 254-9626

Vancouver, B.C. V5L 2Y7
Website: www.mosaicbc.com

Fax: (604) 254-3932
E-mail: mosaic@mosaicbc.com

Immigrant Services Society of B.C. **

#501 – 333 Terminal Avenue
Vancouver, B.C. V6A 2L7
Website: www.issbc.org

Telephone: (604) 684-2561
Fax: (604) 684-2266
E-mail: iss@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.

Suite # 615 – 525 Seymour Street
Vancouver, B.C. V6B 3H7
Website: www.inlandrefugeesociety.ca
E-mail:
contact@inlandrefugeesociety.ca

Telephone: (778) 328-8888
Fax: (604) 873-6620

- 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
Website: www.success.bc.ca
E-mail: info@success.bc.ca

Telephone: (604) 684-1628
Website: www.success.bc.ca

- 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

BC Provincial Nominee Program

Suite 450 - 605 Robson Street
Vancouver, B.C. V6B 5J3

Telephone: (604) 775-2227
Fax: (604) 660-4092
E-mail: pnpinfo@gov.bc.ca

*These organizations may have closed / their mandates may be significantly altered due to changes in funding.

**This Society can no longer assist people who have not already been granted Permanent Resident Status.

