A Failed Discourse of Distrust Amid Significant Procedural Change: The Harper Government's Legacy in Immigration and Refugee Law

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This paper examines two legacies of the Harper government in immigration and refugee law. The first is a discursive legacy, that is, a legacy pertaining to the government's particular characterization of claimants for refugee and immigrant status seen through a series of its legal initiatives. The government engaged in a "discourse of distrust" with respect to claimants, repeatedly identifying them as persons trying to fool or take advantage of Canada's immigration and social welfare schemes. The second legacy pertains more to a number of institutional and procedural changes in the immigration system. These initiatives have not received the same attention given the higher profile measures that comprise the discourse of distrust. However, they embody trends in Canadian immigration law toward enhancing the authority of executive government in administering the country's immigration programs, together with a consequent loss of security for the prospective and recent newcomer to Canada.

In the end the discursive legacy of the Harper government appears to have outweighed its institutional legacy. The Conservative Government took a sword to many of the long-established understandings that informed Canada's immigration law — and it seems that the Government's truculence in matters dealing with immigrants and refugees served as one of the bases on which the election of October 2015 turned. For the foreseeable future, political discussions about immigration issues in Canada will start from a different place than the distrust and fear of the stranger.

L'auteur de cet article examine deux héritages du gouvernement Harper en immigration et en droit des réfugiés. Le premier est un héritage discursif, c'est-à-dire un héritage se rapportant à la caractérisation particulière des demandeurs du statut de réfugié ou du statut d'immigrant par le gouvernement, vu par une série de ses initiatives juridiques. Le gouvernement s'est lancé dans un « discours de méfiance » à l'égard des demandeurs, en les identifiant à plusieurs reprises comme des personnes essayant de berner le gouvernement ou de profiter des projets d'immigration ou d'aide sociale du Canada. Le deuxième héritage se rapporte davantage à de nombreux changements institutionnels et des changements de procédure dans le système d'immigration. Ces initiatives n'ont pas reçu la même attention étant donné les mesures très médiatisées qui constituent le discours de méfiance. Elles donnent également forme à des tendances en droit de l'immigration canadien à accroître l'autorité du gouvernement exécutif en matière d'administration des programmes d'immigration du Canada, conjointement avec une perte de sécurité consécutive à cet accroissement pour les éventuels nouveaux arrivants au Canada ainsi que pour les nouveaux arrivants récents. En fin de compte cependant, l'héritage discursif du gouvernement Harper semble l'avoir emporté sur son héritage institutionnel. Le gouvernement conservateur a attaqué de nombreuses vieilles compréhensions qui influençaient le droit de l'immigration du Canada et il semble que son agressivité relativement aux questions touchant les immigrants et les réfugiés a servi d'une des bases sur lesquelles a reposé l'élection d'octobre 2015. Dans un avenir prévisible, les débats politiques liés aux questions d'immigration au Canada auront un autre point de départ que la méfiance et la peur de l'étranger.

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I. Introduction

The Government of Prime Minister Stephen Harper was remarkably active in the areas of refugee and immigration law throughout its nine years in office, and especially after attaining a majority in the federal election of 2011. This paper examines two legacies of the Harper government in immigration and refugee law. The first is a discursive legacy, that is, a legacy pertaining to the government's particular characterization of claimants for refugee and immigrant status seen through a series of its legal initiatives.[1] The second is a legacy pertaining more to institutional and procedural changes in the immigration system.

One thesis of this paper is that the government engaged in a "discourse of distrust" with respect to claimants, repeatedly identifying them as persons trying to fool or take advantage of Canada's immigration and social welfare schemes. This thesis is developed by examining five instances in which the government enacted legislation for the avowed purpose of attacking presumed dishonesty on the part of claimant groups. A second thesis of this paper is that the discourse of distrust failed. It failed on two principal levels: in the courts, and at the ballot box in the federal election of October 2015. Late in the life of the Harper government, it lost a series of court challenges to legislative amendments embodying distrust of immigrants and refugees, which were brought on constitutional and other grounds.[2] Moreover, the Conservative government lost the 2015 election to an opposition party, the Liberals, whose leader Justin Trudeau made a different discourse on immigration matters a central part of its platform and, in its first months in power, rolled back several elements of the Harper agenda. The Syrian refugee crisis, which occurred in the midst of the election campaign, highlighted this dramatic series of events.

1 This paper is not a treatise on "discourse theory," nor does it employ a methodology of measuring and analyzing (legal) text familiar to practitioners of discourse theory. The use of "discourse" here is, however, intended to have a meaning similar to that set out by political scientist Carol Bacchi in *Analysing Policy: What's the Problem Represented to Be?* (Pearson Australia: Frenchs Forest, New South Wales, 2009), a practical approach to exploring the social meaning of policy or legislation through its construction in language. Bacchi's approach involves asking a series of questions directed at ascertaining how the policy-maker has (and has not) framed the "problem" to which they are offering a solution. It is in this sense that "discourse" is meant here. The government of Stephen Harper repeatedly justified its immigration initiatives by pointing to problems of dishonest or fraudulent behaviour by newcomers to Canada.

2 In "How the *Charter* Has Failed Non-citizens in Canada: Reviewing Thirty Years of Supreme Court of Canada Jurisprudence" (2013) 58:3 McGill LJ 663, Catherine Dauvergne argues that through to 2012, foreign nationals and permanent residents had achieved relatively little success in bringing *Charter* claims. This perhaps underlines the significance of the court decisions discussed below, *infra* notes 24-29.

However, the story of the Harper legacy in Canadian immigration policy is not wholly captured by the idea of a discursive failure. In addition to the policy initiatives noted above, the Conservative government sought to make changes to a number of legal processes and institutions. The paper looks at three process changes: the reconfiguration of the refugee determination system, the use of Ministerial Instructions, and the introduction of the "Express Entry" system for selection of permanent residents. These initiatives have not received the same level of attention given the higher profile measures that comprise the discourse of distrust. They also embody trends in Canadian immigration law that, while accelerated by the Harper government, are likely to persist over the longer term. These trends include enhancing the authority and flexibility available to executive government in administering the country's immigration programs, together with a consequent loss of security for the prospective and recent newcomer to Canada.

The exercise of identifying a government's legacy in a certain area of concern is necessarily selective, but even more so in a case like this where there is so much to examine. If one was to discuss the legacy of the Harper government in immigration policy generally, the range of subjects would cover at least the following: increasing the role of temporary foreign workers in the Canadian workforce[3] (until sharply pulling back on that initiative in the last year of the government's life), increasing the numbers of economic class immigrants at the expense of the family class, and enhancing the role of provincial nominee programs and employer selection mechanisms in the process of selecting immigrants.[4] These are significant policy developments, but they lie outside the scope of this study. Rather, the specific focus here is on the Harper government's legacy in the legal domain, that is, on the areas of law-making, legal process, and jurisprudence.

The nature of immigration law is constitutional in the basic sense that it instantiates principles related to what constitutes membership in the national

3 The best single summary of the expansion of the Temporary Foreign Worker Program (TFWP) in the decade from 2001 to 2010, by both Liberal and Conservative governments, together with the major legal issues it raised is likely Delphine Nakache & Paul Kinoshita, "The Canadian Temporary Foreign Worker Program: Do Short-Term Economic Needs Prevail Over Human Rights Concerns?" (2010) 5 IRPP Study, online: <http://irpp.org/wp-content/uploads/assets/research/diversity-immigration-and-integration/new-research-article-3/IRPP-Study-no5.pdf>. For a brief account of the regulatory changes made by the Harper government in 2014 to rein in the TFWP following extensive media criticism, see Lisa Carty, "Changes Affecting Temporary Foreign Workers in Canada" (2014) 24 Employment and Labour Rev 69-71.

4 See Delphine Nakache & Catherine Blanchard, "Remedies For Non-Citizens Under Provincial Nominee Programs: Judicial Review And Fiduciary Relationships" (2014) 37:2 Dal LJ 527.

community and of the relationship between that community and foreigners or outsiders. Law in the form of the Constitution, international law, and federal legislation mediates this relationship by placing specified limits on arbitrary action by the state. This article examines issues arising in the areas of both refugee and immigration law. It does not cover developments in the related area of citizenship, which was also a *locus* of considerable activity by the Conservative government.[5] In terms of Canadian law, "refugee protection" represents a domain of state *obligation* to foreigners fleeing persecution,[6] while "immigration" represents a domain in which the state exercises *sovereignty* on behalf of Canadians to decide who it will allow to join, and remain in, the national community. The Supreme Court of Canada affirmed the latter idea when, in a case dealing with section 7 of the *Canadian Charter of Rights and Freedoms*,[7] it described the "basic tenet" of Canadian immigration law in these terms: "the most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country."[8]

The balance of the article proceeds as follows. Part II considers the discursive level of the Harper government's legacy. It looks at five instances where the government identified policy problems caused by foreign nationals seeking to take advantage of Canada's decision-making processes. In each instance, the government took legislative initiatives intended to promote its image as defender of Canadians and their interests. Three of the initiatives dealt with claimants for refugee status, while two were directed more at permanent residents. Part III of the paper discusses three policy initiatives of a procedural nature, two concerned with immigration and one with refugee determination. Part IV is a concluding section that considers the reasons why the measures discussed in Part II failed, while those discussed in Part III seem likely to endure.

5 See also Audrey Macklin, "Citizenship Revocation, The Privilege to Have Rights and the Production of The Alien" (2014) 40:1 Queen's LJ 1, and Craig Forcese, "A Tale of Two Citizenships: Citizenship Revocation for 'Traitors And Terrorists'" (2013) 39:2 Queen's L J 551.

6 The obligation is founded in the *United Nations Convention on the Status of Refugees*, which Canada ratified in 1969, and has incorporated into its domestic law, principally in section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

7 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

8 *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 SCR 711 (per Sopinka J).

II. The Harper legacy in discourse: distrust of the stranger

In suggesting that the government engaged in a discursive campaign of this nature, one can start simply by listing the titles of several legislative initiatives: the *Preventing Human Smugglers from Abusing Canada's Immigration System Act;*[9] the *Protecting Canada's Immigration System Act;*[10] the *Faster Removal of Foreign Criminals Act;*[11] and the *Zero Tolerance for Barbaric Cultural Practices Act.*[12] Many of the initiatives represented by these and other legislative acts followed specific incidents that the government identified as being representative of a generalized problem that needed to be quickly addressed by dramatic policy changes. Most of the problems and policies dealt with claimants for refugee status. In reacting quickly and aggressively to highly publicized events involving refugee claimants, the Harper government both responded to and reinforced what it believed to be nativist strands in Canadian public opinion.

A. Refugee claimants

The refugee claimant is the ultimate outsider to the national community. By definition, she arrives in Canada unexpectedly and without invitation, and often without documents to establish identity or personal history. These circumstances make the claimant an easy target for feelings of distrust or even fear. The claimant's only legal status is that of being allowed to remain in Canada while the government determines whether she meets the requirements of being the subject of persecution in her home country on grounds of race, nationality, religion, political opinion, or being the member of a particular social group that is subject to persecution. Since the Supreme Court of Canada's 1985 ruling in *Singh v Canada,*[13] every refugee claimant is constitutionally entitled, as a matter of "fundamental justice," to an in-person hearing to determine their claim. This is an expensive process. In these circumstances, several tropes about

9 Canada Bill C-49, *Preventing Human Smugglers from Abusing Canada's Immigration System Act,* 3d Sess, 40th Parl, 2010. The Bill was subject to extensive criticism, and was not enacted prior to the prorogation of Parliament for the election held in 2011. Several elements of Bill C-49 were reintroduced and enacted in *Protecting Canada's Immigration System Act,* SC 2012, c 17.

10 *Ibid.*

11 *Faster Removal of Foreign Criminals Act,* SC 2013, c 16.

12 *Zero Tolerance for Barbaric Cultural Practices Act,* SC 2015, c 29. From an immigration standpoint, the "barbaric practice" in question was polygamy. The statute barred sponsorship of a spouse in a polygamous relationship, and barred permanent residence to anyone in a polygamous relationship. Both in its use of "zero tolerance" and "barbaric cultural practices," the title of this statute may well be the most hyperbolic in Canadian legislative history.

13 *Singh v Canada (Minister of Employment and Immigration),* [1985] 1 SCR 177.

the alleged motives of claimants have developed: (1) many claimants are in reality economic migrants, seeking to jump the immigration process by falsely claiming persecution; (2) claimants in Canada often come from "safe countries," where they could and should have claimed asylum, merely because they prefer the work, health and social benefits Canada offers; (3) individuals who lose their initial claims in Canada exploit delays in the domestic legal system to stay in the country an unreasonably long time, seeking to establish themselves so as to make their removal more difficult. All of these tropes may come to the surface at any particular moment. All were cited by the Harper government at different times as problems that needed to be addressed.

1. Human smuggling and "irregular arrivals":

In the refugee claims field, the Conservative government's first major reform proposal followed in response to dramatic news events: the arrival on Canada's West Coast of two rusty freighters — the Sun Sea in 2009 and the Ocean Lady in 2010 — carrying 76 and 490 Tamil passengers respectively, most of whom were fleeing from Sri Lanka after the end of that country's civil war. These events evoked a storm of media attention and public concern. Questions were raised about how well-prepared Canada was to deal with mass arrivals of undocumented people, whether Canada was about to experience an influx of boats carrying economic refugees as Australia had in recent years, and whether the country was going to be at the mercy of organized gangs of human smugglers. In response, the government introduced Bill C-49, the *Preventing Human Smugglers from Abusing Canada's Immigration System Act*. Bill C-49 proposed increases to criminal and civil sanctions for persons engaged in human smuggling, and introduced the concept of "irregular arrivals," applied to groups of more than 10 individuals arriving in Canada without prior authorization. Persons designated by the Minister as irregular arrivals were to be subject to one year's detention while awaiting the hearing of any refugee claims. Bill C-49 was vigorously opposed by lawyers and refugee groups supporting refugees, and was not enacted prior to the federal election in 2011. Upon returning with a majority, the Harper government reintroduced features of Bill C-49, but without the detention provisions, in the *Balanced Refugee Reform Act,*[14] which Parliament passed in 2010. Just prior to this statute's scheduled coming into force at the end of December 2012, Parliament enacted the *Protecting Canada's Immigration System Act*, which made further amendments to the human smuggling provisions and refugee claims process.

14 *Balanced Refugee Reform Act*, SC 2010, c 8.

A major upshot of the legislative amendments made in the 2010-2012 period was the Harper government's bringing into existence a system for administrative appeals of first-level refugee claims determinations. A new Refugee Appeal Division (RAD) of the Immigration and Refugee Board (IRB) took on this role. The creation of the RAD had been a promise of previous governments going back to the passage of *Immigration and Refugee Protection Act* [15]in 2002, but had never been fulfilled. With this reform, claimants whose claims are refused at first instance are no longer limited to the vagaries of applying for judicial review to the Federal Court of Canada.[16] The structuring of the RAD and the IRB is discussed further in Part III.

At the same time it created the administrative appeals process, however, the Harper government denied access to that process to several disfavoured categories of refugee claimants. This included "irregular arrivals," and refugees arriving directly or indirectly from a country subject to a Safe Third Country Agreement (see below) or who are nationals of a "designated country of origin."[17]

Section 20.1(2) of *IRPA* defines as "irregular" an arrival of a group of persons either where their identities are unlikely to be ascertained in a timely manner, or where it is reasonably suspected that their arrival was facilitated by human smuggling. Should the Minister designate an arrival as an "irregular arrival," the individuals involved become "designated foreign nationals," subject to a refugee determination process differing from that available to other claimants for refugee protection.[18] In particular, irregular arrivals are barred from appealing a rejected claim for refugee status to the Refugee Appeal Division of the Immigration and Refugee Board (see discussion below).

The legal legacy of the Sun Sea and Ocean Lady incidents included proceedings brought against several individuals with respect to "people smuggling" or "human smuggling" under two different sections of *IRPA*: section 117, which sets out a criminal offence, and section 37, which renders an indi-

15 *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

16 One of the vagaries of applying for judicial review is the requirement in section 72 of *IRPA* to first obtain leave of a Justice of the Federal Court of Canada. A recent study has shown that the chances of obtaining leave vary widely between individual Justices — see Sean Rehaag, "Judicial Review of Refugee Determinations: the Luck of the Draw" (2012) 38:1 Queens LJ 1. Judicial review, and the requirement to obtain leave, continue to be in place, but now for decisions of the Refugee Appeal Division.

17 *IRPA, supra* note 15, s 109.1.

18 Luke Taylor, "Designated Inhospitality: The Treatment of Asylum Seekers Who Arrive by Boat in Canada and Australia" (2015) 60:2 McGill LJ 333.

vidual found to have engaged in the "organized crime" of people smuggling to be inadmissible to Canada, and thus deportable. The issue under both sections was whether the provisions in question would apply to individuals who assist in bringing refugee claimants to Canada for motives other than profit. Refugee advocates argued that this broad reading, urged by the government, would make family members and members of refugee support groups liable to prosecution, and as such, would violate section 7 of the *Charter* for overbreadth. The Supreme Court of Canada agreed.[19]

2. Designated countries of origin:

In 2002, the Canadian government of Prime Minister Jean Chrétien entered into a formal Safe Third Country Agreement with the United States, pursuant to authority set out in section 102 of *IRPA*. Section 102 authorizes the government to share the "responsibility with governments of foreign states for the consideration of refugee claims," on the basis of being satisfied that the foreign state in question respects the Refugee Convention in substance and procedure. Under Canada's agreement with the US, each party agreed that it would return claimants to the first of the two countries in which the claimant had landed, for the purpose of having their claim for refugee status determined.[20] This worked greatly to Canada's advantage with respect to claims being made by prospective refugees coming through the US from Central and South America. The US remains the only country with which Canada has entered into an agreement pursuant to the mechanism set out in section 102 of *IRPA*.

The number of refugee claims in Canada dropped significantly following the making of the agreement with the US. Within a few years, however, the number of claims were rising again. In part, this reflected claims coming from Mexico, and by members of the Romany community in Eastern Europe, especially Hungary. The Harper government viewed many of these claims as being fraudulent, and pointed to higher-than-normal numbers of rejected claims coming from these sources. It responded by amending *IRPA* in 2012 to introduce a concept similar to that of the safe third country, "designated countries of origin" (DCOs).[21] The amendment authorized the Minister of Immigration to designate specific countries, on one of two bases: (1) that the percentage of failed refugee claimants in a specified period coming from that country has fallen below a percentage set by the Minister; or, (2) that the Minister deter-

19 *B010 v Canada (Citizenship and Immigration)*, [2015] SCC 58; *R v Appulonappa* [2015] SCC 59.

20 See text of the Agreement, online: <http://www.cic.gc.ca/english/department/laws-policy/safe-third.asp>.

21 *IRPA*, *supra* note 15, s 109.1.

mined that the country had an independent judicial system, and respected basic democratic and human rights. Within a short period after adoption of the DCO provisions, Minister Jason Kenney designated 38 countries as DCOs, including Mexico and Hungary.

The DCO system differs from the safe third country approach in two principal ways. First, the safe third country mechanism turns on Canada's assessment of whether a partner country abides by the terms of the UN Convention in providing asylum for genuine refugees. By contrast, the DCO process turns on whether countries can be presumed by Canada to provide state protection with respect to persecutory activities within their societies. Second, the safe third country approach results in those to whom it applies being ineligible to make a refugee claim in Canada. The DCO process does not deny eligibility to make a refugee claim, but was designed to result in expedited processing of refugee claims, and a denial of the right to appeal a failed claim to the Refugee Appeal Division of the IRB.[22]

The government's denial of the right to appeal to DCO claimants received a sharp judicial rebuke in mid-2015. In *YZ v Canada (Minister of Citizenship and Immigration)*, Justice Keith Boswell of the Federal Court of Canada ruled that this denial was unconstitutional as a violation of equality rights in section 15(1) of the *Charter*.[23] Equality rights claims require petitioners to establish two things. First, the impugned law must be shown to distinguish between groups on grounds enumerated in section 15(1), or analogous thereto. Justice Boswell found that section 110(2)(d.1) of *IRPA* differentiated between claimants on the basis of the enumerated ground of "national origin." Second, claimants must demonstrate that the distinction is discriminatory in the sense of perpetuating prejudice against, or adversely stereotyping the group in question. One of the government's stated purposes for denying appeals to claimants from "safe" DCOs was to discourage the making of bogus claims, which, in Justice Boswell's view, perpetuated a stereotype of refugee claimants as frequently engaging in fraud against the Canadian refugee determination system:

> The distinction drawn between the procedural advantage now accorded to non-DCO refugee claimants and the disadvantage suffered by DCO refugee claimants under paragraph 110(2)(d.1) of the IRPA is discriminatory on its face. It also serves to further marginalize, prejudice, and stereotype refugee claimants from DCO countries which are generally considered safe and "non-refugee producing." Moreover, it perpetuates a stereotype that refugee claimants from DCO countries are some-

22 *Ibid*, s 110(2)(d.1).

23 *YZ v Canada (Minister of Citizenship and Immigration)*, [2015] FC 892.

> how queue-jumpers or "bogus" claimants who only come here to take advantage of Canada's refugee system and its generosity... .[24]

3. Reduction of Health Care Benefits:

Similar policy concerns about claimants' taking advantage of Canada's purported generous health and social benefits schemes led the Harper government in 2014 to rewrite the Interim Federal Health Plan program, which had been in place since the 1950s. The changes limited access to public health care benefits to DCO claimants and to failed refugee claimants, in most instances leaving them with access to emergency health services only. Government officials explained that the reduction in benefits for these groups was again done with the intention of discouraging "bogus" refugees from coming to Canada in the first place, and encouraging individuals whose refugee claims were rejected to leave the country more quickly, irrespective of appeal or review rights.[25]

In *Canadian Doctors for Refugee Care et al v Canada (Minister of Citizenship and Immigration)*,[26] petitioners challenged the constitutionality of the measures restricting refugee claimants' access to public health care in Canada. Justice Mactavish dismissed their claim that the changes to the Interim Federal Health Plan violated refugee claimants' *Charter* section 7 rights.[27] However, she went on to make the extraordinary ruling that the government's withdrawal of health benefits for certain refugee classes constituted "cruel and unusual treatment" in violation of section 12 of the *Charter*. Justice Mactavish found that the word "treatment" was not limited strictly to medical issues, but also extended to deliberate, targeted government action, and that the IFHP changes constituted action of this type:[28]

> ... [T]he decision to change the IFHP was not a neutral decision taken by the Governor in Council that has only incidentally had a negative impact on historically marginalized individuals who were covered under the former IFHP. Rather, the executive branch of government has in this case intentionally targeted an admittedly vulnerable, poor and disadvantaged group for adverse treatment, making the 2012 changes to the IFHP for the express purpose of inflicting predictable and preventable physical and psychological suffering on many of those seeking the protection of Canada... .

24 *Ibid* at para 124.

25 As found by Mactavish, J in *Canadian Doctors for Refugee Care et al v Canada (Minister of Citizenship and Immigration)*, [2014] FC 651 at para 589 [*Canadian Refugee Doctors*].

26 *Ibid.*

27 *Ibid* at para 571.

28 *Ibid* at para 587.

The Court concluded that the program changes were "cruel," and that alleged but unproven cost savings argued by the Attorney-General of Canada could not justify the breach of section 12. The *Canadian Doctors* case remains the only instance in Canadian jurisprudence in which a federal or provincial government has been found to have engaged in cruel treatment with respect to a group of individuals.

B. Permanent Residents

Permanent residents, formerly known as "landed immigrants," occupy a much different position in the hierarchy of immigration status in Canada than do refugees. They have constitutional recognition in section 6(2) of the *Charter*, which guarantees them the rights to move to and reside and work in any province or territory. Permanent residents may become citizens of Canada after a certain period of residence in the country. The major difference between permanent residents and citizens is that the former may be removed or deported from the country as a result of specified misconduct, whereas citizens are not subject to removal. In the governing legislation, permanent residents are distinguished from "foreign nationals." Despite the fact that permanent residents enjoy a considerably more secure status than refugee claimants, actions taken by the Harper government extended a discourse of distrust to them as well. Two such actions will be discussed here.

1. Conditional permanent residence for sponsored spouses:

Canadian immigration law has long allowed citizens and permanent residents to sponsor the immigration of their close family members, especially of dependent partners and children. *IRPA* extends the concept of sponsorable partners to married spouses, common law partners, and conjugal partners, all terms understood to include same-sex relationships. Canada has long incorporated in its sponsorship laws barriers to the forming of spousal relationships strictly for immigration purposes, i.e., "marriages of convenience." Should an immigration officer form the belief that a relationship had been entered into for the purpose of obtaining permanent residence for the overseas partner, they can refuse the sponsorship application and deny a permanent resident visa, a decision that the sponsor can appeal to the Immigration and Refugee Board.[29]

The Conservative government decided that this process was an insufficient means for defending Canada against the practice of marriages of convenience. In 2013, it introduced Regulations to *IRPA* that made the newly-arrived per-

29 *IRPA*, *supra* note 15, s 63(1).

manent resident spouse's status *conditional*.[30] That is, the sponsored spouse could have his or her permanent residence status revoked, and face deportation from Canada, should the relationship with the sponsor terminate within two years of arrival in Canada:

> 72.1 (1) Subject to subsections (5) and (6), a permanent resident described in subsection (2) is subject to the condition that they must cohabit in a conjugal relationship with their sponsor for a continuous period of two years after the day on which they became a permanent resident.

Exceptions were made for what could be established to be legitimate relationship breakdowns, and for situations of spousal abuse. Nevertheless, these regulations introduced a new insecurity into the lives of permanent residents in Canada. It meant that they would be subject to scrutiny, including investigations by immigration officials, following their arrival in Canada. It also meant a corresponding increase in in-country enforcement resources.

2. Limiting access to the right to appeal removal orders:

In June 2013, the government brought the *Faster Removal of Foreign Criminals Act* into force.[31] The statute amended *IRPA* by reducing the eligibility of permanent residents convicted of criminal offences to appeal removal orders issued against them, and thereby retain a chance of remaining in Canada. Since the *Immigration Act, 1976*, Canadian law has provided permanent residents ordered removed from Canada for criminal conduct with an appeal right that goes to "all the circumstances of their case." This is a broad jurisdiction that authorizes the appeal body — the Immigration Appeal Division of the Immigration and Refugee Board of Canada (IRB) — to look at a range of factors that may (or may not) mitigate in favour of permitting the individual to have another chance to remain in Canada.

Permanent residents who commit criminal offences in Canada are subject to removal if their conduct meets a threshold for seriousness set out in section 36(1)(a) of *IRPA* — being convicted of an offence for which the maximum term of imprisonment is at least ten years or, alternatively, being sentenced to a term of imprisonment of at least six months. A removal order can be issued against a person meeting this threshold, to be enforced at the conclusion of any custodial sentence in Canada. However, the individual may have recourse

30 Canada SOR/2002-227, ss 72.1-72.4. Conditional status was limited to recent relationships, i.e., where the sponsorees had been in a conjugal relationship with the sponsor for less than two years at the time the application was filed — see section 72.1(2)(b).

31 *Faster Removal of Foreign Criminals Act*, SC 2013, c 16.

to appeal the removal order under section 63(3) of *IRPA*. In most appeals in criminal cases, the facts of the underlying offence and sentence (having been determined at trial) are not in dispute. Rather, the appellant is seeking a stay of removal for a specified period of time, on terms and conditions governing their conduct. This is a form of probation order. The Act provides that if, at the time the stay expires, the terms and conditions have been satisfied, the Immigration Appeal Division can quash the removal order and return the individual to unqualified permanent resident status.

Section 68(1) of *IRPA* states that all the circumstances of the case, including the best interests of children directly affected, must be considered in determining whether there are sufficient humanitarian and compassionate considerations to warrant special relief. Immigration Appeal Division jurisprudence, confirmed by the Supreme Court of Canada,[32] established six relevant factors (known as the *Ribic* factors[33]) for assessing such appeals:

- degree of remorse, and chance of rehabilitation
- seriousness of the facts of the offence
- degree of establishment in Canada, including length of time in Canada
- degree of support in the community
- harm to family members, including any children directly affected, of the individual's deportation
- harm to the individual resulting from deportation

This is an important appeal right, providing offenders with an opportunity to argue that despite what they have done that brought them into the criminal justice system, their ties and connections to Canada, especially to family members, should allow them to remain in the country, on good behaviour.

For several years prior to 2013, section 64(2) of *IRPA* limited eligibility for the "all the circumstances" appeal to those persons sentenced to less than two years in prison.[34] With the *Faster Removal of Foreign Criminals Act*, the Harper government reduced the threshold from two years to six months' imprison-

32 *Chieu v Canada*, [2002] 1 SCR 84 [*Chieu*].

33 *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IADD No 4.

34 In *R v Pham*, 2013 SCC 15, the Supreme Court of Canada ruled that the consequence of removal from Canada of a criminal sentence is a "collateral consequence" that can and should be taken into account by trial judges when sentencing an accused person. For discussion of this case, and the interaction between criminal and immigration matters, see Eric Monkman, "A New Approach to the Consideration of Collateral Consequences in Criminal Sentencing" (2014) 72 UT Fac L Rev 38.

ment. This is a significant reduction. Imprisonment for two or more years is the dividing line between serving sentences in provincial prisons or federal penitentiaries. Reducing eligibility to a mere six months' imprisonment was tantamount to saying that persons who commit offences sufficiently serious to render them removable from Canada do not have a right to an "all the circumstances" appeal. The only permanent residents who currently retain the right of appeal are those whose offences make them liable to a sentence of ten years or more, but who receive an actual sentence of less than six months.

In *Chieu v Canada*,[35] the Supreme Court of Canada traced the history and importance of the appeal right being discussed. In a unanimous judgment, the Court pointed out that until 1966, Canadian immigration law provided for a status known as "domicile." Domicile was obtained by permanent residents after living in Canada for five years. Once a person had domicile, they were no longer subject to deportation from Canada except for the most serious of criminal offences. Domicile provided recognition, short of citizenship, that a person who had come to Canada and built their life in this country had acquired a form of tenure to remain here. The Court described how domicile status was removed from the immigration legislation in 1966, but that as a trade-off, the equitable appeal on all the circumstances was created. From then until the early 1990s, permanent residents subject to removal for criminal offences had the right to appeal, irrespective of the sentences they had received. In 1993, a threshold of sentences of five years or more was introduced. In 2002, this was reduced to two years. In 2013, Parliament reduced it to six months.

The use of the phrase "foreign criminals" is itself worth interrogating. It is a pejorative term that obscures a reality that underlies many removals for criminal conduct. While those subject to removal are, by definition, not Canadian citizens, and in that narrow sense "foreigners," many are permanent residents and thus not "foreign nationals." Permanent residents have chosen to live in Canada, or in many cases, have had that choice made for them by their parents when they were children. Canada is their home.

The phrase "foreign criminal" connotes someone who was already engaged in criminal activity when they entered Canada, or who started engaging in criminal activity soon after arrival. It implies that the individual intended to commit crimes before entering Canada. In either sense, the "foreign criminal"

35 *Chieu, supra*, note 32.

fooled Canada into letting them enter. They have little or no moral claim to remain in Canada, and the country will be safer once they are removed.[36]

This stereotype misses out on a whole host of circumstances that can lie behind any one instance of criminal conduct by a permanent resident. A not atypical scenario is the following. An individual comes to Canada as a minor accompanying his or her immigrant parents, often as an infant or toddler. The minor grows up in Canada, imbibing Canadian culture and education, as with any other child. For any number of reasons, however, the parents never arrange for the child to obtain citizenship. As the child moves through his or her teenage years and into young adulthood, he or she starts getting into trouble. Once a first criminal charge occurs, they can no longer apply for citizenship and attain its protection from removal. In many instances, the individual has few or only remote family ties in the home country. They do not speak its language. In their own minds, they are Canadians. In a real sense, they have been made or formed by Canada. In this kind of case, deportation looks much less like a form of "justice" or reparation for a wronged Canadian public, and much more like a means of unloading a Canadian social problem to another, often poorer, country, at the expense of imposing considerable suffering on Canadian family members. The equitable appeal in immigration was intended, and has long provided, a safety valve to mitigate these harsher consequences. With the reduction of eligibility to persons receiving sentences of less than six months, it is now available in many fewer instances.

The availability of this appeal recourse for permanent residents has not obtained constitutional protection. The issue was raised in *Chiarelli v Canada*, but not answered. In *Charkaoui v Canada*,[37] the Supreme Court of Canada ruled that where an individual has been found inadmissible and subject to removal for alleged involvement in terrorism, the removal implicates security of person because the allegation could well endanger the individual in their home country. The Court did not, however, disturb a ruling they had made three years earlier in *Medovarski v Canada*, a case brought after the eligibility for appeal

36 In introducing the *Faster Removal of Foreign Criminals Act*, the government largely focused public attention on several high-profile instances of convicted persons who had been able to "delay" removal by pursuing lengthy appeal and review processes, not so much the issue of raising the threshold for appeals. The assimilation of permanent residents with "foreigners" was underlined by Minister Kenney's publicly citing the case of Issa Mohammed, who he failed to note had permanent resident status in Canada — see Nicholas Keung, "Palestinian Terrorist's File Sat Idle in Ottawa for 8 Years," *Toronto Star* (13 May 2013), online: < https://www.thestar.com/news/canada/2013/05/13/palestinian_terrorist_deported_decades_after_arriving_in_canada.html>.

37 *Charkaoui v Canada (Minister of Citizenship and Immigration)*, 2008 SCC 38.

was reduced from five year to two year sentences.[38] In *Medovarski*, the Court ruled that deportation *per se* — i.e., a removal from Canada that does not carry with it a threat to the individual tantamount to persecution in the refugee sense — does not involve an interest of liberty or security of person sufficient to attract section 7 rights. In the right circumstances, one wonders whether section 12, cruel and unusual punishment, might be invoked with respect to deportation for criminal conduct without appeal. This argument would encounter the difficulty that it is a long-standing tenet of Canadian immigration law that removal is a civil sanction, and not considered "punishment."

III. The Harper legacy in processes of law-making and decision-making

The measures that we now move to examine have three things in common. First, they are noteworthy for having altered the institutions and processes by which Canadian immigration policy is carried out. Second, they involve expanding the authority of executive government, and reinforcing the idea that the Canadian state is sovereign in matters of immigration *per se* — i.e., the determination of who is entitled to join the Canadian community. A further feature of these three institutional and procedural measures is that they have received less public and scholarly attention than those that characterized the discursive legacy described above.

A. Refugee appeals and the immigration and refugee board

At the same time, the government altered the structure of the Immigration and Refugee Board as a whole. Previously, first level claims adjudication had been conducted by Members of the Refugee Protection Division (RPD), who were appointees of the federal Cabinet with the degree of independence from ministerial direction and control that this is intended to provide. The new legislation converted Refugee Protection Division decision-makers into civil servants within the department of Citizenship and Immigration Canada. Only Members of the Appeal Division are now Cabinet appointees. This change in status of first-level claims adjudicators came with a series of legislative provisions requiring claims to be processed and determined within tight time frames.[39]

38 *Medovarski v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51.

39 Angus Grant and Sean Rehaag provide an in-depth empirical analysis of 2013-1014, the first two years' performance of the administrative appeal system, in "Unappealing: An Assessment of the Limits on Appeal Rights in Canada's New Refugee Determination System" (2016) 49:1 UBCL Rev 203. They make a strong case that the barriers in *IRPA* to several categories of claimants from having access to the appeal system, including claimants from DCO countries, should be removed.

A major question pertaining to the impact of the new appeals system concerns the scope of the jurisdiction of the Refugee Appeal Division. An early decision of the Refugee Appeal Division itself determined that it should exercise only a limited appeal jurisdiction over RPD decisions, by deferring to the rulings of the latter unless those were found to be unreasonable. Such a deferential approach would have had the potential to reduce significantly the impact of the administrative appeal recourse. However, in a judicial review proceeding, the Federal Court of Canada, affirmed by the Federal Court of Appeal overturned this approach.[40] For a unanimous Court of Appeal, Justice Gauthier ruled that properly interpreted, section 110 of *IRPA* gives the RAD full authority to reverse decisions of the RPD where it disagrees with them. While the RAD should, like any appellate body, take the first level decision-maker's ruling into careful consideration, it owes that decision no deference. In coming to this conclusion, Justice Gauthier quoted Minister Kenney's own statement in the House of Commons during debate on the legislation:

> The proposed new system would also include, and this is very important, a full appeal for most claimants. Unlike the appeal process proposed in the past and the one dormant in our current legislation, the refugee appeal division, or RAD, would allow for the introduction of new evidence and, in certain circumstances, provide for an oral hearing.[41]

Other legal issues will also need to be determined in the courts. The new government of Prime Minister Trudeau has not indicated any intention to revise these arrangements. For this reason, it seems safe to say that the changes to refugee determination and appeal recourses instituted in 2012 by the Harper government are likely to be a significant legacy of its time in power.

B. Ministerial instructions

Ministerial Instructions ("MIs") are a form of legislative instrument introduced by the Harper government into Canadian immigration law in 2008, and relied on heavily in succeeding years. MIs have a status akin to that of other forms of subordinate legislation, but intended on their face to have a more limited scope. Subordinate legislation refers to written laws enacted by public bodies or persons under authority expressly delegated by Parliament. Statutory authority to make regulations is commonly given to Cabinet as a whole or to individual

40 *Huruglica v Canada (Minister of Citizenship and Immigration)*, [2014] FC 799 Phelan J, aff'd [2016] FCA 93.

41 *House of Commons Debates*, 40th Parl, 3rd Sess, No 33 (26 April 2010).

Ministers of the Crown. Regulations provide the specific detail necessary to implement the broader policy directives set out in the parent statute. They are enforceable by the courts. In contrast, policy guidelines are a form of "soft law" intended to guide public authorities in decision-making, but not to bind or fetter their decisions. Policy guidelines are not enforceable by courts. In form, Ministerial Instructions have the appearance of guidelines, principally in that they are addressed to civil servants, not to the public generally, and describe how applications are to be processed, a seemingly internal concern. However, as noted below, MIs have to date been treated as enforceable statements of subordinate law, fully enforceable by the courts.

The *Immigration and Refugee Protection Act* (*IRPA*) provides for the making of regulations in many areas. The *IRPA Regulations* presently contain 364 sections, compared to the 275 contained in *IRPA* itself, and are considerably more voluminous. When Parliament enacted *IRPA* in 2001, it included a provision intended to ensure transparency in the making of regulations. Section 5 provides that proposed regulations be brought to the attention of Parliament as a whole and discussed in Committees of the House and the Senate prior to being adopted. In the case of MIs, however, no advance notice to Parliament, nor to any interested constituency, is required.[42]

Since 2008, section 87.3 of *IRPA* has provided for Ministerial Instructions (MIs) that, in the opinion of the Minister will support the immigration goals of the Government of Canada, related specifically to the processing of applications under the IRPA, including conditions, categories, priorities, and annual quotas. Between 2008 and 2015, the government issued 19 Ministerial Instructions.[43] The stated reason for the earliest MIs was to reduce the backlog of applications for permanent residence in the system.[44] These Instructions provided for temporary but indefinite "pauses" or moratoria in receiving new

42 See France Houle, "Consultation During Rule-Making: a Case Study of the Immigration and Refugee Protection Regulations" (2010) 28:2 Windsor YB Access Just 395 for an interesting exercise in discourse analysis of submissions made to parliamentary committees during the consultative process on the *IRPA* Regulations in 2001-2002.

43 The full text of these 19 MIs can be accessed through the CIC website at <http://www.cic.gc.ca/english/department/mi/>.

44 The elimination of much of the backlog was the object of a new section 87.4 of *IRPA*, passed in 2012, which effected termination of applications received before February 27, 2008, and still unprocessed as of June 29, 2012. The significance of the February 2008 date is that MI 1, adopted in November 2008, retroactively changed categories eligible for processing as of February 27. A challenge on constitutional and other grounds brought by 1,400 applicants caught by section 87.4 was dismissed by the Federal Court of Canada in *Tabingo v Canada (Citizenship and Immigration),* 2013 FC 377 Rennie J, and on appeal by the Federal Court of Appeal in *Austria v Canada (Citizenship and Immigration),* 2014 FCA 191, leave to appeal to SCC refused, 2015 CanLII 22997 (SCC).

applications. Later MIs specified narrower categories of applications that could be received, and imposed limits on those categories. Instructions eliminated the investor and entrepreneur classes of business applicants for permanent residence,[45] which were replaced by the Start-Up Visa and the Venture Capital Investor classes, respectively.[46] Several MIs expressly overrode previously issued Instructions,[47] while others were stated to have retrospective effect on applications already in the processing system.

In Omnibus legislation enacted by Parliament in 2014, *IRPA* was amended to introduce an entirely new system for processing applications for the economic class — the "Express Entry" system, discussed below. A new section 10.3 of *IRPA* gave the Minister extensive authority to issue MIs to implement the new system.[48] The Express Entry system has subsequently been set out in its entirety in two lengthy and detailed MIs issued in January and May 2015, the latter replacing the former.[49]

This means that the Harper government accomplished a major rewriting of Canadian immigration law through a mechanism that provided it with a unique degree of flexibility and non-transparency. No advance notice of Ministerial Instructions to Parliament, nor to any interested constituency, was or is required. A second implication of the MI practice of the Harper government follows from the first: it greatly reduced the security, in the sense of predictability, for applicants for permanent residence to Canada. The impact this will have on Canada's efforts to attract permanent residents remains to be seen. But, one would expect some price to be paid for using unpredictable and non-

45 MIs 3 and 5 (July 1, 2011 and December 1, 2011, respectively).

46 MI 7 (March 30, 2013) and MIs 17, 18 and 19 (January 23, February 13, and May 23, 2015), respectively.

47 For instance, MI5 overrode or superseded measures set out in MI3.

48 *IRPA, supra* note 15 s 10.3 reads in part:

> (1) The Minister may give instructions governing any matter relating to the application of this Division, including instructions respecting
>
> (a) the classes in respect of which subsection 10.1(1) applies…
>
> (e) the criteria that a foreign national must meet to be eligible to be invited to make an application;
>
> (f) the period during which a foreign national remains eligible to be invited to make an application…
>
> (h) the basis on which an eligible foreign national may be ranked relative to other eligible foreign nationals;
>
> (i) the rank an eligible foreign national must occupy to be invited to make an application…

49 Ministerial Instructions governing Express Entry are currently found at a different location on the CIC website than the 19 MIs referred to above, at <http://www.cic.gc.ca/english/department/mi/express-entry.asp>.

transparent mechanisms like MIs for establishing "law," albeit subordinate law, on a foundation of such shifting sand.

Given the important role Ministerial Instructions have acquired over a short period in the administration of Canada's immigration system, and their often adverse impact on prospective immigrants to Canada, it was only to be expected that they would be challenged in the Federal Court of Canada. Indeed, a number of cases have been brought against specific Ministerial Instructions, and of greater interest here, against the nature of the authority they provide to Ministers of Immigration. To date, the challenges brought have been unsuccessful.[50]

C. Express entry: the expression of interest system

The Express Entry system for foreign skilled worker applicants was put in place through Ministerial Instructions that came into effect in early 2015. Express Entry represents a new relationship between prospective immigrants and the government of Canada. Since the introduction of the modern points system for immigration of "independent" or skilled workers and their dependent family members to Canada in the *Immigration Act, 1976*, the system operated roughly on a "first come, first served" basis. That is, foreign nationals who wished to come to Canada would file an application for permanent residence at the nearest Canadian consular location. Once in the system, an application would be subject to processing by immigration officers stationed abroad. Decision-making authority to allow or refuse applications was delegated to officers by the Minister. Officers assessed applications against a points system going to education, work experience, language ability, age, and certain adaptability factors. Officers were also accorded the discretion to decide for or against an applicant irrespective of the points scored, in view of an overriding assessment of the likelihood that the applicant would be able to establish herself economically in Canada.

Foreign nationals whose applications were refused by immigration officers had the recourse of applying for judicial review of the decision by the Federal Court of Canada. While applicants faced significant waiting times for the processing of their applications, varying widely depending on demand and on the resources devoted by Canada to particular countries or regions, they were assured that they were "in the queue" and would at some point receive a decision.

50 See *Esensoy v Canada (Citizenship and Immigration)*, 2012 FC 1343 Zinn J, and *Lukaj v Canada (Citizenship and Immigration)*, 2013 FC 8 Crampton CJFC.

Express Entry changes the process by introducing a form of pre-screening of applicants by Canada, to be accomplished largely by electronic means. Section 10.3(3) of *IRPA* reads:

> 10.3(3) A foreign national who wishes to be invited to make an application must submit an expression of interest to the Minister by means of an electronic system in accordance with instructions given under section 10.3 unless the instructions provide that they may do so by other means.

The first step in the Express Entry system, then, is the filing by the foreign national of an "expression of interest" (EOI). Only after the information provided in the EOI has been assessed by electronic means using a new 1200-point scale set out in the MIs, may this lead to an "invitation to apply" being sent to the foreign national. Employers will have access to information on the pool of high scorers at the EOI stage, and be able to make job offers that will lead to an invitation to apply being issued, and the government itself will from time to time issue applications to groups of high scorers.[51] Only at this stage may a foreign national make a formal application to immigrate, which application will be processed.

The Express Entry system is intended to have significant cost savings benefits for Canada. Harper claimed it would also benefit applicants for permanent residence, in that it would give them greater assurance that when they applied, they were more likely to be approved, and that they would have a much shorter wait to find out. That is likely true of the invitation to apply stage. At the EOI stage, however, applicants will be even less certain of their chances than prior to Express Entry.

On the legal side, the system likely means fewer refusals of applications for permanent residence. At the point an invitation to apply is extended, the expectation is that most applicants will be eligible and admissible. Decisions to refuse an application at that stage should remain subject to judicial review. However, the decision on scoring at the EOI stage appears much less amenable to legal challenge. The scoring is to be performed electronically, with little or no application of human discretion. Moreover, the points threshold for being eligible to receive an invitation to apply is a moving target set by frequently released Ministerial Instructions announcing a maximum number of invitations to be issued that meet the specified target. As of March 9, 2016, the Minister had released five MIs in 2016, roughly one every two weeks, providing these

51 Government of Canada, "How Express Entry Works" *Government of Canada, Immigration and Citizenship* (18 December 2015), online: <http://www.cic.gc.ca/english/express-entry/index.asp>.

numbers. The MI for March 9, for example, states that 1,013 invitations may be issued on March 9 or 10, 2016, and that invitations shall only be made to those assigned a total of 473 points or more under the Comprehensive Ranking System. It is difficult to conceive how individuals who fail to meet eligibility under this highly contingent and incremental system could obtain judicial review.

The test for whether Express Entry will succeed is much more likely to depend on how it works on the ground. The Harper government's stated intention was to maintain the annual number of federal skilled worker immigrants to Canada at its historic level of approximately 100,000, including dependent family members. The question is whether the new system will attract the same number of persons interested in making a new life in Canada as the former "first come, first served" system. This may well turn on whether prospective immigrants find the new system a sufficiently secure basis for making those life-changing plans.

IV. The Harper legacy in the Trudeau era

This article has identified two aspects of the Harper government's legacy in immigration and refugee matters: a public discourse casting migrants as untrustworthy, costly, and associated with criminal activity; and a policy of institutional change that strengthened the role of executive government, reducing security for prospective immigrants and permanent residents. The first turned out to be a failure — or to put this another way, the legacy of the Conservative government with respect to discourse around immigration issues is its failure. With respect to institutional changes, it may be too early to say a great deal, but there are reasons to believe this will be a more lasting legacy. Of these two aspects, the definitive failure of the government's attempt to craft the immigration discourse is more significant. This concluding section seeks to elaborate on these points.

With respect to the election in October 2015, immigration and refugee issues were front and centre. The differences between the Conservative government, and the Liberal and New Democratic opposition parties, were clear. Specifically and importantly, the Liberals under the leadership of Justin Trudeau made it a cardinal feature of their election campaign to reject what they identified as the government's negative and restrictive approach to multiculturalism, in favour of a more positive perspective.

The Harper government's policy initiatives with respect to immigration combined with three other policy initiatives pursued in 2015 to convey an impression of nativism and fear of the "stranger." First, there was the government's position, pursued through unsuccessful Federal Court litigation, that Muslim women could not cover their faces with the niqab when taking the citizenship oath.[52] Second, as a response to the rise of ISIS, the government moved to make the Canadian citizenship of dual nationals revocable should they be convicted of engaging in an armed conflict against Canadian forces.[53] Mr. Trudeau argued forcefully that this breached the long-standing principle that every citizen, whether acquiring citizenship by birth or by naturalization, must be treated equally. Third, the government enacted legislation with the easily ridiculed title of the *Zero Tolerance for Barbaric Cultural Practices Act*. The principal target of the statute was polygamy. A statement made during the election by Minister of Citizenship and Immigration Chris Alexander that the government intended to create a "tip line" for the reporting of barbaric cultural practices, only added to an overall impression of an exaggerated fear of the stranger.

Into the midst of a contest already defined in significant part by these positions occurred the international crisis of Syrian refugees flooding into Europe. The Harper government's series of program and legislative changes limiting refugee claims and benefits provided the context in which the Syrian refugee crisis occurred. The perceived slow response by the government to the humanitarian distress of Syrian refugees, including the death by drowning of the young boy Alan Kurdi, became a central issue in the election's closing weeks. The government's difficulty in changing that immediate perception undoubtedly followed from the fact that so much of its legislative agenda in the preceding years was built on a rhetoric of suspicion of refugees and recent immigrants.[54] To define its contrast in approach, Trudeau and the Liberals promised to permit 25,000 Syrian refugees to enter the country by the end of 2015.

There was an irony involved in the role played by Syrian refugees in the 2015 election campaign. The crisis in no way implicated Canada's refugee

52 *Ishaq v Canada (Citizenship and Immigration),* 2015 FC 156 Boswell J, aff'd 2015 FCA 194.

53 *Strengthening Canadian Citizenship Act*, SC 2014, c 22.

54 As just one example of many from Canadian media during this period, see Debra Black, "Immigration and refugee policies centre stage in federal election campaign" (15 September 2015), *Toronto Star,* online: <http://www.thestar.com/news/immigration/2015/09/18/immigration-and-refugee-policies-centre-stage-in-federal-election-campaign.html>, quoting Jason Kenney as saying: "More broadly, we need to make sure our efforts to crack down on illegal immigration, smuggling, fake asylum claims, crooked immigration consultants, fraudulent immigration marriages ... are properly enforced."

determination system, the subject of so much legislative activity by the Harper government. That system deals only with refugee claimants who arrive in Canada and make a claim for asylum within the country. The Syrian crisis concerned Canada's policies and programs directed at resettlement of refugees living outside their own countries, often in large refugee camps of a more or less temporary nature, and most often, a long way away from Canada's borders.

The Liberals won a majority victory, which it was possible to understand as a rejection of the Harper government's immigration and refugee discourse. Over its first several months in power, the Trudeau government moved to screen and admit the 25,000 refugees to which it had committed. With attendant publicity the government announced the arrival of the 25,000th refugee from Syria on March 1, 2016. The government has also cancelled, repealed or announced its intention to reverse the following initiatives of the Harper government that were animated by concerns about fraudulent refugee and immigrant claims:[55]

- The changes to the Interim Federal Health Plan, including withdrawing the appeal of the decision by Justice Mactavish in the *Canadian Doctors* case;
- The Regulations that introduced the conditional status for the first two years of permanent residence by sponsored spouses;
- The current configuration of the "designated countries of origin" concept, signalled by withdrawing the appeal of the ruling by Justice Boswell in the *YZ* case.

This leaves the question of what have been identified as the more procedural and institutional changes made by the Harper government. Here, the Trudeau government has to date done and said much less. In fact, its actions would suggest that it intends to maintain the course set by the Conservatives. This is true with respect to the use of Ministerial Instructions, and implementation of the Express Entry program. The Minister of Immigration, Refugees and Citizenship has issued numerous Instructions setting the required points score and the number of invitations to apply for immigration to be issued over short periods of time. No doubt the program, and its dependency on the Ministerial Instruction mechanism, had achieved significant bureaucratic momentum by

55 For the new government's statement of intentions in these areas, see Justin Trudeau, "Minister of Immigration, Refugees and Citizenship Mandate Letter," Office of the Prime Minister, online: <http://pm.gc.ca/eng/minister-immigration-refugees-and-citizenship-mandate-letter>. Note also that in this letter, the Prime Minister confirmed a change in the title from "Minister of Citizenship and Immigration" to "Minister of Immigration, Refugees and Citizenship."

the time of the election. Its future likely depends on the degree to which it succeeds in attracting the number and quality of economic class immigrants that were its original intention and justification. It would seem, however, only consistent with the Trudeau government's vision of a fair and open immigration process to limit the use of Ministerial Instructions as a tool for shaping and responding to the expectations of prospective immigrants to Canada.

These program changes reflect two longer-term trends in Canadian immigration law: enhancing the authority and flexibility available to executive government in administering the country's immigration programs, combined with a consequent loss of security for the prospective and recent newcomer to Canada. The use of Ministerial Instructions, and the Expression of Interest system, both reduce the legal status of applicants for permanent residence to Canada. They make the process of applying to immigrate to Canada less predictable, and less subject to assertion of rights by applicants. In a similar vein, the withdrawal of the right to appeal removal orders for all but the most minor criminal offences adds a significant degree of insecurity to the lives of families that have succeeded in immigrating to Canada. The more positive discourse advanced by the Trudeau government would suggest that it may be appropriate to reconsider this measure. The bar is currently set at a level that makes too many long-term permanent residents subject to peremptory removal from the country. It may even be time to look again to something like domicile status, which would reverse the current presumption that criminal conduct by immigrants to Canada is a problem mostly for their countries of origin to deal with. Convicted offenders and their families are not at any time, however, a strong constituency.

It might be said that the Conservative Government took a sword to many of the long-established understandings that informed Canada's immigration law. This would permit using the venerable saying that "they who live by the sword die by the sword" — for it appears that the Government's truculence in matters dealing with immigrants and multiculturalism served as one of the bases on which the election of October 2015 turned. And in the first year of the Liberal government of Prime Minister Trudeau, Canada has witnessed, with respect to immigration, one of the most emphatic rejections of a previous government's policy discourse in Canadian history.

The events of 2015 and 2016 have established one thing: the Harper government's approach to refugee and related issues strayed too close to a nativism and insularity that was uncomfortable for the preponderance of the Canadian electorate. This is important. It means that for the foreseeable future, political

discussions around immigration issues will start from a different place than the distrust and fear of the stranger. The government of Stephen Harper organized much of its agenda in an effort to change the national discourse in this area. It did so, it appears, as much or more for perceived political gain than to address real social problems. In the end, it was in this effort that the Harper government most clearly had its legacy shattered.