

## IMMIGRATION ISSUES IN DEPTH 2019

### PAPER 3.1

# Canadian Immigration Legislation and Policy in Review 2019: On Safety Nets and Sped Up Processes

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## **CANADIAN IMMIGRATION LEGISLATION AND POLICY IN REVIEW 2019: ON SAFETY NETS AND SPED UP PROCESSES<sup>1</sup>**

<b>I.</b>	<b>Introduction – Some Background and A Framework.....</b>	<b>1</b>
A.	Defining “Safety Net” and Introducing the Metaphoric “Net” .....	2
B.	Parent and Grandparent Program – Holes in the Net .....	3
C.	Electronic Applications – The Challenges of the Net .....	4
D.	Open Work Permits for Vulnerable Workers and Temporary Resident Permits – A Needed Net with Some Knots.....	6
1.	Open Work Permit for Vulnerable Workers.....	6
2.	Temporary Resident Permits.....	8
E.	Sponsorship of Excluded Family Members – R.117(9)(d) and R.125(1)(d) IRPR - Cutting the Net.....	9
F.	Caregivers/Sector-Specific Options – Rethinking the Net .....	10
G.	Biometric Expansion – Building Nets, But of What Type? .....	11
H.	Moving Forward - Nets to Be Cautiously Weaved.....	12
1.	International Students.....	12
2.	Exit Controls and the Potential Effects.....	14
3.	The Question of Permanent Residency for Low-Skilled/Non-Traditional Workers .....	15
4.	Humanitarian and Compassionate Applications .....	16
<b>II.</b>	<b>Conclusion.....</b>	<b>16</b>

### **I. Introduction – Some Background and A Framework**

For me, immigration law and practice is about reclaiming the legal processes that were historically intended exclude migrants of colour. I try to do so using a critical lens, working to identify gaps and opportunities while using my practice and my writing to shine a lens on these exclusionary legal practices and processes. Growing up in an immigrant household with the privileges and weight of being born in Canada, immigration was not about the oft-debated ‘standard of review’ but the review and constant challenge of the standards set and imposed by outside systems of authority, including the legal system. Therefore, until recently, I saw law as a set of rules and instructions to be followed and implemented by me as a rule-enforcing

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<sup>1</sup> The author acknowledges that he lives and works as a racialized settler on the traditional, unceded territories of the Coast Salish – sk̓wx̓wú7mesh (Squamish), sel̓ílwitulh (Tsleil-Waututh), and x̓m̓əθk̓ʷəy̓əm (Musqueam) nations.

practitioner. I initially entered immigration law as someone who was prepared to be part of a gatekeeper function I had assumed lawyers played. Through the experiences of my clients and through participating in community consultations, I find myself questioning the ‘why’s’ at every corner, as well as how to best deliver justice as a racialized settler in the colonial system that this area of the law operates in.

I have titled this paper “*On Safety Nets and Sped Up Processes*” because I believe, broadly-speaking, it captures two major themes of this year. I saw Immigration, Refugees and Citizenship Canada (“IRCC”) implement various legislative and policy changes that created much-needed safety nets aimed at assisting vulnerable and historically marginalized migrant communities. These changes led me to conclude that positive progress has been made in 2019. However, with ‘speed’ and ‘efficiency’ rising to the top of IRCC’s agenda, there have also been mistakes, oversights, and plenty of “WIPs,”<sup>2</sup> as well as the impact of some changes we have yet to see.

In writing this paper and presenting on year-end legislative and policy updates, I have decided to take an approach of not merely regurgitating what I see as important updates. Taking creative liberty, I will try and thread together several changes, and do so while bringing in some of the individuals I have met while doing this work, a perspective often forgotten in our high-level academic discourses and technical aspects of the law. I propose utilizing immigration policy to carve out further safety nets and to consider the speed in which we approach these processes. The overemphasis on ‘speed’ and ‘efficiency’ can clash with or create the need for additional nets but at the same time can show societal responsiveness to emerging problems. We also need to be aware of the other ways nets can be used to capture or trap applicants and how these roles pertain to immigration policies.

### **A. Defining “Safety Net” and Introducing the Metaphoric “Net”**

Safety nets come with several definitions and connotations. I will adopt the one from the Cambridge Dictionary.<sup>3</sup>

*something, esp. a government program, that protects or helps people*

Safety nets, particularly in the U.S. context, have taken on a polarized connotation.<sup>4</sup> My use of this word is depoliticized, focusing instead on the imagery of a legal system that builds a net to protect those that may be excluded, vulnerable, and marginalized, thus providing them greater safety from issues such as loss of status, departure from Canada, and migration-related hardship. The metaphoric net I will be speaking of will also be applied in different ways throughout this paper. This includes the idea that a net has the ability to trap, control, subsume, link, and in the case of inter-net (and a core theme of this paper) – speed up.

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2 Acronym stands for *Work-in-Progress*

3 Cambridge Dictionary (Online). <https://dictionary.cambridge.org/dictionary/english/safety-net> (Accessed 15 November 2019)

4 Alexia Fernández Campbell, *Trump wants to cut safety net. It kept 47 million people out of poverty last year.* Vox 10, September 2019. <https://www.vox.com/2019/9/10/20858828/census-poverty-estimates-safety-net> (Accessed 15 November 2019)

## B. Parent and Grandparent Program – Holes in the Net

The beginning of this year saw prioritization of sped up systems, done at the expense of an online system that revealed many holes in the net. This online process was meant to standardize and centralize the *Parent and Grandparent Program – Expression of Interest* system. The motivation behind the change was that this would be a more organized way than a random draw to accept perspective applicants and, at the same time, avoid a system where those who could pay for couriers would be placed in a position of privilege.

Several individuals who tried to submit their expression of interest at 9am PST (12pm EST) on 28 January 2019 were unable to access the form or had the form crash in the middle of completing it. Authorized representatives were uncertain as to the level of assistance they could (or should) provide. Many chose to assist, thus creating ethical issues, and other non-immigration related businesses profited in signing up clients for this tech-based service.

What resulted was an oversubscription and crash of the web-based system. Importantly, among those who were unable to effectively access this ‘typing race’ included individuals who suffered from disabilities – the two lead litigants in our group matter at the Federal Court<sup>5</sup> suffered respectively from serious anxiety/depression and dyslexia. In our litigation, we recognized that IRCC appeared to have disability-based safety nets in place for all other electronic-based systems: express entry, employer portals, etc. but did not put one in place for this Expression of Interest process.

The parent and grandparent program in 2019 through Ministerial Instruction 29<sup>6</sup> failed to put in a required safety net for persons with disabilities and discriminated against these clients contrary to s. 15 of the *Canadian Charter of Rights and Freedoms, s 7, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [“Charter”]*, in a manner that could not be justified under section 1 of the *Charter*. Indeed, had persons with disabilities been considered in the first place, a solely typing-speed, ‘first-in’ based system could arguably never have been implemented without an alternative that would have fundamentally changed the manner these expressions of interest were solicited. The ability for sponsors to request to submit a form in ‘another format’ was only made available at the same time the Expression of Interest opened for the general public, rendering that option essentially moot.

This early-in-the year example demonstrated that these processes aimed at the majority failed to serve the margins; a trade-off with efficiency resulting in disaster. This example represents an effort to speed up a process which failed to recognize that a safety net was needed to achieve the former in a fair manner.

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5 Kathleen Harris, *Federal government quietly offered a settlement to halt lawsuits over immigration program*, CBC News. 30 May 2019. <https://www.cbc.ca/news/politics/immigration-parent-sponsorship-legal-settlement-1.5154407> (Accessed 15 November 2019)

6 Government of Canada, *Canada Gazette, Part I, Volume 153, Number 2: GOVERNMENT NOTICES*. 12 January 2019. <http://www.gazette.gc.ca/rp-pr/p1/2019/2019-01-12/html/notice-avis-eng.html#ne7>(Accessed 15 November 2019)

## C. Electronic Applications – The Challenges of the Net

In 2019, IRCC also introduced new instructions aimed at increasing the efficiency of application processing through the replacement of paper-based processing options with electronic tools. It also streamlined application processes for international adoptions and family sponsorships, and gave IRCC more flexibility to determine where it accepts applications into processing. After putting forth proposed regulations in late January 2019, in June 2019 *Regulations Amending the Immigration and Refugee Protection Regulations (Electronic Administration): SOR/2019-174* came into effect.<sup>7</sup> Online program delivery instructions were made available on 11 July 2019 to provide a table of those applications exempt from the e-application list.<sup>8</sup>

The above-mentioned regulatory amendments did contain an important carve-out provision (one that was missing in MI29 as discussed above) regarding persons with disabilities:

### Disability

**9.5** A foreign national or an individual who, because of a disability is unable to meet a requirement to make an application, request or claim, submit any document or provide a signature or information using electronic means, may do so by any other means that is made available or specified by the Minister for that purpose.

This exemption was also applied for payment, consistent with what has been done with past applications requiring electronic payments.

### Exception — disability

**(4)** A foreign national or an individual who, because of a disability is unable to pay the required fees referred to in subsection (1) by electronic means, may do so by other means that is made available or specified by the Minister for that purpose.<sup>9</sup>

In the Regulatory Impact Analysis Statement (“RIAS”) accompanying the regulatory amendments, there is a visible direct clash between IRCC’s desire to increase efficiency and processing speed and their recognition of the need for safety nets that extend beyond disability. The RIAS states:

More than ever, improving processes means leveraging technology. These regulatory amendments are about modernizing and standardizing tools and processes to support greater use of technology in the immigration system to help manage volumes, improve client service, and enhance consistency and efficiency in processing immigration applications. Specifically, the regulatory amendments described in this document seek to support greater technological

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7 Government of Canada, IRCC, *Changes to Immigration and Refugee Protection Regulations Take Effect*. 12 June 2019 <https://www.canada.ca/en/immigration-refugees-citizenship/news/notices/changes-regulations-12-june-2019.html>. (Accessed 15 November 2019); Government of Canada, Canada Gazette, Part II, Volume 153, Number 12, *Regulations Amending the Immigration and Refugee Protection Regulations (Electronic Administration): SOR/2019-174*. 3 June 2019. <http://gazette.gc.ca/rp-pr/p2/2019/2019-06-12/html/sor-dors174-eng.html> (Accessed 15 November 2019)

8 Government of Canada, IRCC, *Programs exempt from the in-Canada mandatory electronic application (e-application) requirement*. Last modified 11 July 2019 <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/visitors/place-application-visa-electronic-travel-authorization-study-permit-work-permit/exempt-electronic-applications.html> (Accessed 15 November 2019)

9 Ibid.

### 3.1.5

use across temporary and permanent resident business lines while also streamlining the process for some family sponsorship applications in the permanent resident stream.<sup>10</sup>

(emphasis added)

The recognition of the need for safety nets for vulnerable clients also appears in the stakeholder consultation phase between Part I and Part II of the Gazette. The relevant portion states:

Changes were made to clarify the “Direction of the Minister/use of other means” provision, which provides the Minister with the authority to require the use of alternate means in certain circumstances. Additional situations in which the Minister can exercise this authority have been added. For instance, it now provides the added flexibility to facilitate the use of paper forms for clients in vulnerable situations facing significant barriers to accessing online forms that are unrelated to disability. The provision may also facilitate the use of paper forms on an interim basis in cases where online processes cannot be updated quickly enough to accommodate unanticipated program changes.<sup>11</sup>

(emphasis added)

On the Gender-based analysis plus [GBA+] (which examines differential impacts on sex, gender, race, ethnicity, age, religion and/or disability), further acknowledgment was made suggesting vulnerable persons would have access to Service Canada offices and that IRCC would prescribe alternative options. The analysis states:

A majority of in-Canada applicants already submit their applications online. IRCC statistics show that on average, in 2017, approximately 81% of applicants applying to renew their temporary resident visa from within Canada did so using e-applications (97 143 individuals out of a total of 119 886 applicants). From January to August 2018, the proportion increased to 91% (72 211 individuals out of 79 780). Given Canada’s high Internet availability and connectivity, issues of connectivity are not expected for prospective applicants, including vulnerable populations. However, should individuals be unable to access the Internet, they can get support from Service Canada’s network of offices across Canada. Moreover, the ministerial authority to prescribe circumstances where the Department may direct the use of alternative processes will facilitate the use of paper forms in cases where specific vulnerable groups may be facing barriers to electronic access.<sup>12</sup>

(emphasis added)

In practice, the changes have had serious impacts on individuals who may not have disabilities, nor necessarily meet a threshold for vulnerability, but lack the linguistic/technical experiences to navigate the online processes. Within months of the change (which immediately affected work permit extension/visitor extension applicants), many of the individuals who met with me were women migrant workers (many non-English speaking) who were not even aware of library access to free computers and PDF forms, let alone how to begin to fill these forms out and

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10 Ibid.

11 Ibid.

12 Ibid.

validate them. Many of the individuals I met never filled out their initial immigration forms, as these were done by recruiters or agents abroad that helped facilitate their initial entry as visitors and workers. The reality of unintended incomplete applications or misrepresentation under s.40 of the *Immigration and Refugee Protection Act*<sup>13</sup> is one created, but not effectively cautioned, by the move to electronic means.

As we focus on expedited processes, it is also important to understand who these processes may harm and create safety nets for them as well. For example, if these Service Canada offices to assist vulnerable workers to completing their forms are already operational, or if the idea is for settlement agencies or pro-bono clinics to assist to help, these services need to be made publicly available and known to applicants. However, the opening up of a service window for one group of individuals may lead to valid questions of why physical faces are not more available for other visa applicants – a long-standing criticism of Canada’s migration process.

## **D. Open Work Permits for Vulnerable Workers and Temporary Resident Permits – A Needed Net with Some Knots**

### **1. Open Work Permit for Vulnerable Workers**

Through Part II of the Canada Gazette,<sup>14</sup> the Government released the final regulatory amendments for an open work permit regime for vulnerable temporary foreign workers experiencing abuse as defined by R. 196.2 of the *Immigration and Refugee Protection Regulations*.<sup>15</sup>

The changes came into effect 4 June 2019 and created an effective national regime. It also simultaneously replaced a B.C. Pilot program<sup>16</sup> which operated on a different scope, and uniquely through the requirement of a referral from a third-party organization. The changes were aimed at protecting employer-specific work permit holders or those on implied status, who are experiencing or at risk of experiencing (1) physical abuse, including assault and forcible confinement, (2) sexual abuse, including sexual contact with consent, (3) psychological abuse, including threats and intimidation; and (4) financial abuse, including fraud and extortion.

One of the immediate challenges, particularly in B.C., came from those who had been organizationally/politically supported in obtaining work permits and now were left without that support. Another challenge was posed by the duration of the open work permit being too short to meaningfully find a new employer and convince them to support a Labour Market Impact Assessment (“LMIA’s”). In many circumstances, workers ended up back with marginally less

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13 *Immigration and Refugee Protection Act* (S.C. 2001, c. 27) at s.40.

14 Government of Canada, Canada Gazette, Part II, Volume 153, Number 11, *Regulations Amending the Immigration and Refugee Protection Regulations*: SOR/2019-148 (22 May 2019) <http://www.gazette.gc.ca/rp-pr/p2/2019/2019-05-29/html/sor-dors148-eng.html> (Accessed 15 November 2019)

15 *Immigration and Refugee Protection Regulations* (SOR/2002-227) at R.196.2.

16 Government of Canada, IRCC, Program delivery update: Canada–British Columbia Immigration Agreement 2015 – Foreign worker protection (Annex B, section 9.4), 4 June 2019. <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/updates/2019-canada-bc-agreement.html> (Accessed 15 November 2019).

### 3.1.7

precarious employers, survival jobs, yet no longer in the 'abusive' situation which underlined their initial permit.

Still, this program implementation from my perspective should be lauded, as imperfect as it may still be. The recent story of Ravinder Singh, published in the Vancouver Star-Metro,<sup>17</sup> outlines a common situation workers are in (related to certain unscrupulous consultants) and how the vulnerable open work permit can serve as a remedy. I have also highlighted two examples of feedback (both positive and negative) I recently received from legal counsel regarding their experiences with the program:

The employee was subjected to unsafe work conditions including faulty equipment and hazardous material, and his commissions were withheld. One of his managers was also looking at his LinkedIn profile regularly late at night and in early morning hours. When our client was interviewed by IRCC he was dragged through all theoretical routes of redress, including the workplace safety board and the provincial human rights commission. The interviewer really seemed to have a lack of understanding of the context of vulnerable workers. Our client said that the vulnerable worker application process was almost as traumatizing as the abuse. In the end the application was refused and our client returned to Italy. Clearly the standard for abuse that is being applied by IRCC is high, and abuse is being interpreted mainly as sexual abuse.

On a positive note, one lawyer shared:

The interview was waived. I uploaded about 60 pages of evidence, including an affidavit from the worker, copies of multiple emails between the worker and the HR department (including the formal complaint with all the details of the alleged abuse), copies of explicit text messages to the worker from her supervisor, copies of doctor's reports detailing how my client sought treatment for panic attacks and depression after experiencing abuse and was put on medical leave, etc. The day after submission, an agent from IRCC Fredericton emailed me to say that some of the supporting documents had not come through properly in the online submission. I forwarded him the submission package again and the following morning I had the approval letter in my Portal.

As the Vancouver Star-Metro article alludes to, the thresholds to obtaining this permit may be high:

Of the 50 applications processed that first month, only 22 were approved. After three months, 231 were processed, and just under half — 108 — were approved. Critics say the approval rate is too low and that barriers such as lack of translation and legal help prevent many of the approximately 30,000 temporary foreign workers living in Canada at any given time from applying.<sup>18</sup>

In addition to these suggested high thresholds, there are also several unanswered questions on issues such as the role counsel should be allowed to play, how termination of employment and

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17 Alex McKeen, First he mopped floors. Then this B.C. janitor put Canada's potentially abusive employers on notice, Star Vancouver, 9 November 2019. <https://www.thestar.com/vancouver/2019/10/25/first-he-mopped-floors-then-this-bc-janitor-put-canadas-potentially-abusive-employers-on-notice.html> (Accessed 15 November 2019)

18 Ibid.



employer inspections affect/threaten worker eligibility for this permit, and how the program interact with other offerings such as Express Entry's arranged offer of employment to create additional challenges and uncertainties. Still, I believe IRCC should be praised for implementing a well-researched and well-consulted safety net for vulnerable workers. Yet, it is clear that further amendments may need to be slowly and strategically updated to align with the lived experience of the vulnerable worker applicants navigating an oft-complex migration system.<sup>19</sup>

## 2. Temporary Resident Permits

Through Ministerial Instruction 30 (MI30),<sup>20</sup> effective 26 July 2019, a new Temporary Resident Permit (TRP) option has been released for victims of family violence from a spouse or common law partner, including the dependent children of a foreign national. Foreign nationals who are physically located in Canada, and experiencing abuse including physical, sexual, psychological, or financial neglect and abuse AND who are either seeking permanent resident contingent on remaining in a genuine relationship in which there is abuse, or if the relationship is critical to the continuation of the individual's status in Canada may be eligible.<sup>21</sup> This represents a 180 degree turn from where IRCC started on this issue – the idea that spouses needed to be conditionally admitted as permanent residents in order to fight marriage fraud and prevent system abuse. It came from recognizing that in IRCC's efforts to tackle discrete issues, for which there were other legal avenues such as preventative overseas campaigns and misrepresentation laws, many were being exposed to the harms of conditional status. The TRP is the opposite solution, recognizing that even though a program such as sponsorship may work for a majority and have clearly set rules, there may be cases of vulnerability that fall through those processes.

A further Temporary Public Policy for out-of-status construction workers in the Greater Toronto Area was also released on 4 July 2019 (coming into effect 2 January 2020) providing 500 construction workers the potential to obtain a temporary resident permit. While it appeared to be targeted a very specific challenge, the pilot did leave many other construction and farm workers wondering what options they had. One of the unintended public policy of putting out a safety net is those who may argue the net does not do enough to capture and protect them.<sup>22</sup>

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19 *Disclosure: I attended the consultations earlier this year on behalf of a non-profit organization, and assisted in providing feedback for the Canadian Bar Association's submissions. I am also currently working with a local provincial organization in providing input for their public resources on this permit.*

20 Government of Canada, IRCC, *Ministerial Instructions 30 (MI30): Ministerial Instructions pursuant to subsection 24(3) of the Immigration and Refugee Protection Act concerning foreign nationals who are victims of family violence*. 4 July 2019 <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/ministerial-instructions.html#mi30> (Accessed 15 November 2019)

21 Government of Canada, IRCC, *Temporary resident permit (TRP) for victims of family violence*. Last Modified 26 July 2019. <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/permits/family-violence.html> (Accessed 15 November 2019)

22 Canadian Labour Congress, *Permanent Residence for "Out-of-Status" Construction Workers in the GTA*. 3 September 2019. <https://canadianlabour.ca/permanentresidence/> (Accessed 15 November 2019)

Still, having TRPs and Public Policies for individuals that are vulnerable represents a positive safety net. Little things that IRCC has done, such as making quick links to leave webpages and advising vulnerable individuals to seek safety first, are positive steps – on paper. More feedback is needed from the individuals that have utilized these processes as to the overall efficacy and whether these processes were ‘fast enough’ to allow them to leave positions of vulnerability.

### **E. Sponsorship of Excluded Family Members – R.117(9)(d) and R.125(1)(d) IRPR - Cutting the Net**

On 9 September 2019, IRCC’s *Public Policy to facilitate the immigration of certain sponsored foreign nationals excluded under paragraph 117(9)(d) or 125(1)(d) of the Immigration and Refugee Protection Regulations* took into effect.<sup>23</sup> This is a two-year public which will be valid until 9 September 2021, and apply to applications that were pending as of 31 May 2019, received or will-be received between 31 May 2019 and 9 September 2021, or pending reconsideration between 31 May 2019 and 9 September 2019.

After blistering academic studies on this area including “*Troubling Trends in Canada’s Immigration System Via the Excluded Family Member Regulation: A Survey of Jurisprudence and Lawyers*” by Jamie Liew, Prasanna Balsundaram, and Jennifer Stone<sup>24</sup> and testimony in front of the Standing Committee on Citizenship and Immigration (“CIMM”) over the course of several years, IRCC instituted this positive change.

The eligibility requirements did provide a partial scope for those who be covered to the following groups:

- The foreign national has applied as a spouse or a common-law partner in the Spouse or Common-Law Partner in Canada class or as a spouse, a common-law partner or a dependent child in the Family Class;
- The foreign national has a sponsor who:
  1. Applied for, and was granted permanent residence status as a Convention refugee or a person in similar circumstances; or,
  2. Was granted permanent residence after having been determined to be a protected person; or,
  3. Was determined to be a member of the Family Class, and was granted permanent residence as a sponsored spouse, common-law partner, conjugal partner, or dependent child; or,

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23 Government of Canada, IRCC, *Public Policy to facilitate the immigration of certain sponsored foreign nationals excluded under paragraph 117(9)(d) or 125(1)(d) of the Immigration and Refugee Protection Regulations*. 5 July 2019. <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/excluded.html> (Accessed 15 November 2019)

24 Jamie Liew; Prasanna Balasundaram; and Jennifer Stone. "Troubling Trends in Canada’s Immigration System Via the Excluded Family Member Regulation: A Survey of Jurisprudence and Lawyers." *Journal of Law and Social Policy* 26. (2017): 112-136. <https://digitalcommons.osgoode.yorku.ca/jlsp/vol26/iss1/6> (Accessed 15 November 2019)

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4. Was determined to be a member of the Spouse or Common-Law Partner in Canada Class and was granted permanent residence as a sponsored spouse or common-law partner.
  - The foreign national, if declared and examined at the time their sponsor immigrated to Canada, would not have made their sponsor ineligible in the class that the sponsor applied for.<sup>25</sup>

This has been a welcomed change but also one that raises questions about scope, about who was kept in and who was kept out. What makes an economic migrant or caregiver who failed to disclose a dependent different than one who was in the family class, Spouse-in-Canada or Convention refugee class. There may not be the principled difference that the public policy is aimed at trying to carve out. The addition of the requirement that the declaration and examination of the family member would not have made their sponsor initially ineligible was also a late add-on to the scope of those protected and introduced s.42 IRPA implications particularly in cases of possible criminality and medical inadmissibility.

Others, particularly sponsors who are permanent residents, are rightfully concerned about whether misrepresentation may be pursued against those sponsors who are still permanent residents, particularly if the application to sponsor does not itself meet the requirements of the public policy. While not statistically recorded, this was especially an issue under caregiver iterations particularly around undisclosed spouses (marriages) and children, mostly at the recommendation of overseas agents and recruiters. Arguably the very processes that widen the safety net could serve to be the same processes that capture and bring to light applicants for their past wrongdoings.

## **F. Caregivers/Sector-Specific Options – Rethinking the Net**

On that note, there has also been major change on the caregiver file. IRCC has created two five-year pilot programs – the Home Child Provider Pilot or Home Support Worker Pilot.<sup>26</sup> These came into effect 18 June 2019, replacing an Interim Pathway for Caregivers that ended on 8 October 2019.<sup>27</sup>

There are three application pathways – one for individuals who do not have any qualifying work experience, a second for individuals who have some qualifying work experience in Canada but less than 24 months, and a third for individuals who have worked in Canada for a total of 24 or more months in the past 36 months in either the National Occupation Classification (“NOC”) 4411 or NOC 4412 categories. Work permit applications and permanent residence applications

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25 Ibid.

26 Government of Canada IRCC, *Home Child Care Provider Pilot and Home Support Worker Pilot*. Last modified: 18 June 2019. <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/caregivers/child-care-home-support-worker.html> (Accessed 15 November 2019)

27 Government of Canada, IRCC, *Interim Pathway for Caregivers: About the process*. Last modified 09 October 2019. <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/caregivers/interim-pathway.html> (Accessed 15 November 2019)

### 3.1.11

are submitted together at the front end and updated once the 24 months are obtained, and work permits are occupation, rather than employer, restricted.<sup>28</sup>

This change effectively eliminated the need to obtain a Labour Market Impact Assessment and for employer-specific permits, two elements of caregiver work that created financial vulnerability and dependency. An occupation-restricted open work permit on one hand provides mobility for the workers, but on the other hand, having no monitoring transitions between employers could lead to foreseeable challenges. Caregivers, particularly overseas processing through visa offices like Manila, have been a source of historical admissibility issues (as discussed above, particularly with regards to s.117(9)(d) and s.125(1)(d) *IRPR* excluded family members, s.40 *IRPA* misrepresentation, and s.36 *IRPA* criminality). It will be interesting to see how the dual functions of providing more options at the front-end and widening the net interact with systems aimed at looking for exploitable holes. Rather than a widened net of possible permanent residents, it is likely to see greater filtering through front-end barriers to deny workers their initial work permits based on concerns/suitability with the positions arranged.

The Agri-Food Immigration Pilot<sup>29</sup> is another innovative re-examination of employer-specific work permits that was introduced as a three-year pilot with an effective date of March 2020. The program will be based on the North American Industry Classification System (for three eligible industries), eligible jobs (within those industries), capped number limits per job, lower education and language requirements (high school diploma/Canadian Learning Benchmark 4), and minimum settlement funds of 50% of the low-income cutoff. Programs such as this rethink and challenge the idea that it is only up to the Province to create low-skilled permanent resident pathways and that these changes can be drafted and implemented quite quickly. We will need to wait until next year to determine how effective it is in practice.

## G. Biometric Expansion – Building Nets, But of What Type?

The expansion of biometrics<sup>30</sup> to nationals of countries in Asia, Asia Pacific, and the Americas starting on 31 December 2018 and the ongoing process to finalize in-Canada biometric collection locations has had an understated but important effect on applicants. In practical terms, applicants have had to navigate additional fees, timing issues with biometric collection at visa offices, and confusion over when they are required. In larger theoretical terms, the net has been expanded to ensure that all the fish are in the proverbial immigrant pond. We are seeing this having direct impacts on applicants who are not fluent in English, often low-skilled workers or students who may not have been the ones completing their original forms. Only

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28 Government of Canada IRCC, *Home Child Care Provider Pilot and Home Support Worker Pilot*. Last modified: 18 June 2019. <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/caregivers/child-care-home-support-worker.html> (Accessed 15 November 2019)

29 Government of Canada, IRCC, *Agri-Food Immigration Pilot*. Last modified: 01 July 2019. <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/agri-food-immigration-pilot.html> (Accessed 15 November 2019)

30 Government of Canada, IRCC, *Biometrics Expansion*. Last modified: 28 December 2018. <https://www.canada.ca/en/immigration-refugees-citizenship/news/2018/12/biometrics-expansion.html> (Accessed 15 November 2019)

### 3.1.12

through biometric results or the prospect of biometric exams are many individuals now recognizing past failures to disclose arrests, charges, and previous refusals. The unclear, binary nature of background declaration/statutory questions on immigration forms was recently highlighted by the Federal Court in *Sbayti v. Canada (Citizenship and Immigration)*, 2019 FC 1296 (CanLII).<sup>31</sup>

This is a net that will likely interweave and bring together various security-driven mandates but the concern is that it is overarching and captures too much with too much impunity. I have recommended that IRCC make appropriate changes to forms and try to expand applicant awareness to the substantive content of the forms,<sup>32</sup> particularly with in-Canada biometrics collection being sure to reveal migration histories fraught with both honest and less than honest mistakes and misinterpretations.

## H. Moving Forward - Nets to Be Cautiously Weaved

There were several other areas where changes have been made and/or where they are being proposed that have major implications moving forward on our conception of the safety net. Among other prominent 2019 Program Delivery Updates include providing considerations for processing files for those in situations of abuse,<sup>33</sup> processing in-Canada claims for refugee protection of minors and vulnerable persons,<sup>34</sup> incorporating X (another gender) onto the four major lines of IRCC business (temporary residence, permanent residence, citizenship, and refugee),<sup>35</sup> and those requiring medical exams in life-threatening emergencies.<sup>36</sup>

### 1. International Students

While these changes have largely gone under the radar, it has been a busy year for Canada's International Student Program, where changes have come fast and frequent.

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31 *Sbayti v. Canada (Citizenship and Immigration)*, 2019 FC 1296 (CanLII) <<http://canlii.ca/t/j2x72>>.

32 Vancouver Immigration Blog, Five Immediate Steps IRCC Could Take to Make Forms/Application Processes More User Friendly, 1 November 2019. <http://vancouverimmigrationblog.com/five-immediate-steps-ircc-could-take-to-make-forms-application-processes-more-user-friendly/> (Accessed 15 November 2019).

33 Government of Canada, IRCC, *Program delivery update: New instructions on addressing cases of abuse*, 26 July 2019. <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/updates/2019-abuse-cases.html> (Accessed 15 November 2019).

34 Government of Canada, IRCC, *Program delivery update: Processing in-Canada claims for refugee protection of minors and vulnerable persons*. 11 April 2019. <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/updates/2019-refugee-protection-minors-vulnerable.html> (Accessed 15 November 2019).

35 Government of Canada, IRCC, *Program delivery update: Sex or gender identifier on IRCC documents and in IRCC systems*, 4 June 2019. <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/updates/2019-sex-gender-identifier.html> (Accessed 15 November 2019).

36 Government of Canada, IRCC, *Program delivery update: Clarifying immigration medical exams in life-threatening emergencies*. 23 April 2019. <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/updates/2019-emergency-exam.html> (Accessed 15 November 2019).

### 3.1.13

As my legal assistant Edris Arib recently taught me when I was asking for an Afghani idom to describe a present dilemma, *Doo tarbuz ba yak dast gerefta na-mey-shawad* (کی به ترپوز دو (شودی نم گرفتسه دست), which translated into English means “You can't hold two watermelons in one hand.” The creation of prioritized processes for students to obtain permits<sup>37</sup> and the reliance institutions and this country places on the financial benefits that international students represent, have not been adequately balanced with meeting student needs. While positive moves were made to (1) remove the need to hold a valid study permit while making a post-graduate work permit and (2) provide 180 days from the date of completion of studies to make this application,<sup>38</sup> many gaps and uncertainties remain. Specifically, students who are attempting to restore their status when they fail to make an initial PGWP applications within the required time or are refused a PGWP are still not provided a clear pathway to remedy this. Students also are struggling to navigate different education institutional policies and new immigration policies around ‘leave’ and ‘actively pursuing studies’ (R.220.1 *IRPR*).<sup>39</sup> From an application logistics standpoint, the interaction between R.222 *IRPR* which automatically invalidates work permits prior to their expiry, and R.190 *IRPR* which governs which applications can be made in Canada, is also not yet clear. International Students also have to deal with the uncertainty of a six-month bar that may arise when they obtain part-time work in their final semester but then upon a letter of completion of studies must cease that work until a post-graduate work permit application is submitted.<sup>40</sup>

Another issue with international students that increasingly needs to be understood is why and how certain students are being pushed away at the initial application stage. I believe the high refusal rates of applicants from African countries (brilliantly researched and presented by my colleague and friend Kelly Toughill)<sup>41</sup> will cease to be justifiably-viewed by a Canadian public increasingly concerned about issues of race equity, anti-blackness,<sup>42</sup> and immigration as a proxy for race.

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37 Morocco, Pakistan, and Senegal were added to the Student Direct Stream this year. See: Government of Canada, IRCC, *Student Direct Stream: Who can apply*. Last modified: 09 September 2019. <https://www.canada.ca/en/immigration-refugees-citizenship/services/study-canada/study-permit/student-direct-stream/eligibility.html> (Accessed 15 November 2019).

38 Government of Canada, IRCC, *Program delivery update: Processing instructions for the Post-Graduation Work Permit Program*. 14 February 2019. <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/updates/2019-post-grad-work-permit.html> (Accessed 15 November 2019).

39 Government of Canada, IRCC, *Program delivery update: New instructions on assessing study permit conditions*. 7 January 2019. <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/updates/2018-assessing-study-permit-conditions.html>. (Accessed 15 November 2019).

40 See *IRPR* at s. 200(3)(e)(i) and s. 186(w)

41 Kelly Toughill, *Canada rejects most African students*, Polestar Immigration. 4 September 2019. <https://studentimmigration.ca/canada-rejects-most-african-students/> (Accessed 15 November 2019)

42 Tayo Bero, *Canada is overdue for a reckoning with its anti-black racism*. The Guardian. 6 November 2019. <https://www.theguardian.com/commentisfree/2019/nov/06/canada-overdue-reckoning-anti-black-racism> (Accessed 15 November 2019)

## 2. Exit Controls and the Potential Effects

On 25 June 2019, *Exit Information Regulations: SOR/2019-241*<sup>43</sup> came into force, with exit information collection by land (with the United States) having started this summer and collection by air beginning next summer. The land collection at U.S. Port of Entries is done through the sharing of biographic entry data from the U.S. Customs and Border Protection. While the way the provisions are currently worded makes it appear that there will be no physical face stamping upon one's exit, the broad and overarching purposes give rise to the possibility that this may be a more expansive net. Comparing the language used by IRCC and CBSA in discussing the purposes of exit controls one is immediately drawn to CBSA having a much broader potential scope:

IRCC states in their announcement of the program in June 2019 states:

IRCC will be able to query the CBSA's Entry/Exit Information System directly to

- verify **residency requirements** to process an ongoing application to objectively verify the information provided by the client, such as applications for **grants of citizenship (CIT)** or **permanent resident cards (PR cards)**
- verify if a temporary residence applicant may have previously **overstayed** their allowable period of admission in Canada
- assist in an **investigation** into an individual's entitlement to a Canadian travel document

In addition, IRCC will be able to use entry and exit information to

- verify that sponsors are residing in Canada
- verify the residency of spouses and partners under the spouse or common-law partner in Canada class
- verify whether or not a refugee claimant entered Canada using their travel documents
- support investigations into possible fraud in relation to immigration, citizenship, and passport and travel document programs<sup>44</sup>

CBSA's July announcement of a month later states:

It [the Exit/Entry Initiative] will enable the CBSA and its federal government partners to:

- Respond to the outbound movement of known high-risk travellers and their goods prior to their actual departure from Canada by air (i.e., fugitives of justice, registered sex offenders, human/drug smugglers, exporters of illicit goods, etc.);
- Address time sensitive situations more effectively, such as responding to Amber Alerts and helping find abducted children or runaways;

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43 Exit Information Regulations (SOR/2019-241) <https://laws-lois.justice.gc.ca/eng/regulations/SOR-2019-241/index.html> (Accessed 15 November 2019)

44 Government of Canada, IRCC, *Exit/Entry Program*. Last Modified: 26 June 2019 <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/service-delivery/entry-exit.html> (Accessed 15 November 2019)

### 3.1.15

- Identify individuals who do not leave Canada at the end of their authorized period of stay (i.e., visa overstays) and provide decision-makers with an accurate picture of an individual's complete travel history;
- Focus immigration enforcement activities on persons still in Canada by eliminating wasted time and resources spent on issuing immigration warrants and conducting investigations on individuals who have already left the country;
- Verify whether applicants for permanent residency or citizenship have complied with residency requirements;
- Verify travel dates to determine applicable duty and tax exemptions and continued entitlement to social benefit programs; and
- Help prevent the illegal export of controlled, regulated or prohibited goods from Canada.<sup>45</sup>

(Emphasis added)

Safety nets will be needed to expand public knowledge of where the exit information collected is going and to monitor that the information sharing is done in a manner that provides adequate procedural fairness to immigration applicants – particularly temporary residents, protected persons, and permanent residents. The passing of applicant's information through personal information banks (PIBs)<sup>46</sup> where information is then disseminated and made available is not a publicly known process and the web/net of the potential implications have not, in my opinion, been adequately understood. If the exit controls begin to trigger issues such as an international student's meeting of their obligations to actively-pursue studies under R.220(1) *IRPR* or to stop individuals prior to their efforts to leave Canada and cure their previous unauthorized work/study, these provisions could lead to speedier removals and more denied entries. It may be vulnerable migrants who are most affected by the new Exit/Entry initiative.

### 3. The Question of Permanent Residency for Low-Skilled/Non-Traditional Workers

Arguably, the most pressing area when it comes to economic immigration is whether the current National Occupation Classification ("NOC") based system is still relevant in today's modern work environment. Specifically, given the importance of low-skilled workers to our labour-short economy, should our immigration system provide more options for those workers to obtain permanent residence and/or extend their permits to gain relevant skilled work experience upon their promotions?<sup>47</sup>

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45 Government of Canada, CBSA, *Entry/Exit initiative*. Last modified; 11 July 2019 <https://www.canada.ca/en/border-services-agency/news/2019/07/entryexit-initiative.html> (Accessed 15 November 2019)

46 Government of Canada. IRCC, *Info Source: Personal Information Banks*. Last modified: 26 June 2019) <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/transparency/access-information-privacy/info-source/personal-information-banks.html> (Accessed 15 November 2019)

47 Teresa Wright, Canada's low unemployment rate boosts demand for temporary foreign workers. Global News, The Canadian Press. 4 June 2019. <https://globalnews.ca/news/5350679/temporary-foreign-workers-canada/> (Accessed 15 November 2019)



Also, how do we capture that in this day and age, employees are turning into contract workers? That individuals have three or four contractual gigs instead of one paid job, and that small businesses require individuals who do both the accounting and account for store cleanliness? The NOC code system inevitably creates challenges for those workers who find themselves between NOC codes or in their employment playing multiple skilled and unskilled functions.

In my perspective, the safety net we are building needs to recognize low-skilled workers in the conversation about permanent residence, or at the very least give them a recourse besides short term renewals and the limited spaces offered through humanitarian and compassionate applications (see below). The Agri-Food Immigration Pilot, as discussed earlier, may become some sort of a model that could be expanded to other industries and as well encourage the movement of more migrants to rural communities where agricultural jobs may be more abundant. Yet, the rollout may need to occur through larger systemic changes to Express Entry (honouring past lower-skilled work in the point calculation) or in offering those who obtain employment in rural communities a greater migration incentive than currently exists. Whether these individuals who are nominated end up staying in these rural communities to support local employers may be an additional challenge to address.

#### **4. Humanitarian and Compassionate Applications**

Other than with Division 16 of the *Budget Implementation Act* clarifying the 12-month bar for ineligible refugee claimants, there have not been any other major changes from a policy or legislative perspective to s.25 of *IRPA*.<sup>48</sup> However, I would like to start the conversation of whether we may begin to see a shift in numbers here and what implications this may have. Canada currently has targets<sup>49</sup> of 4,250 for total persons selected on humanitarian and compassionate grounds, for reasons of public policy, and in the Permit Holders Class. With international students (including students who have been in Canada since they were minors) running into challenges with Express Entry competitiveness and more temporary options being created for vulnerable workers, spouses, and low-skilled individuals, will the approval rates for these applications continue to hover in the 50-60% range? There seems to be two options – expand the pie and the safety net of humanitarian and compassionate grounds or start handling the refusals efficiently. I would not be surprised to see numbers of H&C and public policy applicants for permanent residents increase in the coming year(s).

## **II. Conclusion**

I look at this past year still with some hope. Sure, many of the changes were political in nature (in an election year), but there were some very positive proactive efforts to address those

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48 Parliament of Canada, Division 16 of the Budget Implementation Act (Bill C-97) <https://www.parl.ca/DocumentViewer/en/42-1/bill/C-97/royal-assent>

49 Government of Canada, IRCC, *Notice – Supplementary Information 2019-2021 Immigration Levels Plan*. 31 October 2018. <https://www.canada.ca/en/immigration-refugees-citizenship/news/notices/supplementary-immigration-levels-2019.html>

### 3.1.17

traditionally ignored by immigration's safety net, as shown by IRCC's focus on vulnerable persons and providing second chances for those who may have made a first-instance mistakes.

Still, there are many other areas where these solutions can be provided. It will be interesting where and when they are done by program delivery instruction changes, temporary public policies, Operational Bulletins, Ministerial Instructions or larger Legislative Reform. My initial hypothesis is that we will see more temporary policies and program delivery instructions, where possible, to allow for responsive changes.

*It is better to start weaving your fishing nets than merely coveting fish at the water. 临渊慕鱼，不如退而结网 Lin yuān mù yú, bùrú tuì ér jié wǎng*

I am *net* (overall) hopeful in the approach IRCC is taking on some very challenging issues, identifying gaps, and responding to them.