

Getting a Permanent Resident Visa: Process

1. Must enter Canada with PR visa with intent to stay (unless exceptional circumstances)
 IRPA: s. 20(1)
 Regs: s. 6

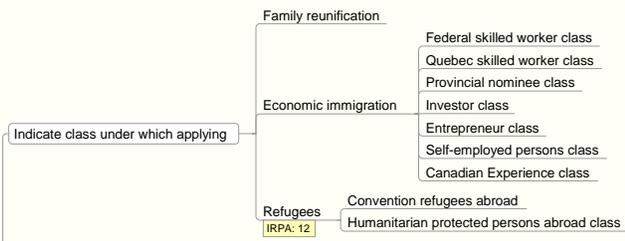
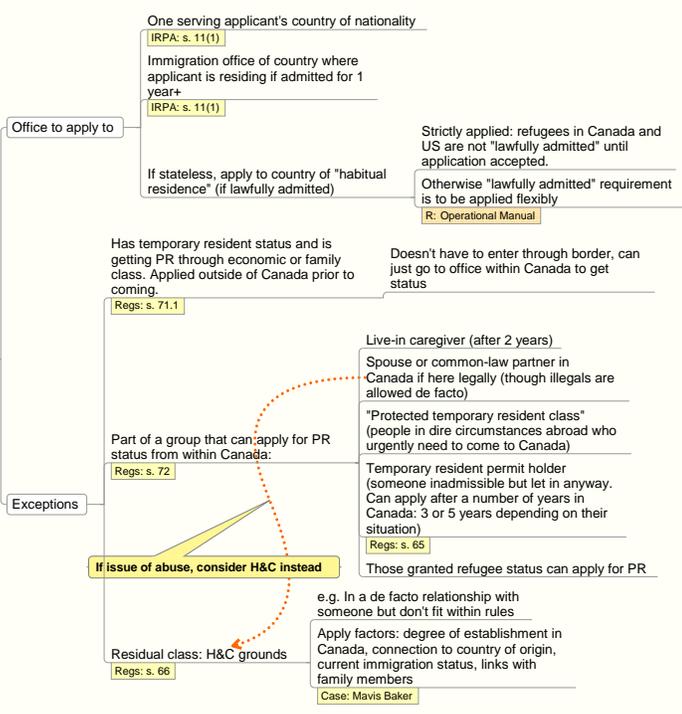
2. Requirements
 Regs: 70(1)c

3. Family allowed to bring: family members

4. Test applied by visa officer and at Port of Entry

5. IAD access

6. Federal Court Appeal



Meet class definition

- Non-individualized analysis: a rule is a rule
Case: Hamid

Meet class selection criteria

- May need to do better than bare minimum with individualized analysis (e.g. more \$ if sick child)
Case: Hilewitz

Possibility of substitutive evaluation

- Need concurrence from second officer.
76(4)
- If officer thinks points are not sufficiently indicative of whether skilled worker will become economically established in Canada
- If applicant requests substitutive evaluation, has to be considered. If no request, does not have to be considered.
- Caselaw is open to saying officer not obligated to conduct substituted evaluation.
- Or officer could use against claimant even where they have enough points. (e.g. bribery of officer)
Chen

Not be inadmissible
 IRPA: 33+34

If represented by an immigration consultant, they are a member of an association if paid (Regs)
 10(2)

Definition: spouse, common law partner, dependent child, dependent child of dependent child (nuclear family)
 Regs: s. 1(1), s.1(2), s.1(3)

Dependent child definition

- Must meet definitions to be eligible
Case: Hamid
- Date for age of child: application date
Case: Hamid
- Date for determining whether enrolled in school: assessment date
Case: Hamid

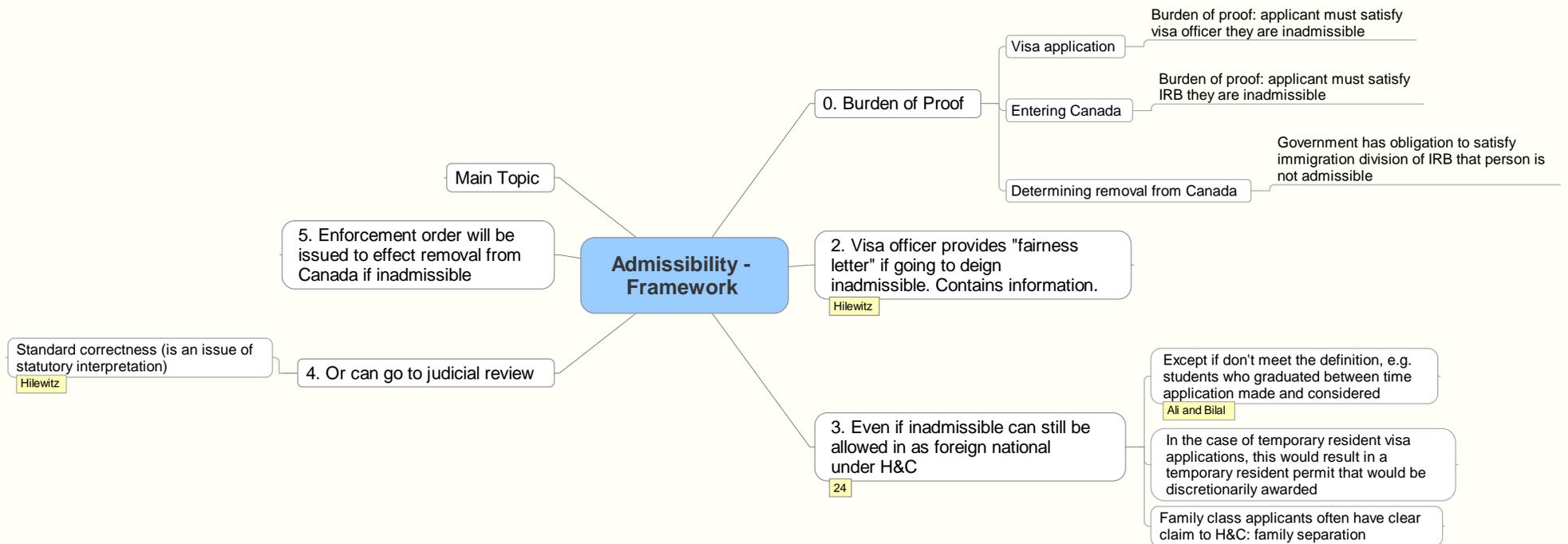
Family members must not be inadmissible
 Regs: s. 70(1)e

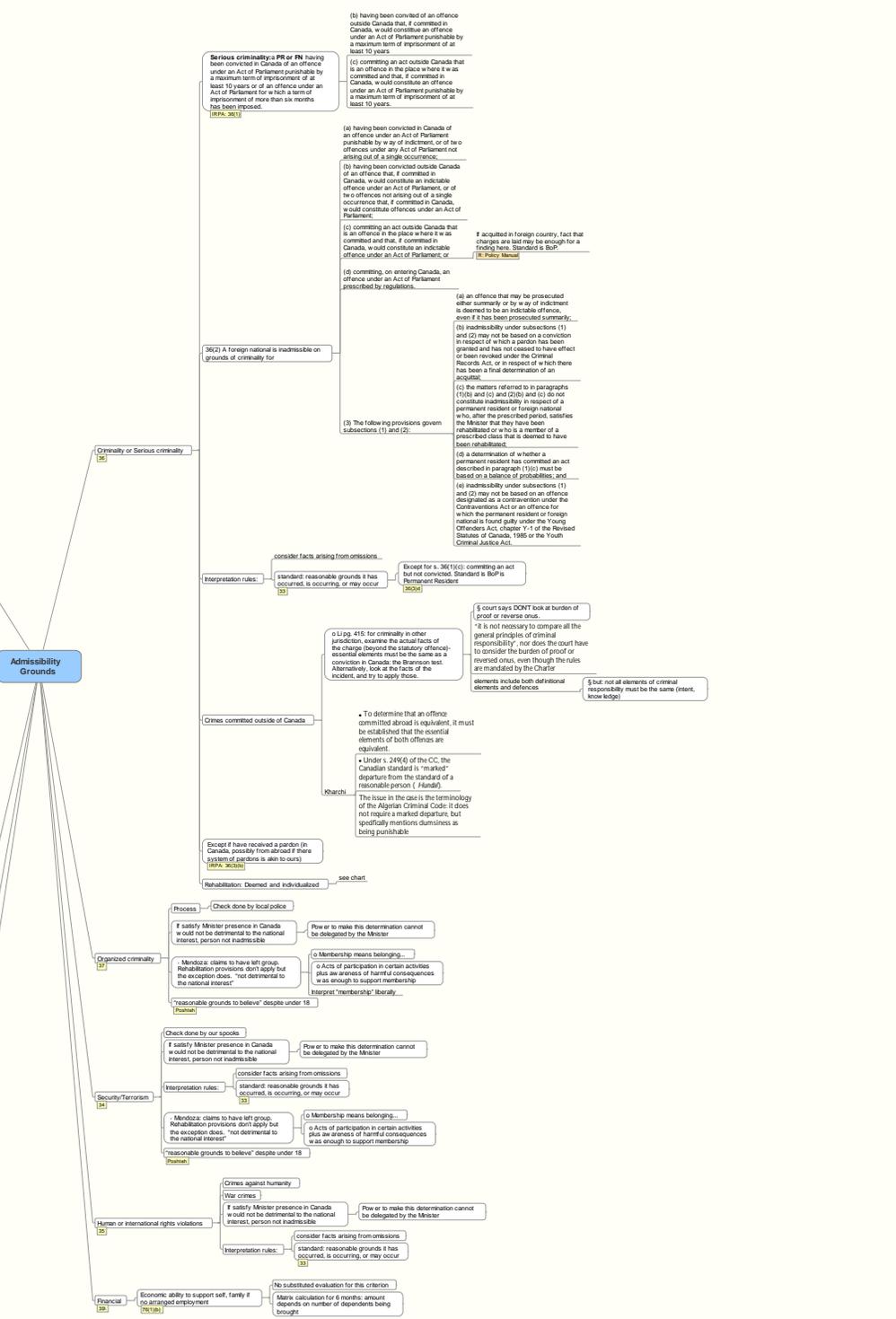
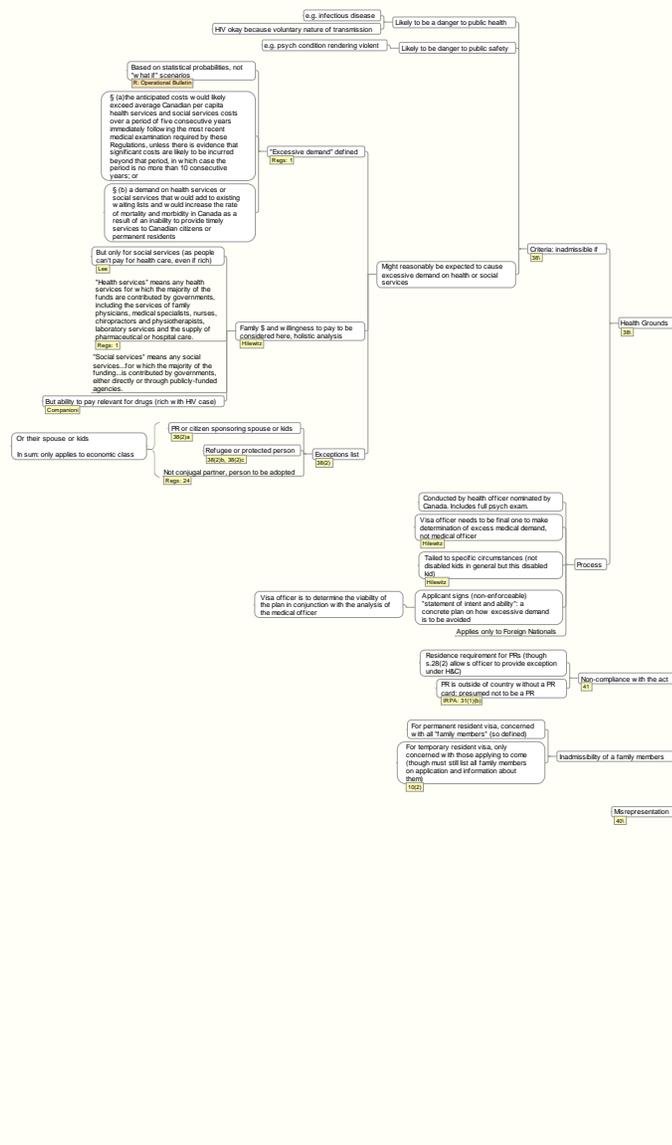
- Whether accompanying or not
- Inadmissibility requirements same as for foreign nationals except that financial requirements differ
Regs: s. 70

Status granted at border, not upon receipt of visa

- May have to go through entire application process at PoE again (though unlikely)

If a visa holder and denied access at PoE, have access to IAD including H&C





Policy Arguments when discussing Immigration

! Exploitation of workers on temporary work permits

Are we plundering skilled workers from poor countries? Is this offset by remittances?

If we view this as a purely economic cost-benefit exercise for Canada, people could stop showing loyalty to Canada and start seeing citizenship as ! insurance

Adaptability: should give more points for those who have received an education in Canada than elsewhere

Arranged employment beneficial because mitigates need for networks in Canada

Give employers strong role in system to select people they want, so immigrants have jobs

Especially with refugees

Consider wages of second-generation immigrants: long timespan for benefits

Tolley: official language proficiency more important than credentials

Younger immigrants do better than older ones (<10 best)

Renewable temporary work permits can allow us to reject burdensome newcomers (Fraser Institute)

Procedural Fairness

1. How much procedural fairness is owed? (spectrum)
 Case: Baker

- 1. Nature of decision: Does it look like a court? [likely yes in immigration context]
 - o Yes: fact-finding function, "truth" at issue, adversarial, applying formal evidence, other court-like procedures
 - o No: decisions that affect wide groups, highly discretionary, informal procedures
- 2. Nature of the Statutory Scheme
 - Where does this decision fit? More procedures required for final decisions.
- 3. Importance to the Individual
 - The greater the effect on life, the more procedures required. Look at wider effects, e.g. professional career, family
- 4. Legitimate expectations
 - Legitimate expectations doctrine does not provide substantive rights in Canada, but it can be a factor.
 - If one legitimately expects a certain procedure, it will be required. An expected result will just lead to greater procedures.
 - o Manuals are important source of expectations: published, detailed, authoritative.
- 5. General Practices of the tribunal/agency
 - o When board free to choose its own procedures, courts should respect [this is logically questionable]

Standard of review always correctness
 Case: Baker

Though some latitude can be offered to experts in the procedures they select
 Case: Baker

2. Based on answer, specific procedures required. From least to most fair:

- written app
- oral interview
- informal hearing
- formal hearing

For all:

- Applicant should be made aware of negative evidence: Even on written app, should be an advisory "fairness letter"
 - Unfair to decide on the basis of number of false claims from area without giving the claimant a chance to address this.
 - Unfair to decide without giving claimant a chance to address concerns
 - Guidelines are not determinative, they don't usurp the discretion of the decision-maker. Just persuasive.
- Access to actual decision-maker: Person who hears evidence should decide.
 - Must read information
 - Didn't read response to "fairness letter", just passed on to doctor. not good.
- Free from Bias
 - Reasonable person standard: Procedural fairness is violated if "an informed person, viewing the matter realistically and practically - and having thought the matter through" would conclude that the decision maker would not decide the matter fairly. Officer in that case appeared biased based on notes.
- Reasons
 - Possibility for judicial review must be cognizable: Applicant must be able to decide whether or not to appeal.
 - Must provide reasons for denial (including for TRV)
 - Sufficiency of reasons: if something is not mentioned, the decision-maker may have ignored it and that may be an unreasonably exercise of discretion
- Where equitable jurisdiction available (e.g. at IAD) must consider everything relevant, such as Ribic factors including hardship in foreign country
- Must give due weight to factors: consideration cannot be superficial, perfunctory if factor important.
 - Decision-maker cannot fetter their discretion
- Individualized assessment required
 - Not based on "what if" scenarios, but instead on statistical probabilities of persons in applicant's exact situation
 - Not disabled children in general, but *this* child with *this* parent with *this* parent's wealth
 - May be limited to health and social services context and in the case of criminality, rule is strict
- Not entitled to an interview
 - If there is an interview, there is a right to counsel present
 - Can make a negative determination on skilled worker without calling person in

This is more than using international conventions to resolve ambiguities. Unless legislature explicitly wanted statute to operate notwithstanding international legal obligations.

International obligation determinative of meaning, don't look to other statutory interpretation aids

International obligation a persuasive factor

Use date at review of app, not submission date
Case: Ali

As circumstances change, law should respond. "Law is always speaking"

H&C exception for everything in act
IRPA: 25

Intent of statute, words that are used

Expressio unius: if date has one meaning elsewhere, should have same meaning here.

Construe and apply IRPA to ensure that decisions taken under the act are consistent with Charter of Rights and Freedoms
IRPA: 3(3)

If international instrument is binding on Canada
Case: De Guzman, para. 87

If international instrument is not binding on Canada
Case: De Guzman, para. 87

Interpret consistent with international human rights instruments to which Canada is a signatory
IRPA: 3(3)(f)

Didn't need to do individualized analysis because legislature has created second-stage of temporary resident permits to deal with fairness. Can't explain their existence if fairness supposed to be considered at first stage
Case: Hilewitz (Dissent)

Existence of other statutory provision

See see that families are reunited in Canada
IRPA: 3(1)(d)

Addressing criminality is more serious objective of IRPA
Case: Medocarski

(a) to permit Canada to pursue the maximum social, cultural and economic benefits of immigration;

(b) to enrich and strengthen the social and cultural fabric of Canadian society, while respecting the federal, bilingual and multicultural character of Canada;

(b.1) to support and assist the development of minority official languages communities in Canada;

(c) to support the development of a strong and prosperous Canadian economy, in which the benefits of immigration are shared across all regions of Canada;

(d) to see that families are reunited in Canada;

(e) to promote the successful integration of permanent residents into Canada, while recognizing that integration involves mutual obligations for new immigrants and Canadian society;

(f) to support, by means of consistent standards and prompt processing, the attainment of immigration goals established by the Government of Canada in consultation with the provinces;

(g) to facilitate the entry of visitors, students and temporary workers for purposes such as trade, commerce, tourism, international understanding and cultural, educational and scientific activities;

(h) to protect the health and safety of Canadians and to maintain the security of Canadian society;

(i) to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks; and

(j) to work in cooperation with the provinces to secure better recognition of the foreign credentials of permanent residents and their more rapid integration into society.

Objectives of law
IRPA: 3

You don't need to consider every factor every time, only important ones
Case: Chieu

Contextual approach
Case: Rizzo shoes

Statutory Interpretation

Driedger

"Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

Legislative History

Minister made incorrect statement, answer taken as authoritative
Case: Hilewitz

Contrast statute with predecessor: see many more mentions of criminality, therefore legislative intent

Addressing criminality is more serious objective of IRPA
Case: Medocarski

Always consider best interests of the child
Case: Baker

(3) This Act is to be construed and applied in a manner that
IRPA: 3

(a) furthers the domestic and international interests of Canada;

(b) promotes accountability and transparency by enhancing public awareness of immigration and refugee programs;

(c) facilitates cooperation between the Government of Canada, provincial governments, foreign states, international organizations and non-governmental organizations;

(d) ensures that decisions taken under this Act are consistent with the Canadian Charter of Rights and Freedoms, including its principles of equality and freedom from discrimination and of the equality of English and French as the official languages of Canada;

(e) supports the commitment of the Government of Canada to enhance the vitality of the English and French linguistic minority communities in Canada; and

(f) complies with international human rights instruments to which Canada is signatory.

(a) to recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted;

(b) to fulfil Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement;

(c) to grant, as a fundamental expression of Canada's humanitarian ideals, fair consideration to those who come to Canada claiming persecution;

(d) to offer safe haven to persons with a well-founded fear of persecution based on race, religion, nationality, political opinion or membership in a particular social group, as well as those at risk of torture or cruel and unusual treatment or punishment;

(e) to establish fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada's respect for the human rights and fundamental freedoms of all human beings;

(f) to support the self-sufficiency and the social and economic well-being of refugees by facilitating reunification with their family members in Canada;

(g) to protect the health and safety of Canadians and to maintain the security of Canadian society; and

(h) to promote international justice and security by denying access to Canadian territory to persons, including refugee claimants, who are security risks or serious criminals.

Objectives of IRPA re: refugees:

Judicial Review at Federal Court

1. Access to Federal Court (of Appeals)

Must exhaust rights of appeal under IRPA first
IRPA 72(2)

s. 2: defines "federal board, commission or other tribunal" to include all officers and decision-makers who are part of immigration regime - this is the right court.
Statute: Federal Court Act

Make application for leave to appeal. Leave should be granted unless it is "plain and obvious" no chance of success
Case: Saleh

Federal Court of Appeal: only access if trial judge certifies that a "serious question of general importance" is involved and states the question
IRPA: 72(2)(e)
Statute: Federal Court Act

No appeal for denial of leave to appeal
IRPA: 72(2)(e)

No appeal of interlocutory judgement (preliminary decision made prior to main decision such as staying an order)
IRPA: 72(2)

Behaviour passes thresholds of act. "FC may grant relief...if it is satisfied that the federal board, commission or other tribunal"
Federal Court Act: 18.1(4)

(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction

(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe

(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record

(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

(e) acted, or failed to act, by reason of fraud or perjured evidence

(f) acted in any other way that was contrary to law

Constitutional arguments (which see)

Prohibition (proscribing future action)
Federal Court Act: 18(1)

Federal Court will only substitute its judgement for original by attaching directions to its judgement. But the court is reluctant to do this. Only where a single legal conclusion is possible and there are no factual disagreements.

Certiorari (quash decision already made)
Federal Court Act: 18(1)

Case: Xin

Declaration
Federal Court Act: 18.1(3)

Injunction
Federal Court Act: 18.1(3)

Mandamus (decision-maker required to perform duty) requires:
Case: Vaziri

- Public legal duty to act
- Duty owed to applicants
- Clear right to performance of duty
- No other adequate remedy available to applicants
- Order sought must be of some practical value
- No equitable bar to relief (clean hands)
- On a balance of convenience, mandamus should lie

Applicant satisfied all conditions precedent
Prior demand for performance, reasonable time to comply with demand (or outright refusal), an express refusal or implied refusal through unreasonable delay

2. If access, choose:

Prerogative writs (requirement at Federal Court)

s. 18.2 of the Federal Courts Act gives the FC the ability to make any interim orders that it considers appropriate. This includes granting a stay before or after a decision on leave has been made.

Interim stay
3 part test in Manitoba (AG) v. Metropolitan Stores, adopted for removal orders in Toth:

- § The applicant must show that they have raised a serious issue to be tried;
 - normally, applicant must only show that it's not frivolous or vexatious: Mauricette
 - Mauricette: interests of children are to be taken into account in stay applications (Baker)
- § The applicant must show that they would suffer irreparable harm if no order was granted; and
 - note: in Toth, disruption to business/life was not fully compensable in damages, therefore met threshold
 - Omar: must be more than mere speculation.
- § The applicant must show that the balance of convenience, considering the total situation of both parties, favours the order
 - note: severity of consequences to the applicant is relevant here.
 - Omar v. Canada: reason for removal order affects balance. Favours Minister when there is a persistent or serious criminal element, or welfare fraud: goes to public interest.
 - Ghahremani: unrest in Iran weighed in favour of stay of removal
 - Mauricette: when the court finds a serious issue and irreparable harm, balance "will flow with the applicant."

IAD

Access to IAD

Permanent resident may appeal decision made outside of Canada on residency obligation
IRPA: 63(4)

Protected person, permanent resident visa holder may appeal removal order
IRPA: 63(2)

Permanent resident may appeal removal order
IRPA: 63(3)

Sponsor of foreign national via family class
IRPA: 63(1)

Minister may appeal any decision of the Immigration Division on admissibility
IRPA: 63(5)

If the application is based on membership in the family class, H&C can only be considered if foreign national meets definition of being in family class and sponsor meets definition of sponsor in regs
IRPA: 65

No appeal allowed if finding of inadmissibility was made on grounds of misrepresentation
IRPA: 64(3)

Except if foreign national's sponsor's family member (nuclear)

If the application is based on membership in the family class, H&C can only be considered if foreign national meets definition of being in family class and sponsor meets definition of sponsor in regs
IRPA: 65

Except if the person was found inadmissible on grounds of security, violating human or international rights, serious criminality (i.e. punished in Canada by 2 or more years), organized criminality
IRPA: 64

Powers of IAD

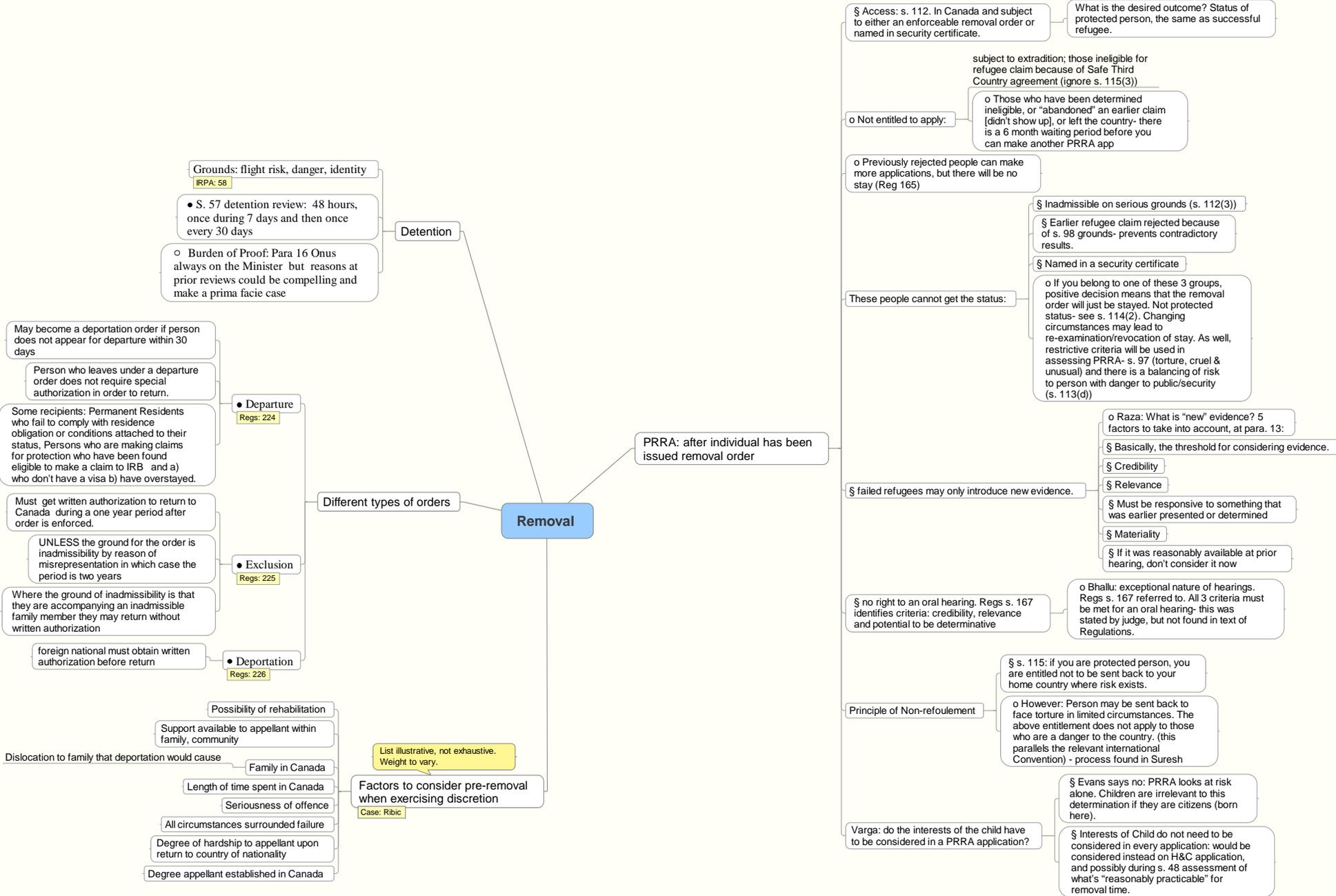
IRPA: 66

Allow appeal

Stay removal order

Dismiss appeal

de novo hearing. IAD can consider factors original decision-maker did not have before them. No deference
IAD must consider everything relevant because of equitable jurisdiction



Citizenship

How to get it

Citizenship Act: 3(1)

- Born in Canada
- Various retroactive measures for those who lost citizenship previously
- Born outside Canada and one parent is a Canadian citizen (who didn't receive Citizenship this way - one generation rule)

Citizenship Act: 3(3)(a)

Granted or acquired citizenship

Citizenship Act: 5, 11

Going to be stateless from amendments? exception.

Citizenship Act: 5(5)

age: 18+ years

3 years of residence in Canada during previous 4

Residency: definition. use any one of three tests

- Centralized Existence
- Physical Residency
 - Physical presence
 - Immediate family location
 - Extent of absences
 - Absence caused by temporary situation?
- Factors

New bill from government proposes requiring the physical presence in Canada test

Standard of review: deference in terms of choice of test.

Exception: s. 5(1.1): if you are living with Canadian who works outside the country, counts as residence.

How to apply

Adequate knowledge of one official language of Canada

Adequate knowledge of "responsibilities and privileges of citizenship"

Not subject to a removal order or s. 20 declaration

Following sections provide for special treatment

5.1: shall grant citizenship to adopted child, in lawful circumstances

5(2): minor children of naturalizing parents, who are permanent residents

5(3): compassionate discretion- minister may waive above requirements of knowledge of language/citizenship, or of age. May also waive requirement to take oath for those without capacity to understand (mental disability)

5(4): Cabinet may direct Minister to grant citizenship when a person deserves it- either for hardship, or for exceptional service to the country.

Negative Criteria- who CANT get citizenship

§ s. 19(2): if minister has opinion that person is involved with security threat or organized crime, makes report to SIRG- process of investigation under CSIS Act, which ends w/ Cabinet determination.

§ s. 20: Where Cabinet declares reasonable grounds to believe in security risk or criminal activity, can make declaration that blocks citizenship. This is conclusive proof.

§ s. 22: can't be in jail, or 22(2) have been convicted of indictable offence within last 3 years.

Revocation of Citizenship

§ S. 10: You CAN lose citizenship when GiC (cabinet) is satisfied on Minister's report that you committed false representation or knowingly concealed material info.

o Minister gives notice that report will be sent to Cabinet

o Applicant has 30 days to request it be sent to Federal Court

o Federal Court would then decide whether citizenship was obtained improperly- just makes a determination. Not a question of whether it SHOULD be revoked. Also, no appeal from this decision.

o Once Federal Court finds impropriety in application, this is sent to Cabinet, who exercises discretion on revocation.

new bill will make it easier for the government to revoke citizenship, could have retrospective effect

Canada Experience Class

Regs: 87.1

Definition: A class of persons who may become permanent residents on the basis of their experience in Canada. Requirements:

Have acquired in Canada within the 24 months before the day on which their application for permanent residence is made at least 12 months of full-time work experience, or the equivalent in part-time work experience, in one or more occupations that are listed in Skill Type 0 Management Occupations or Skill Level A or B of the *National Occupational Classification* matrix, and have acquired that work experience after having obtained a diploma or degree OR

Have acquired in Canada within the 36 months before the day on which their application for permanent residence is made at least 24 months of full-time work experience, or the equivalent in part-time work experience, in one or more occupations that are listed in Skill Type 0 Management Occupations or Skill Level A or B of the *National Occupational Classification* matrix AND

Have English or French language ability

Entrepreneurs

Few applicants (372 principals in 2009)

Definition:

Regs: 88\

1. Has business experience: at least 2 one-year periods of managing a qualifying business and control of a % of equity of the business for a period of 5 years prior to application

Qualifying business: cannot be primarily for deriving investment income (e.g. a holding company) as Canada wants to create jobs

2. Net worth of 300k

3. Written statement of intent and ability to meet conditions

Points system (need 35 of 96 points - easy to meet)

Adaptability: 6 points for business exploration trip or participation in federal provincial initiative

Language: Max 24 points for both official languages

Business Experience: 35 points for 5 years

Education: 5 to 25 points (for Masters + 17 years)

Age: 21-49 years rewarded

If fail on points, substituted evaluation

Regs: 76(3)

Conditional Entry until:

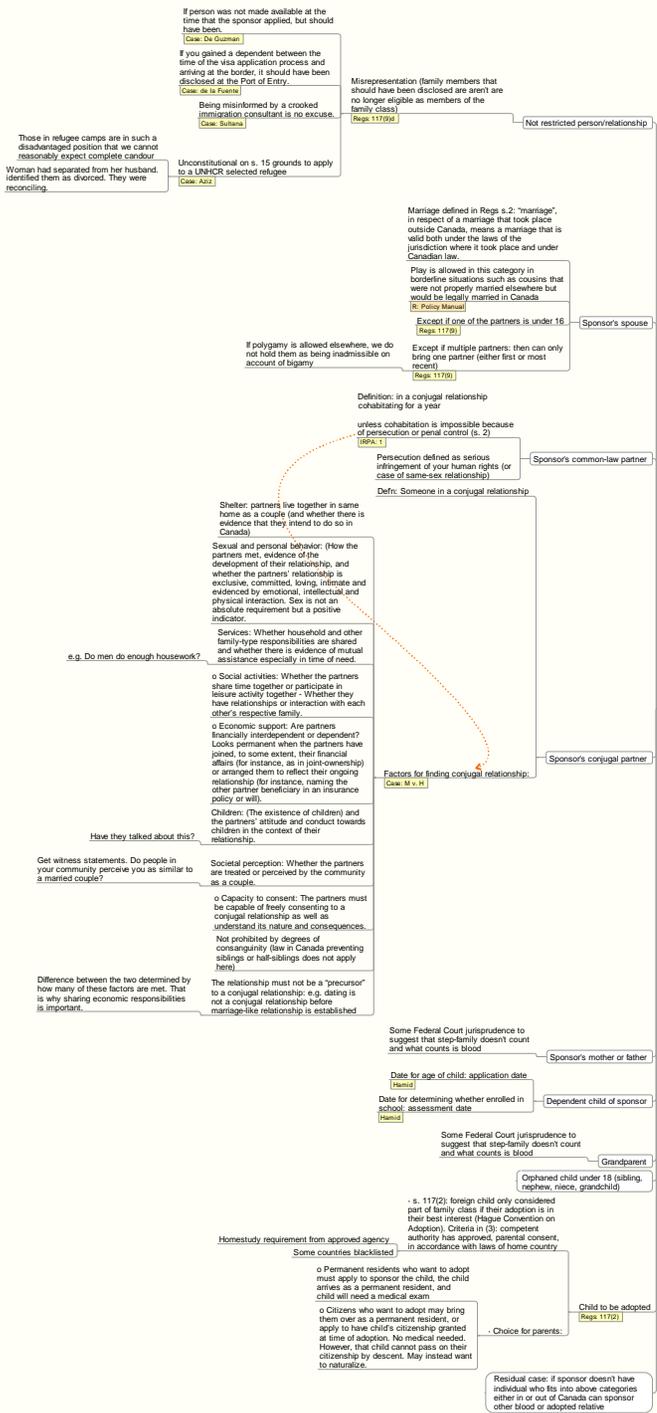
Control 33.3 equity of qualifying Canadian business

Active management of qualifying Canadian business

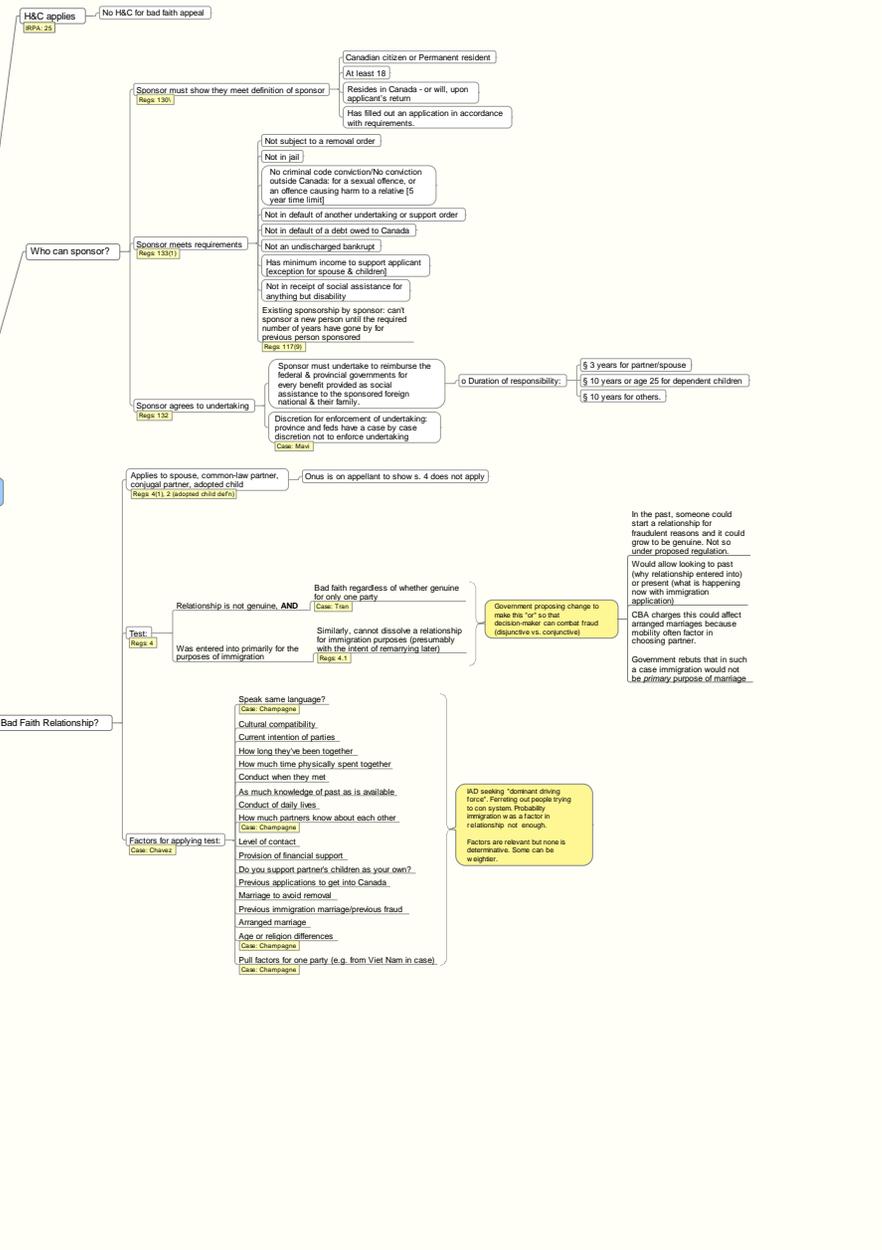
Create one job for non-family member (full-time job for Canadian citizen or PR)

- Must meet conditions for a year within 3 years of becoming a PR
- Permanent address required after 6 months
- Evidence of efforts to comply required after 18 months
- Evidence of compliance required within 3 years

If you don't meet requirements, you and your family lose status



Family Class



Investor

2800 principal applicants in 2009

Critique: a lot of people under program having difficulty forging connections in Canada, leaving after obtaining citizenship

Definition:

Two years of "business experience"

Business Experience: management of 5+ full-time job equivalents

Legally obtained net worth of \$800,000+

Includes spouse/common-law partner assets

\$400k investment in an approved fund (have made or intend to make) for 5 years

Points system (need 35 of 96 points)

Adaptability: Post-secondary education considered, spouse's education considered, history of work or study in Canada considered

Language: Max 24 points for both official languages

Business Experience: 35 points for 5 years

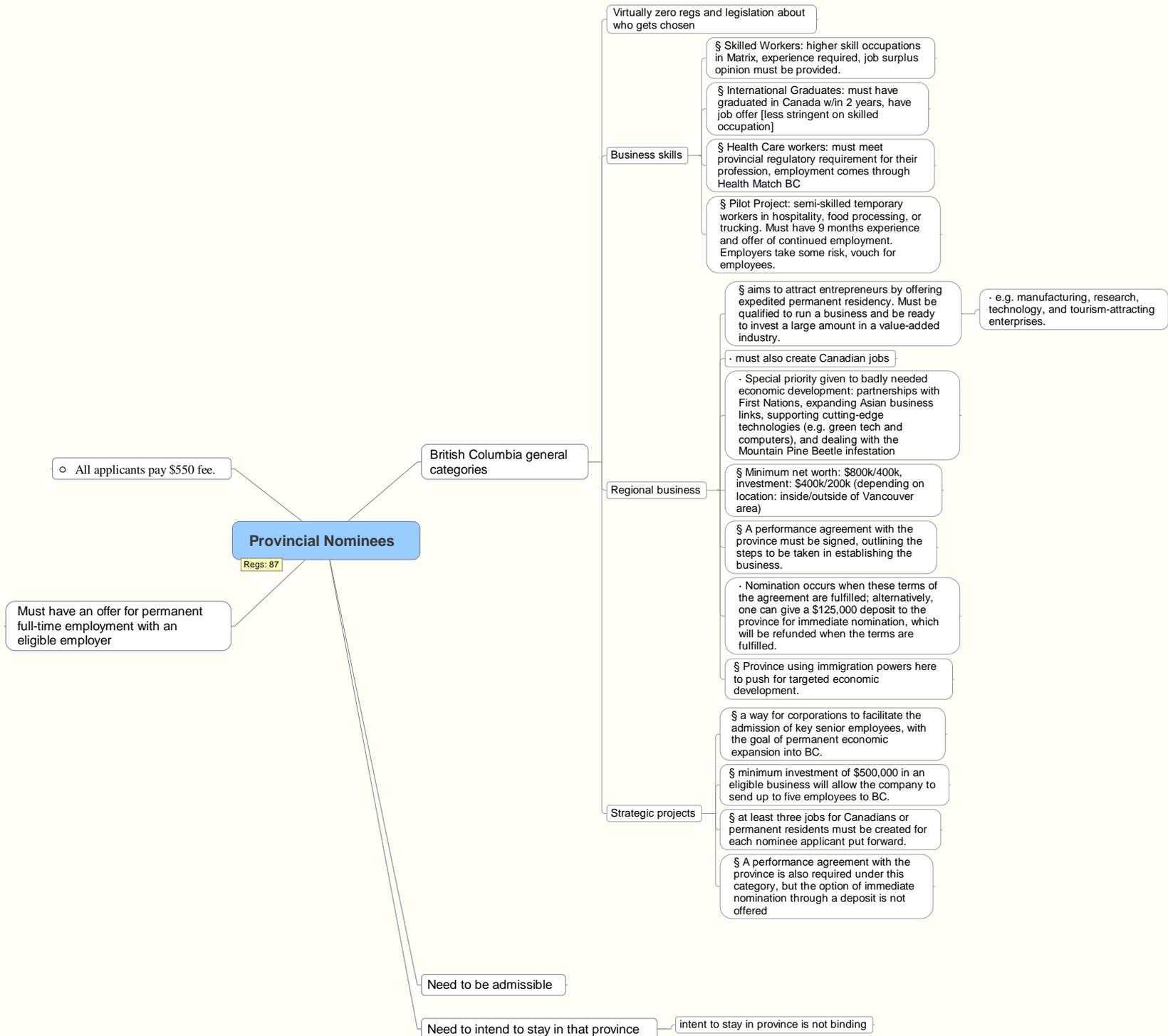
Education: 5 to 25 points (for Masters + 17 years)

Age: 21-49 years rewarded

If fail on points, substituted evaluation

76(3)

Unconditional status



Security Certificates

§ s. 83 is 10 parts, requiring the following:

o tolerance for a high level of informality and expeditiousness (as much as fairness will allow)

§ s. 85(3) - provides administrative support to advocates

§ s. 85.1: job is to protect the interests of names party. may challenge the claims of danger/injuriousness, and relevance/reliability/sufficiency

§ advocate is not a party and is not in a solicitor-client relationship (although communications are privileged).

§ Minister obliged to provide the advocate with the evidence, but not the party themselves. Is that enough?

o the appointment of a special advocate. [less power than SIRC used to have]

§ s. 85.4(2): after seeing evidence, the advocate may communicate with others only with permission and subject to conditions [implication is that the named party cannot hear about it]

§ ss. 86-87.1 discuss confidentiality rules in admissibility, detention reviews, appeals to IAD and judicial review applications. A parallel procedure is therefore in place for these proceedings, where similar issues of protected information arise.

o the power to hear information in camera if the judge believes that disclosure would be injurious to national security or endanger a person's safety

o assurance of confidentiality by judge

o judge must also make sure the subject gets a summary of evidence unless it would be injurious...

o evidence withdrawn by minister must remain confidential

o opportunity to be heard

§ s. 1.1 evidence believed (on reasonable grounds) to be obtained by torture cannot be included

o standard of evidence is anything that the judge believes is reliable and appropriate (even if inadmissible in court)

o judge may base a decision on evidence even if not included in summary given

o no decision to be based on irrelevant or withdrawn evidence

s. 77(1): certificate signed by 2 ministers, stating that person is inadmissible on most serious grounds (security, int'l rights, organized criminality). (2): Minister shall file the information on which the certificate is based, allowing person to be reasonably informed of reason for certificate, without risking security. Not required to show all information- may be removed from context of person's story. Relevant information may therefore be withheld from view of court or advocate.

s. 80: if security certificates passes scrutiny in formal terms, it is conclusive proof of inadmissibility, and counts as an enforceable removal order, without any further hearing (e.g. examination, admissibility hearing).

s. 78: Federal Court designated judge must determine the reasonableness of the certificate.

Charkaoui 2 (SCC 2008)

§ Ministers also filed fresh allegations against Charkaoui. Hearing postponed to give C more time to assess this. Allegations based on interviews with CSIS, so C requested original notes/transcripts of interviews (rather than summary). As matter of policy, CSIS destroys notes once summary completed (!). Charkaoui claims that this violates procedural fairness.

o Judge found that destruction of notes was a breach of duty. Summary not enough (judge should at least be able to review original information). However, court not willing to void the security certificate on this basis.

Self-employed

Few applicants (179 principals in 2009). Note narrow definition.

Athletics coaches, music teachers have been success stories

Farmers have largely failed here: Canadian farming is often on a larger scale than elsewhere

Definition:
88\

Has "relevant experience" and has the intention and ability to be self-employed in Canada and make a "significant contribution" to "specified economic activities"

Relevant experience: 2 years of employment and for cultural or athletics or 2 years participation at a world-class level or a combination of one year of each

Specified activities: athletics, the purchase and management of a farm, cultural activities

Significant contribution: undefined

Points system (need 35 of 96 points)

Adaptability: Post-secondary education considered, spouse's education considered, history of work or study in Canada considered

Language: Max 24 points for both official languages

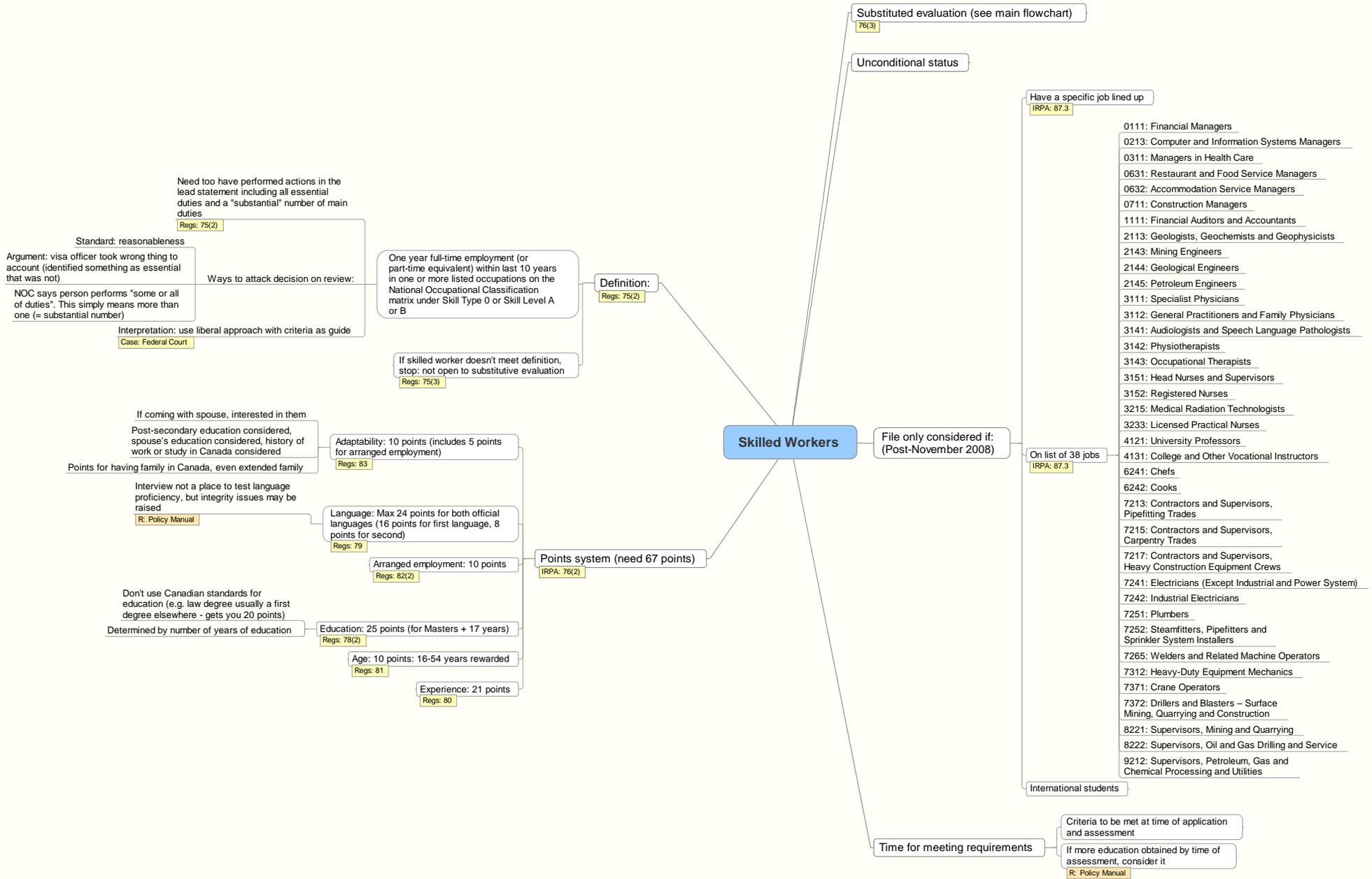
Business Experience: 35 points for 5 years

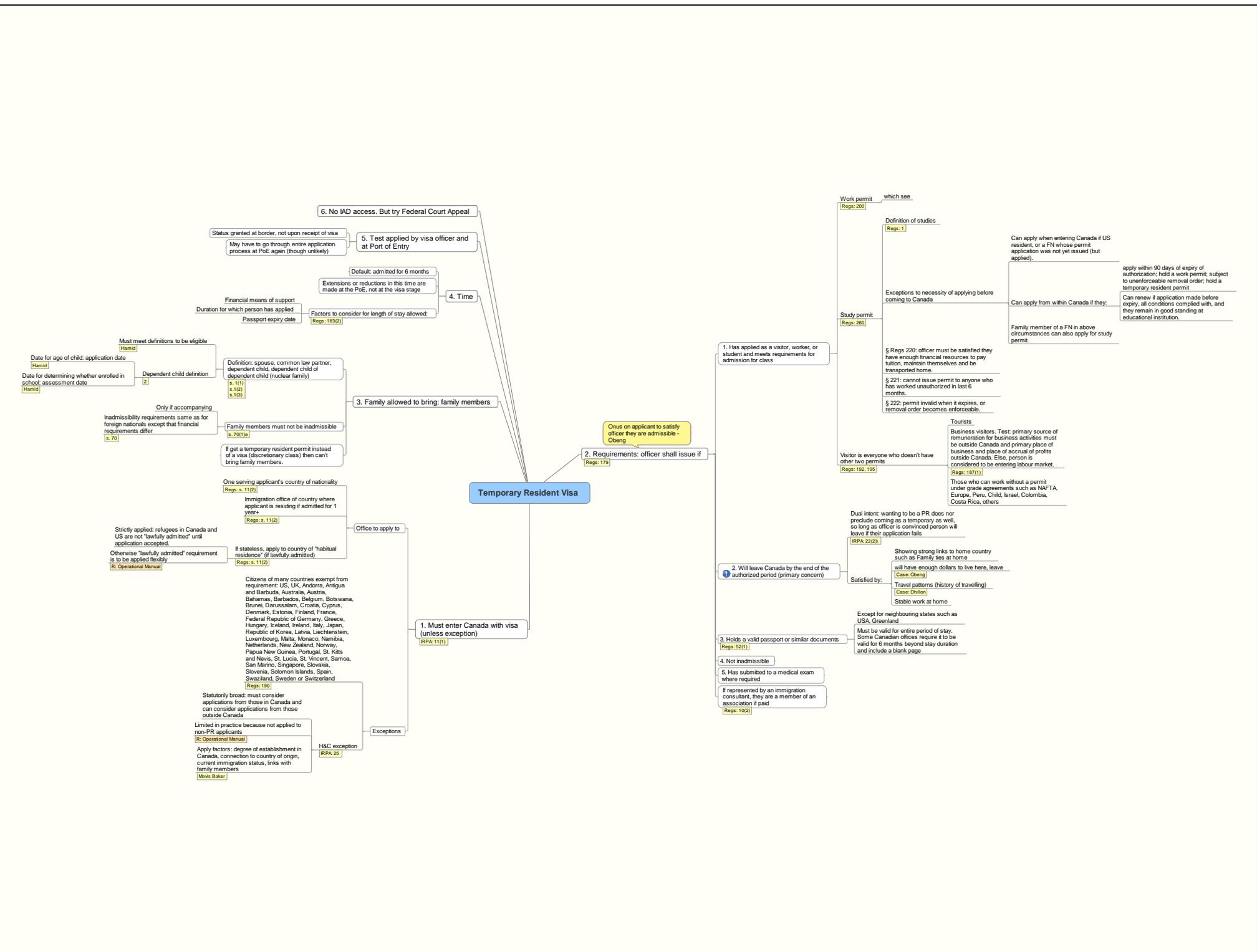
Education: 5 to 25 points (for Masters + 17 years)

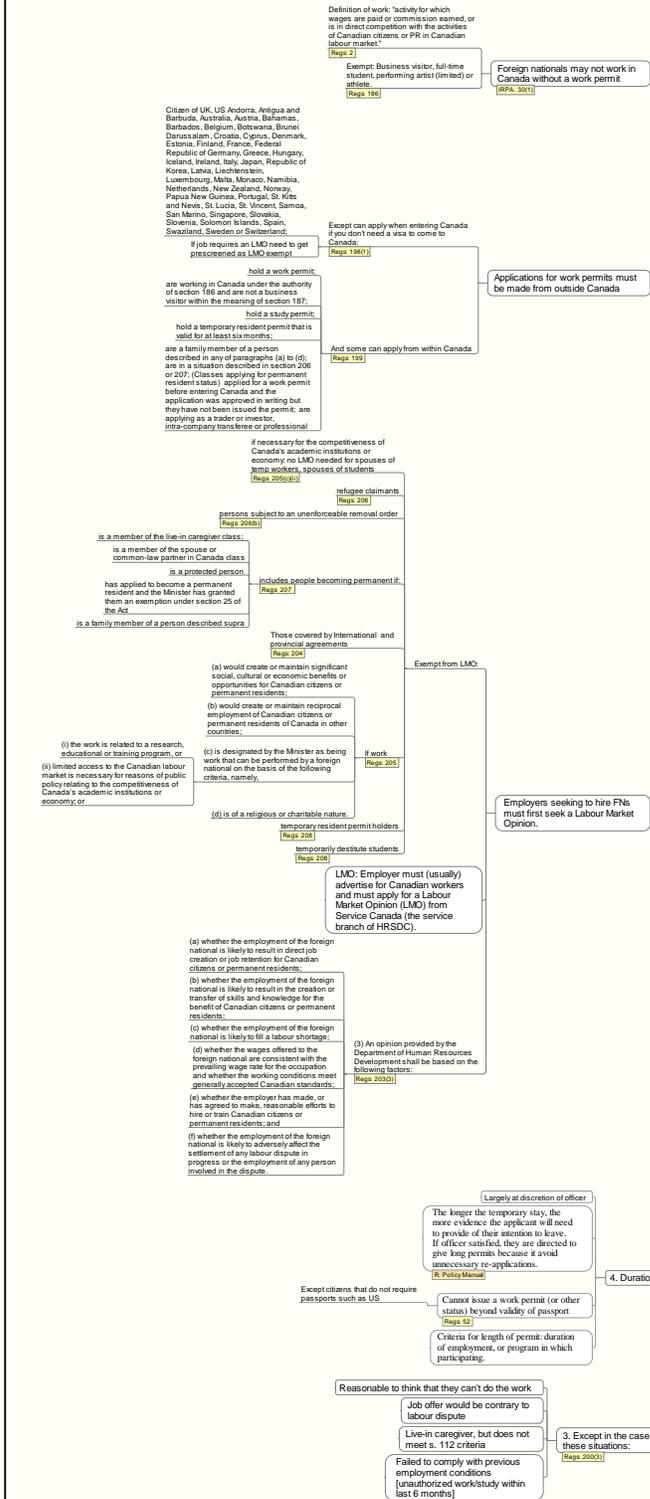
Age: 21-49 years rewarded

If fail on points, substituted evaluation
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Unconditional status



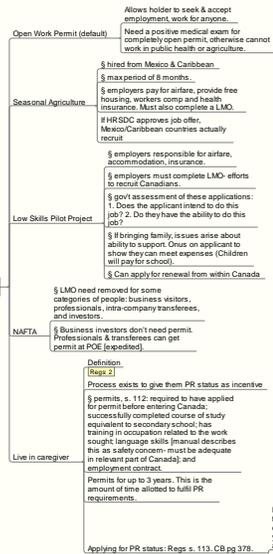




Temporary Work Permit

2. Requirements for a work permit. Officer shall issue a permit when criteria met. (Regs 200(1))

Proper application made for a particular type of work permit.

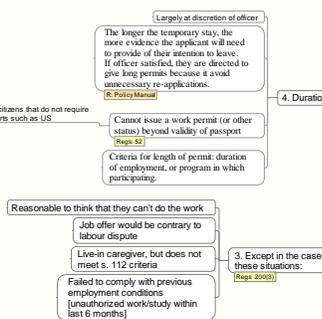


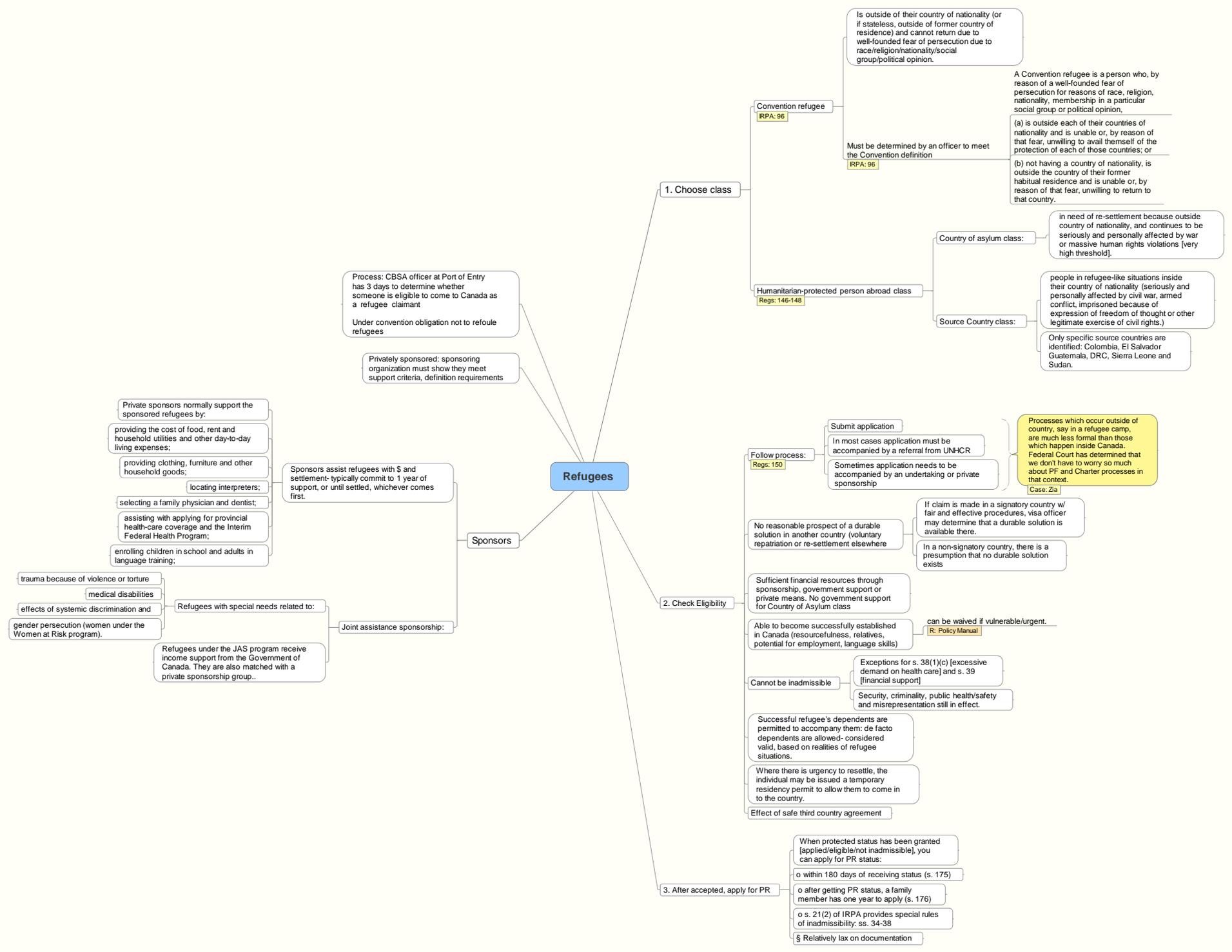
Do normal PR application, including test for admissibility of family members. May discover that they worked in Canada for years as a Live-in caregiver only to have an inadmissible family member!

Officer didn't believe he would leave, due to 7x higher salary in Canada. Fed Court quashed this, because of insufficient weight was placed on family and home country ties. (Case Math)

- Applicant will leave Canada at end of authorized period
- Applicant has been offered employment w/ a LMO, or is exempt from LMO requirement.
- Applicant has had medical test (if required - rare)

4. Duration of permit





Rights

Who has the right to enter and remain in Canada?

PRs
IRPA: 19(2)

Citizens
IRPA: 19(1)

Indians
IRPA: 19(1)

may be foreign nationals

Foreign nationals
IRPA: 29(1)

No right. Conditions may be placed on their entry including deposits, restrictions on movement

Complaints to international human rights bodies

15(1)

Step Four: s. 1, baby!

Define Comparator Group (Hodge)

We adopt a substantive equality approach that is comparative, but not as rigidly comparative as a formal equality approach.
Case: Nancy Law

1. Consider the universe of potential beneficiaries

Refer to legislative purpose
Case: Hodge
e.g. universe is separated spouses; the argument for this is that couples rationally choose not to marry and that choice should have some significance and be respected
Case: Hodge

2. Does the claimant fit in this universe?

e.g. Court - Hodge does not fit into universe at all - not a 'separated spouse', she is no longer a spouse at all
Case: Hodge

3. Personal characteristics basis for exclusion?

(but for this personal characteristic, I would be in this universe, and then connect personal characteristic with an enumerated or analogous ground)
e.g. distinction b/w separated married spouses and separated common law spouses - personal characteristic of marital status
Case: Hodge

Distinction

Can be in terms of purpose or effect; law can be facially neutral
Case: Big M

Based on personal characteristic

Characteristics that have been found include age and race; must go to human dignity.
Case: Health Services
"Occupational classification" was found to relate to work, not a personal characteristic
Case: Health Services

Negative impact: Imposition of burden or withholding benefit/protection

Withholding CPP benefits
Case: Nancy Law
Withholding welfare benefits
Case: Gosselin

Enumerated grounds (s. 15)

- Age
- Race
- National/ethnic origin
- Religion
- colour
- Sex
- Disability

Recognized, e.g.

- Citizenship (Andrews)
- Marital status
- Sexual orientation (Vriend)
- Aboriginality-residence

Case: Corbiere

Analogous ground

Not recognized (Use Corbiere test):

"Grounds are markers of suspect decisionmaking"

Factors for recognizing something as a ground:
Case: Corbiere

These markers reflect historical patterns of stereotyping and discrimination. Stereotyping is about irrational perceptions.

Immutable or quasi-immutable characteristic: it is either beyond one's power to change this characteristic or the state cannot reasonably ask them to change it.

Engage fundamental aspect of human dignity? (arguably irrelevant post-Kapp)

Group has traditionally lacked political power
Case: Corbiere
Role: Dissent

This is an enumerated ground in a federal or provincial human rights code
Case: Corbiere
Role: Dissent

e.g. The court has rejected "residence" as a ground
Case: Corbiere

Step One: formal distinction or differentiation based on personal characteristics with impact?

Kapp merges these as it returns to the two-stage Andrews test

Step Two: Is treatment based on analogous/enumerated grounds? (Nancy Law)

Step Three: Is the distinction in purpose or effect discriminatory in a substantive sense? (evaluated on facts of case and s. 15)

1: Pre-existing disadvantage: Claimant must show law reinforces stereotypes or traditional disadvantage

Don't need to show

Relevant factors include whether there is a history of exclusion, a history of oppression, or whether the group broadly experiences disadvantage.

Look to the group to which the individual belongs, not to the individual themselves. e.g. Non-citizens in general, not Andrews himself as a rich foreign-educated non-citizen.
Case: Andrews
Judge: Wilson, J.

Group not disadvantaged: Test not met because younger people are not traditionally disadvantaged but instead advantaged on account of their youth.
Case: Gosselin

We're all part of group: Also, we all go through different ages during our lifetimes, so this criterion is not particular to a certain group.
Case: Gosselin

We use age for social classification already; you wouldn't put a sign on a bar saying "no blacks" but you would saying "no minors"
Case: Gosselin

No correlation of age and legislative purpose
Case: Nancy Law

No age is a relevant distinction. There are natural differences between different age groups.
Case: Gosselin

No, Charter allows for differential treatment of non-citizens

2: Corresponding factor (rational connection test): Does legislation make distinction based on an "irrelevant characteristic" in relation to its purpose?

Definitely important

Will uphold legislation if benefit conferred (less likely to offend dignity) e.g. ameliorative for older widows
Case: Nancy Law

What is the legislation trying to do in distinction?

A benevolent purpose can rescue a law that has discriminatory effects

3: Ameliorative purpose/dsadvantage

Doesn't need to be shown, but it can help government

Subjective-objective perspective (Reasonable rights-holder): The subjective portion focuses on the individual and the objective portion allows for a broader consideration that allows us to consider the claim in the context of the legislative purpose.
Case: Nancy Law

Definitely important

Dismissed because the court found that the claim came down to "mere financial anxiety"
Case: Nancy Law, Gosselin

Severe and localized impact on claimant that affects human dignity

§ Being able to lead evidence of things like "my client can't feed themselves because of the situation"

the greater the affected interest, the more problematic the distinction will be

If you can relate the interest claimed to some fundamental constitutional principle like autonomy, some norm or value that there is a norm or consensus that it is important

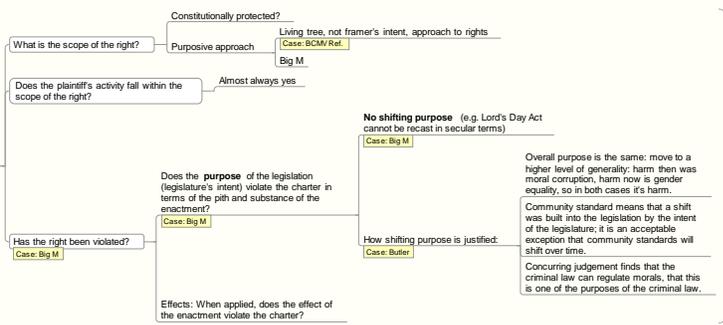
Economic, constitutional, and societal significance

Corbiere case was found to be about this: access to the electoral process for band government

Access to fundamental societal interest/affects basic aspect of full membership in society

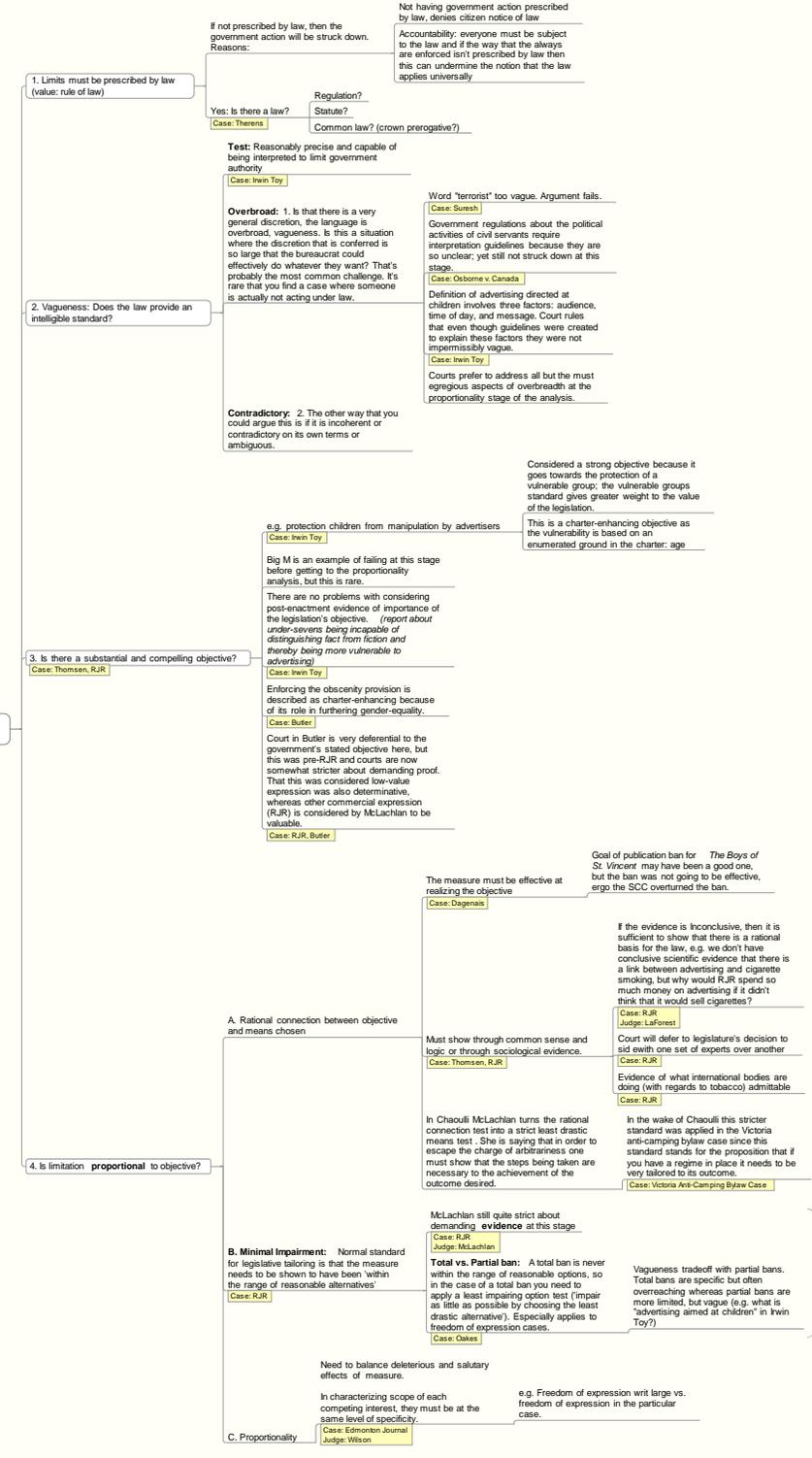
Access denied to full membership in Canadian society?
§ Basic things like work, mobility

Step 1: Is a right being engaged?



Burden of proof on the plaintiff (rightsholder)

Step 2: Justification Analysis (must pass every element of test)



Burden of proof on the defendant (government)

This tends to be the area where the courts feel most comfortable scrutinizing government

section 7

General

Wording: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

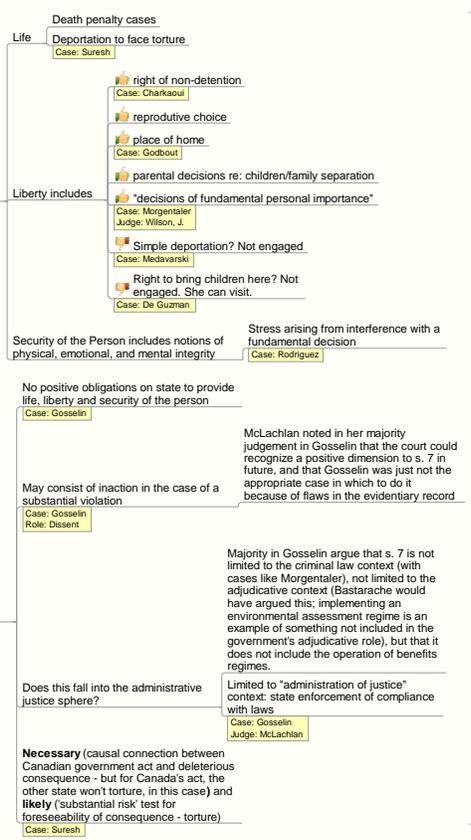
3 values independent of each other
Case: BCMVA

Each value is informed by other values; we can't have a concept of liberty that is inconsistent with our notion of life, say.
Case: Rodriguez

Analysis of s. 7

Step 1:

A. Does the impugned law engage any one of protected interests?



Burden on plaintiff

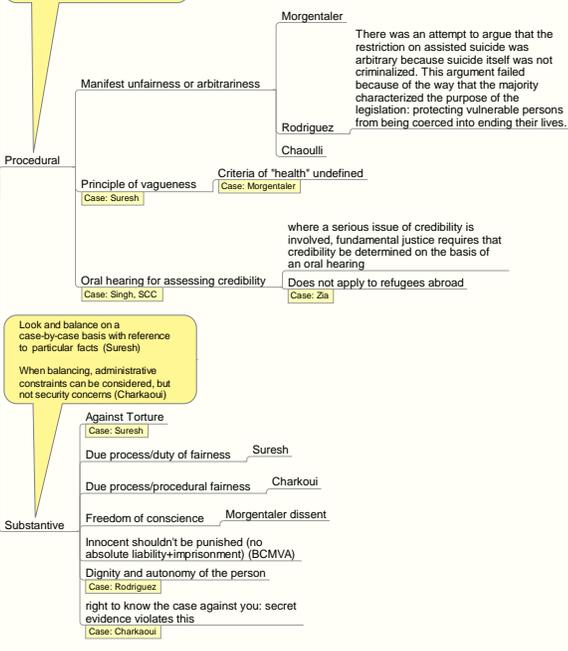
B. Is the right deprived by impugned law?

Look at underlying principles of legislation for determining PFJs - Charell



Due process rights are a sliding scale without absolutes where various factors are considered including norms about fairness and the nature of the interest at stake both for the individual and the government; in Charkaoui (2007) McLachlan says "no balancing of interests pre-s. 1 for s. 7, though she allows for "contextual tailoring" of the right.

Step 2: Is the deprivation inconsistent with the principles of fundamental justice?



s.32 Does Charter Apply?

1. Is this a government actor?
(strongly determined by factors)

Even if the charter does not apply, IRPA is to be construed as if it did apply
IRPA: 3(3)(d)

But only if there is ambiguity in the act
Case: Medavakalski

CBSA has been given the authority to not just look at people who come to the primary enforcement line, but to go out and ask for people's documents pro-actively, e.g. on an airplane

If in Canada, applies
Case: Singh

o Hape (2007, criminal law, search & seizure in another country): International law recognizes sovereignty between states. So, start with assumption that Charter does not apply outside Canada, unless there's a reason for it.

o Khadr (2008, interviewing Omar Khadr in Guantanamo): Does Charter apply to Khadr in Cuba? One of the referred-to exceptions in Hape is present here: if something illegal is happening outside of Canada. Court said that Guantanamo is contrary to international law (Geneva Convention)

o Amnesty International v. Canada (2008 FCA 401), non-citizens being transferred by Canadian gov't, potentially facing torture. Court found that the facts did not support arguments of clear breaches of international law. Possibility of human rights violations not enough.

3. Territoriality

Overseas: somewhat open to question because jurisprudence not from this area of law. Hape could raise questions about some circumstances when other laws apply.
Case: Hape

32. (1) This Charter applies:

a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Text of section:

2. Even though the actor is not a governmental one, is this nonetheless a government action?

Delegated Decision-Maker Applying Legislation. **Test:** is the provision of this particular service from an otherwise independent organization not simply a matter of internal hospital management but instead an expression of gov't policy?
Case: Eldridge

Yes Charter Applies

No If litigation between two private parties over common law, charter does not apply. However, if one of the private parties relies on a statute, (e.g. citizens arrest), then the Charter becomes involved.

a particular activity of the non-gov't actor can still be susceptible to the Charter (e.g. hospital providing services to disabled)
Case: Eldridge

Rationale: Since legislatures may not enact laws that infringe the Charter, they may not authorize or empower another person/entity to do so (Staight)

The basic starting point is that the legislative/executive/administrative branches of government are covered by the charter.

If the actor is a government actor, then all of their actions are automatically considered government actions - they can't claim that some of their actions are private.
Case: McKinney v. University of Guelph

Common Law: Charter applies to common law when the common law is the basis for government action, eg. Royal Perogative.
Case: Dolphin Delivery

Is the body in question part of the judiciary?

Judiciary is excluded + parliamentary privilege
Case: Dolphin Delivery

government actors	Private actor
<ul style="list-style-type: none"> • Creatures of statute <ul style="list-style-type: none"> o Statutorily mandated o Heavy public funding o Both operational and capital expenditures • Judicial review re: rules of natural justice • Degree programs - need min. Approval • Statutory basis for government framework • Provision of public good, part of a regime of public higher education 	<ul style="list-style-type: none"> • Governing board - only minority are government appointees • Hiring plus other operational decisions are independent of government • Extensive discretion re: management of budget • Principle of academic freedom, academics conducting pure research free of government control • The big theme of these cases is autonomy

Does the actor count as being part of the administrative branch of the government?

Use **Autonomy vs. Control Test:** Regular/routine control (public) versus ultimate/extraordinary control (private)
Examples of application:
Case: Stoffman v. Vancouver General Hospital

University
Case: McKinney v. University of Gu...

Government Actor

- Creatures of statute
- Framework re: Board
- 14/16 of Directors are cabinet appointments
- Minister must approve bylaws has veto, can alter/amend bylaws
- Government has "ultimate" control
- Funding public through medicare, little discretion re: funding
- Can require new bylaws

Private Actor

- Groups in civil society submit lists of nominees to cabinet and then cabinet selects from those lists
- "Routine + regular" control is by board

Hospital
Case: Stoffman v. Vancouver Gene...

- Board is entirely appointed by minister
- There doesn't seem to be any mechanisms where the appointments reflect civil society groups
- There is no term of office for the board members
- They are appointments at the pleasure of the crown which means they can be fired immediately
- When we looked at judicial independence, the key measure for that was job security
- The appointees to the hospital and university boards don't have the same sort of protection that judges do, but they do have some protection, like terms for the appointments

Community College
Case: Douglas

Quintessentially Government Function Test
(e.g. Godbout finds municipalities are government actors)
Note: that control is not available as a test here since no control exists.
Case: McKinney v. University of Guelph

Taxing powers.
Democratically elected (significant but not determinative).
General law-making power with a territorial jurisdiction.
Municipalities are creations of provincial governments; if they were not created the provincial governments would have to do similar tasks itself.

Is the actor in question part of the legislative branch of government?

Independent adjudicators and impartial decision-makers: **Close Nexus Test**

Where an action being carried out is inherently governmental e.g. implementing a public program.
Case: Eldridge
People who work for transportation companies have quasi-public role as they will not let people onboard who do not have authority to enter the country, lest they be fined.