UNFORTUNATE BUT ORDINARY: A STUDY OF FEDERAL COURT APPROACHES TO STAYS OF REMOVAL

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Abstract

Interlocutory decisions issued on stay of removal motions by the Federal Court of Canada remain under-studied. A leading reason for the limited research is that stay orders were not published or publicly accessible five years ago. Since then, changes to the Court's policies regarding publication have increased the number of accessible stay orders. The outcome of a denied stay motion may result in the immediate deportation of a foreign national from Canada. Given the high-stakes nature of these decisions, it is imperative to critically examine stay motion procedures, laws, and trends against established human rights norms. This study presents an overview of this final legal frontier followed by a multi-method inquiry to investigate Federal Court stays. The inquiry exposes an area of law that remains extremely limited and procedurally lacking, resulting in a legal process that stands in tension with human rights protections.

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Table of Contents

PART I: INTRODUCTION

It is Wednesday morning. Mr. G has a removal order scheduled for tomorrow, Thursday. Mr. G cannot know whether he will be on a plane to his birth country tomorrow, or getting himself ready to go to work as he would on any regular Thursday. His lawyer makes his way to the Federal Court to present oral arguments supporting a stay motion that was prepared the previous weekend and filed by the law office earlier that week. During this hearing, the lawyer will argue that there is a serious legal issue yet to be determined in an underlying immigration application submitted by Mr. G, that Mr. G will suffer irreparable harm if he is removed from Canada, and further, that in comparing Mr. G's interests with the government's interests, the balance lies in his favour.

Mr. G arrives to the Federal Court on 180 Queen Street in Toronto at 8:30 AM. He takes the elevator to the second floor, as instructed by his lawyer. Once on the second floor, he notices a billboard to the right of the elevators indicating which cases are being heard in which rooms. He is surprised to find his last name displayed along with his lawyers. Looking up from the billboard, he notices a security guard coming his way. The security guard asks Mr. G to place all his belongings through a screener, just like at the airport. At the other end of the screening, Mr. G spots his lawyer sitting in a chair lining the courtroom hallway. He's wearing a black and white robe, which Mr. G has never seen in person before – only in TV shows. He has an open briefcase on the floor beside him and is flipping through notes balancing on his lap. His lawyer had called him the night before to inform him of the time and location of the stay hearing. In that phone call, he had told him that he did not have to attend the hearing but was free to sit in the audience should he so choose. Mr. G had taken the day off work, deciding that if this proceeding was his last in Canada, he wanted to witness it. He continued down the hallway and sat a few doors down from his lawyer to await the start of his hearing at 9:00 AM.

A few minutes before 9:00 AM, Mr. G follows his lawyer into a courtroom labeled 5B. Mr. G has been to the Immigration and Refugee Board and CBSA offices near the airport but has never been inside a Canadian courtroom. He is the only one sitting in the audience. Other than himself, there are three other people in the courtroom. His lawyer is seated at the left side of the room, the government lawyer at the right side, and a third person is standing closer to the head of the room, dressed in black and white, and typing on a laptop. It is a large room, and Mr. G feels small. No one acknowledges his presence. He listens to his lawyer and the government lawyer make friendly chatter. The government lawyer's daughter recently got married. His lawyer is training for a marathon. Mr. G's eyes linger on the government lawyer's kind face, and he wonders why the government is committed to his removal from the country after having lived in Canada for ten years.

The typist interrupts Mr. G's thoughts by asking everyone to please rise. A door at the front of the room opens, and an elderly gentleman wearing black and white robes enters. He sits at the head of the room and asks everyone to please be seated.

Mr. G's lawyer explained that the hearing would last about an hour and that Mr. G's testimony was not required. The lawyer would be the only one to speak. When he finishes, the government lawyer can then respond. He also explained that a decision would be issued that same day, given that Mr. G's removal was scheduled for the next day. "You'll know by 4:00 PM latest," he had said.

It was hard for Mr. G to understand everything his lawyer said because much of the language was legal and formal. However, he understood that his lawyer was trying to convince the judge that the Officer who had denied the request to defer his removal made a mistake. The Officer had written that Mr. G's removal should not be stopped because he would not face "death, extreme sanction or inhumane treatment" if he were to be removed from Canada. The lawyer explained evidence of the new risks to Mr. G in his country of birth, given the change in government and Mr. G's ethnic group. The lawyer spoke about the letters Mr. G had diligently acquired from his family members, documenting the threats and risks they faced, and believed Mr. G would face upon his return.

When preparing for the Pre-Removal Risk Assessment (PRRA) application, Mr. G was told by his lawyer that gathering evidence was critical. This evidence should include letters from his family members living in his country of birth. But explaining this via WhatsApp to his family living in fear and dealing with hardship, was challenging for Mr. G. He finally got letters from his family, including his sister and his uncle. They wrote in their native language, explaining the danger they are facing, which they believe will be heightened for Mr. G should he return. A certified translator in Canada translated the letters. Unfortunately, it did not seem that this evidence was helpful. The Officer found the letters worthless because they were written by people who wanted Mr. G to succeed in his immigration application.

Now, the lawyer pointed out that finding the letters unimportant simply because family members wrote them is not fair. The lawyer also pointed to Mr. G's Humanitarian and Compassionate (H&C) application, which he had submitted a few months ago. The lawyer spoke about how strong the H&C application was; that a decision should be coming soon; and that Mr. G should be allowed to stay in Canada until a decision is taken on that application. He referenced some of the evidence in the H&C application, including support from Mr. G's employer, who claims he will suffer economic harm if Mr. G is deported. Finally, the lawyer described the terrible human rights situation in the country of removal after the change in government, particularly for someone like Mr. G. He described the tendency of security forces to use excessive violence and the particularly heightened risk for anyone entering the country from a Western nation.

The government lawyer took the stand and stated that Mr. G had not satisfied “the test” to stop his removal. The government lawyer told the judge that despite inter-ethnic conflict occurring in the country of removal, Mr. G does not face a personal risk of death. The government said that while it is true that violence has intensified, Mr. G’s ethnic group are not the *only* ones targeted, nor are they *more* at risk since the change in government. Regarding the letters, the government lawyer pointed out that the letters were not detailed enough. The family did not describe the violence with specificity. The letters did not provide examples showing Mr. G’s family was exposed to a *particular* risk or were involved in a *specific* incident.

The government’s argument was difficult for Mr. G to understand. She seemed to agree that his birth country was dangerous for someone like him, but not dangerous enough to keep him in Canada. She said that even though Mr. G had lived in Canada for ten years, this did not mean that he should be allowed to stay until his H&C application is decided by an Officer. As far as Mr. G understands, a main component of the H&C application is proving establishment in Canada, and he felt strongly that he met this standard. Against all odds, he had succeeded in maintaining a good job, was very involved with the community, and had, in every way, made Canada his home. He felt sick to his stomach imagining returning to his birth country, back to the very dangers he fled.

When the lawyers finished speaking, the judge thanked everyone for attending and declared that a decision would be faxed to the lawyers by the end of the day. It was only 11:00 AM. Mr. G wondered what he would do for the next 5 hours, until 4:00 PM, the promised time for receiving the decision. Should he continue packing his things, which he had begun the night before? Should he meet friends and say goodbye? Should he pray? He sat at the back of the courtroom wondering, paralyzed. His lawyer approached him, repeated that he would call him as soon as he had news, patted him on the shoulder, and walked out. Mr. G followed him out of the courtroom, walking slowly.

Mr. G received a call on his cell phone from his lawyer around 3:30 PM. The judge dismissed the case. He had issued lengthy reasons, something the lawyer seemed pleased about, explaining that this was rare. Mr. G understood that the judge had agreed with the government lawyer that Mr. G did not face a personal risk to his life if he was removed. The “new” evidence was not convincing, and the refugee tribunal had already looked at the “old” evidence. The H&C application was submitted too recently, so it was not a reason to keep him in Canada. He had to be on a plane the next day. His lawyer explained that not appearing for removal would put him at risk of being arrested and detained by CBSA.

Mr. G is instructed to appear for removal at 6900 Airport Road, which gets its name from Toronto Pearson International Airport.

The focus of this study is the final legal proceeding prior to the deportation of a foreign national from Canada. This study involves an in-depth analysis of the approaches taken by Federal Court judges to determine whether to grant the Applicant's request to stay against the Respondent's position that they must leave Canada. Part I outlines the research context through a high-level description of the relevant parts of Canada's immigration regime. Part II provides further contextual and conceptual considerations to situate the research problem. Part III offers a brief overview of the Federal Court's approach to stay decision-making, including the law and procedure involved. Part IV outlines the research purpose. Part V discusses the study's methodology, which involves a multi-method approach. Part VI reports the study's empirical and interview findings separately, further divided into those relating to substance, procedure and the Canadian Charter of Rights and Freedoms. Part VII summarizes the implications of the research findings for the legal regime and those subject to it and provides recommendations. I include a final note discussing some of the limitations of this research.

A. Canada's Deportation Regime

Place is not, as might be thought, a matter of legally bounded physical space, but rather it is the work of legal ordering and relationship.[1]

We hear about deportations in the news, sometimes. We hear about them when a family is torn apart, when a beloved community member is at risk of being sent away, when asylum-seekers are deported *en masse*. These are the stories that the media tells because they provoke us, move us, and cause us to question a not-so-visible state operation. What coverage of deportations does make clear is that deportations are not reserved for war criminals, nor are they a rare occurrence. The reality is that deportations are enforced outside of the public eye on a regular basis. Deportations are a threat to a wide range of members of society and happen every day, described by Matthew Gibney, Professor of Politics and Forced Migration at the University of Oxford, as the "quotidian practice of lawful expulsion." Ordering an individual deported invokes complicated notions, such as that of belonging and "deservingness." Legally, they are characterized as an inevitable administrative operation – some people belong here, and those who don't must leave. As a policy instrument, deportations are described as "at best a residual immigration control device."[2]

While deportation is conceptualized as a singular abstract event, deportations comprise an entire program with multiple intervening temporal and spatial components. Deportations connect to a complex web of state power, including, for example, detention, surveillance, and border control. There is a temporality to

[1] Shaunnagh Dorsett & Shaun McVeigh, *Jurisdiction* (London: Routledge, 2012) at 98.
[2] Matthew Gibney and Randall Hansen, "Deportation and the liberal state: the forcible return of asylum seekers and unlawful migrants in Canada, Germany and the United Kingdom" (2003), UN High Commissioner for Refugees, ISSN 1020-7473.

deportations, too: the moments before, during, and after the subject of the deportation is physically removed from the country. Each of these moments involves distinct risks and merits attention.

Assuming an individual has exhausted their recourses to attain immigration status in Canada, once a deportation order becomes enforceable, it is challenging to change course. The system is designed such that deportation orders precede the last-resort option to stop removal, which is to request that a judge stall the removal. This legal process functions as a desperate, last-hope plea in shape and form.[3] The court proceeding is usually scheduled on an urgent basis, mere days or even hours before the flight.

The Federal Court has broad jurisdiction to deny or grant a stay of removal order. The courtroom thus acts as the final legal frontier before the enforcement of a deportation order. The outcome of the stay hearing determines whether a person makes their way to the airport. The issuance of the triggering event, being the "Direction to Report for Removal," is a power reserved for the Canadian Border Services Agency.

B. CBSA: Immigration Enforcement Powers

Deportations are ordered and executed by Canada's enforcement agency, the Canada Border Services Agency (hereafter "CBSA"). CBSA initiates nearly all deportation proceedings, and CBSA officers do not have to wait for explicit authority from a legal or administrative tribunal. As soon as a removal order becomes enforceable, CBSA is empowered to initiate deportation proceedings. In some cases, immigrants are deported by CBSA without undergoing any administrative process. Such may be the fate for immigrants found entering Canada from the U.S. on foot, for example, via Roxham Road in Quebec.[4]

It is worthwhile to provide additional context regarding the role of CBSA officers within Canada's immigration regime. CBSA officers have powers that extend beyond issuing removal orders. Drawing their authority from immigration and customs legislation, CBSA officers generally have powers akin to those of the police. For example, CBSA officers hold the power to issue nationwide immigration warrants, arrest, detain, and search and seize.[5] As such, failing to appear for removal can result in Canada-wide warrants issued by

[3] See LLM Interview Transcripts: Transcription of lawyer interviews conducted by the researcher for the purpose of this LLM project [LLM Interview Transcripts].
[4] On March 25, 2023, without warning, the "Safe Third Country Agreement" (STCA) between the U.S. and Canada was extended to cover the entire border between the U.S. and Canada rather than just the official border crossings. The STCA was created in 2004 under the premise that refugees arriving in Canada, or the US should apply for refugee status in the first "safe country" they arrive. As of today, immigrants crossing into Canada on foot from the U.S. are being arrested and handed over to U.S. border officials. See Nadine Yousif & Madeline Halpert, "US-Canada agree to turn back asylum seekers at border," *BBC* (25 March 2023), online: BBC <https://www.bbc.com/news/world-us-canada-65047438>.
[5] "At the border, CBSA officers have an even wider range of powers than police: they can stop travelers for questioning, take breath and blood samples, and search, detain, and arrest non-citizens without a warrant. They may carry firearms, batons, and pepper spray and are authorized to use reasonable force when necessary to carry out their duties. The CBSA also has legal responsibility for immigration detention facilities, including the conditions of detention therein, though correctional services staff the facilities:" British Columbia Civil Liberties Association,

CBSA. Under the *Immigration and Refugee Protection Act* ("IRPA"),[6] a CBSA officer may arrest and detain a foreign national[7] other than a protected person, even without a warrant. The officer must only have reasonable grounds to believe that person is unlikely to appear for removal or for another proceeding that could lead to a removal order.[8]

CBSA officers have a vast authority and are not accountable to anyone outside the agency. Charged with the obligation to "remove" foreign nationals under an enforceable removal order as soon as possible, CBSA officers have been known to collaborate with police forces, such as the RCMP and provincial or municipal police, to arrest foreign nationals for removal.[9] Professor David Moffette's recent research is important to mention here, as it exposes police involvement in detention and deportation mechanisms. In addition, his research maps out collaboration between CBSA and municipal police forces in Toronto, Montreal, and Vancouver.[10] The results of mapping police-CBSA collaboration demonstrate that "immigration policing is deployed on various scales by a number of actors, and in particular by officers involved in everyday urban policing." What Moffette points out is that joint operations between police officers and CBSA means "the mere presence of officers conducting everyday policing activities in our cities, and the interactions and communications between local social services agencies (e.g., shelters or the anti-Violence Against Women sector) or initiatives (e.g., festivals, Pride events, youth programming) increase not only the risk of criminalization in general but also the risk of immigration policing, detention, and deportation."[11]

Removal Orders

"Removal" refers to deporting foreign nationals who are not legally permitted to be in Canada. A deportation order permanently bars a foreign national from returning to Canada unless they obtain permission from the Minister of Immigration, Refugees and Citizenship Canada (hereafter "IRCC").[12] As discussed above, CBSA initiates removals and proceeds at the agency's discretion. Technically, a removal is initiated and confirmed through a Direction to Report for Removal (hereafter "DTR") or a removal order. The removal

"Oversight at the Border: A Model for Independent Accountability at the Canada Border Services Agency" (2017), online: *BCCLA* <bccla.org/wp-content/uploads/2017/06/FINAL-for-web- BCCLA-CBSA-Oversight.pdf>.
[6] *Immigration and Refugee Protection Act,* SC 2001, c 27.
[7] For the purposes of this research, a foreign national is anyone in Canada who is not a Canadian citizen or permanent resident. For example, a foreign national could be a refugee claimant, visitor, or someone holding a work or student permit.
[8] *Supra* note 6 at s 55(1)(2).
[9] David Moffette, "Immigration status and policing in Canada: current problems, activist strategies, and abolitionist visions" (2021) 25:2 Citizenship Studies 273-291.
[10] The records revealed a formal Memorandum of Understanding between the Transit Police and CBSA's Pacific Region Enforcement Centre. While the MOU was rescinded following pressure from activists in the "Transportation not Deportation" campaign, according to Moffette, "it is unclear what level of informal collaboration continued:" *ibid* at 278.
[11] *Ibid* at 281-283.
[12] Canada Border Services Agency ("CBSA"), *Overview of the Removals Program*, online: <https://www.cbsa-asfc.gc.ca/transparency-transparence/pd-dp/bbp-rpp/pacp/2020-11-24/orp-vpr-eng.html>.

order is either mailed or given in-person when a foreign national reports to CBSA and provides the foreign national with an itinerary of their departure from Canada.

Notably, "removal order" is not a term found in the law. However, the law distinguishes between three types of removal orders issued by the government: departure orders, exclusion orders, and deportation orders.[13] The departure order is the least severe in consequence, requiring the person subject to it to leave Canada within 30 days.[14] Being issued an exclusion order bars a foreign national from Canada for one year unless they are granted written authorization by the government to return, officially called an "Authorization to Return to Canada." Finally, a deportation order is the most drastic outcome as it permanently bars a foreign national from Canada unless they are granted Ministerial authorization to return. Regardless of the type of removal order, the foreign national becomes indebted to Canada for the cost of their removal if CBSA paid for the airplane ticket.[15]

Two legal conditions must be met before CBSA can initiate deportation proceedings:
(1) the removal order must come into force; and
(2) the removal order should not be stayed.

Under the IRPA, a removal order is enforceable if it "has come into force and is not stayed." The provision alludes to the distinction between a removal order that is *legally enforceable* and one that *comes into force*. When a removal order "comes into force," this means it becomes actionable. Whether a removal order comes into force depends on the legal rights and proceedings at play, for example, the right to appeal.[16] A removal order becomes enforceable if a foreign national has exhausted every recourse to remain in Canada or is not eligible for any outstanding recourses.[17]

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[13] *Immigration and Refugee Protection Regulations*, SOR/2002-227, s 223. For more on enforcement powers, see "Enforcement Powers: Removal, including departure orders, exclusion orders, deportation orders and conditional versus final orders" in Lorne Waldman, *Halsbury's Laws of Canada – Immigration and Citizenship (2023 Reissue),* (Toronto: LexisNexis Canada, 2023), Chapter VII.
[14] If the 30-day window is exceeded, a departure order will become a deportation order: CBSA, *Arrests, Detention, and Removals*, online: <https://www.cbsa-asfc.gc.ca/security-securite/rem-ren-eng.html>.
[15] The foreign national bears the cost of removal. See e.g., *ibid*: "If the CBSA paid for your removal, you must repay that cost."
[16] *Supra* note 6 at s 49(a). Note removal orders come into force on the day they are made unless there is a right to appeal. If an appeal was made, the removal order will come into force on the first day of the final determination of the appeal. If no appeal is made, the removal order will come into force on the day the appeal period expires.
[17] *Supra* note 6 at s 49(2). Note distinct rules apply to the removal of refugee claimants. Canada's immigration law states that a refugee claimant's removal order must be conditional. Conditional removal orders are given to refugee claimants upon claiming refugee status. The most significant distinction between removal orders and conditional removal orders is that removal orders come into force on the day they are made subject to appeal rights, while conditional removal orders are, true to their name, conditional on another event. As such, a refugee claimant's removal comes into force when their claim is determined to be ineligible, denied by the RPD, or 15 days after being denied on appeal at the RAD (or if the refugee claim is withdrawn or abandoned, see *supra* note 6 at s 49(2)(d)). Otherwise, if they are granted refugee status in Canada, the order is cancelled. If a removal order has yet to come into force, it may or may not become enforceable upon their refugee status determination depending on the legal proceeding that is halting its enforcement – this could be a judicial review, a pre-removal risk assessment application, or a humanitarian and compassionate application.

If a removal order is enforceable, time is of the essence, and removal could be imminent.[18] As stated in the IRPA, "the foreign national against whom it was made must leave Canada immediately and the order must be enforced as soon as possible."[19] No official regulations dictate when CBSA should issue a removal order. The timing of a removal order depends on the internal bureaucratic workings of the CBSA. Sometimes, the order is issued immediately following a refusal of an immigration application by the IRCC. Other times, the order appears months after an unfavourable decision.[20] Either way, the resulting legal scenario offers the Federal Court stay motion as the only potential obstacle to removal.

C. Stays Of Removal in Immigration Matters

A judicial stay is an injunction to have the merits of an individual case assessed after having exhausted all administrative remedies. Often, the stay motion hearing is in close proximity to the scheduled deportation. It is common for the court hearing to occur mere days or even hours before the scheduled departure flight. The outcome of the stay hearing determines whether the removal is enforced on the date set by CBSA or temporarily stalled.

Importantly, readers must understand that judicial scrutiny of removal orders is the exception rather than the norm. Most removal orders are enforced without judicial oversight. This is partly because legally speaking, stay motions are an extraordinary equitable relief requiring special and compelling circumstances.[21] Practically speaking, they are an exceptionally difficult remedy to access. Hiring an immigration lawyer to appear on a stay motion is usually costly, creating a financial barrier for many potential applicants.[22] Financial resources are one important factor among others that determines whether a foreign national will face removal without filing a Federal Court stay motion. Because the preparation of a stay is a highly time-consuming and urgent process, lawyers available to take on this challenge can be far and few in between. Therefore, even those individuals with sufficient resources to pay for a lawyer may face challenges accessing representation under the given time constraints.

[18] "Timely removal" is a "core competency" of CBSA, see CBSA, *International Strategic Framework for Fiscal Year 2019 to 2022*, online: <https://www.cbsa-asfc.gc.ca/pd-dp/tb-ct/evp-pvp/spb-dgps-isf-csi-eng.html>.
[19] *Supra* note 6 at s 48(2).
[20] See LLM Interview Transcripts. Also, CBSA has repeatedly been found to be mismanaged and disorganized, see Office of the Auditor General of Canada, *Report 1 – Immigration Removals*, online: <https://www.oag-bvg.gc.ca/internet/english/parl_oag_202007_01_e_43572.html>.
[21] See *Canada (Minister of Citizenship and Immigration) v Harkat*, 2006 FCA 215 at para 10. As suggested by RP Cohen writing in 1994, "the power to exclude and remove aliens" has largely been immune from "vigorous judicial scrutiny:" Russell P. Cohen, "Fundamental (In)justice:" the Deportation of Long-term Residents from Canada" (1994) 32:3 Osgoode Hall Law Journal 457-501.
[22] See LLM Interview Transcripts.

Types of stays

There are three types of stays in law: statutory, administrative, and judicial stays. The various types of stays are different in nature and can be distinguished based on the authority granting them. Recall that immigration stays, whether statutory, administrative, or judicial, do not extinguish an enforceable removal order but only *temporarily delay* the enforcement of the order. Generally, an order granting a stay has an inherent expiry date, being the disposition of the underlying application for leave or the application for judicial review.

This research examines judicial stays as the last resort legal proceeding before removal. But in some cases, foreign nationals can, firstly, avail themselves of a statutory stay of removal under the IRPA. Section 50 of the IRPA enumerates five particular circumstances in which a removal order would be stayed, including if the enforcement of the removal order would directly contravene a decision made in a judicial proceeding[23] or if a foreign national has not yet completed a term of imprisonment.[24] Meanwhile, the *Immigration and Refugee Protection Regulations* provide that a removal order is stayed if a foreign national has an outstanding application for leave to have a decision of the Refugee Appeal Division judicially reviewed.[25] Another exceptional and risk-based statutory stay provided by the IRPR includes the Minister's power to stay a removal if the country of removal poses a generalized risk to the entire civilian population (because of armed conflict or an environmental disaster, for example).[26] In addition, the risk-based immigration application, named the Pre-Removal Risk Assessment, results in a statutory stay the first time a foreign national becomes eligible to apply.[27] In contrast, other immigration applications, such as a permanent residency application based on humanitarian and compassionate (H&C) grounds, do not automatically grant a stay of removal.[28]

Administrative stays are granted by the administrative bodies, boards, or tribunals and are not prescribed by law. Referred to in the jurisprudence as a "deferral of removal," this type of stay is requested from the Minister or their representatives. Importantly, the IRPA provides that an enforceable removal order "must

[23] *Supra* note 6, s 50.
[24] The section also acknowledges the power of the Immigration Appeal Division and the Minister to grant stays: *supra* note 6 at ss 50 (a)-(e).
[25] *Supra* note 13 at s 231(1). Note statutory stays based on the existence of a judicial review application only apply if the underlying matter relates to a decision of the Refugee Appeal Division that rejects or confirms the rejection of a claim for refugee protection. If the judicial review is refused, the stay is lifted. If granted, the stay remains in effect until the application for judicial review is refused, and no question is certified for the Federal Court of Appeal. This administrative stay does not apply If the person subject to the removal order is inadmissible on grounds of serious criminality, see s 231(3).
[26] *Supra* note 13 at s 230.
[27] *Ibid* at s 232. Note the statutory stay does not apply on a subsequent PRRA.
[28] However, the Minister can grant an administrative stay if they determine that humanitarian and compassionate considerations under subsection 25(1) or 25.1(1) of the Act justify a stay.

be enforced as soon as possible."[29] The statutory regime, therefore directly limits an Officer's discretion to defer enforcement, resulting in deferral as the exception and removal as the norm.[30] Further, courts generally defer to administrative authorities and have granted a great deal of discretion to removal officers, who are also the decision-makers in this context.[31]

Thirdly and finally, a judicial stay motion may be available to a foreign national who has exhausted administrative remedies to remain in Canada. Generally, a judicial stay is a form of equitable relief against a federal decision-making body, such as a federal agency, tribunal, or board. In the immigration context, a judicial stay is an equitable order requiring immigration authorities to refrain from executing or enforcing a removal order. The Federal Court derives its authority to grant interim orders from the Federal Court Act (hereafter "the FCA").[32] Technically, the stay application is an interlocutory injunction. As such, as with any other interlocutory injunction, stays proceed by a motion asking for interim relief before the determination of a final matter, and plaintiffs must satisfy a three-part legal test.[3]

Notably, while immigration legislation recognizes the existence of the legal remedy of judicial stays, there is no regulatory framework for Federal Court applications for stays of removal. For example, the FCA does not even reference motions to stay removal. Further, the IRPA only addresses stays of removal when it provides that absent a Federal Court stay order,[33] the removal of foreign nationals who cannot benefit from an automatic stay of removal must be enforced as soon as possible.[34]

PART II: CONTEXTUAL CONSIDERATIONS

A. Situating Stays in Canada's Immigration Regime

To properly understand the results of this research, one would benefit from a basic understanding of the context surrounding the data. Little is known about how deportations are carried out in Canada, and yet,

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[29] See *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at paras 54-61; see also *Toney v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1018 at para 50; and *Gill v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 1075 at paras 15-19.
[30] See *Wang v Canada (Minister of Citizenship and Immigration)* [2001] 3 FC 682 at para 45; and *Prasad v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 614 at para 29.
[31] In the removal context, CBSA enforcement officers are referred to as "removal officers." The Act does not explicitly refer to removal officers' power to stay removals. An officer's power to stay removals arises from Federal Court jurisprudence which has, over the years, described the power provided by section 48 of the IRPA and attempted to delineate the scope of this discretionary power.
[32] The FCA gives the Court the broad jurisdiction to grant the interim relief that it considers appropriate pending the disposition of administrative law judicial reviews. Further, the FCA provides that the Federal Court has the power to grant "an injunction… in all cases in which it appears to the court to be just or convenient to do so. The order may be unconditional or on any terms and conditions that the court considers just: Federal Courts Act, RSC, 1985, c F-7, s. 18.2 and s 44. For more on Federal Court stays, see "Judicial Review of Immigration Matters: Stay of Removal" in Lorne Waldman, *Halsbury's Laws of Canada – Immigration and Citizenship (2023 Reissue)*, (Toronto: LexisNexis Canada, 2023), Chapter IX.
[33] *Supra* note 6 at s 50(a).
[34] *Ibid* at s 48(2).

deportations bring to the fore a vast range of legal and human rights implications. Only with an understanding of the stakes at play can we adequately question the status quo.

Once filed, a stay motion results in a Federal Court judge presiding over an Applicant's appeal to stay in Canada, notwithstanding an enforceable removal order. While the stay motion process is familiar to some legal practitioners or supporters of individuals seeking to stop their deportation, it is otherwise not a legal field that receives great exposure. Because stay motions are technically interlocutory injunctions, studying stay decisions will involve a general analysis of the equitable remedy in law. Understanding the form and function of the interim legal test should assist us in understanding whether it is appropriate for the immigration context. Plain language coding of stay decisions will allow us to examine how the Court applies the law, specifically focusing on the availability of constitutional protections before removal.

This study will also provide an overview of stay motion procedure. Since stay procedure is not codified in law, drawing knowledge from those practicing immigration law will allow us to investigate procedural components of the Court process. The two datasets together should help clarify whether the law is responsive to the factual context and, therefore capable of resulting in equity. More broadly, the datasets may clarify whether access to a court process is a meaningful remedy for those facing deportation.

i) Removal as exclusion

Canada's immigration regime has historically been described as discriminatory and exclusionary and continues to be described as such by domestic and international legal scholars.[35] The power to deport is directly born of a state's sovereign right to exclude and remove. RP Cohen, writing in response to this principle in 1994, stated: "This all-powerful notion of sovereignty that took hold in the nineteenth century has held an iron grip on immigration; its dubious sources have, for the most part, gone unquestioned."[36] As discussed, this powerful notion continues to preface immigration law. In 1992, the Supreme Court held that non-citizens do not have an unqualified right to enter or remain in Canada. In *Canada (Minister of Employment and Immigration) v Chiarelli*, Justice Sopinka stated that "[t]he most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country."[37]

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[35] Ameil J. Joseph, *Deportation and the Confluence of Violence within Forensic Mental Health and Immigration Systems*, 1st ed (London: Palgrave Macmillan, 2015). See also, e.g., Graham Hudson, "Ordinary Injustices: Persecution, Punishment, and the Criminalization of Asylum in Canada" in *Immigration Policy in the Age of Punishment: Detention, Deportation and Border Control*, edited by Philip Kretsedemass and David C. Brotheron (West Sussex: Columbia Univ Press, 2018); Barbara Roberts, *Whence They Came: Deportation from Canada 1900-1935* (Ottawa: University of Ottawa Press, 1988) 8-9; Wendy Chan, "Crime, deportation and the regulation of immigrants in Canada" (2005) 44 Crime, Law & Social Change 153; and Matthew Gibney and Randall Hansen, *supra* note 2.
[36] Russell P. Cohen, *supra* note 21.
[37] *Chiarelli v Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 711 at 733. See also Joshua Blum, "The Chiarelli Doctrine: Immigration Exceptionalism and the Canadian Charter of Rights and Freedoms" 54 UBC L Rev 1 (2021).

Courts play a central role in regulating lines of exclusion. Through research on the Immigration Appeal Division's decision-making of removals, Professor Ameil Joseph investigates representations made by the state regarding the removal of "the undesirable person from society." He describes the purpose of state action to be controlling or eliminating a perceived threat to Canadian society. Further, in his study of the function of judicial constructs, he states they provide evidence of a set of power relations, systems, and governing processes.[38] Indeed, investigating the legal and practical effects of stay decision-making highlights the moral underpinnings of Canada's immigration system. Historically constituted discourses continue to govern questions of who is deserving of relief, and worthy of inclusion. While outside the scope of this paper, I acknowledge that exclusionary logics are deeply implicated in present-day decision-making of immigrants' rights to remain in Canada.

ii) Studying decision-makers

Naturally, Federal Court judges are central players in the study of outcomes of Federal Court stay motions. As such, there is value in studying their distinct approaches. Moreover, understanding judges' interpretive tools, with an awareness of potential biases can also shed light on the overarching federal immigration regime.

Studies of frontline decision-making in immigration and refugee law settings influence my research framework. The line of research assesses the role played by an individual judge in a final decision by investigating divergent approaches to fact-finding.[39] For example, in his research, Asad relies on ethnographic data, informal conversations with immigration judges, and archival materials relating to judges' roles as court administrators, to describe how judges in this setting justify deportation decisions. The author attempts to categorize and explain judges' distinct approaches to decision-making. He notes that personal approaches to fact-finding play a significant role in determining the outcome as opposed to a more process-based model of decision-making: "distinct personal approaches, biases, or motivations that judges harbor are sometimes used to justify relief for noncitizens seen as deserving" of relief. Attributions to individual judges would detract from a process-based model of decision-making."[40]

The author describes federal court judges as "street-level bureaucrats, or frontline workers who interpret the law – sometimes unevenly – to enforce government policy while interfacing with the individuals subject

[38] Ameil J. Joseph, *supra* note 35.
[39] See e.g., Sule Tomkinson, "Who are you afraid of and why? Inside the black box of refugee tribunals," (2018) 61:2 Canadian Public Administration 184, where she describes how judges can come to opposite conclusions on the same evidence, and provides two distinct approaches to fact-finding: interview and interrogation. See also Asad AL, "Deportation Decisions: Judicial Decision-Making in an American Immigration Court," (2019) 63:9 American Behavioral Scientist 1221.
[40] Asad, *ibid* at 1236.

to said policy." He believes the decisions taken by judges at this level demonstrate the "social control capacity" of the federal immigration regime. As described by the author, many judges adhere to "well-rehearsed narratives regarding the limited legal rights and remedies available to most noncitizens."[41]

Describing the federal immigration regime as a constraint on judges is valuable framing for this research. Judges are complex actors situated within a larger bureaucratic context that enables or constrains their discretionary authority. Thus, being embedded in these bureaucratic structures can condition judicial decision-making. While it is tempting to critique on individual-level factors, it is critical to keep in mind the overarching cultural, structural, and bureaucratic context within which decision-makers operate. As stated by Tomkinson, speaking of Canada's refugee status determination tribunals, a "strictly individualist approach is limited for offering a comprehensive portrait." Building on these insights, I acknowledge that an analysis of judicial decisions is incomplete without a corresponding critique of the system within which those decisions are taken, including the law, politics, and administration.[42] For this reason, while this research focuses on Federal Court stay-decision making, the role played by CBSA's enforcement agency in the stay motion process, including the vast discretion afforded to these actors by law, will also be referenced. Nevertheless, a judge's motivations ultimately remain a significant factor in the outcome of a decision.

Further, it is worth considering how a time-pressed process attaching to grave consequences increases the risk of judicial error.[43] Writing on this very issue in 1980, R Grant Hammond proposed that if interlocutory injunctions are to in fact be an equitable remedy, the magnitude of a judge's possibility for error should somehow weigh in on the formula to "balance the gravity of the of interim injury against the interlocutory judicial error."[44] Given the time-sensitive nature and high-stakes nature of stay motions, judicial error is an inherent aspect of the calculation. According to the above model, this "points to a conscious need, on any balancing exercise, for a judge, as far as humanly possible, to take the possibility of judicial error into account as one of the factors to be considered." Formally acknowledging the risk of judicial error in the stay context would support affording judges more time to make these life-altering decisions.

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[41] *Ibid* at 1233.
[42] Tomkinson, *supra* note 39 at 185.
[43] In "Justice on the Fly: The Danger of Errant Deportations," the authors explore the Federal Court deportation process in the U.S. context. The authors shed light on the doctrinal controversies surrounding stays by presenting an empirical analysis of 1646 cases heard in all the circuits that hear immigration appeals. The authors' empirical research demonstrated a pattern of consistently denying stays to petitioners whose underlying cases ultimately succeed. The authors argue that this indicates serious issue with a legal standard which first and foremost relies on judges' predictions of future outcomes, noting: "the standard we employ for obtaining that relief proves impossible to apply with any accuracy, undermining the very objective of an equitable outcome." Among the various recommendations given by the authors, one was further research on judge's abilities to predict the outcome of cases, including research on the various cognitive biases that may colour their assessment: Fatma Marouf, Michael Kagan & Rebecca Gill, "Justice on the Fly: The Danger of Errant Deportations" (2014) Scholarly Works 889.
[44] R. Grant Hammond, "Interlocutory Injunctions: Time for a New Model?" (1980) The University of Toronto Law Journal 30:3 at 240–82.

iii) Constitutionalism

Canadian courts have continually held that the deportation of a non-citizen alone cannot implicate the liberty and security interests protected by section 7 of the *Canadian Charter of Rights and Freedoms*. However, the courts have also indicated that section 7 rights are not engaged at "earlier" stages in the administrative process because those rights are engaged "later" at the stay of removal stage. The possibility of accessing section 7 rights at the stay stage appears to justify Applicants' being subject to an array of potentially unconstitutional processes prior.

The goal of understanding the above-described system design, and how that design is justified, guides my exploration of the application of the Charter on stay motions. Why does the Charter not apply until the final immigration proceeding? Does the final immigration proceeding offer a fair forum to make Charter arguments, and if not, why not? To situate these questions in my research, I rely on the notion of constitutionalism described by Colin Grey in his work, "Thinkable: The Charter and Refugee Law after Appulonappa and B010."[45] Constitutionalism is preliminarily described by the author as "an ideal according to which enforceable norms, such as those propounded in the form of immigration law, are subjected to the discipline of legal justification, through the medium of various institutional forms and practices, including judicial review based on a written bill of rights like the *Canadian Charter of Rights and Freedoms*." To simplify this concept, the author explains that robust constitutionalism exhibits the ability to answer to the question of "why" down to a fundamental level. Institutional practices capable of doing so indicate a sophisticated level of legal justification. Constitutionalism which is only able to answer to "why" with "because" represents weaker constitutionalism.

B. Examining Critical Approaches in Literature

i) The Tripartite Test

Understanding the history and broader application of the test for injunctive relief is an important starting point to assess how the test operates in the immigration context. Below, I describe the legal test then explore past and current critiques of the interlocutory injunction test.

The relevant legal test in stay motion hearings is the tripartite test for interlocutory injunctions. The origin of this test takes us back to 1975. In 1975, the House of Lords in American Cyanamid Co. v Ethicon Ltd.[46] established that irreparable harm is harm that cannot be compensated for monetarily. In that case, the Appellant was a company that held a patent for surgical sutures. Meanwhile, the Respondent was a

[45] Colin Grey, "Thinkable: The Charter and Refugee Law after Appulonappa and B010" (2016) 76 SCLR (2d) 111.
[46] *American Cyanamid Co. v Ethicon Ltd.*, [1975] AC 396.

company that intended to launch a suture to the British market, which the Appellant claimed was in breach of its patent. The injunction before the House of Lords concerned an order to restrain the Respondent's use of the type of suture at issue until the resolution of the underlying patent infringement trial.

The Supreme Court of Canada in *RJR-MacDonald Inc v Canada*, followed the reasoning of the House of Lords in *American Cyanamid Co*. The ruling in RJR-MacDonald remains the leading case for applying the tripartite test to stays pending trial.[47]

At issue in that case was the request to restrain government regulations against a tobacco manufacturing company pending the final decision of the appeal on the merits. According to the Supreme Court, all three "prongs" or parts of the tripartite test must be satisfied for the requested interim relief to be granted. As such, the applicants must demonstrate that: (1) there is a serious question to be tried, meaning the claim is not frivolous or vexatious; (2) they will suffer irreparable harm if denied the relief; and (3) the balance of inconvenience pending trial favours them, meaning they would suffer greater harm than the opposing party from the refusal of a stay pending a decision on the merits.

While limited, scholarly commentary on the form and function of the tripartite test demonstrates that it has long caused confusion. For example, a consistent critique throughout the literature refers to the broad and vague nature of the tripartite test, which tends to produce inconsistent results. This inconsistency, in turn, leads to ambiguity in the jurisprudence. In 1989, Paul M. Perrell discussed some problems he believed plague the tripartite test. One such problem he described as "the serious problem of ambiguity" and "the serious problem of a lack of precision." His analysis clarifies that the inadequacy of damages can arise in two different scenarios: one, where damages are inadequate because the court *cannot* accurately calculate compensation for the injury, and two, where damages *can* be accurately calculated but are inadequate in the context. Perrell's understanding of irreparable harm in the context of an interlocutory injunction is simple: irreparable harm exists if the remedy at trial – whatever it may be – will come too late to do justice.

In 2008, Jean-Phillipe Groleau authored an article titled "Interlocutory Injunctions: Revisiting the Three-Pronged Test," examining the premises underlying the three-pronged test.[48] The author believes the premises are inaccurate for many interlocutory injunction applications. He argues that the test is ill-conceived and that the court should adjudicate primarily on the merits. The author makes one reference to the application of the test in the immigration context in a footnote. He writes that in the context of a stay based on an underlying judicial review of a deferral decision, granting a stay is "tantamount to granting the

[47] *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311 [RJR-MacDonald].
[48] Jean-Phillipe Groleau, "Interlocutory Injunctions": Revisiting the Three-Pronged Test" (2008) 53 McGill LJ 269.

remedy sought at trial."[49] In such cases, the author writes that the court should, instead of applying the three-prong test, engage with a more thorough review of the merits of the underlying deferral application.

Ultimately, my literature review reveals that how the interlocutory injunction test functions in immigration law has not received much attention. Nor has resulting stay jurisprudence been closely examined. Only one graduate research paper was located. In that paper, the author studied the nature and procedure of stays granted by the Federal Court. At the outset of their examination, the author expresses their hope that the research may "help create consistency and coherence in the jurisprudence relating to stays."[50] The author examines the tripartite test and its various components, stating that the three prongs carry "a peculiar meaning in immigration."[51]

ii) Irreparable Harm

Given the complexity of the irreparable harm analysis, I also looked at its characterization in the literature and jurisprudence. The irreparable harm component of the test is likewise plagued with ambiguity, especially when Charter rights are implicated. Literature focused on the irreparable harm prong describes the standard as containing "a multiplicity of meanings" which has caused "confusion in the jurisprudence," resulting in irreparable harm surviving as a "condition precedent," which will sometimes unfairly deny an injunction.[52]

As articulated by one researcher published by the UNHCR, "one can have serious doubts as to whether degrading punishment is more difficult to repair than arbitrary detention, since reparation cannot provide restitution of the victim's status *quo ante* but only compensate."[53] As such, irreparable harm remains "quite obscure, unless understood as meaning permanent bodily harm such a death or amputation."[54] As we will explore, while practitioners can indeed agree that the standard now looks for lesser harms than death or amputation, what is required to meet the standard remains unclear.

Quantifying harm in law continues to confound legal scholars and courts alike. The legal definition of irreparable harm in the immigration context and beyond remains limited. Further, harm-causing situations

[49] *Ibid* at 286, fn 67.
[50] Alexandre Tavadian, *Statutory, Judicial, and Administrative Stays in Immigration Matters* (A thesis submitted to the Faculty of Law at Universite de Montreal, 2010) [unpublished] at 6.
[51] *Ibid* at 7.
[52] Paul M. Perell, "The Interlocutory Injunction and Irreparable Harm" (1989) 68:3 Canadian Bar Review 538.
[53] Santhosh Persaud, "New Issues in Refugee Research, Research Paper No. 132, Protecting refugees and asylum seekers under the International Covenant on Civil and Political Rights" (2006), UNHCR Policy Evaluation and Development Service.
[54] *Ibid*.

which will attract Charter protections also remain limited.[55] As we will explore in the jurisprudence, treatment that could implicate the Charter as per the courts include death, detention, or the prospect of deportation to torture.[56] Legal scholars have criticized the status quo resulting from this treatment of Charter protections as unavailable to all but those who face the most extreme human rights abuses. For example, Professor Graham Hudson writes that "as an analogue of punishment, the notion of irreparable harm re-serves constitutional protection only to "extreme" or extraordinary sanction."[57] This status quo, he argues, serves to legitimize the availability of constitutional protection only when deportations also result in extreme, grave, or irreparable harm. Meanwhile, he argues: "most harmful immigration measures do not lead to grave human rights abuses, but they still contravene international law and any responsible interpretation of constitutional rights."[58]

How Canadian courts quantify harm directly impacts the availability of constitutional protections to foreign nationals. Using recently published decisions may help us understand the Court's treatment of the notion of irreparable harm and any corresponding Charter engagement. At the very least, defining rough parameters to the meaning of irreparable harm can lend greater transparency to a lesser-known Court process.

C. An Aerial View and a Closer Look

The above context allows us to dive into research that considers an aerial view of the system design alongside a closer examination of the law. Canadian courts have acknowledged that decision-making at the removal stage carries great legal importance by design, because a foreign national's previously withheld Charter protections come alive. The supporting logic indicates that because stay motions are directly and foreseeably linked to deportation – and therefore to a deprivation of a non-citizen's constitutional protections – an Applicant's circumstances must be scrutinized by a decision-maker to ensure that this deprivation complies with the principles of fundamental justice. If it is the case that Charter protections are pushed to the margins of law only to be forgotten, then we are dealing with a deeply problematic broken promise. Whether and how the system design ensures Charter compliance alone should propel us to investigate stays.

Further, it is imperative that we investigate the interpretive tools used to decide whether a foreign national should be denied a stay of removal. As identified above, the current legal test was migrated into the

[55] For an important analysis of how the colonial dynamic plays out in injunction proceedings as applied to Indigenous rights, see: Shiri Pasternak & Irina Ceric, ""The Legal Billy Club": First Nations, Injunctions, and the Public Interest," Article forthcoming in the Toronto Metropolitan University Law Review.
[56] See e.g., *Charkaoui v Canada (Citizenship and Immigration)*, [2007] 1 SCR 350 at para 17.
[57] Writing in the context of applicants deemed a security or criminal risk in Canada, Hudson outlines "what can only be described as a Charter vacuum." These applicants cannot apply for a stay of removal nor refugee status and can therefore be deported without ever having their Charter rights considered. See Hudson, *supra* note 35 at 92.
[58] *Ibid* at 88.

immigration and human rights context from the commercial context. This begs the question: is a test designed to respond to monetary considerations capable of responding to serious human rights considerations? The potential for immense human suffering upon deportation demands further investigation of the law and decision-making processes that may result in deportation.

PART III: FEDERAL COURT STAY MOTIONS

STAY MOTION PROCEDURE

This research centers on stay motions heard in Toronto, Ontario. The Federal Court hears stays of removal proceedings in the province of Ontario at 180 Queen Street in Toronto. To proceed with a stay motion hearing, an applicant must file a Stay Motion Record (hereafter "stay motion") with the Federal Court registry. Often, these stay hearings are heard the day before or the day of the Applicant's deportation date.

An Applicant cannot file a stay motion absent an underlying application challenging an administrative immigration decision. In the immigration context, an underlying application is commonly an Application for Leave and for Judicial Review (hereafter "Application for Leave") pursuant to section 72(1) of the IRPA. Therefore, an Applicant must generally file an underlying Application for Leave of an immigration decision or have such an application in process prior to filing a stay. The underlying application must challenge a reviewable immigration decision and be filed within the timelines set out by IRPA.[59] Late applications that are not granted an extension of time by the Federal Court cannot ground a stay motion.[60] Therefore, the implications of a late application for leave and for judicial review include the court refusing to hear a stay motion based on the deficiency of the underlying application.

The requirement for an underlying application goes to the interim nature of stay motions as a temporary stay pending trial. An underlying application indicates that there is potentially a serious legal issue that has yet to be dealt with by a Canadian court, supporting the Applicant's argument that their deportation should be delayed by the court until a decision is made on an outstanding Application for Leave, for example. In the case of a late underlying application, the Applicant must establish that the motion for an extension of time also raises a serious issue.[61]

The general timeline for filing a stay is at least three days prior to when the Applicant proposes the Federal Court to hear the stay.[62] If an Applicant files a stay motion within this timeline, it is considered non-urgent.

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[59] *Supra* note 6 at 72(1). See also Section 72(2)(b) of the IRPA, which requires that the Application for Leave be initiated within fifteen days (or within sixty days in the case of a matter arising outside Canada) after the day the applicant is notified of the decision they seek to challenge.
[60] Extensions of time may be granted under Federal Court Rules 8(1): "On motion, the Court may extend or abridge a period provided by these Rules or fixed by an order:" Federal Courts Rules, SOR/98-106 at s 8(1).
[61] *Supra* note 6 at s 72(2)(c).
[62] *Supra* note 60 at s 362.

In contrast, stays filed with less than three days' notice are considered urgent. "Last-minute" or "urgent" stays generally transpire because CBSA did not inform the Applicant of their removal until the last minute, and the Applicant did not anticipate the need for a stay motion.[63] The most recent Federal Court Practice Notice addressing stays indicates that an Applicant should bring a stay motion "as soon as possible," recognizing that in some cases, last-minute cases are unavoidable:

> The Court recognizes that in immigration matters there are circumstances where an applicant has no alternative but to bring a last minute, or urgent, motion to stay their removal from Canada. Such unavoidable urgent stay motions may be necessary, for example, when a Direction to Report for removal is issued for an imminent removal date, leaving an applicant with little time to retain and instruct counsel and to bring a stay motion.[64]

Federal Court procedure also dictates the content and form of stay motion records. For example, the most recent Federal Court Practice Notice requires that counsel keep their motion records under 100 pages absent exceptional circumstances. The Practice Notice also requires counsel to include a complete record of immigration decisions attributable to the Applicant, such that the record contains: "everything required by the Court to make its decision."[65] While not explicitly stated in the Practice Notice, these guidelines appear designed to accommodate better the short timelines associated with stay motions.[66]

A single-judge panel overhears and decides a stay motion. The Court does not provide the identity of the presiding judge to counsel or the Applicant upon the scheduling of a stay hearing. However, counsel can contact the Federal Court registrar the day before the hearing to ask which judge will be hearing the stay. Sometimes, if counsel is familiar with the various Federal Court judges, knowing who will be presiding over the motion may impact their approach to oral argumentation.[67]

From the Applicant's perspective, finding a lawyer to file a stay motion (and possibly also a deferral request), and further, to represent them at their hearing poses the first hurdle to filing a stay.[68] From the perspective of legal representatives, the stay process requires such urgency that even the most well-meaning lawyer may need more time, resources, or information to take on a case. Working off an incomplete file is a common challenge with stay motions, especially if the Applicant facing removal was not already a client of

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[63] See LLM Interview Transcripts.
[64] Federal Court, *Practice Guidelines – Immigration and Refugee Proceedings Urgent Stay Motions for Removals from Canada* (18 February 2021).
[65] Federal Court, *Consolidated Practice Guidelines for Citizenship, Immigration, and Refugee Protection Proceedings* (24 June 2022), page 6(e).
[66] See LLM Interview Transcripts.
[67] See LLM Interview Transcripts.
[68] Note that generally, applicants hire lawyers to file a stay motion and represent them at their hearing, however, it is also possible to file a stay without legal representation.

the lawyer.[69] Lawyer listservs frequently see urgent requests such as: “if anyone is available to take on a very urgent stay motion with removal set for this Friday, and deferral decision received today, please contact me.”[70]

Typically, stay hearings last about one hour, however, they can also last several hours, subject to the complexity of the issues at play and the arguments presented by counsel. The judge may deliver their decision to the Applicant at the conclusion of the hearing, or they may reserve their decision. Given the short timelines, these orders are often communicated some hours after the conclusion of the hearing, or the next day. The judge’s order does not have to provide reasons. According to Federal Court Regulations, judges “may” provide reasons for their judgement or simply sign their order.[71]

A foreign national who reaches the stay motion site is often threatened by imminent deportation from Canada. A successful stay motion temporarily prevents the scheduled deportation of the Applicant. Time, therefore, is truly of the essence. As will be discussed, the limited time afforded to all actors involved in this legal process directly impacts every aspect of the stay motion procedure.

STAY MOTION LAW

A. The Tripartite Test

The tripartite test is a general framework that admits exceptions. Therefore, while the interlocutory injunction test is meant to address an interim issue that does not go to the heart of the matter, in some cases, a judge is expected to engage in an extensive review of the merits. The first exception arises when what should be an interim determination amounts to a final determination of the action. For example, if an Applicant seeks to protect a right that can only be exercised immediately or not at all.[72]

The most recent iteration of the tripartite test appeared in *R v Canadian Broadcasting Corp*. In that case, an accused was charged with the first-degree murder of a minor. The Crown requested a mandatory ban under the Criminal Code to prohibit the dissemination of information that could identify the victim. The order, ultimately granted by the presiding judge, was initiated in response to the CBC’s refusal to remove the victim’s identifying information from its website. In applying the test, the SCC replaced the serious issue requirement with the requirement that an applicant demonstrate “a strong *prima facie* case that it will likely succeed at trial,” restating the test as follows:

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[69] See LLM Interview Transcripts.
[70] Email to Refugee Lawyer Association (RLA) listserv, received at: <rla@list.web.net>.
[71] Sean Rehaag and Pierre-André Thériault, "Judgments v Reasons in Federal Court Refugee Claim Judicial Reviews: A Bad Precedent" (2022) 45:1 Dal LJ 185.
[72] *R v Canadian Broadcasting Corp*, 2018 SCC 5 at para 13.

i. The applicant must demonstrate a strong *prima facie* case that it will succeed at trial. This standard entails a *strong likelihood* on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice;
ii. The applicant must demonstrate that irreparable harm will result if the relief is not granted; and
iii. The applicant must show that the balance of convenience favours granting the injunction.

The rationale given by the Court for the higher threshold for the finding of a serious issue centers the defendant's experience. The Court explained that the defendant is mandated to undertake a positive course of action, "which is often costly or burdensome." The Court noted that because restorative relief can usually be obtained at trial, the "potentially severe consequences to a defendant" resulting from a mandatory interlocutory injunction demand an extensive review of the merits at the interlocutory stage.

Essentially, the tripartite test seeks to achieve equity. As stated by the Supreme Court in *Google Inc v Equustek Solutions Inc*, the fundamental question is whether granting the injunctive relief is "just and equitable in all of the circumstances of the case," and this will "necessarily be context specific."[73]

B. The Toth test

The application of the tripartite test in immigration matters was established by the leading Federal Court of Appeal case on stays, *Toth v Canada (Minister of Employment and Immigration)*. In that case, the Court stated that if the applicant is deported, "there is a reasonable likelihood that the family business will fail and that his immediate family as well as others who are dependent on the family business for their livelihood will suffer." The judge in that case, found that "at least a portion of this potential harm is irreparable and not compensable in damages."[74]

Now commonly referred to as the "Toth test," this test remains authoritative. The Federal Court applies the Toth test to determine whether to grant or deny a stay of removal. The Toth test requires the applicants to demonstrate:

i. there is a serious issue to be tried;
ii. irreparable harm will result if the stay is not granted and their removal is not stayed; and
iii. the balance of convenience favours the granting of the order and the staying of their removal, considering the total situation of both parties.

[73] *Google v Equustek Solutions* 2017 SCC 34 at para 25.
[74] *Toth v Minister of Employment and Immigration*, (1988) 86 NR 302 (FCA). See more recently: *Es-Sayyid v Canada (MPSEP)*, 2012 FCA 59 at paras. 6-7: "In the immigration context, the leading case on stays is *Toth* […]."

Outlining each of the three stages of the test will provide context to the questions of interest to this research, including: the substantive analysis involved with each stage, including the evidentiary standards they carry; the relationship between the stages; and generally, the adequacy of the tripartite test when used to determine whether to stay a deportation.

i) Serious Issue

The jurisprudence defines a serious issue as the existence of a serious question to be determined by an underlying, reviewable immigration application.[75] The nature of the underlying application determines the possible serious issues at play.

Typically, the threshold for establishing a serious issue is a low one.[76] An Applicant need only show that at least one of the grounds raised in the underlying application for judicial review is not frivolous or vexatious. The Supreme Court of Canada has held that an exception to the low threshold occurs "when the result of the interlocutory motion will in effect amount to a final determination of the action."[77] In such circumstances, the moving party must meet an elevated threshold to be entitled to interlocutory relief.

In the immigration context, this elevated threshold applies to stay motions when the underlying application is a CBSA-issued deferral decision. In those cases, a stay of removal effectively grants the relief sought in the underlying application by overturning the decision refusing the deferral. Suppose the underlying application is a deferral request made to a CBSA officer. In that case, the Court applies a reasonableness standard, such that the Applicant must demonstrate that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency."[78]

If the Applicant meets this elevated threshold at the first stage of the test, the anticipated result on the merits should be considered with the second and third stages of the test.[79] As such, the Court looks to the strength of the grounds for judicial review. If the underlying matter appears to favour the Applicant, this can weigh heavily in favour of granting a stay. However, if the Applicant fails to meet the elevated serious issue threshold, the Court can dismiss the stay on this ground alone.[80]

An indefinite number of issues may arise from any underlying challenge to a refused immigration application. Accordingly, it is counsel's role to identify the serious issues at play within the context of the

[75] *Ibid.*
[76] *Supra* note 47 at 335 and 337; see also *Gateway City Church v Canada (National Revenue)*, 2013 FCA 126 at para 11 and *Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 at para 25.
[77] *Supra* note 47 at 338.
[78] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 100.
[79] According to *RJR Macdonald*, *supra* note 47 at 339.
[80] See e.g., *Augusto v Canada (Citizenship and Immigration)*, 2022 FC 226 (CanLII).

underlying challenge. The serious issue examination may relate to whether a previous decision-maker erred in coming to a negative decision on an immigration application. For example, if the judicial review of the underlying application is a PRRA application, the Applicant may argue that the officer ignored new risk evidence. If the application under review is an H&C application, the officer may have erred in their assessment of the best interests of the children. In brief, "the best interests of the children" is a principle derived from caselaw and codified in Canadian immigration legislation. Specifically, decision-makers must be "alert, alive and sensitive" to the best interests of a child directly affected by the decision when assessing humanitarian and compassionate submissions.[81] This guiding principle recognizes that certain circumstances may adversely affect a child and warrant exceptional relief even though that relief may not have been available if the analysis was limited to the impact on the parent.[82] The well-being of children, therefore, requires a distinct analysis.

If the Court holds that the CBSA officer acted within their discretion and conducted a thorough review of the underlying application, a serious issue may not exist. This feature is important to understand because the granting of leave on an underlying application by another Federal Court judge does not necessarily mean that the serious issue prong of the Toth test will be deemed satisfied by the judge subsequently presiding over the stay hearing. Conversely, a granted stay does not mean that the applicant raised on arguable issue on an application for leave and judicial review. It is, therefore, possible to be granted a Federal Court stay and be subsequently denied leave.

In some cases, an Applicant will argue that an immigration application should be considered a serious issue regardless of whether it is subject to judicial review by the court. For example, Applicants have argued that an ongoing spousal sponsorship application or an application humanitarian and compassionate application that has been outstanding for a significant amount of time (relative to the average processing time) is a serious issue.[83] The serious issue in that situation may rely on the imminence of a potentially positive decision on the outstanding immigration application.

If the court agrees that there is a serious issue to be tried, then the next stage of the analysis is a discussion of whether the applicant will face "irreparable harm" in the country of removal.

ii) Irreparable harm

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[81] See *Baker v Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817.
[82] See e.g., *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61.
[83] An Applicant may argue that the interests of the children affected by the removal is a serious issue, particularly if there are short term interests that would be impacted such as a child's interest in finishing a school term or receiving necessary medical treatment. See e.g., Appendix A: Case List, R18: *Montique v Canada (Public Safety and Emergency Preparedness),* 2019 CanLII 1611 (FC).

The irreparable harm stage of the Toth test represents the law's acknowledgement that the risk of certain types of harm justifies halting the removal of a foreign national from Canada.

Broadly, Canada has a legal duty to refrain from returning refugees to territories where they face irreparable harm under both domestic and international refugee law. The principle of *non-refoulement*, one of the pillars of international refugee law, makes reference to the irreparable harm standard. *Non-refoulement* prohibits states from transferring or removing individuals from their jurisdiction or effective control when there are substantial grounds for believing that the person would be at risk of irreparable harm upon return, including persecution, torture, ill-treatment, or other serious human rights violations.[84]

Meanwhile, the Supreme Court of Canada describes 'irreparable harm' as follows: "'Irreparable' refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms, or which cannot be cured, usually because one party cannot collect damages from the other."[85] In other words, harm that can be avoided or cured is not irreparable. Whether irreparable harm exists is determined on a case-to-case basis. To establish irreparable harm, an applicant must show there is "real, definite, unavoidable harm – not hypothetical and speculative harm." To do so, they must adduce clear and non-speculative evidence that irreparable harm will follow if the stay is refused. Unsubstantiated assertions of harm will not suffice. Instead, "there must be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result" unless the stay is granted.[86]

While the Federal Court has not issued specific criteria on what types of harms experienced upon deportation are irreparable, the jurisprudence provides some guidance. For example, the Court has established that irreparable harm not only refers to the possibility of interference to bodily integrity with the person to be removed but covers a broad range of harms. In *Belkin v Canada (Minister of Citizenship and Immigration)*, the Court reiterated the various types of harms that do not implicate the bodily integrity but are irreparable, beginning with the seminal Toth case:

> [12] First, there is *Toth v M.E.I.*, [See Note 3 below] in which the Federal Court of Appeal found that the possibility of the failure of the family business headed by the appellant, which would lead to personal and economic problems for the latter's family and unemployment

[84] See United Nations, Human Rights, Office of the High Commissioner, "Technical Note: The principle of non-refoulement under international human rights law (2018)," OHCHR, online: <https://www.ohchr.org/en/documents/tools-and-resources/technical-note-principle-non-refoulement-under-international-human>.
[85] *Supra* note 47.
[86] For the establishment of the irreparable harm standard, see e.g., *Glooscap*, *supra* note 76 at para 31; see also *Canada (Attorney General) v Canada (Information Commissioner)*, 2001 FCA 25 at para 12; *International Longshore and Warehouse Union, Canada v Canada (Attorney General)*, 2008 FCA 3 at para 25; *United States Steel Corporation v Canada (Attorney General)*, 2010 FCA 200 at para 7.

> for the employees of the business, constituted irreparable harm. In *Calabrese v M.C.I.*, Mr. Justice Gibson allowed a stay application in the case of a young man who was to have been returned to Italy, a country he had left as a child and who did not speak Italian. In *Garcia v M.C.I.*, Mr. Justice Dubé held that there would be irreparable harm if a man whose state of health was fragile were returned to Nicaragua. Gibson J. allowed a stay application in the case of a criminal undergoing rehabilitation who would be deprived of the community resources on which he relied on the ground that the loss of these sources of support would constitute irreparable harm in his case. There are other similar examples.[87]

In the foundational case *Melo v Canada*, a former Canadian champion boxer faced deportation to his native Portugal based on his criminal record. The applicant was 33 years old and the father of three children, including two teenage daughters and a 3-year-old son. In his introductory statements, the judge presiding over Mr. Melo's stay motion hearing stated:

> Clearly Eddie Melo is a man of many parts. If and when he is deported, it is not only the criminal who will leave but the father, son, partner, brother, cousin, will leave as well. Whatever our society's quarrel with the former, it has none with the latter. This is not a one-dimensional problem.[88]

The court stated that "irreparable harm, if it is to be found, must be found in the circumstances of the applicant and those around him." The court also confirmed that "there is authority in the Federal Court of Appeal to the effect that damage to the economic and other interests of the applicant can satisfy the requirement of irreparable harm."[89] However, to satisfy the irreparable harm standard, the harm must extend *beyond* the hardship inherent in deportation. The Federal Court adopted this reasoning and stated that if the phrase irreparable harm "is to retain meaning at all," it must refer to "some prejudice beyond that which is inherent in the notion of deportation itself. To be deported is to lose your job, to be separated from familiar places and people. It is accompanied by enforced separation and heartbreak."[90]

Ultimately, the Court deemed there is "nothing in Mr. Melo's circumstances which takes it out of the usual consequences of deportation […] as unhappy as these circumstances are, they do not engage any interests beyond those which are inherent in the nature of a deportation."[91]

More recently, the court in *A.C. v Canada (Citizenship and Immigration)* clarified that irreparable harm is not reserved for harms faced directly by the applicant but can also include harm to any person directly

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[87] *Belkin v Canada (Minister of Citizenship and Immigration)* [1999] FCJ No. 1159 (QL) at para 12.
[88] *Melo v Canada (Minister of Citizenship and Immigration)*, 2008 FC 150, [2008] 4 FCR at paras 1-3.
[89] *Ibid* at paras 19-20.
[90] *Ibid* at para 21.
[91] *Ibid*.

affected by the removal. The Court also confirmed that harms alleged at the stay stage must be "new," which excludes harms rejected in prior immigration proceedings, stating:

> In the context of a stay of removal, the harm usually relates to the risk to the individual(s) of harm upon removal from Canada. It may also include specific harms that are demonstrated in regard to any persons directly affected by the removal, and who will be remaining in Canada. Any risk of harm that was assessed – and rejected – in prior immigration proceedings cannot form the basis for a finding of irreparable harm at this stage. In those situations, it is a question of whether new harms have emerged.[92]

To summarize, while the court has not established specific criteria for proving irreparable harm, the jurisprudence provides some guidance on the standard. Irreparable harm can include risk to bodily integrity in the country of removal, but this is only one type of harm. The notion of irreparable harm can include both social and economic hardship. While the harms may threaten the Applicant themselves, the court may also consider the potential impact on others directly affected by the removal of the Applicant, such as family members or employees. Notably, the harms must extend beyond the "usual" or "ordinary" consequences of removal, which according to the Court, can include losing your job and being separated from your family.

iii) Balance of Convenience

With the first two stages of the test covered, only the third remains. At the third prong, the Federal Court determines whether the balance of convenience favours the Applicant or the Minister. The balance of convenience analysis compares competing interests.

The essential question in determining the balance of convenience is whether the Applicant or the Respondent will be most disadvantaged by the grant or denial of the stay. For example, the Court may consider whether the interests of the Minister go beyond the question of administrative convenience. The government may argue that the balance weighs in favour of removal if Applicants have "benefitted" from multiple entries to Canada, from residence and employment without authorization in Canada, or from access to IRPA processes to regulate their status.[93] The court may deem the balance of convenience to favour the Minister if the government's interests implicate the integrity, fairness of, and public confidence in, Canada's system of immigration control.[94] The government's interest in deporting a foreign national may be outweighed if the court finds that the Applicant would suffer greater harm than the government should the stay be denied.

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[92] *A.C. v Canada (Citizenship and Immigration)*, 2019 FC 1196 (CanLII) at para 23.
[93] *Silva v Canada (Citizenship and Immigration)*, 2021 CanLII 121233 (FC).
[94] *Jama v Canada (Citizenship and Immigration)*, 2008 FC 374 (CanLII).

Criminality is one factor that consistently impacts the balance of convenience analysis. Federal Court jurisprudence indicates that the balance of convenience may favour the Minister in cases where the applicant has a criminal record. During the weighing exercise, the Federal Court considers whether a person is a danger to the public in Canada or has committed crimes against humanity, as well as the material cost of keeping the public safe from them. For example, in *Townsend v Canada*,[95] Justice Rothstein considered the appellant's "costly incarceration" in assessing the balance of convenience. In *Omar v Canada* following *Townsend*, Justice Shore noted that "the fact that the Applicant requires two guards for every detention review hearing demonstrates the great cost of keeping safe the people with whom he comes into contact."[96] In that case, the Court found that the applicant had not satisfied the third branch of the test. Given the applicant's "persistent criminality," the balance of convenience weighed in the Minister's favour. Lesser crimes, such as welfare fraud, can also tip the balance in favour of the Respondent.[97]

According to Federal Court jurisprudence, the three prongs are equally important and must all be met but are not discrete. As articulated by Barnes J. in the case of *Chung v Canada*: "[t]he tripartite test is not a series of independent hurdles. The strength of one of its requirements relative to the other may determine the outcome (e.g., the severity of the resulting harm may overcome the weakness of the serious issues)."[98] Said differently, "the test cannot be reduced to a simple box-ticking of the three components test."[99] The court has recently described the components of the test as focused on factors that inform the exercise of the Court's discretion rather than representing three independent watertight compartments.[100] In exercising this discretion, the Court must "be mindful of overall considerations of justice and equity."[101]

The jurisprudence concerning how the three prongs relate to one another involves divergence. One line of jurisprudence indicates that if a serious issue is found to exist, irreparable harm should "flow" or follow from that finding. However, generally, there has been a shift away from this practice. Now, the court may find a serious issue to exist yet find the irreparable harm prong not satisfied and ultimately dismiss the motion. For example, more recently, in *Yu v Canada*, the Applicants were scheduled for removal to China the day after their stay motion hearing. The applicable threshold to the serious issue prong of the *Toth* test was low because the underlying decision was the refusal of an H&C application by a Senior Immigration Officer of IRCC. The court found a serious issue to exist because leave had already been granted by the Federal Court, meaning the judge deciding the leave application had found there to be an arguable case in that application. The Applicants therefore met the serious issue threshold.

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[95] *Townsend v Canada (Minister of Citizenship and Immigration),* 2004 FCA 247.
[96] *Omar v Canada (Citizenship and Immigration)*, 2009 FC 94 (CanLII) at paras 5 and 59.
[97] See e.g., *Richards v Canada (Minister of Citizenship and Immigration)*, 2007 FC 783 at para 35; and *Gomes v Canada (Minister of Citizenship and Immigration)* (1995), 91 FTR 264 at para 7.
[98] *Chung v Canada (MCI)*, IMM-561-12 (Reconsideration), at para 3.
[99] *Yu v Canada (Citizenship and Immigration)*, 2021 CanLII 131246 (FC).
[100] *Acti v Canada (Citizenship and Immigration)*, 2022 FC 336 (CanLII) citing *Wasylynuk v Canada (Royal Mounted Police)*, 2020 FC 962 (CanLII) at 135.
[101] *Yu v Canada*, *supra* note 99.

The court then considered the various grounds of harm alleged, including loss of business, forced sterilization, loss of Canadian citizenship, the emotional distress of the children, and the mother's mental health. Finally, on the balance of convenience, the court stated as follows:

> I understand that the Applicants' challenge of the most recent H&C Decision is not yet complete, and that their application for judicial review will be heard soon, but I am not convinced that this is enough to tilt the balance of convenience in their favour. This judicial review can proceed in their absence, and the Applicants have not provided any evidence of irreparable harm in that respect.

Ultimately, the Court dismissed the stay motion.

C. The Charter – A Section 7 Overview

As we explored, *American Cyanamid Co. v Ethicon Ltd* established that irreparable harm is harm that cannot be compensated monetarily.[102] Since then, Canadian courts have stated that the interlocutory test may be inappropriate for deportation cases where human rights are at stake. For example, while RJR-MacDonald followed the reasoning in *American Cyanamid Co*., the Supreme Court of Canada noted the difficulty of assessing harm when Charter rights are at play, stating: "the assessment of irreparable harm in interlocutory applications involving Charter rights is a task which will often be more difficult than a comparable assessment in a private law application. One reason for this is that the notion of irreparable harm is closely tied to the remedy of damages, but damages are not the primary remedy in Charter cases."[103]

Further, in *Suresh*, the Federal Court was faced with a request to stay from an Applicant who was scheduled to be deported to Sri Lanka. The Court accepted that the Applicant would be detained upon arrival. The Court then directly addressed irreparable harm, stating at the outset that when the tripartite test was formulated, the House of Lords "probably did not consider its applicability in the human rights context." Although the Federal Court found the test to be problematic, it was nevertheless relied on for their analysis:

> Any court would characterize irreparable harm in terms of that which cannot be compensated in monetary terms only in a commercial context such as that which presented itself in *American Cyanamid*. No transgression of a basic human right can be accurately measured or compensated by money, particularly in immigration cases involving deportation to a country which fails to abide by international norms respecting human rights.

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[102] *Supra* note 46.
[103] *Supra* note 47 at section C. "Irreparable Harm."

The Court went on to say: "nevertheless, there is no absolute right to remain in Canada."[104]

In a 1985 case of the Supreme Court of Canada, *Singh*, the Court held that a refugee has the right not to be removed from Canada to a country where his life or freedom would be threatened and that denial of this right amounts to a deprivation of security of the person – within the meaning of section 7 of the Charter. In other words, if Convention refugees have a well-founded fear of persecution, they are entitled to fundamental justice in adjudicating their status.[105]

The Supreme Court reviewed the meaning and breadth of the phrase "security of the person," stating that no clear meaning of the words emerges from the case law. To grant more clarity to the phrase, the Court noted that security of the person means "not only protection of one's physical integrity, but the provision of necessaries for its support."[106] However, the Court withheld from providing an expansive definition of security of the person, and according to the Federal Court of Appeal in *Savunthararasa*, "expressly left open the question of whether a more expansive approach to security of the person should be taken."[107]

Despite this seemingly open-ended question, the jurisprudence since *Singh* has unequivocally narrowed the application of section 7 to non-citizens, generally and briefly, as follows:

- In *Medovarski*, the Court reiterated that the deportation of a non-citizen *in itself* cannot implicate the liberty and security interests protected by section 7.[108]
- In *Charkaoui v Canada (Citizenship and Immigration)*, the court elaborated on the "features associated with deportation," which "may" engage section 7. Examples of such features cited by the court included: detention during the security certificate process or the prospect of deportation to torture.[109]
- In *B010 v Canada*, the court held that section 7 is "not engaged at the stage of determining admissibility to Canada" and that the benefit of the Charter "is typically engaged" only during the actual removal stage.[110]
- In *Febles v Canada*, the court explicitly denied that the Charter applies to decisions on exclusion from refugee status under Articles 1(E) and 1(F) of the Refugee Convention.[111]

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[104] *Suresh v Canada (Minister of Citizenship and Immigration)* [1999] 4 FC 206, [1999] FCJ No 1180 (QL). This case was appealed to the Supreme Court, see Suresh v Canada (Minister of Citizenship and Immigration), 2002 SCC 1, [2002] 1 SCR 3.
[105] *Singh v Canada (Minister of Employment and Immigration)*, [1985] 1 SCR 177 at para 35.
[106] *Ibid* at para 46.
[107] *Savunthararasa v Canada (Public Safety and Emergency Preparedness)*, [2017] 1 FCR 318 at para 28.
[108] *Medovarski v Canada (Minister of Citizenship and Immigration)* [2004] 4 FCR 48.
[109] *Charkaoui v Canada, supra* note 56 at para 17.
[110] *B010 v Canada (Citizenship and Immigration)*, [2015] 3 SCR 704 at para 75.
[111] *Febles v Canada (Citizenship and Immigration)*, [2014] 3 SCR 431.

Currently, Charter protections are not engaged in any administrative proceedings under the IRPA that precede stay proceedings. The Supreme Court in *Febles v Canada (Citizenship and Immigration)* found that a determination of exclusion from refugee protection under the IRPA did not engage section 7 because "even if excluded from refugee protection, the appellant is able to apply for a stay of removal to a place if he would face death, torture or cruel and unusual treatment or punishment if removed to that place."[112]

More recently, in the context of a challenge against an eligibility provision, the Court provided that "a number of safety valves" ensure that a decision-maker will consider the effect of removal prior to deportation.[113] In that case, the Applicant challenged an eligibility provision that prohibits anyone who has made a refugee claim in a country with which Canada has an information-sharing agreement from having their claim heard and adjudicated by the RPD. He also argued that the effect of this provision is an increased risk that a person will be deported to persecution, torture, cruel and unusual treatment, or death without having their risk of refoulement meaningfully assessed. In response to this section 7 argument, the Court stated:

> The IRPA provides for a number of safety valves and multiple steps where the effect of a possible removal will be considered before it is actually imposed […] Section 7 of the Charter does not protect the right of individuals to access the RPD, but rather the right of individuals not to be subject to removal without a proper assessment of the risks they face if they are returned to their country of origin. In other words, Mr. Seklani's section 7 arguments made at this early eligibility determination stage, prior to any prospect of removal, are simply premature.[114]

The absence of Charter protections prior to "any prospect of removal" appears to rely on the logic that section 7 will inevitably apply in stay proceedings. Importantly, even those proceedings which can result in deportation, such as ineligibility or inadmissibility proceedings before the Immigration Division, do not engage Charter protections. A finding of criminal inadmissibility by the Immigration Division, for example, is considered "merely one step"[115] in the administrative process that may lead to removal – still, critically, it is not the last. In the result, it appears the law treats stay motions as the sole immigration proceeding *directly* linked to removal. Presumably, then, other proceedings are only *indirectly* linked. Stay motions fulfill the last-in-line position. How the Federal Court engages with the Charter in stay motion proceedings is thus particularly urgent, given the Court's own assertions that this very engagement justifies non-application in earlier immigration proceedings.

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[112] *Ibid* at para 67.
[113] *Seklani v Canada (Public Safety and Emergency Preparedness)*, [2021] 1 FCR 171 at para 31.
[114] *Ibid*.
[115] Gerald Heckman, "Revisiting the Application of Section 7 of the Charter in Immigration and Refugee Protection" (2017) 68 UNBLJ 312.

PART IV: RESEARCH PURPOSE

Interlocutory decisions issued on a motion for stay of removal by the Federal Court[116] remain understudied. A leading reason for the limited research is that stay orders were not published or publicly accessible five years ago. Since changes to the Court's policies regarding the publication of decisions on both the Court website and third-party websites, more stay orders are now publicly available than ever before. Any increase in these decisions offers new information and thus, a significant research opportunity. The prospect of achieving greater transparency around adjudication in immigration matters is the primary impetus behind this research.

Major changes to Federal Court practices occurred in 2015 and again in 2018, which resulted in a significant increase in the number of stay decisions available on third party websites. Prior to the Practice Notice issued by the Federal Court in 2018, final decisions which a Federal Court judge did not designate as having "precedential value" were not published on the Court's website. If the presiding judge considered the case non-precedential, the decision could be issued as a short-form judgement without fulsome reasons.

The policy of having judges themselves designate which decisions hold precedential value and, therefore, which decisions are accessible to the public, has faced push-back from members of the immigration bar. The Citizenship, Immigration and Refugee Law Bar Liaison Committee has voiced some of these concerns. While outside the scope of this research, the impact of parties' reliance on unpublished decisions on the development of stay jurisprudence remains a source of concern for refugee lawyers and immigration scholars. For example, scholars have expressed concern that relying on unpublished decisions as precedents perpetuates asymmetrical access to unpublished decisions because the government is a party in all applications for judicial review and by default, benefits from greater access to unpublished cases.[117]

i) There has been a significant increase in published stay orders.

In June 2018, the Federal Court issued a Notice to the Profession addressing a policy change in the publication of court decisions. The Notice framed the availability of relevant Court decisions as an access to justice issue, echoing long-standing grievances from members of the immigration bar.[118] The Court then outlined new policies for the publication of both final and interlocutory decisions, whereby all final decisions

[116] Hereafter sometimes referred to as "stay decisions."
[117] *Supra* note 71 at 29-32. In that study, researchers looked at when unpublished decisions were cited as precedent by Federal Court judges, government lawyers, committee members, and private bar refugee lawyers. The researchers searched the full text of 3,878 published refugee judicial review decisions on the merits from 2007 to 2018 for citations to 1,463 unpublished judicial review decisions on the merits. They found 56 instances where a published decision cited an unpublished decision, and dozens of instances where the Federal Court explicitly relied on unpublished refugee decisions.
[118] *Ibid* at 26.

would be published on the merits by the Court's website. The shift to merit-based publication diminished the judge's role in determining whether a final decision is made available to the public.

Interlocutory decisions, however, continue to be published on the Federal Court's website only if considered by the presiding judge to have precedential value. Decisions considered to have such value are assigned a neutral citation number, translated, and published on the Court's website in both official languages. And as for their availability on third-party websites such as CanLII, the Practice Notice provided that the Federal Court would give CanLII access to interlocutory decisions issued on a motion for a stay of removal. The policy resulted in a significant increase in published stay orders. The more recently published stay orders are the basis of one dataset for this research.

Past 10 years – stay decisions published on CanLII

stay(*) remov(*)	Citing *Toth*	Both keywords & citing *Toth*	
2019 – 650 2018 – 314 2017- 191 2016 – 169 2015 – 199 2014 – 154 2013 – 165 2012 – 259 2011 - 228 2010 - 239 2009 – 246	2019 – 406 2018 – 127 2017- 11 2016 – 22 2015 – 6 2014 – 9 2013 – 19 2012 – 24 2011 - 30 2010 - 32 2009 – 38	2019 – 382 2018 – 104 2017- 10 2016 – 19 2015 – 6 2014 – 8 2013 – 19 2012 – 23 2011 - 28 2010 - 27 2009 – 37	Even using overinclusive search terms, it is clear that the number of published stay orders dramatically increased after 2018.

The significant increase in publicly available stay decisions since 2018 creates a new and urgent opportunity to study interlocutory decisions issued on a stay of removal.

ii) Stay cases are high-stakes decisions.

Little is known about how deportations are carried out in Canada. In fact, there is a disturbing lack of transparency surrounding a foreign national's experience of deportation, from the legal proceedings prior

to removal, to the mechanics of a deportation flight, to the foreign national's treatment upon arrival to their country of deportation.[119]

The CBSA website proclaims: "The Canadian immigration system, including the enforcement component, is lauded as one of the most generous in the world. It includes many checks and balances to ensure that a person has access to comprehensive risk assessments and procedural fairness prior to removal."[120] Determining whether this statement holds up to reality can be challenging. Because the authority to initiate and carry out deportations is in the hands of Canada's enforcement branch, deportations remain highly discretionary and opaque. What we do know is that deportations can have a devastating impact on the lives and well-being of individuals and families forced to leave Canada.

Barbara Buckinx & Alexandra Filindra rely on the principle of *jus noci* to emphasize the impact of deportation. The authors describe *jus noci* as: "a normative principle for harm avoidance in deportation practice"[121] and write: "The effects of removal are both personal and social and they can migrate along with the deportee to the country of origin. Journalistic accounts and academic studies have documented the hardship of removal, the suffering experienced by families who remain behind, and the hardship that the deportees themselves face upon their return."[122]

The authors argue that the oft-irrevocable nature of deportation makes it inconsistent with widely held principles of justice that require the availability of recourse and redress. In addition, they argue that any blanket justification of deportation as a response to crime risks lumping together categories of individuals who are not equally "culpable," noting: "the imposition of harm through deportation cannot be justified if the potential deportees lack culpability."[123] Ultimately, they argue that physical removal should not be a routine part of a liberal democracy's arsenal of social control.

Indeed, a growing body of scholarship critiquing deportation as a potential outcome of non-compliance with immigration laws in liberal democracies. For example, Professor Matthew Gibney has referred to deportation as a "cruel power" of the liberal state, "one that sometimes seems incompatible with human rights."[124]

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[119] William Walters, "The Flight of the Deported: Aircraft, Deportation, and Politics, Geopolitics" (2016) 21:2 435. See also Anna Pratt, *Securing Borders: Detention and Deportation in Canada*, (Vancouver: UBC Press, 2005) at 185 on how deportations in Canada are essentially "black-boxed."
[120] CBSA, online: <https://www.cbsa-asfc.gc.ca>.
[121] According to the principal of *jus noci*, democratic states must take into consideration the expected harmful effects of territorial removal and refrain from deporting individuals whose removal is, all other things being equal, likely to impose significant harm: Barbara Buckinx & Alexandra Filindra, "The case against removal: *Jus noci* and harm in deportation practice" (2015) 3:3 Migration Studies 393-416.
[122] *Ibid* at 401.
[123] *Ibid* at 407.
[124] Matthew Gibney, "Asylum and the Expansion of Deportation in the United Kingdom" (2008) 43 Government and Opposition 2. See also research by Professor David Kanstroom, who publishes in the field of U.S. immigration law. He questions the productive function of deportations., describes deportation in the U.S. context as "a post-entry social control measure that is applied outside of the criminal justice system and without the approval of a jury:" David

iii) Deportations involve human rights.

Canadian courts have consistently found that section 7 of the *Charter*, the right to life, liberty, and security, is not engaged by deportation itself. Further, courts have noted that "if deportation is a "treatment" it is not cruel and unusual."[125]

The Canadian Charter of Rights and Freedoms, part of the Canadian Constitution, guarantees rights and freedoms to be interpreted at least as broadly as Canada's commitments in international human rights law. While some Charter rights, such as the right to vote, are reserved exclusively for Canadian citizens, others apply to "everyone" or "every individual" in Canada. As such, a discussion of Charter rights in the immigration context is usually referring to these broadly applicable rights, including section 7, the rights to life, liberty, and security of the person; section 12, the protection against cruel and unusual treatment; and section 15(1), the right to equality. Understanding the Charter's relevance to immigrant rights requires a careful review of the jurisprudence, which various Canadian legal scholars have undertaken.[126]

The Court in *Charkaoui* provided a lasting justification for a separate and distinct deportation regime for non-citizens. In its analysis of an alleged section 15 violation of Mr. Charkaoui in that case, the Court stated that a deportation scheme that applies to non-citizens but not to citizens is not an infringement of section 15 of the Charter because section 6 of the Charter "specifically provides for differential treatment of citizens and non-citizens in deportation matters." In essence, the court's logic provides that section 15 of the Charter cannot apply to deportations because the Charter itself says so. Commenting on this statement, Professor Catherine Dauvergne writes: "this is a broad stretch from the wording of section 6, which says nothing about deportation and is primarily directed to entry rights for citizens and mobility rights between provinces for citizens and permanent residents."[127]

Charter-related discussions in this research will predominantly refer to section 7 of the Charter. The protection of section 7 of the Charter guarantees "everyone ... 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." To demonstrate a violation of section 7, one must establish, first, that a law or state action interferes with or deprives natural persons present in Canada and thus subject to Canadian law of their life, liberty, or security of the person and, second, that this deprivation is not in accordance with the principles of

Kanstroom, "Reaping the harvest: The long, complicated crucial rhetorical struggle over deportation" (2007) 39:5 Connecticut Law Review 1911–1922.

[125] *Revell v Canada (Citizenship and Immigration),* 2019 FCA 262 at 123-126.

[126] Heckman, *supra* note 115; and Catherine Dauvergne, "How the Charter Has Failed Non-Citizens in Canada: Reviewing Thirty Years of Supreme Court of Canada Jurisprudence" (2013) 58 McGill LJ 663. See also Hamish Stewart, "Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms" (Toronto: Irwin Law, 2012); and Colin Grey, "Thinkable: The Charter and Refugee Law after Appulonappa and B010" (2016) 76 SCLR (2d) 111.

[127] Dauvergne, *supra* note 126.

fundamental justice.[128] The second stage of section 7 is an internal justification analysis as it permits deprivations of life, liberty, and security of the person that are justified by their accordance with fundamental justice and thus do not infringe the section 7 right.

The application of section 7 of the Charter in immigration matters must also contend with the Supreme Court's assertion of "the fundamental principle of immigration law," being that non-citizens do not have an unqualified right to enter or remain in Canada.[129] Yet, as observed by immigration lawyer Joshua Blum, this most fundamental principle "has come to be dutifully recited at the outset of the analysis of any Charter claim in the immigration context."[130] Specifically in deportation matters, the fundamental principle has supported other propositions, including: 1) Deporting of a non-citizen *in itself* does not implicate the liberty or security interests protected by section 7 of the Charter, and 2) Section 7 rights are not engaged at "earlier" stages in the administrative process because those rights are potentially engaged "later" at the site of stay proceedings. [131]

While the Federal Court does not initiate deportations, the material effect of a denied stay order is a person's deportation from Canada. How does the Court adopt the interlocutory motion test to account for the array of hardships that a foreign national may face upon deportation? What harms are jurisprudentially characterized as "irreparable?" Given that the stay motion may likely be an applicant's last legal proceeding before being forced to leave Canada, what is done to ensure this final legal proceeding is constitutionally sound? More recently published stay decisions offer an opportunity to understand better how the law operates at the stay stage and the impact on those subject to it. A confluence of factors, including the recent access to a significant number of stay decisions; the high-stakes nature of these decisions; and the promise of a Charter analysis that precedes removal, makes investigating stay decisions timely and urgent.

PART V: METHODOLOGY

The research relies on a multi-method approach, including the plain-language coding of Federal Court stay decisions supplemented by lawyer interviews.

A. Primary method: Empirical analysis

[128] *Singh*, *supra* note 105.
[129] *Chiarelli*, *supra* note 37; *Medovarski v Canada (Minister of Citizenship and Immigration)* 2005 SCC 51; *Esteban v Canada (Minister of Citizenship and Immigration)*, [2005] 2 SCR 539 at para 46.
[130] Blum, *supra* note 37.
[131] See *Chiarelli v Canada*, *supra* note 37. See also Blum's reference to" "four propositions impacting on the interpretation of the most salient Charter rights a non-citizen can claim" stemming from "misinterpreted, expanded, and repurposed" Charter jurisprudence, *supra* note 37 at 21.

This research partially relies on the empirical analysis of a dataset collected by the researcher. To create this dataset, 158 stay decisions were coded using a plain-language coding system.

I chose large-scale data sampling over purposive sampling because I am interested in starting to build a nuanced understanding of stay decision-making at the Federal Court. While purposive sampling would allow for a more comprehensive and in-depth look at particular cases before the Federal Court, large-scale sampling may identify important and unrecognized patterns and trends, i.e., how does the court interpret irreparable harm? Which types of fact scenarios are the most compelling? What role does the Charter play at the stay stage of the immigration process? I intend to explore trends, and at a minimum, to identify areas of the stay process needing more attention.

Empirical analysis forms part of the research methodology because certain insights can only be discovered through data collection, including in the study of systems and their outcomes. The legal system is no exception. We gain new information by reading, analyzing, and comparing legal decisions but also, by coding them at a granular level. The goal is to have this additional information complement doctrinal research and ultimately provide greater insight into how the law operates. While doctrinal research assists us in understanding what the jurisprudence *says* about a legal issue, an empirical analysis sheds light on what the jurisprudence *does* in factually diverse situations.

Neutral Citations

The Federal Court assigns their decisions "neutral citations," which are unique sequential numbers indicative of the jurisdiction and court level of the decision. The neutral citation can be found in the top right corner of published decisions. These numbers are used to permanently identify judicial decisions independently of their mode of publication, be it paper or electronic.[132] A neutral citation enables lawyers, litigants, and the public to retrieve decisions without needing to rely on a citation that is specific to a database or case law report.

Final vs. Interlocutory Orders

Interlocutory orders are distinct from final decisions because they do not determine the underlying matter between the two parties but rather address an ancillary issue. Further, interlocutory decisions are not appealable. In litigation terms, the interlocutory order does not determine the very subject matter of the litigation, but only some matter collateral. An order may be final in that it decides the ultimate question raised by the application, but it is interlocutory if the case's merits remain to be determined.

[132] Lexum, "A Neutral Citation Standard for Case Law," online: <https://lexum.com/ccc-ccr/neutr/neutr.jur_en.html>.

Stay decisions are categorized as interlocutory decisions rather than final decisions – a technical feature of stays that will be discussed further in the interview section of this research. At this point, it is only important for readers to understand that because interlocutory decisions are not deemed to have precedential value, they are not *usually* published on the Court's website. However, the Court *may* give stay cases neutral citations when considered to have precedential value. While stay orders deemed to have precedential value (and therefore given a neutral citation) are rare, this caveat poses one limitation to relying on CanLII's internal citation as a search term when collecting the dataset.

Collecting the dataset

The data required for this research is made available by the Canadian Legal Information Institute (hereafter "CanLII"). CanLII is a non-profit organization created and funded by the Federation of Law Societies of Canada in 2001 with the aim of publishing all written decisions issued by courts and tribunals. The database allows users to search cases published on the website by the content, case name, file number, citation, or by cited case names, legislation titles, citations, or dockets within the decision.

In developing my methodology, I experimented with various search methods for stay orders using the public database. Two methods outlined below highlight the limitations inherent to any search term and explain my choice of search term.

Method 1: Identifying stay decisions published on the CanLII website using the following search term: stay(*) remov(*). This search term captures all references to stays of removal, whether references in the singular or plural and whether references in combination or separately. One evident limitation of this search term is that stay cases published in French discuss a "requête en sursis" and a "renvoi" rather than a stay of removal. Therefore, the limitation associated with this search term is the exclusion of French-language decisions from the search results.

Method 2: Identifying stay decisions published on the CanLII website using CanLII's internal citation system. Stay decisions usually lack a neutral citation because they are technically considered interlocutory orders rather than final orders. For this reason, CanLII assigns stay orders its own CanLII citation in the following form: "[Date] CanLII [Number] (FC)." The CanLII citation can be used as a search term to identify stay cases, given that they are not commonly assigned neutral citations. The limitation associated with this search term is the exclusion of stay cases that the Federal Court has assigned neutral citations.

The search term “2019 canlii” (including quotation marks) produces 67 decisions between January 1, 2019, and January 31, 2019. However, it appears two of those 67 decisions are duplicated. Duplicates usually reflect a decision twice published because of subsequent amendments by the presiding judge to either the content of the decision or the style of cause. Only one result refers to a decision that is not a stay decision, which results in a final case count of 64 cases. Using the search term stay(*) remov(*) between the same dates produces 90 decisions; however only 65 of those cases are stay cases.

As such, I identified a minor discrepancy between the results produced by different search terms. The discrepancy relates to two types of cases that are left out by one or the other search term. The “2019 canlii” search term includes stay decisions that are published in the French language, while the search term stay(*) remov(*) does not. However, the search term stay(*) remov(*) includes stay decisions that are assigned neutral citations by the Federal Court, which the “2019 canlii” search does not. There were four French cases in the date range indicated above. Subtracting those decisions (64 total – 4 French decisions) results in sixty stay cases in January. Meanwhile, there were five cases with neutral citations. Subtracting those decisions (65– 5 decisions with neutral citation) also results in sixty decisions in total.

	Search Term	Total Results	Total # of stay decisions	Includes	Excludes	Total # of stay decisions when differences are accounted for
CanLII internal citation	“2019 canlii”	67	64	French decisions (4)	Decisions with neutral citations	60
stay(*) remov(*)	stay(*) remov(*)	90	65	Decisions with neutral citations (5)	French decisions	60

My conclusion is that if the limitation of English-language-only decisions is accepted, the stay(*) remov(*) search terms will best serve the purposes of this research as it will not exclude decisions that the Federal Court gave neutral citations. The result is a dataset excluding French-language decisions. I use this data set to identify and investigate patterns or trends in decision-making. The data points collected for analysis are as follows:

a. Style of cause
b. CanLII neutral citation
c. Federal Court citation
d. Presiding Judge
e. Date motion filed

f. Date motion heard
g. Date of removal
h. Country of removal
i. Administrative deferral sought
j. Date of deferral
k. Date of deferral decision
l. Deferral sought until [which event]
m. Underlying application [being judicially reviewed]
n. Stay sought until [which event]
o. Whether stay is based on risk
p. Whether a refugee claim was made
q. Outcome of the stay motion [granted, denied, other]
r. Risk category
s. Harm alleged by applicant
t. Whether applicant is in detention
u. Direction to Report
v. Whether Charter was argued or addressed
w. On what prong the stay was denied [serious issue, irreparable harm, balance of convenience]
x. Whether the stay was refused on delay
y. Notes on delay
z. The legal representative, if applicable

Dataset Limitations

The dataset collected for this research is a limited sample. The dataset is limited to 158 decisions by 24 different judges. The Federal Court lists 48 judges as being active, including those that are part-time or semi-retired. The dataset thus represents loosely half of the range of possible decision-makers. This sample of decisions is not indicative of how all stay motions are decided at the Federal Court. Further, the dataset spans a period of 3 months, which means that only certain Federal Court judges are represented. As such, some Federal Court judges who decide stays are excluded from the collected data because they were not assigned to stay cases during the period in question.

The dataset is further limited by the categories I chose to code. While the a. to z. categories indicated above extract many components of a stay decision, they are not exhaustive. As such, a stay decision may contain insightful information beyond the scope of the chosen categories.

As indicated above, the search term used to retrieve the stay decisions from CanLII produces limited results because it excludes French-language decisions. A dataset containing only English-language decisions is a further major limitation.

Stay decisions are not consistently published. Because stays are considered interlocutory orders and only sometimes published, the jurisprudence on stays is incomplete, making a robust legal study of stay decisions elusive. The only-sometimes-published feature is important to critiquing the methodology used for this research, but also in understanding the position of stay motions in the broader legal culture.

Finally, my coding of the dataset was completed independently. The observations and notes taken on each decision were not externally reviewed. An independent human analysis without external review is always vulnerable to blind spots.

B. Secondary method: Interviewing lawyers

Federal Court stay orders represent the culmination of an individual's immigration history in Canada. But even those orders that are published are often dry and limited in content. The information provided in stay decisions is relatively sparse compared to other immigration decisions produced by the Federal Court.

Given the scarcity of data, I chose to complement it with interviews of immigration and refugee lawyers who represent applicants before the Federal Court on stay applications. First-hand accounts of preparing for a stay, submitting a deferral request, filing a stay motion, arguing a stay before the Federal Court, and witnessing the aftermath of a stay decision offer a more nuanced understanding of the process.

Collecting the Dataset

The first phase of the recruitment process for interviews made use of the coded stay decisions. I contacted lawyers who appeared before the Federal Court on one or more of the stay decisions included in the collected dataset. Lawyers who agreed to be interviewed were provided with an information and consent letter, and a set of ten questions. The lawyers were informed that the interview would be anonymous. Before the start of the interview, the lawyers were reminded, as indicated in the information letter, that they did not have to answer every question and could choose the questions they were comfortable answering. Most of the lawyers interviewed answered all ten questions. Interviews were conducted over Zoom. One interviewee chose to respond in writing, by email. Many of the lawyers interviewed focus their legal practice on immigration and refugee law. Other lawyers have a mixed practice, including immigration, criminal, and civil law matters. The interviewees also varied in terms of their roles in seeking stays, whether representing

individuals or the government. In one case, an immigration lawyer was a former criminal defense lawyer. In another case, an immigration lawyer formerly represented the Department of Justice.

The set of 10 questions included the following:

1. How would you describe the role of the Federal Court's emergency stay motion to someone who is not familiar with Canada's immigration regime?
2. What do you feel is most challenging about representing an applicant in the Federal Court stay process?
3. What would you say is the average time frame you've had to prepare a stay? Do you find that this time frame poses any challenges to full and fair representation?
4. Have you ever argued the Charter on a stay motion? Why or why not? If you did, can you recall the court's response?
5. Are there any cases that you found particularly concerning, either in terms of the court's procedure or the court's decision?
6. Do you believe tripartite test is an adequate means of determining stays? Why or why not? If not, which part of the test do you find most problematic?
7. What type of evidence have you found most compelling with respect to proving irreparable harm?
8. Based on your experience, are there types of harms/consequences upon deportation that you believe should be considered irreparable by the court but are not?
9. Are there any cases you've taken on where the irreparable harm finding surprised you?
10. What aspect of the stay process generally do you believe should be changed, if any?

While I did not intentionally diverge from these questions, interviews remained informal to the extent that I engaged with any tangential issues raised by lawyers. Lawyers were encouraged to discuss issues that they felt to be most significant.

Dataset Limitations

A first and obvious limitation is the limited number of interviews conducted. I conducted eight interviews ranging between 45 minutes and 1.5 hours with interviewees who responded to email recruitment. Further, email recruitment may skew the pool of interviewees, given that participants must voluntarily come forward and may only do so if they are particularly interested in the subject matter. However, I interviewed all those who came forward, and did not engage in any additional selection process. As indicated above, the immigration lawyers I interviewed possessed a wide range of practice backgrounds, including appearing both for and against an applicant seeking a Federal Court stay.

This data is further limited because it relies on anecdotal accounts and is therefore inherently biased. I address this limitation by acknowledging that interviewees' answers represent their truth but may not represent a universal truth. The set of questions presented to the interviewees asks for the interviewees' personal thoughts and opinions. Answers to these questions are therefore described as subjective opinions in this research. For example, the questions seek to know what an interviewee *feels* is the most challenging aspect of representing an applicant in the Federal Court Stay process, or the forms of harm they *believe* should be considered irreparable based on *their experience*. These types of questions attract subjective responses. Therefore, the strength of the interviews as secondary data is not in their truth *per se*, but in the insight this data can provide to complement empirical and doctrinal analysis.

Ideally, I would foreground this research with accounts of those who have experienced Canada's deportation program, including those who have lived under the threat of deportation or those who have been deported from Canada. Unfortunately, given time and ethical constraints, it was not possible to collect these accounts for this research.

PART VI: DATASETS & FINDINGS

A. EMPIRICAL DATASET

a. SUBSTANCE

Introduction: Stay Decisions

I remind readers that stay decisions are both limited in number and sparse in content. As indicated earlier, judges are not obligated to provide reasons for their orders. The limited information provided by judges in published stay orders was made evident through the collected data. An Applicant's basic information is often missing or incomplete. For example, stay decisions often omit an applicant's narrative from the decision, save for noting a rudimentary immigration history. In some cases, judges do not even mention the country where the Applicant is being removed.[133] As such, readers cannot always tell what harms were alleged by reading a final order. It is sufficient for a presiding judge to note in their final order whether the requirements for the tripartite test are met. Further details need not be provided. The scarcity of information in many stay decisions is one reason I have chosen to incorporate interviews in my research methodology.

Broadly speaking, the results of this data analysis demonstrate that while in some cases, there appears to be a principled pattern to Federal Court findings on stays, in other cases, the findings appear to be varied – and sometimes incoherent. When the Federal Court jurisprudence seems to principally agree, it is on

[133] See Appendix A: Case List ("hereafter Appendix A"): in the following Rows (hereafter "R"): 4, 53-58, 62-66, 68, 84, 86, 89, 109, 111-114, 116-118, 132, 134, and 138-146.

justifications to deport rather than reasons to grant the stay. For example, the Court has repeatedly stated that given the exceptional nature of stays as a remedy, consequences of deportation must rise above the ordinary. However, in other tension areas, such as whether the deprivation of a remedy constitutes irreparable harm, the Court's reasoning appears to diverge.

i) What amounts to a serious issue?

According to decisions studied as part of the dataset, a serious issue is neither frivolous nor vexatious. That said, in some circumstances, a judge may find that an issue is not frivolous nor vexatious but still does not meet the threshold for a serious issue on a stay.[134] Examples of serious issues found in the empirical dataset include vague or amended laws on which no judicial authority exists. However, most commonly, the serious issue pertains to legal errors made by the decision-maker in the underlying application. For example, an officer's erroneous assessment of new evidence,[135] an officer's failure to address evidence,[136] or the RPD's misunderstanding of a risk assessment or the failure to engage with psychiatric evidence.[137] Only in highly exceptional cases would a stay be granted if there is a serious issue but no finding of irreparable harm. For example, if there is ongoing, outstanding constitutional litigation, such as around the s.112 PRRA bar[138] or other ongoing legal proceedings, such as a settlement conference for a custody case in Superior Court.[139] In the latter case, the Court granted the stay until the conclusion of the family law proceedings.

ii) How is irreparable harm defined?

Within the dataset, the irreparable harm standard is defined as a "real probability" of "unavoidable irreparable harm"[140] that "cannot be cured."[141] The standard to be met is therefore one on a balance of probabilities. Allegations of unavoidable irreparable harm must be based on "convincing, credible and non-speculative evidence." The court reiterates that "speculations" and "possibilities"[142] cannot establish

[134] Appendix A, R102.
[135] Appendix A, R98.
[136] Appendix A, R99.
[137] Appendix A, R110.
[138] Section 112(2)(b.1) IRPA, referred to as the "PRRA bar" bans refugee claimants facing removal from Canada from applying for another risk assessment until 12 months following an unsuccessful refugee hearing. For the case of individuals from formerly "designated countries of origin" (DCO), the wait was 36 months. In *Feher v Canada (Minister of Public Safety and Emergency Preparedness)*, 2019 FC 335, the Federal court ruled that s.112(2)(b.2) discriminated against applicants from designated countries on the basis of national origin, compared to applicants from non-designated counties, and therefore, violated section 15 of the Charter. While the distinction made with respect to claimants from designated countries was struck down as unconstitutional, section 112(2)(b) remains in place.
[139] Appendix A, R31.
[140] Appendix A, R82.
[141] Appendix A, R35.
[142] Appendix A, R81.

irreparable harm. The court often clarifies in stay decisions that assumptions, speculations, hypotheticals, and arguable assertions, unsupported by evidence, carry no weight.[143]

Depending on the evidence presented and the presiding judge, similar claims can fall on either side of the non-speculative line, which is a thin line indeed. For example, the assumption that a previously violent ex-boyfriend will resume violent behaviour if given a chance, was deemed a probable harm in one case and merely a possibility in another.[144]

Aside from the probability of the harm, the nature of the harm must be "more than the harm or prejudice that is inherent in the removal process," with most cases citing *Melo v Canada (Minister of Citizenship and Immigration)* for this threshold.[145] This threshold too has been described as a "fine line," between inherent prejudice caused by removal and irreparable harm.[146]

Along with the probability and nature of the harm, the court may assess *when* this harm may occur. Suppose the Applicant requests a stay until the final determination of an Application for Leave. In that case, the court looks at whether the harm will occur between the time of the stay motion and the final determination of the judicial review, if the Applicant is removed from Canada prior to the determination of the Application for Leave. If Applicants can prove with clear and non-speculative evidence that they will suffer irreparable harm between now and the time that their application for judicial review is finally disposed if they are removed from Canada, it is "inasmuch as their constitutional rights may be violated if the removal is not stayed."[147] In the context of risk, the Court adopts Charter language, referring to irreparable harm as a "serious likelihood" of "jeopardy to life, security, or safety."[148]

Notably, the timeframe outlined by the jurisprudence for when the harm is to occur – between the time of the stay hearing and the disposal of the underlying judicial review application – is a function of the interlocutory nature of the stay hearing and demonstrates that the ultimate remedy lies in the underlying application. For this reason, counsel within the coded dataset argue that having an outstanding immigration application to stay in Canada in processing points to irreparable harm, given that the remedy will become moot if the Applicant is deported. As discussed in brief further in this paper, it appears from these decisions that the Court is generally not in agreement that mootness constitutes irreparable harm.

In the H&C application context, the Court asserts that H&C applications can still be processed outside the country. Counsel's argument on this point often relies on statistics provided by IRCC's Statistical Reporting

[143] Appendix A, R46.
[144] Appendix A, R20 and R46.
[145] Appendix A, R13, R73, R75, R80, R83, R85, R115, and R135.
[146] Appendix A, R13.
[147] Appendix A, R9.
[148] Appendix A, R65.

Group, usually included in the motion record. IRCC's statistics are used to demonstrate that the likelihood of an outstanding H&C application being approved if someone is removed is "significantly lower" than if they were to remain in Canada, which itself amounts to irreparable harm. The following holding represents the Court's most frequent response to this argument:

- With respect to the statistical data relied upon by the applicant, I note that an H&C application is to be assessed on the individual merits of the application. Statistics alone and in the absence of any analysis or consideration of the factors that might impact the interpretation of the data, fall well short of demonstrating, through clear and non-speculative evidence, that there is a likelihood of harm.[149]

The Court does appear to agree that a deferral officer assessing a deferral request should consider if an H&C decision is imminent.[150] Further, the Court often describes H&C applications as submitted "at the last minute." In the eyes of the Court, last-minute H&Cs appear to include applications submitted anywhere within six months preceding the stay hearing.[151]

In the spousal sponsorship context, the Court has similarly indicated that a spousal sponsorship can always be filed from abroad, if necessary,[152] and that an outstanding spousal sponsorship is generally not a serious issue.[153]

iii) What is the relationship between serious issue and irreparable harm?

The dataset demonstrates that an applicant can succeed or fail on any one of the three prongs of the Toth test. As a result, even if the Court agrees that a serious issue is presented by the Applicant's case, the stay could still be dismissed by the Court on the irreparable harm prong. For example, in one case, the Court found serious issues with the Officer's assessment of living conditions in the country of removal (hereafter "COR"), the risk of violence against women, and the best interests of the children analysis, deeming the analyses unreasonable. However, the Court found that because the alleged risks were generalized conditions rather than particularized, the irreparable harm threshold was not met, and the stay was denied.[154] In another case, although the Court found that the underlying issues were "not frivolous or vexatious" they still did not meet the serious issue threshold. If the presiding judge does not find irreparable harm, they can choose not to address serious issue or balance of convenience in their

[149] Appendix A, R106.
[150] Appendix A, R18.
[151] Appendix A, R19.
[152] Appendix A, R11.
[153] Appendix A, R52.
[154] Appendix A, R16.

determination.[155] Similarly, if the Court does not find a serious issue, they need not engage with the question of irreparable harm.

The dataset also indicates that the deprivation of an effective remedy is not judicially understood as constituting irreparable harm. For example, in one case, counsel argued that a) enforcing the removal of the applicant would "pre-judge" the application for leave and judicial review; b) CBSA had failed to observe a principle of natural justice by ordering the Applicant's removal before the adjudication of her Application for Leave and Judicial Review; and c) enforcing the removal order would cause the Applicant's leave application to become moot.[156] In the order dismissing the stay, the presiding judge stated that none of the serious issues arose from the decision underlying the leave application, and therefore the first branch of the Toth test was not satisfied.

Another case which found that the mootness of the underlying application did not go to irreparable harm supported the finding with the following logic:

- Assuming for purposes of this analysis that the Applicants established a serious issue as to whether the Officer's consideration of the children's best interests is reasonable, I have difficulty with the Applicants' position, that irreparable harm would flow automatically therefrom because the remedy sought in the application for judicial review would be rendered nugatory by removal. This position would result in irreparable harm automatically being established, in any stay motion where an applicant raises a serious issue surrounding analysis of the best interests of children in an H&C, deferral or other administrative decision, effectively conflating the first and second elements of the Toth test.[157]

Stay Decisions: A Closer Look at Irreparable Harm

Forms of harm

i) Best interests of the children

I analyzed how the Court treated the best interests of the children within the dataset. It is unclear whether the Court's treatment of the impact of removal on children is consistent. In the removal context, if the underlying decision is a CBSA deferral decision, then the Court must look at whether CBSA sufficiently engaged with i) any evidence put forward regarding the children's short-term interests in staying in

[155] See e.g., Appendix A, R73, R132, R19, and R159.
[156] Appendix A, R22.
[157] Appendix A, R106.

Canada; ii) any harm that removal may cause to the children; and iii) any specific needs the child has that cannot be met in the COR.

If an officer fails to engage with psychological evidence of harm to the child, this is a compelling reason to grant a stay. In most cases, it appears that a stay is granted to prevent psychological harm resulting from a rupture of a child's connection to something meaningful in Canada, be it school, religion classes, or a sports team. However, in other cases, a child's establishment in Canada may actually work *against* the plea to stay their removal. This is so when the court relies on a child's positive acclimatization in Canada as evidence that the child would adjust well to new conditions in their COR. One instance involved the best interests of a Grade 8 student who had lived in Canada for 6.5 years; who was president of the student council; had marks in the high 90s; was part of a city-wide orchestra of outstanding student musicians selected from schools in the city; played many sports like soccer, basketball, volleyball, and ultimate Frisbee; and desired to become a doctor practicing in Canada. The Court found the deferral decision findings "that he is doing well in his studies in Canada and has social skills to develop close friendships with a number of schoolmates demonstrating the ability to adjust to a new school system with proven academic ability and developing new friends" to be reasonable. The Court also agreed that while the child did not wish to leave his friends "there remains the means to maintain contact by Skype, email and telephone allowing the friendship to continue at a distance."[158]

Psychological or physical harm resulting from a deprivation of necessary medical care can also be the basis for a stay. However, judges will generally require evidence of lack of care in the COR specific to a child's conditions. A lack of such evidence could lead to a denial.

Similarly, providing evidence of the mental health consequences of removal is not enough to grant a stay. Applicants should also demonstrate, in addition to providing credible psychological evidence, that the required treatment is unavailable in their COR. If the underlying application is an Application for Leave of a deferral requested based on said medical needs, the Court will expect these needs to be of a short-term nature rather than "life-long:"

- A deferral of removal is intended to address short-term impediments to removal, and not life-long medical needs. Consequently, the applicant has not established that there is a serious issue with respect to this aspect of her deferral request.[159]

Risk to pregnancy constituted another short-term harm resulting in the Court granting the stay. In that case, CBSA had granted the deferral request until the Applicant's delivery. The court granted a further stay for "a

[158] Appendix A, R122.
[159] Appendix A, R148.

limited duration," given the serious issue. The serious issue in that case was whether the officer's risk assessment was unreasonable given the Applicant's former marriage to an alleged abusive man in Djibouti and her current marriage to a Canadian man:

- Counsel for the Minister acknowledges that if Ms. Amir is in fact married to a man in Djibouti, then "there is an issue here". I agree. Without expressing a view on the ultimate merits of the underlying application for leave and judicial review, and applying the elevated standard prescribed by Baron and Wang, I am persuaded that Ms. Amir has identified a serious issue respecting the CBSA officer's decision. For similar reasons, I am satisfied that irreparable harm will result if the stay is not granted.[160]

ii) Risks never assessed

Whether an Applicant received an adequate risk assessment while in Canada is critical to the success of the stay, highlighting the vital role played by every immigration proceeding up until stay proceedings. The Federal Court looks at the Applicant's immigration history in Canada to determine whether they've had a risk assessment before removal. The risk assessment may have occurred in the determination of a refugee claim or a Pre-Removal Risk Assessment ("PRRA") application. It appears the date of the risk assessment is irrelevant, assuming no compelling new evidence of risk has arisen since. In one case, the most recent PRRA had been conducted by an Immigration Officer eight years prior to the stay motion, which was considered sufficient because the Applicant had submitted multiple H&C applications and spousal sponsorships since.

For refugee claimants, their initial hearing at the RPD is foundational. The RPD findings impact all future immigration proceedings in Canada, including a motion to stay. One judge referred to the RPD decision in the case as the "backdrop" against which all other findings must be made.[161] These findings include those related to the Applicant's credibility and alleged risks. The Federal Court is careful not to substitute determinations made at the tribunal stage without evidentiary justification. Accordingly, CBSA may rely on the RPD decision in determining whether to defer the removal. For example, if the RPD found the Applicant to be not credible to their alleged risk of persecution, the CBSA can rely on these credibility determinations. The Federal Court takes a deferential approach to prior credibility determinations in assessing the risk of unavoidable irreparable harm.

[160] Appendix A, R30.
[161] Appendix A, R47.

However, sufficiency requires that the risk in fact be assessed, which means that a refugee claim wherein the RPD decision-maker denied the claim strictly on identity may result in an outstanding right to have risk assessed prior to deportation.[162]

The length of time someone has been away from their COR may exacerbate risk factors or, perhaps counter-intuitively, point away from risk. For example, in one case, the Court considered that the Applicant had been away from his COR for over 20 years. To the Court, this span of time indicated that the risk he had fled over two decades ago was no longer existent, and therefore, his return did not pose a risk to him.[163] In another case, the Court found that because the Applicant had been away from his COR for 30 years, the lack of a support system or ties to the country in itself posed a risk of irreparable harm.[164]

iii) Family separation

Many Federal Court decisions will dedicate a sentence or two to acknowledge that removal results in family separation. Described as "enforced separation," judges commonly acknowledge the "heartbreak" and "disruption"[165] that separating family members causes, including parents separated from their children. And yet, judges also describe family separation as an unavoidable consequence of enforcing Canada's immigration laws. Other judges bypass discussing the harm caused by family separation or deny it altogether, noting that many means of communication, such as Skype, can keep family members in touch even at a distance. Separation is characterized as "an unfortunate but expected consequence of removal."[166] Consistently, any alleged harm caused to a child due to a parent's deportation is seen as mitigated by the continued presence of the second parent. Below are some instances of how the court assesses family separation against the irreparable harm standard:

- The deportation of a child's father was not deemed irreparable harm to the Canadian child because the Canadian mother could remain in Canada.[167]
- The deportation of a father was not deemed irreparable harm because there was no evidence that the mother could not provide a "stable and loving environment for the child" pending the issuance of a visa to allow the child to visit their father.[168]
- The deportation of a mother did not constitute irreparable harm if there is someone to look after the children. In that case, the mother's daughter was in the custody of the father and stepmom. Her

[162] Appendix A, R20.
[163] Appendix A, R151. The COR was Guinea.
[164] Appendix A, R123. The COR was Somalia.
[165] Appendix A, R35, R175.
[166] Appendix A, R85, R126.
[167] Appendix A, R101.
[168] Appendix A, R82.

son was in the care of his grandparents. As such, the court concluded: "There is essentially no evidence to support a finding of irreparable harm regarding the children."[169]

- A 9-year-old child had not seen her father in two years, and so it could not be concluded that his absence would cause irreparable harm.[170]

Generally, because irreparable harm must be something outside the "natural" or "ordinary" consequences of removal, the Court may not consider harm caused by the family's refusal to separate. In other words, if irreparable harm can be mitigated or avoided by family separation, that case will not meet the irreparable harm standard. For example, suppose one parent could legally remain in Canada and continue to make an income that could allow them to support their family abroad. In that case, the fact that this parent would face financial hardship if removed to their country of origin is not considered:

- It arises as a result of the family's choice to relocate to Mexico if the Applicant is removed; this choice being made despite the right of all of the Applicant's family members to remain in Canada. Harm arising from the family's choice to relocate to Mexico cannot, in my opinion, be the basis upon which to conclude irreparable harm has been established.[171]

Similarly, if a Canadian child requires specific medical treatments available in Canada, and has sufficient support as deemed by the court, any harm they would face if removed with a parent is also not considered.

It is worth noting that while not apparent from the dataset, jurisprudence demonstrates that family separation can constitute irreparable harm if the impact of separation goes beyond the expected consequences of removal. For example, in *Tesoro v Canada (Minister of Citizenship and Immigration)*, the court indicates that the test is not "a sufficiently serious impact on family relations," but an impact that is more than the usual consequences, which is "a more difficult test to meet."[172] The Federal Court made the following comments in that case:

- The jurisprudence on the issue of family separation is far from clear. Although there are some cases that hold that family separation does not constitute irreparable harm, there are others where the court has taken the opposite position. It would appear that the only possible way to reconcile these diverse decisions is to accept that determinations of irreparable harm are very fact specific.
- […] when facts and discretion are all important, the significance of definitional differences in the applicable legal test may prove more apparent than real.

[169] Appendix A, R105.
[170] Appendix A, R8.
[171] Appendix A, R75.
[172] *Tesoro v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 148 at paras 33-35.

- Nonetheless, in my opinion, irreparable harm in this context may include family separation, and is not limited to threats to a deportee's life and limb. The more difficult issue is to delineate the circumstances in which family separation, and the disruption of personal and other important relationships, constitute irreparable harm.[173]

One case in the dataset demonstrated family separation resulting in consequences beyond the usual, involving a 33-year-old father of a Canadian child who came to Canada from Trinidad and Tobago when he was 12.[174]

iv) Psychological harm & Trauma

Another point of interest during my data collection was how the Federal Court deals with the psychological trauma of deportation. Most commonly, the Court questions whether the Applicant will be deprived of responsive medical treatment either because the treatment does not exist, or they are not able to access it. Below is one example of the Court's response to alleged psychological harm upon removal:

- "[…] the evidence relating to the medical circumstances of the applicants, particularly those of the minor son, while concerning, speaks to stress, anxiety, and depression relating to removal. The evidence does not indicate treatment for the health issues identified is unavailable in Nigeria."[175]

Consistently, cases involving psychological distress leading to suicidal ideation gave the Court pause. The court nonetheless looks for convincing evidence of the risk of suicide upon removal.[176] While there were not enough cases coded to understand the full extent of the Court's response to risk of suicide upon removal, this issue arose in discussion with lawyers, specifically in response to the types of harms they have found most consistently compelling to the Court.

v) Economic harm

An Applicant's inability to support themselves financially may provide a basis for an irreparable harm finding in certain circumstances. For example, if removal of an Applicant would deprive a Canadian child of their sole source of financial support, this outcome may warrant staying a parent's removal.[177] However, even in this context, the court will consider whether the Applicant under a removal order could make a comparable income to what they make in Canada in their COR. It is only when the Court finds

[173] *Ibid* at paras 31-33.
[174] Appendix A, R100. Note the underlying application was the judicial review of a TRP.
[175] Appendix A, R81.
[176] Appendix A, R11.
[177] Appendix A, R14.

convincing evidence that an Applicant's economic situation would be severely impacted by removal that the harm suffered by those dependent on that income may be deemed irreparable. The court will also consider whether the child has a secondary source of financial support. However, even if there is a secondary source of income, if the Applicant's removal will affect that person's ability to work, this may be considered "indirect harm" and warrant a stay.

If dependents are extracted from the equation, financial hardship born of general economic conditions alone does not meet the standard. The court's logic is that it casts too wide a net to justify a stay of removal for "any person in Canada who is outside their country of citizenship where the social situation has become difficult."

- As Justice Yvan Roy held in *Franco v Canada (Citizenship and Immigration)*: […] even though the social and economic situation in Venezuela has seriously deteriorated in recent years, the applicants' position would mean that any person in Canada who is outside their country of citizenship where the social situation has become difficult should benefit from humanitarian and compassionate considerations to stay in Canada. This, of course, is not the law.[178]

Aside from the issue of dependents, courts have taken into consideration the Applicant's age in the context of financial hardship. In multiple cases, the court cited the Applicant's age as an exacerbating factor when the Applicant has no support or home in their country of removal.[179] In one such case, the court considered that because the Applicant is 63 years old and her husband is incarcerated, she has no prospect of employment in her COR and is therefore, entirely dependent on family members in Canada for her survival.[180] A confluence of factors, including age, best interests of a child, and the socio-economic conditions in the country of removal, may also lead to a stay granted based on economic harm. For example, in another case, the court cited the Applicant's age as well as the fact that they had no financial support or home in the COR and had sole custody of a Canadian son. In that case, the court granted the stay.[181]

In another case, the Applicant argued "indirect economic harm."[182] The Applicant alleged that if he was deported, his wife's mental health would deteriorate, impacting her ability to work, and leading to occupational impairment. As the sole provider for their son, the wife would be unable to support their son or meet the income requirements for the future sponsorship of her husband. The Court granted the

[178] *Franco v Canada (Citizenship and Immigration)*, 2017 FC 1003 at para 7 as seen in Appendix A, R16 cited by: *Spooner Romero v Canada (Citizenship and Immigration)*, 2019 CanLII 843 (FC).
[179] Appendix A, R125.
[180] Appendix A, R61.
[181] Appendix A, R18.
[182] Appendix A, R50.

stay, partly based on irreparable harm, and partly on procedural fairness issues stemming from counsel incompetence.[183]

Additionally, the court may consider the existence of a support system as a mitigating factor in the case of potential economic harm. In one case, the 33-year-old Applicant had left Somalia at the age of three and sufficiently proved that they had no support system or ties to the country.[184] This case can be contrasted with another where the Court found that the Applicant, the father of a Canadian son, would have no trouble finding employment in their country of removal. In that case, the Applicant had come to Canada in 2003, unsuccessfully claiming refugee status in 2005. The outstanding immigration application underlying the stay was a spousal sponsorship in its first stage. The dismissal of their stay motion was further justified by the fact that the Canadian mother could support their 11-year-old Canadian son in the absence of the father. The Court agreed with the Minister's arguments, as follows:

- The Minister says that Mr. Niccon has provided no evidence that his wife is incapable of looking after their son. The Minister notes that Mr. Niccon's wife and son are both Canadian citizens, and have access to a broad range of social services should they be required. The son is not an infant, and can assist with many household chores. There is no evidence that Mr. Niccon will be unable to find employment in Bangladesh, where he has worked before, or that his family cannot visit him there. Despite his young age, Mr. Niccon's son has travelled to Bangladesh in the past.[185]

Overall, the court considered arguments pertaining to loss of income, and related factors, including the Applicant's age, whether an Applicant has a physical home to return to, or a support system to rely on. In sum, it appears that financial hardship may meet the irreparable harm threshold if either: a) the Applicant has particular vulnerabilities alongside evidence of financial hardship in their country of removal; b) the Applicant is a sole provider for a Canadian child; or c) the Applicant's removal will indirectly impact the provision or support to a child (i.e., the remaining parent will experience occupational impairment). On the other hand, if the Applicant cannot prove they will have trouble finding employment in COR or if there is another direct source of support in Canada for a Canadian child, financial hardship will likely not result in irreparable harm.

b. PROCEDURE

[183] The Applicant had multiple failed spousal applications attributed to counsel incompetence. One previous representative had her license suspended by LSUC. The deferral application was largely based on deprivation of natural justice.
[184] Appendix A, R123.
[185] Appendix A, R26.

Time Constraints

Given the time-limited nature of the process, I sought to understand exactly how time-limited most cases tend to be. Overall, approximately 61% of hearings took place on the same day or the day prior to the date of removal. Approximately 95% of stay hearings happened within the week prior to the date of removal, with the majority landing two days prior to the removal. As such, approximately 77.5% of hearings took place within three days of the removal. Only one hearing in the dataset took place earlier than one week prior to the date of removal.[186]

In terms of outliers, in one case, the stay hearing was held on the 24th of January, for a removal scheduled between the 27th and 29th of January. However, the Respondent received a call during the hearing that CBSA had postponed the removal and had not set a new removal date.[187] In another case, the presiding judge granted an interim stay of 4 days given that the scheduled next-day removal had not provided the Respondent with an opportunity to file a response to the stay motion. As a result, the new removal date in that case remained unclear. Finally, in 3 cases of 158, the removal date was not mentioned.

Applicants are expected to take immediate action upon learning of their upcoming removal from Canada.[188] Any delay risks jeopardizing their last chance to argue for a stay. Further, there is an expectation that Applicants act immediately following the receipt of an unfavourable decision and before being issued a Direction to Report from CBSA. Failing to do so, in the court's eyes, results in "last minute" and "short notice" hearings.

In the majority of decisions involving an alleged delay, the Court took the stance that the delay could have been avoided if the Applicant had acted in a timelier fashion. For example:

- This was the case even when an Applicant acted (sought counsel, submitted a deferral request and a stay motion) within a 5-day period, including a weekend, after being issued a Direction to Report. The Court stated: "The Applicant … did not file an application seeking judicial review of the negative PRRA decision and bring this motion for a stay until the day before his scheduled removal, necessitating a hearing on an urgent and short notice basis, for which the Applicant offers no explanation."[189]

[186] Appendix A, R16. The timeframe was 21 days.
[187] Appendix A, R45.
[188] Appendix A, R60.
[189] Appendix A, R96.

- In another case, the Applicant received their removal notice on January 12, 2019 (a Saturday) and submitted their stay on January 17, 2019 (the following Thursday), which the court described as submitting "a last-minute stay."[190]
- In another case, an 11-day period transpired between the Applicant's receipt of their removal order and the submission of a deferral request. The Court explicitly stated that hearing the stay may not be in the interests of justice. The Court referred to its discretion to refuse to hear a stay wherein the Applicant "failed to pursue deferral of the removal in a timely manner and to provide timely notice to the Court and the Respondent of the intent to pursue a motion staying removal in the event the deferral request was denied." Ultimately, the Court considered the merits of the motion, and the stay was dismissed.[191]

In one case, both the lawyer and the Applicant were disparaged in one sentence. In discrediting a psychological report submitted on behalf of the Applicant at the stay stage, the judge notes: "their lawyer seeking a forensic medical opinion at the 11th hour in the last of a series of unsuccessful immigration procedures brought by the Applicant."[192]

The Court most often described last-minute hearings as caused by the Applicant's failure to act earlier. In these cases, Courts expected an explanation from Applicants as to why they did not file their motion sooner.[193] The Court noted the impact of an Applicant failing to act in a timely manner on the Court and the DOJ. In one case, one of the "dangers" of last-minute stay motions included the Court or the Department of Justice not having the time to understand the Applicant's complete immigration history. In one case, the judge noted that this might make the Court or DOJ vulnerable to being "manipulated," for example, believing that the Applicant had never received a risk assessment when in fact, they had.[194] Consider the following passages for example:

- […] it is not fair to ask the respondent to prepare a meaningful response in a very short period of time, in particular during weekends. The respondent may have difficulty assembling the relevant materials and preparing submissions that are tailored to the facts of the case. Moreover, it is not in the interests of justice to ask our Court to decide such motions in a hurried fashion.
- […] we should not apply the law in a manner that rewards the strategic delaying of filing a motion for stay of removal. If we allowed the filing of such motions at the last minute, applicants could file a record that omits certain facts, hoping that the respondent will be unable to find them quickly.

[190] Appendix A, R37.
[191] Appendix A, R72.
[192] Appendix A, R122. Ultimately, the judge decided that the psych report was unreliable, stating: "there are concerns of an apprehension of bias of a physician providing more than 1000 forensic reporting letters for refugee claimants and other people with uncertain immigration status in Canada."
[193] Appendix A, R96.
[194] Appendix A, R131.

> They could try to create an atmosphere of urgency and an impression that the risk they face has not been thoroughly assessed. The interests of justice are better served by the timely filing of motions for stay of removal, allowing both parties to provide the Court will all relevant information.[195]

Evidently, the onus is on the Applicant to understand the implications of a refused immigration application and to take the appropriate course of action. If the Applicant fails to make the correct application in time, this works against them in the eyes of the Court. For example, failing to file a deferral request upon notice of removal and instead incorrectly relying on another application in process may negatively impact the judge's perception of the Applicant at the stay stage.

In one case, the stay order included the judge's analysis of whether the court should consider post-hearing submissions. In declining to assess counsel's submissions, the judge held they were not convinced that the Applicant did not have the opportunity to provide the Court with a complete record before the start of the hearing.[196] In another case, the judge declined to hear the stay because the Applicant submitted a late leave application, and the judge presiding over that application had denied the Extension of Time Request. As such, the stay judge stated they were not obliged to consider the Toth test absent a properly filed underlying application.[197]

There is no doubt that urgent legal proceedings cause a strain on the system and every actor involved. For counsel representing Applicants on a stay motion, it often requires gathering materials and forming arguments overnight. If the stay motion is based on an underlying deferral application, there is no guarantee that counsel will receive a deferral decision prior to the stay hearing. The empirical dataset reflects this reality, including decisions where the Court noted that the deferral decision had arrived "minutes" before the stay motion.[198] In those cases, lawyers may be unable to rely on their motion record fully, and may have to make oral arguments at the final hour in response to CBSA's decision.

For the Department of Justice, it means high-stress assignments and very little time to review materials. In one case, the Court granted an interim stay to give the Respondents time to file a response to the Applicant's stay motion and scheduled a continuation hearing for 5 days later.[199] Judges too, often have a negligible amount of time to review the record and make a significant decision. Time constraints are detrimental to every actor involved in the legal process, but most obviously to Applicants subject to these decisions taken in a "hurried fashion."[200] While not quantifiable through this data, further research

[195] Appendix A, R131.
[196] Appendix A, R85.
[197] Appendix A, R156.
[198] Appendix A, R20.
[199] Appendix A, R59.
[200] Appendix A, R131.

should examine the extent to which a judge's decision-making exercise is affected by the limited time afforded to them.

c. THE CHARTER

At this point in the research, we can at least assert that the Court acknowledges stay of removal motions *may* invoke interests protected by section 7 of the Charter given the risk to the Applicant's life or physical integrity upon deportation. And yet, in 158 decisions authored by 24 different judges, the Charter was only mentioned seven times by the Court, as follows:

- Two instances were with respect to ongoing Charter litigation pertaining to an issue raised in the present application.[201]
- Two instances referred to "a constitutionally compliant removal process" but did not proceed to conduct a Charter analysis.[202]
- Two instances referenced Charter language[203] but did not proceed to conduct a Charter analysis.
- The final occurrence cited Charter violations as a reason why the Court should be cautious about declining to hear a stay.[204]

In the context of ongoing constitutional litigation, the Court asserted that the Applicant's constitutional rights would be violated unless a stay is granted until the outcome of the litigation.[205] Otherwise, the studied body of stay decisions did not see a Charter analysis conducted. Rather, the court simply acknowledged that removal *could* engage constitutional rights, which necessitates a "constitutionally compliant removal process."

Finally, the Applicant raised the Charter on two occasions.[206]

B. EMPIRICAL FINDINGS

While acknowledging the empirical dataset relied on in this research is limited and therefore cannot be used to generalize, we can identify certain trends, as follows:

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[201] Appendix A, R124, R127.
[202] Appendix A, R20, R42.
[203] "The evidence adduced by the Applicant upon this motion does not show a serious likelihood of jeopardy to the life, security, or safety of the Applicant if removed from Canada at this time:" See Appendix A, R113, 117.
[204] Appendix A, R131.
[205] The litigation pertained to the deprivation of a PRRA applications for Applicants from then "designated" countries, which counsel ultimately successfully argued resulted in the risk of deportation prior to a risk assessment.
[206] Appendix A, R11, R108.

1. There is significant variance in what types of harm legally constitute irreparable harm. The Court relies on some criteria in specific contexts; however, the use of these criteria is not consistent. As such, while the nature of the irreparable harm assessment is indeed fact-specific, it is also highly discretionary.

2. There is also variance with respect to how judges approach the application of the tripartite test. Despite the jurisprudence indicating that the three prongs are not discrete and not a series of independent hurdles, the interconnectedness of each prong may be overstated. The dataset demonstrates that even when the serious issue pertains to errors in the Applicant's risk assessment, the Court's findings on the serious issue and irreparable harm may diverge and do not necessarily lead to a stay. As in the example above, even if a serious issue and irreparable harm are found to exist, a stay can still be denied if the Court finds that the harm is not particularized. However, given the Charter implications, if the serious issue pertains to a lack of a risk assessment or an adequate one, this may go directly to the irreparable harm argument.

3. The notion that being deprived of an effective legal remedy could constitute irreparable harm was most often rejected in the dataset. This notion was previously supported by *Melo*, where the Federal Court held although a serious issue concerning the best interests of the children of that case was not found, the dismissal of the stay would mean that:

> […] "the children's interests will be affected prior to a ruling being obtained on the extent to which their interests must be considered. This will effectively render the judicial review nugatory […] If there is to be any reality to the judicial review application, the status quo must be maintained. While the benefit in question may appear to be one for the children, it is also a benefit for Mr. Melo. I find that the loss of the benefit of the application for judicial review constitutes irreparable harm for the purposes of this application."[207]

This case is part of a line of jurisprudence indicating that where the law requires a government official to carefully consider a child's best interests, failing to do so constitutes irreparable harm.[208] However, the jurisprudence on this point is not consistent. Another line of jurisprudence disagrees that the mootness of an underlying judicial application can ground an irreparable harm finding. In *Figurado*, the Court stated that the issue of irreparable harm "can be answered in one of two ways." The first involves assessing the risk of personal harm to an individual upon deportation to a particular country. The second involves "an assessment of the effect of a denial of a stay application on a person's right to have the

[207] *Melo v Canada*, *supra* note 88 at para 22.
[208] See e.g., *Samuels v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1349; *Sowkey v Canada (Minister of Citizenship and Immigration)*, 2004 FC 67; *Okojie v Canada (Minister of Citizenship and Immigration)*, 2003 FC 905; *Mauricette v Canada (Public Safety and Emergency Preparedness)*, 2008 FC 420 at para 41.

merits of his or her case determined and to enjoy the benefits associated with a positive ruling." The court held that the underlying application possibly becoming moot upon deportation does not necessarily constitute irreparable harm.[209]

The Court stated:

> […] "the case law has not been unanimous on the question of whether an individual's removal renders moot a judicial review application or nugatory any remedy that could be granted under the *Federal Courts Act*, subsection 18.1(3)… while removal undoubtedly renders an underlying judicial application moot or nugatory, this fact alone should not constitute the only governing factor in the exercise of the Court's discretion to grant a stay, as it would otherwise deprive the Court of the discretion to decide questions of irreparable harm."[210]

Since *Figurado*, Federal Court of Appeal jurisprudence has held that rendering a proceeding nugatory does not necessarily constitute irreparable harm.[211] The cases included in this dataset appear to align with the Federal Court of Appeal's ruling.

4. It is interesting to notice the ways in which the Court frames the fairness interests at play with delay – almost entirely from the perspective of the Court or the Department of Justice. While reading the decisions, it is easy to overlook who the most vulnerable party is. Although the Court acknowledges the last-minute nature of the stay, judges are mostly silent on the possible impacts this could have on the Applicant's right to a full and fair process.

5. In 157 decisions authored by 24 different judges, the Charter was only mentioned seven times by the Court and not one case saw a Charter analysis conducted. The dataset puts into serious question the court's commitment to Charter compliance, which is a concerning trend that must be investigated by further research.

C. INTERVIEW DATA

a. SUBSTANCE

Federal Court stay motions carry legal and technical particularities distinct from other areas of law falling under the jurisdiction of the Federal Court. An essential distinction between stay motions in immigration law

[209] *Figurado v Canada (Solicitor General)*, [2005] 4 FCR 387 at para 42.
[210] *Ibid* at para 38.
[211] *Palka v Canada (Public Safety and Emergency Preparedness)*, 2008 FCA 165 at paras 11-16, 18-21.

versus other contexts is the potentially devastating consequences to human lives, including serious human rights implications.

Given the context, I question whether relying on a test based on the adequacy of money damages is appropriate. The Court itself has commented that the current test, which was migrated into the human rights context rather than customized for it, may be inappropriate. Naturally, one would ascertain that it may, therefore, need to be revised. Not unsurprisingly, the Court also added that the legal remedy in deportation cases is more aligned with those granted in Charter cases than in commercial cases, where the primary remedy is an award of money. But researchers who have examined Charter jurisprudence in the immigration context have described that it is applied "in a manner that would be unrecognizable to practitioners of any other area of law," and that the harms experienced by immigrants and refugees "have been stripped of constitutional meaning."[212] How do lawyers' experiences with stay law and procedure hold up against jurisprudence and the literature?

I interviewed legal representatives about their experiences representing Applicants seeking a stay of removal before the Federal Court. These interviews should assist in answering the broad questions associated with my research purpose, including: can a principled pattern be found within Federal Court's stay jurisprudence? If there is divergence, how is it justified? Furthermore, do stay proceedings truly act as a site for ensuring Charter compliance, as the jurisprudence expressly indicates? I presented lawyers with a set of ten questions. These questions prompted interviewees to share their experience representing Applicants on stay motions before the Federal Court. Questions addressed the substantive and procedural components of the process and allowed for discussion of any challenges posed to representatives.

As a "warm-up" question, I asked all the interviewees to describe the role of the Federal Court's stay motion to someone who is not familiar with Canada's immigration regime. Generally, lawyers described it as a "last resort," "last-ditch" effort to stay in Canada. Lawyers followed this description with sentiments regarding the significant difficulties posed by representing an applicant on a stay compared to other immigration applications. After providing briefly describing the technical requirements of a stay, one lawyer went on to say:

- "Usually, when [clients] come to us at the stay stage, they have already expended a lot of mental, emotional, financial resources in the process, so at the stay level, there is a lot of desperation; there is a panic because these individuals have built their lives in Canada, and so they appreciate that this is sort of a last-ditch effort. And there's this sense of urgency and they often don't have the resources that are needed for a time-intensive, rushed process – so it's a confluence of all those factors."

[212] Blum, *supra* note 37.

Lawyers emphasized the financial barrier posed by stay motions, which lends to their inaccessibility. As stated by one lawyer:

- "Often, a client may not have funds available to pay, especially if they need to pay everything up front due to the nature of the legal services (i.e., the client may be deported from Canada, and the likelihood of payment then decreases). Alternatively, if they require Legal Aid, they may not receive confirmation that they qualify in a timely manner, i.e., before services need to be provided."

The Tripartite Test: Common Concerns

Lawyers were also asked to provide their views on the application of the tripartite test. I explicitly asked interviewees whether they believed the tripartite test to be an adequate means of determining stays. By way of overview, the central tensions raised by the lawyers included:

a. The test may not have the capacity to respond to the human consequences in the immigration context;
b. The evidentiary standards presented by the tripartite test are not responsive to the reality of the stay process;
c. The variance between judges, particularly on the irreparable harm standard, results in an unfair process and a lack of foreseeability;
d. The balance of convenience prong does not serve the Applicant's interest, or justice.

Some of these tensions will be discussed more in-depth in the following pages.

i) Migration from Commercial Context

Half of the interviewees noted the test's commercial origins as one indication of its limitations in the immigration context. Specifically, lawyers noted that the RJR-MacDonald framework could not have envisioned the test being used to address the myriad types of harms that could arise upon the deportation of an individual from a country that, while not their home country, has become home to them.

Multiple lawyers agreed that greater progress could be made if the Court acknowledged the test's history and explicitly assessed its applicability to stays of removal. As one lawyer stated, because the original form and purpose of the test are no longer applicable, what is needed is: "a better clarification from the Court of how that tripartite test applies to refugee and immigration matters. Because we're not dealing with issues

of monetary damage or monetary loss, were dealing with human lives." Another lawyer stated, "The injunction test developed in an entirely distinct legal context might not be the appropriate one here."

Lawyers raised the development of the irreparable harm standard as particularly concerning. As one lawyer stated: "[…] our precedent memo that we work off talks about how if irreparable harm can be losing out on equity in a business or having to pay more taxes than you're supposed to – if that's irreparable harm than why isn't being torn away from your family or trying to re-establish yourself in a country that you've not lived in since you were a child? Why is that not irreparable harm as well?"

Further, numerous lawyers noted that the potential engagement of Charter rights at the deportation stage fundamentally changes the legal questions at play. There is simply more at stake. As stated by one lawyer: "[The test] is developed in a commercial context and so, there is such a radically distinct potential range of harms in the economic realm than there is in the human rights realm, especially when section 7 of the Charter is engaged."

ii) Heightened Evidentiary Standards

According to lawyers, the legal context where the injunction test was developed also speaks to the evidentiary standards inherent in the test – standards which many lawyers agreed are not generally responsive to the circumstances faced by an applicant at the brink of deportation.

As discussed in earlier sections, the serious issue threshold is elevated if the underlying application is based on the judicial review of a deferral request. For example, if the serious issue raised on the stay relates to an underlying application for leave and judicial review of a PRRA or H&C decision, a lower evidentiary standard applies. While outside the scope of this research, jurisprudence on deferral requests indicates that they should only be granted in exceptional circumstances, the upshot of which means CBSA officers' discretion is limited in granting deferrals, which goes to the likelihood that the Court will find a serious issue with the officer's decision on deferral.

Multiple lawyers described this elevated threshold (which requires the Applicant to demonstrate a "likelihood of success" or "quite a strong case" regarding the underlying application for leave[213]) as problematic. One lawyer described the elevated threshold in this context as punitive and explained that a deferral request is the only venue available to an Applicant. For example, an applicant may find themselves in this situation if they have not succeeded on prior immigration applications, have not filed those applications, or if there is simply no time to bring forward the appropriate application prior to removal. Another lawyer gave the

[213] See *Baron v Canada (Minister of Public Safety and Emergency Preparedness),* 2009 FCA 81 at para 67*;* and *Lewis v Canada, supra* note 29 at para 43.

example of a cessation of refugee status case where CBSA moved quickly on the removal of the claimant: "[…] in those cases, you don't have any means of beginning any other application challenging the position they're in, which means you're basically facing a test that is penalizing them for only having a deferral left as an option to have their case looked at."

Lawyers also referenced "the particularly heightened standard" of "clear, non-speculative, direct and personal evidence" to establish irreparable harm upon deportation. This standard was described as inappropriate and ultimately unjust with all things considered, including that individuals may have very limited time to compile their motion records before their deportation.

iii) Variance in Decision-making

Indeed, the most common critique pertained to the inconsistent application of the test. Lawyers described the variance between judges deciding stays as causing a lack of foreseeability for counsel seeking to prepare their client. Every lawyer premised their critique with the observation that whether the stay is granted depends more on the identity of the presiding judge than on the strength of the evidence before the court.[214] For example:

- "What I would also like to see is a more consistent application of the tripartite test. Because then applicants and applicants' counsel have a better idea of what to expect from the court. Rather than it being left like I feel it is now, at the mercy of the judge you happen to get that day."
- "It's so difficult to advise clients, when you're like well, you have this evidence, but I have no idea which judge is going to hear this stay, so I can't tell you if this will or will not meet the standard for irreparable harm because, for Justice X it will, I can confidently say that but for… Justice… I can name 8 or 10 right now… it won't.
- "Having been before the court on both sides, it really does depend on who your judge is and what their particular biases are."
- "It can be really frustrating, and this is through all of the different decision-making forums in the immigration system – the decision-maker of the judge that you wind up having is the most important thing."

Specifically, numerous lawyers noted divergence in the application of the irreparable harm standard:

[214] See e.g., the wide range in stay grants across judges in: Sean Rehaag, "Luck of the Draw III: Using AI to Examine Decision-Making in Federal Court Stays of Removal" (2023) Refugee Law Lab Working Paper (11 January 2023), Osgoode Legal Studies Research Paper No. 4322881, online: https://ssrn.com/abstract=4322881.

- "Serious issue is usually the more objective one, but with irreparable harm for example, one court can look at children being disrupted in schools as an irreparable harm, another court can say those are the ordinary consequences of deportation. […] there is so much divergent case law in irreparable harm and so it really leaves a lot of room for very discretionary, subjective decisions, which is an issue."
- "[…] I think a lot of it comes down to: is it really proving irreparable harm, or is it having a judge that's sympathetic to the Applicant's plight, or the Applicant's family's plight? That's the thing about Federal Court, there's a lot of wiggle room for the judges. And they don't have to cite any case law to justify granting a stay or not granting a stay."

iv) The Balance of Convenience

The last part of the tripartite test informing the Court's discretion in stay-decision-making is the "balance of convenience," which involves balancing competing interests between the Applicant seeking to stay and the government looking to remove. This third prong was described as a "throw-away" by multiple lawyers, some of whom stated that they may spend only one minute addressing it. Most lawyers felt that the balancing exercise did not play an essential role in the legal assessment of whether the Court should grant the stay.

Interviews also stated the Respondent rarely spend time on the third prong unless they're claiming the Applicant is coming to the Court with unclean hands or has a serious criminal record. One lawyer who has previously represented the Department of Justice on stay motions described the third prong as follows:

- "When I was at DOJ, it was about upholding the program integrity and the legislation, and the requirements under the legislation. As Applicant's counsel, it's more about the equities of the people and the individuals involved, and how greater society is not going to be disadvantaged if this person is allowed to stay. Do I spend a lot of time on it? In most cases, no. The majority of our time is spent on the other two prongs."

Multiple lawyers also described the third prong as a "platform" or "opportunity" for DOJ. One lawyer stated this prong "it never really ends up being a helpful argument for our clients because it's the third part – if you haven't succeeded on the first two then you don't get there, if you have succeeded on the first two then, you can only go down on that particular branch, but I personally have not seen that."

Lawyers described the balance of convenience assessment as "abstract." One lawyer explained that the government's interest in removing a person as soon as possible is an "abstract interest, which may not be quantifiable." To make it less abstract, one might benefit from considering the actual costs the state would incur if a person requesting to stay was allowed to. While the lawyer acknowledged the cost might not be

quantifiable, they mentioned that it is worth thinking about the issue on a conceptual level, i.e., what harms are caused to society when held up against the harms associated with family separation, for example.

One lawyer added that they believed the public should have an interest in protecting vulnerable people, which should include not deporting vulnerable members of our communities from a community and country they've lived for almost their entire lives – a discussion the court does not engage in but should, at the balance of convenience stage.

Aside from the test's challenges, one lawyer raised its potential strength: that it is broad enough to cover a wide range of potential harms. However, this attribute also opens the test to much variance. As they stated: "it's so broad that there's so much discretion and variation in what will move one individual judge versus another […] it's a mixed bag in terms of who you are going to get, what their views are going to be, and whether your client is someone who is going to benefit from this vagueness or are they someone who is going to get the short end of it."[215]

Another lawyer expressed concern that "carving out stay motion tests for different areas of law" would become "quite confusing and get convoluted." They emphasized clarifying the irreparable harm prong of the test rather than seeking a re-design of the test. In other words, how could the irreparable harm standard "translate to the immigration and refugee law context but still remain part of the original test?" Another lawyer provided similar thoughts, stating that the tripartite test is "something to work on" but must be responsive to subjective harms and carry more compassionate standards. Yet another lawyer responded to whether the test is adequate with "Yes and No – it's what we've got. And if you apply a liberal interpretation of it, where you do see in cases like *Melo*, you see that irreparable harm is more than just harm to the applicant, but it's also harm to their family […] So I would say when you have a liberal interpretation of the test, it can be adequate but when you have these stringent applications then no."

Irreparable Harm: Compelling Evidence

I asked lawyers what types of evidence of irreparable harm they found to be most persuasive to the Court.

i) Medical needs

[215] See e.g., Fatma Marouf, Michael Kagan & Rebecca Gill, *supra* note 43.

Every lawyer interviewed responded that the most compelling evidence on a stay motion is credible medical evidence. Lawyers articulated some criteria for what makes medical evidence convincing and credible:

- The medical evidence is relevant because it pertains to a serious medical issue that is either life-threatening or threatens to seriously compromise the foreign national's physical integrity;
- Evidence is personalized and from a medical professional who articulates that removal will have a detrimental impact on the foreign national's physical or mental health;
- The foreign national has an established professional relationship with that medical professional.
- The foreign national is actively receiving treatment, and that treatment would be interrupted, for example, chemotherapy for a cancer patient.
- The foreign national is actively participating in a program they have yet to complete, such as an addiction counselling program.

One lawyer described a situation where the medical issue pertained to the wife of the Applicant. She was a Canadian citizen who had lupus. In that case, they described the comprehensive evidence put forward to demonstrate the wife's upcoming medical appointments and the support offered by her husband, including getting her to those appointments, in addition to financial and emotional support. The evidence included letters from the wife's medical professionals, proof of upcoming appointments, the husband's financial documents, and affidavit evidence documenting the various ways he supports her.

The lawyer indicated they had primarily argued the stay should be granted because the couple had filed a sponsorship application (which would see the applicant gain immigration status through sponsorship by his Canadian wife), and because the application had been in process for a significant amount of time. However, they noted that it was more likely that the medical documentation convinced the Court to grant the stay. The lawyer explained that while "the imminence of a decision" – the likelihood that a decision will be granted in favour of the Applicant in the near future – is an important argument to advance, the Court is usually reluctant to grant a stay based on imminence.

Half of the lawyers discussed that the mental health impact of removal on an individual can be a compelling argument if supported by credible evidence. The court's responsiveness to these arguments surprised one lawyer: "I was actually really surprised by how well the court responded to our mental health arguments; how seriously they took it. That was the only reason that that stay was granted because of the mental health component and that came up during the irreparable harm argument, but I was surprised by it for sure."

Significantly, lawyers indicated that the risk of suicide is a real threat for many of the clients they represent – either for the individual being removed or their children with serious mental health issues. Some lawyers also mentioned their clients attempting suicide upon receiving the news of their removal. In one case, the

lawyer described that her client's treatment in Canada in response to the attempted suicide was still in progress, which would result in deporting her without a treatment plan.

Every lawyer interviewed discussed both how critical it is to establish an evidentiary record to support any arguments based on medical reasons, and the myriad of challenges collecting this evidentiary record presents. For example, arguments relating to precarious mental health issues or the potential for traumatization will likely not be afforded much weight by the judge without medical evidence. Further, the medical report should ideally demonstrate an established relationship between the foreign national and their medical professional. One lawyer described the "gold standard" for evidence as being an established professional relationship rather than a "one off" session or report, which is less likely to "reflect a meaningful or particularly deep professional opinion," in the court's eyes:

- "I feel that absent really strong, concrete, medical evidence from a long-term professional relationship, a one-off psych report is probably not going to do the trick. Oftentimes, you can arrange a psychiatric assessment for someone DOJ and the court already is prejudiced against and view as trying to concoct some new basis to stay in Canada, but the court gives it little weight because they think it's only been entered into for the individual's convenience."

According to lawyers interviewed, achieving this gold standard of evidence can pose a near-impossible challenge. As one lawyer stated: "there are just so many barriers to accessing mental health care in our communities especially for people who are low-income and have other stuff going on in their lives."

ii) The best interests of the children

Every lawyer mentioned the children's best interests as being persuasive evidence to grant a stay given the caselaw on best interests of the children. The best interests of the children may arise if deportation will cause a children's schooling to be disrupted in a significant way, cause separation between child-parent, or have a significant psychological impact on the child, for example. That said, all the above consequences must extend beyond the ordinary consequences of deportation.

- A few lawyers explained that the best interests of the children analysis can also be used against the child and their family. One lawyer characterized this as the legal principal "being turned on its head." For example, the court will describe children as susceptible and vulnerable, but then also describe them as resilient. According to one lawyer, the logic provided by the court is that given this resilience, "they can go anywhere."[216]

[216] This was also reflected in the empirical dataset, see Appendix A.

- A further limitation identified with the best interest of the children argument is when the harm attaches to Canadian children. As one lawyer described it, the court "somehow seems to hide behind Toth, and say, "well, the kids are not subject to deportation, so why should irreparable harm apply to them."" The lawyer described this application of the Toth test as "stringent" partly because it does not properly encompass the best interests of the child analysis.

Outside of medical reasons and the best interests of the children, no other evidence was specified as particularly compelling. In fact, one lawyer noted: "best interests of the children and medical reasons […] are the only two things that I find actually ever work."

For most factual circumstances on a stay motion, expert evidence was mentioned as being particularly compelling. For example, expert evidence could include evidence from medical professionals in the country of removal describing the availability of certain medical treatments. Other examples included reports from credible organizations specializing in human rights, women's, or children's rights. However, if such evidence has not already been obtained by a lawyer prior to the scheduling of the stay hearing, acquiring it within the timeline usually proves impossible. [217]

The Relationship Between Each Prong

According to Federal Court jurisprudence, the three prongs are equally important, and must all be met, but are not discrete. However, my examination of coded datasets paired with conversations with lawyers indicates that the Court often assessed the prongs discretely such that a judge could deny a stay based on one prong without evaluating another.

One lawyer described decisions which treat the prongs as discrete tests as "the worst stay cases I've seen." They offered one particularly concerning example:

- "I had one client from Somalia who lived in Canada since the age of 2, came here during the civil war in the early 90s and the Court, without deciding there was a serious issue, found that there was no irreparable harm and so dismissed purely based on irreparable harm for someone who spent their whole life in Canada and was going back to Somalia. No matter what you think the proper test is, that just can't be right. […] DOJ, they were all about serious issue, and kind of implicitly acknowledged that of course, if there was a serious issue about return to Somalia then

[217] As one lawyer noted, this type of evidence is especially critical if the client did not receive adequate legal representation the first time they applied for a pre-removal risk assessment (PRRA). If the second PRRA has yet to be determined by an officer, the court ultimately stands in the place of an officer or a tribunal member. This results in a situation where the court needs to be properly appraised of risks upon removal, which were never adequately assessed by a Canadian official.

there will probably be some harm. It was just a head-scratcher given that particular country and those particular circumstances. I don't know how you could ever reach that conclusion, but reach it they did."

Another lawyer pointed to the case of *Nsungani v Canada (Citizenship and Immigration)* in public record and decided by Justice Norris in 2019. In that case, the Applicant sought a stay of removal to the Democratic Republish of Congo (the DRC) where he had not lived in seventeen years. Underlying the stay motion was a refused deferral request based on two grounds: a pending H&C application and the risk to the Applicant's life and well-being in the DRC.

The judge found that the Officer's decision denying the deferral request was "exceptionally thorough and detailed" and that the Applicant had not met the serious issue threshold. As such, the judge did not deal with the irreparable harm prong, stating: "given my conclusion with respect to the first part of the test, it is not necessary to address the question of irreparable harm."[218]

The Applicant had put forward country condition evidence, including reports about the detention of deportees upon removal to the DRC. They had also tested positive for HIV in April of that year, and at the time of the stay hearing, had another four months of antiretroviral medical remaining in their treatment plan. The expectation was that the Applicant would continue antiretroviral medication for the rest of their life. At the time of the stay hearing, the Applicant had an H&C application in process for about four months, post-dating the HIV diagnosis.

While many stay decisions are sparse, this particular decision included reasons worth repeating here. In dismissing the stay, the judge stated the following:

- This outcome may appear harsh to some. The applicant arrived in Canada seventeen years ago, when he was fourteen years of age. He has little, if any, family or other support in the DRC. Conditions there are difficult, to say the least. However, the applicant has known since 2011 that he was facing deportation because of serious criminality and that he no longer benefited from the Temporary Suspension of Removals. The deportation order has been enforceable since December 2012, when the first PRRA application was rejected. Unfortunately for the applicant, he failed to take timely and effective steps that could have secured his status in Canada (as other members of his family have done). Instead, he let the clock run down until his last hope for a reprieve was a deferral of his removal. This was denied. The applicant's grounds for challenging this decision are not sufficiently strong to satisfy the first part of the test for a stay. As a result, there is no legal basis for this Court to stand in the way of the enforcement of the removal order.

[218] *Nsungani v Canada (Citizenship and Immigration)*, 2019 FC 1213 (CanLII), [2020] 2 FCR 101 at paras 37 and 51.

Here, too, the judge adopted the logic that all three parts of the tripartite test must be met to grant the stay, such that if one prong is not met, the Applicant fails the test. Although jurisprudence indicates that the strength of one requirement of the test relative to another can determine the outcome, a judge can also assess each prong discretely and deny a stay based on one prong. Irreparable harm evidence may therefore go unconsidered.

Multiple lawyers gave examples where irreparable harm should flow from a serious issue finding, given the potential consequences of deportation. As one lawyer stated:

- "The Toth decision, the first Federal Court stay decision from the late 80s it was about economic harm; not being able to carry on his business that he had established in Canada. If that's our standard of potential irreparable harm, then of course, separation from children or a spouse, even extended family, or separation from the only society you've known since grade school or something, it should just flow from serious issue."

That said, lawyers described the argument as a "dangerous" one to argue before the Court, given that some judges are adamant that each prong of the tripartite test represents a discrete test. As one lawyer described:

- "I made the mistake of saying where there's serious issue, irreparable harm flows. And [the presiding judge] interrupted me and said "Counsel! It doesn't flow. You need to show me that it flows." It was my first stay motion. And I had read case law that said it flows! She said there's three different parts to the test, and you have to prove all three of them."

One lawyer mentioned that instead of using the language of "flowing," which is drawn from the jurisprudence, they instead ask that the Court produce a consistent determination on serious issue and irreparable harm given that the findings and evidence underlying a serious issue remain relevant in the context of irreparable harm.

Nor does irreparable harm appear to "flow" from mootness of the underlying application. As discussed in the section on the relationship between serious issue and irreparable harm, while the Court acknowledges that an underlying application – for example, the judicial review of an H&C application – may become moot upon deportation, this does not necessarily constitute irreparable harm because this would deprive the Court of the discretion to decide irreparable harm.

Multiple lawyers challenged the Court's logic on this point. As pointed out by interviewees, an interlocutory injunction is unlike most legal injunctions because the underlying application usually becomes moot when a stay is denied and so, "the stay becomes a make or break." Related comments include:

- "The mootness of an H&C should be considered irreparable. Everybody knows the H&C is an inside Canada remedy. And then to say, well, you can still do it when you're outside Canada. It's a blatant misreading of the statute."
- "I personally feel that if someone is applying to stay in Canada by whatever means, and the removal is enforced, the enforcement of removal is irreparable harm. Because if their overarching goal is to remain in Canada for whatever reason – whether it's because their Charter rights are at risk, or their child is here, or they just want to stay and work, or they have family here, and they prefer to remain here because the economic situation in their country is not as great as the opportunities here in Canada – whatever the case, their removal from Canada is a form of harm that cannot be repaired; it can't be made whole by a subsequent decision in their favour."

The deprivation of the remedy underlying the stay adds to the high-stakes nature of this decision-making context. All interviewees noted that cases where applications continue to be processed after deportation – *and* be processed favorably – are extremely rare.

- "And in any event, it becomes moot because you've removed that person to torture. Or you've severed the relationship between the child and the parent by deporting the parent. Or you've negatively impacted the best interests of the children by sending them to the place where their interests are being undermined. And often in cases where the underlying JR is with respect to H&C applications that's exactly what happens."

Legal arguments with respect to the impact of removal on an underlying H&C application are often supported by statistics pulled from IRCC's Statistical Reporting Group on H&C grant rates,[219] demonstrating a low percentage of H&C approval rates post-removal relative to those who remain in Canada while their H&C applications are processed. Specifically, the IRCC statistics show only a *de minimis* 3.8% approval rate for H&C applicants who are deported, compared to 68.2% for H&C applicants in Canada. Lawyers describe the reality of lower chances of success on an H&C if you're outside Canada as "rudimentary and basic, it shouldn't have to be proven by statistics."

The Court, meanwhile, has generally disagreed that the statistics demonstrate that an H&C decision is less likely to be positive if an Applicant is deported. For example, the Court has stated that the IRCC statistics

[219] See e.g., *Barco v Canada (Minister of Public Safety and Emergency Preparedness)*, 2018 FC 421 at para 26; and *Dosa v Canada (Citizenship and Immigration)*, 2019 CanLII 391 (FC) at para 3.

"only indicate that there is a correlation between the rate of approval of H&C applications and the removal of applicants […] a correlation between rates of success in H&C applications and the departure of an applicant from Canada does not necessarily imply causation." Moreover, the jurisprudence on the issue demonstrates that the Court does not consider it an error for a CBSA officer to entirely ignore these IRCC statistics in their review of the deferral request. Finally, the Court has held there is no obligation under the law to have an individual remain in Canada while the H&C application is processed.[220]

As pointed out by one lawyer, the mere fact that IRCC continues to process H&C's post-removal satisfies the vast majority of Federal Court judges, thus ousting the argument that deportation prior to the adjudication of an underlying application can amount to irreparable harm. Lawyers referred to the Court's reliance on the processing of applications post-removal as a "legal fiction" because a) while IRCC may continue to process an H&C, it is unlikely that they will be processed favourably, and b) the Applicant in question will face a series of "hurdles" in attempting to return to Canada.[221]

- "The fiction adopted by the Court, that H&Cs can still proceed, that parents can still be reunited; doesn't consider all the hurdles that are insurmountable that will not be overcome because legally there is no entitlement. So, when you deliberately misread the law like that, it's definitely something that should be part of the irreparable harm that the court should be looking at but they're not."
- "Beyond a discretionary H&C decision, you still also need to go to the Minister and request discretionary authorization to return to Canada, and so even a positive H&C assessment doesn't guarantee any return to Canada. It remains a separate discretionary decision that's not the underlying application that is before the court, and so relying on this series of increasingly difficult hurdles to all fall in someone's failure to overcome potential irreparable harm – it's so far removed from the practical reality of what deportation entails for someone to get back to Canada."

b. PROCEDURE

One primary contributing factor to the lack of foreseeability, inconsistency, and incoherence attributed to stay motion proceedings and jurisprudence is time. As stated by Tavadian, the time crunch makes it "practically impossible to ensure that the law of stays is coherent and foreseeable." Moreover, as became clear from both primary and secondary datasets, technical and procedural constraints together deny all actors the opportunity to apply rigor. Accordingly, while evidentiary standards embedded in the legal test

[220] See most recently, *Fucito v Canada (Citizenship and Immigration)*, 2022 FC 379 (CanLII).
[221] The Authority to Return to Canada (ARC) is a discretionary decision taken by CBSA/IRCC which is required prior to the return of a foreign national who was previously deported from Canada: CBSA, *Authorization to Return to Canada,* online: <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/inadmissibility/reasons/authorization-return-canada.html>.

lack foreseeability, procedures surrounding Federal Court stay motions proceedings exacerbate the uncertainty.

Time Constraints

Every lawyer interviewed responded that the "lack of time to properly prepare" is the most challenging aspect of stays. Generally, the short timelines result in a "brutal" and "unfair" process. Below are a couple of descriptions of stay motion timelines:

- "Tight timelines are the biggest challenge, which cascades into a number of other challenges. One of which is knowing you have the complete, accurate file. For example, getting files in a timely way from the Board or requesting them from counsel who sometimes might not be willing to release them, or even gathering information from a client who is already in crisis, and going through the process of being removed. It can be uncomfortable to feel that the information that you're working with is not as firm or concrete as you might like it to be. If you're working on an RPD matter, you have time to work with the client and establish trust and really drill down into various areas you have questions about. But, with the stay, it's kind of like, we got to move; we've got to keep going. You know, you're preparing an affidavit with a client in detention, and you have one meeting with them to get it done, and there might be areas that you want to get more details about but you're just not able to."
- "I find that generally, CBSA gives very, very short notice of removal arrangements, and so working within a very constrained timeline is the most significant problem for those particular cases."

The deferral context exacerbates time constraints. As one lawyer stated: "this is especially relevant when a deferral request has been submitted, and not answered in a timely manner. But it is also relevant when CBSA provides very short notice of removal arrangements." Every lawyer responded that the earliest they will receive a client's removal notice is two or three weeks prior to removal for non-detained clients. In terms of time to prepare for the stay hearing, most lawyers indicated the most common timeframe is one week or less:

- "Anecdotally, for the stays I have done over the years, I would say that the average time to prepare is less than one week. Although a deferral request may have been submitted prior to that, the CBSA delay in responding means that the final decision regarding deferral is usually received less than a week before the removal date, if received at all."

One lawyer noted that they recently received five weeks' notice of their client's removal, which was "a real luxury, but uncommon."[222] Therefore, within 2-3 weeks, lawyers may have to file a deferral request if there is no underlying matter and prepare the stay record to file with the Federal Court. Lawyers who have not previously represented the applicant must also understand their client's immigration history and collect the necessary documents to meet the evidentiary requirements within this time. Lawyers described preparing either a deferral request or a stay record under a time crunch as involving:

- putting together an affidavit;
- "scrambling to find an interpreter";
- trying to gain access to a client in custody;
- obtaining a client's files from previous legal representatives or administrative tribunals
- obtaining medical records;
- obtaining expert evidence;
- arranging for a psychiatric assessment.

Limited time puts the soundness of the legal process into question. As some lawyers described, they commonly find themselves preparing for the stay application at the deferral stage to increase their chances of having a complete record for the court at the hearing. While this approach may be practical, it was described as bad litigation: "That's not an ideal way to practice as a lawyer but that's what we do. We try to conform to the limitations by doing as much as we can prior to the decision that […] is subject to litigation and to compensate for the lack of time, but it shouldn't be on our shoulders to do that."

Truncated timelines present the significant challenge of quickly collecting all the required evidence. As some lawyers described, if they had not previously represented the foreign national, they may have to reach out to prior legal representatives to understand their client's immigration history in Canada. If a foreign national has been in Canada for many years or had multiple legal representatives, this may become time-consuming. In other cases, a foreign national may have been through immigration proceedings without a legal representative, which creates a further challenge of reaching immigration offices or tribunals to access records.

Indeed, because of the sometimes sudden and often fast-paced nature of the deportation process, it is not uncommon for foreign nationals to find themselves with a short period of time to retain a lawyer to represent

[222] While outside the scope of this research, a distinction is made here between detained and non-detained clients because detained clients are scheduled for removal on much shorter timelines. The justification provided by CBSA for the shorter notice and faster removals being that detainees should not spend more time in detention than absolutely necessary.[222] This would be in violation of section 9 of the Charter. See also *Brown v Canada (Citizenship and Immigration)*, 2017 FC 710 at para 159*,* noting that a minimum legal requirement of lawful detention for immigration purposes is that the "Minister of PSEP must act with reasonable diligence and expedition to effect removal of a detainee from Canada."

them on a stay motion. Lawyers' expressed frustration at the amount of time and stress spent assembling a complete court record given incomplete information, describing it as a" significant and recurring problem" that "butts up against the courts expectation that a complete, accurate immigration history has to be provided in these records."

The interviews expressed that so little time affects every aspect of the process, including but not limited to:

- A lawyer's ability to collect and brief themselves on their client's entire immigration history;
- A lawyer's ability to put forward compelling evidence before the court, including expert evidence;
- A lawyer's ability to make cogent arguments;
- A client's ability to access counsel to represent them on their stay motion;
- The opportunity to establish trust in the lawyer-client relationship, which can impact the strength of the evidentiary record;
- The client's ability to collect enough resources to pay for legal representation;
- The emotional and psychological impact on a client when the deportation process transpires rapidly.

One lawyer explained that of all the challenges created by short timelines, the inability to practice in a trauma-informed manner is one of the most serious. They described collecting detailed information for a deferral or stay affidavit from someone they had never met previously under tight time constraints as jarring for both lawyer and client:

- "There is no time to validate how my clients are feeling and support them. Because you need to prioritize just getting the record done and filed. So obviously, it's horrible for clients."

They added that it must be "so bizarre" for a client to be asked to share what may be highly distressing information during a potentially traumatizing period to a lawyer they may have only met a few days prior to stop their imminent deportation. The situation is exacerbated for those in detention, sharing this information through a window. As described by one lawyer, this situation "doesn't leave a lot of room for justice:"

- "Chances are, if you're just going off of Google and trying to find someone in a short period of time *and* you don't have a lot of resources *and* you don't have something exceptional, then it's hard to describe stays as a meaningful safety valve."

<u>CBSA's Discretionary Powers</u>

This research focuses on Federal Court decision-making. But it must be acknowledged that the stay motion process unfolds at the Federal Court level and is directly linked to procedural aspects of CBSA removals, including the "vast discretion" afforded to CBSA officer scheduling removals. Multiple lawyers emphasized the role played by CBSA in *creating* an urgent process.

CBSA policies of enforcing removals as soon as possible[223] are a cause for concern among legal representatives, given the wide-ranging and severe fairness implications associated with this policy. The result is clients who require urgent legal representation because of the short notice given by CBSA of their removal. Several lawyers expressed concern regarding this short notice, describing it as "unnecessarily short" and "really cruel."

The timeframes within which applicants can file a stay motion depend on when the CBSA issues a Direction to Report for removal or when the CBSA responds to a deferral request if there is no underlying matter. Because of this framework, Applicants usually cannot ask for a stay hearing ahead of time because filing the stay with the court is contingent on a CBSA action. As articulated by one interviewee: "If we could go to court two months in advance of the removal, we would – but we're just not allowed to because we don't have the right decisions or refusals underlying the stay."

The practice of issuing a DTR as it stands typically involves CBSA calling in a foreign national to inform them of their removal date and then requiring them to return in about two weeks with a plane ticket, indicating that if the foreign national fails to provide a plane ticket, CBSA will purchase one for them.[224] The two-week period granted by CBSA was referenced by every lawyer as unfair and unjustified, especially given the reluctance to amend the date if the lawyer raises compelling reasons for postponement.

However, given the removal date is discretionary, this can provide some leeway for lawyers to raise issues during the call-in meeting with the CBSA officer overseeing the removal. For example, a lawyer may request a later removal date to allow a child to finish their school term. However, some lawyers noted that in most recent years, it has become more challenging to ask for an extension and less likely for CBSA to be agreeable to one.

One lawyer described a stay matter in October 2022, wherein their client was informed on October 7th that they were being removed on October 24th, the Friday before Thanksgiving. The client was an 18-year-old who had been living in Canada since the age of 6. The lawyer explained that he asked CBSA for a few

[223] See e.g., CBSA, "Operational Bulletin ENF 10 on Removals" (pdf): "The objectives of Canada's immigration policy concerning removals are […] ensure that foreign nationals who are the subject of enforceable removal orders leave Canada immediately, and that the removal order is enforced as soon as possible […]": online: <https://www.canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/enf/enf10-eng.pdf>.
[224] See CBSA, *Arrests, Detention, and Removals*, online: <https://www.cbsa-asfc.gc.ca/security-securite/rem-ren-eng.html>.

more days to allow them to pursue everything possible for their client, given the setbacks that closures on Thanksgiving Monday could cause. The CBSA officer responded that the timeframe provided (17 days) was already relatively generous and that he would not change the date based on counsel's preference.

In cases where the underlying matter rests on a deferral request, lawyers may file the stay *without* a decision from CBSA to have the stay heard prior to the deportation date. For example, if a deportation is scheduled for the 15th of the month and CBSA has not issued a decision by the 13th or 14th of the month, lawyers have no choice but to file the stay in the absence of a deferral decision. In this case, lawyers base their application on what is referred to as a "deemed refusal," given that they do not have a decision from CBSA. CBSA may produce the decision the night before a stay hearing, the morning of, or even during the hearing. Lawyers then find themselves either attempting to amend their materials to include the decision, or making oral arguments not included in their filed materials, given the last-minute receipt of the CBSA decision.

Whether the Court will take judicial notice of the discretionary power and leverage afforded to CBSA is unclear. However, a few lawyers noted that the court appears to have recently become more aware of CBSA's role in either issuing a Direction to Report mere days prior to removal or, in the case of a deferral request, waiting until the last minute to issue a decision.[225] Indeed, the most recent practice notice states that "The Court recognizes that applicants sometimes make a timely request to the Canada Border Services Agency ("CBSA") seeking to have their scheduled removal deferred, but do not receive a response to their request before they begin to run out of time to access the Court."[226]

FC Practices: Access to Justice Concerns

Interviewees raised Federal Court rules as a corollary of the time-rushed process. The practices were described as exacerbating rather than alleviating the pressure caused by tight time periods to prepare for a stay. The most recent Federal Court Practice Notice raised concerns among multiple lawyers, cited as evidence of the disconnect between the stay process design and the reality of removals.

One interviewee explained that their office was involved in the Citizenship, Immigration and Refugee Law Bar Liaison Committee while drafting the Practice Notice. Regarding the concerns raised by their office, the

[225] This rise in awareness can be partly attributed to matters raised by the Citizenship, Immigration and Refugee Law Bar Liaison Committee, which involves quarterly meetings between Federal Court members and members of the bar: <https://www.fct-cf.gc.ca/en/pages/about-the-court/liaison-committees/citizenship-immigration-and-refugee-law-bar-liaison-committee>.

[226] In recognition that deferral decisions are not always received prior to the hearings of the stay motion, the Court states that "it is open to applicants to include, in the underlying application for leave and judicial review and the motion, a summary request for an alternative remedy of mandamus in the event that the deferral decision is not issued by CBSA prior to the hearing of the stay motion: Federal Court, *Consolidated Practice Guidelines for Citizenship, Immigration, and Refugee Protection Proceedings*, *supra* note 65.

lawyer stated: “I don’t think the Court listened very well at all,” noting that the content highlighted as concerning was left intact in the finalized Practice Notice.

On such concern was that the requirement for counsel to include an Applicant’s complete immigration history, stated in the Practice Notice as follows:

- Related and relevant prior immigration decisions involving the applicant or his/her immediate family members should be provided by the applicant within their motion record (for example, RPD, RAD, PRRA or H&C decisions and past requests for deferral of removal). If such related decisions are not provided, an explanation must be given for the failure to do so.

Within the same Practice Notice, the Federal Court stated that the motion record “must be succinct and sufficiently condensed” and that while some circumstances may call for a larger number of documents, “situations in which more than one hundred pages of materials may be required to support a motion for stay of removal should be considered to be exceptional.”

Further, the Practice Notice directs that the stay motion must contain “everything required by the Court to make its decision”[227] such that “the parties should not request the Registry to copy and bring to the Court’s attention related files or motions. The Motion Record as filed in the stay motion must speak for itself.”

Lawyers commenting on this Practice Notice found this guidance to conflict. One lawyer explained that if an Applicant had Canadian RPD, RAD, PRRA, and H&C decisions, they could take up 70 pages of the 100-page record:

- “You can’t say that 100 pages is appropriate while also requiring what could be a substantial amount of documentation. That seeming conflict was totally ignored, and the wording stay exactly as it was in the draft upon publication.”

While the value of having an applicant’s entire immigration history in one record is evident, it is not clear that this asset outweighs the constraint it puts on counsel’s ability to present evidence to the Court. Additionally, the Court’s directive that the stay motion record be a stand-alone record disallows counsel from referring to arguments or evidence filed in a perfected leave application record, for example, a leave record for a PRRA application.

In sum, in preparing a stay record, abiding by the Federal Court directives requires counsel to:

[227] *Ibid*.

- provide the Court with the full range of the applicant's immigration decisions;
- limit the record page numbers to 100 pages save for in exceptional circumstances; and
- ensure that the record contains "everything required by the Court to make its decision," implying that the content of leave applications should not be relied on.

Lawyers described these directives as "a significant expenditure of time and additional resources by an applicant to make things a bit simpler for a judge," and as "tough to reconcile in certain cases."

Specifically, lawyers shared that the stress of condensing the record while meaningfully addressing the irreparable harm branch ultimately overrides all other challenges of preparing the motion:

- "Establishing the allegations the client is making; establishing that they happened; establishing that there's an objective basis to fear being removed as a result of that; getting in social science literature about the impact that removal can have on a person's journey towards recovery; the impact of removal on children's development and mental health. There's so much to get in there when you're talking about irreparable harm. Really challenging to narrow it down."
- "When you're talking about irreparable harm based on personalized harm, essentially risk allegations, DOJ is very quick to cite that it can't be speculative, and must be grounded in clear, direct evidence. But then you're very contained in the amount of direct evidence you can file in a very, very small motion."

Overall, lawyers described the Federal Court's directives to be in extreme tension with the role of the Court as the final safety valve to ensure Charter rights. Because ultimately, the rules restrict the evidence counsel can put forward on an Applicant's life, liberty, and security interests.

c. THE CHARTER

I asked interviewees the following question regarding Canada's *Charter of Rights and Freedoms*: Have you ever argued the Charter on a stay motion? Why or why not? If you did, can you recall the court's response? Below are various observations made regarding the Federal Court's approach to the application of the Charter on stays of removal:

- The Charter is a "derivative argument," argued indirectly as irreparable harm;
- The constitutionality of the underlying decision could be raised as a serious issue;
- Charter rights cannot be accessed until the end of the immigration process;
- Given the time-limited nature of the process, there is no time to argue the Charter;

- A very minimum threshold applies to whether Charter rights have been met.

Lawyers explained that the Charter is applicable when Charter rights are implicated in the underlying matter, and agreed such is the case in a PRRA application. This accords with the fundamental principle under section 7 of the Charter that individuals are entitled to a risk assessment prior to being removed from Canada. As stated by one lawyer:

- "There's really no way to disagree or to wiggle out of the Federal Court of Appeal binding jurisprudence that section 7 is engaged on an allegation of risk at the stage of removal, and so it needs to be addressed."

In that context, Charter rights activate with an allegation of unassessed risk or new evidence of risk. Several lawyers agreed that the PRRA/risk realm is the only context where raising a Charter argument would be "uncontroversial."

One lawyer explained that in her experience, the Court's Charter analysis only goes so far as to ensure that the procedures laid out in the IRPA were adequately followed. As such, if a risk assessment occurred at some point in the Applicant's immigration history, then the process can be said to be Charter compliant: "The Court can then say that Charter rights have been met because the process itself ensures that the Charter rights are met – to the minimum level."

However, one lawyer observed that the stay motion venue is an inadequate remedy in a situation where risk was never assessed. They explained that essentially to decide whether the stay should be granted to determine alleged risk, the stay motion judge must conduct a risk assessment. In addition, procedural complications, such as delay, might also taint a judge's evaluation of whether a further risk assessment is warranted:

- "Given the limitations of time, and all of the procedural complications, judges might not be able to understand why this client didn't retain a lawyer sooner, why they are even in this position – because they missed their PRRA form deadline for example. But people who work with vulnerable Legal Aid clients might be able to understand it better, if the client was living through a situation of precarious housing, domestic violence, addiction, they've got other stuff on their mind and honestly forgot."

Regarding the appearance of Charter rights at the final stages of the immigration process, lawyers articulated the following:

- "We keep reading case after case after case suggesting that there's no engagement of section 7 at the IAD or at inadmissibility stage; it's all done at the stage of removal while it isn't. It's only if you fall into the definition of a PRRA established by Parliament."
- "For example, the Court in B010 – when you throw out a statement that you can't access Charter rights until the very end of the process – what are we doing? So they can be subject to a range of unconstitutional processes because they might get the chance to raise Charter issues at some point?"
- "It feels like you can lodge your complaint to the complaints department, but the complaints department is so overwhelmed that you can only make a complaint 24 hours before the claim expires […] if Charter arguments are going to be at the end of the process then the process should be more robust, and that requires more time to be able to develop arguments and to be thoughtful about them."

Procedural constraints, including limitations on time and page numbers, were also cited as deterrents for raising Charter arguments. One lawyer stated that the page limits established in the Federal Court's Practice Notice of June 24, 2022, are "in such extreme tension" with "the role of the Court as the final safety-valve to ensure Charter rights" because it limits the amount of evidence you can forward on life, liberty, and security of the person interests. As explained in the section on procedural challenges, providing the court with an applicant's complete immigration history leaves very little breathing room for Charter arguments. In addition to time and thoughtfulness, arguing the violation of a Charter right requires a hefty evidentiary record. As stated by one lawyer: "you're just never going to choose to use that space on a probably losing argument that most judges don't want to hear."

Given this status quo, lawyers explained that they will likely argue the Charter in a different venue, for example, a judicial review of a PRRA assessment, where they would also have more time to prepare cogent Charter arguments.

Indeed, most lawyers responded that they had never raised the Charter in a stay motion hearing. Most lawyers also mentioned the court's reticence to hear Charter arguments:

- "I have not argued the Charter on a stay motion. The reason is likely because other issues seem to be more clear, especially best interests of the children (BIOC), or other family related issues. Perhaps the fact that caselaw on these issues is more developed may also be a factor."
- "There's such resistance to [Charter arguments] in the immigration context. I'm more hesitant to throw Charter arguments at the court to see what will stick because they get shot down so often, and the timing is such that it's hard to be thoughtful about those arguments."

- "It just depends on the judge. But most of the judges, as soon as they hear Charter, they roll their eyes. There are so few that actually entertain it."
- "In the PRRA/risk realm, where I don't think [the Charter argument] is controversial, I haven't had a problem. But in other situations, in *any other removal context*, you'd get a pretty dismissive reaction from most judges."
- "It's implicitly discouraged because I have never seen [Charter arguments] go particularly far."

Two lawyers stated that the only time they had heard of Charter arguments raised in the removals context during the time of ongoing constitutional litigation regarding section 112(2)(b.1) of the IRPA, and even then: "it was a very secondary argument. They were told to move along by the judge who was presiding." Similarly, a former government lawyer stated the only time they responded to section 7 arguments was when Applicant's counsel raised them in relation to the PRRA bar.[228]

Outside of the refugee context and risk allegations, the opportunity for Charter arguments does not often present itself. As expressed by one lawyer:

- "The court understands very much what their obligations are and what their role is in protecting section 7 interests as a safety valve […] in risk-based allegations for PRRAs –anything to do with PRRA eligibility or a JR of a PRRA, or a JR of an RPD for someone who is RAD-barred – but I don't think outside of that context, the Charter gets you very far, in my experience."

One lawyer shared a concerning example of where they believed the Charter should have been relevant but where the Court dismissed them. That case involved an individual who was found by the Refugee Appeal Division (RAD) to be at risk in their country of removal based on generalized risk under section 97(1)(b)(2) of the IRPA. The RAD agreed that criminal gangs had targeted the claimant and would likely target them upon their return; however, given the generalized nature of the risk, their refugee appeal could not succeed. The individual's representative filed an H&C. At the stay of removal hearing based on the underlying H&C application, their lawyer argued that while the applicant was not found to be at a personalized risk, section 7 of the Charter should apply because:

- it is broader than sections 96 and 97;

[228] Persons who have received an adverse decision from the Immigration and Refugee Board on their refugee claim or from IRCC on a past PRRA application must wait 12 months before applying for a new risk assessment. This year-long wait provides CBSA with an opportunity to initiate removal proceedings. In addition, depending on an individual's immigration history, this period is when arguments pertaining to alleged risk, including the lack of a recent risk assessment or new risk, may be made. See Immigration, Refugees and Citizenship Canada (IRCC), "Processing PRRA Applications – Applicability of the PRRA bar," online: <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/refugee-protection/removal-risk-assessment/applications-intake.html#applicability>.

- the RPD and the RAD cannot consider it; and
- the RAD finding directly implicates the individual's section 7 rights to life and security of the person.

According to the lawyer on this case, the Court dismissed this argument, giving counsel the impression that they thought "it was absurd to be arguing section 7 in an H&C context." While the stay was ultimately granted based on another ongoing application – a PRRA reconsideration – the lawyer took issue with the court's response to the application of section 7 in the H&C context:

- "I was disappointed that the court couldn't at least admit that it is a serious issue if someone who is not at risk under section 96 or 97 but is at risk of death then maybe we should pause the removal to make sure that this is being properly considered."

D. INTERVIEW FINDINGS

1. Substantive Amendments to the Tripartite Test

The test for interlocutory injunctions applied in the immigration context, has received little attention. Those who have written about the test have noted its inadequacy concerning decisions that have potentially devastating consequences for human lives. A litigator for the Department of Justice writes in his 2010 graduate thesis on stay motions that the notions underlying the test are "highly uncertain" and "at times purely random."[229] Inconsistent results produced by the test create an ambiguous body of law and contribute to a highly unforeseeable legal process.

Lawyers provided some suggestions for amending the test. One lawyer proposed the test be reduced to the serious issue and irreparable harm because "the balance of convenience will always rest with the underdog. What is the actual *inconvenience* of a stay?" They explained that any arguments the Department of Justice would raise at this stage, such as clean hands doctrine, are usually argued as a preliminary issue to avoid engaging with other arguments and described the third prong as an opportunity for the government to "double barrel:"

- "[…] these are life-altering decisions that undermine legal remedies available to the applicant in Canada and could lead to permanent, irreparable harm, so how can the balance ever favour the government where there is no irreparable harm save and except for them not following the law?"

[229] Tavadian, *supra* note 50.

Other lawyers elaborated on this point, stating their belief that the balance of convenience factor of the test should be removed altogether because it serves to maintain the status quo for the government. Further, they pointed out that the government could also invoke irreparable harm at the second stage of the test, which allows a platform for government interest in deporting a foreign national. As such: "having the balance of convenience prong just gives one more advantage to the government that does need to be there […] even in the most heinous example which is serious criminality […] there are ameliorative effects for the government to utilize."

Given that the Federal Court may be the only forum in which the best interests of the children are determined (for example, if an Applicant seeks a stay pending leave on an H&C application), one lawyer believed this interest should be formally encompassed in the legal test for stays. The best interests of the children could appear as a formal step in the analysis, rather than a subsidiary argument.

Outside of amending the test itself, other lawyers suggested modifying the test's application. Most lawyers interviewed called for concrete criteria or guidance as to how standards are applied, to achieve greater consistency and coherence between stay decisions. As one lawyer stated:

- "[…] the irreparable harm prong is obviously the most difficult for immigration and refugee law in applying the tripartite test – so what I would find helpful is, going back to the inception of the tripartite test, is a better understanding or better clarification from the court of how that tripartite test applies to refugee and immigration matters."

Another lawyer suggested that appellate-level guidance is needed: "There should be guidance. Why do some judges think the same economic harms qualifies as irreparable harm and others don't? What we probably need is appellate level jurisprudence on this."

2. Understanding Deprivation of a Remedy as Irreparable Harm

Consider the argument presented by multiple lawyers that removal itself is irreparable harm. The logic is that the underlying matter cannot proceed to adjudication, and even if it does, the Applicant will not necessarily benefit. However, given the structure of Canada's immigration legislation, even if an Applicant succeeds on an underlying judicial review after they have been deported, they still require authorization to return to Canada. The Authorization to Return to Canada (ARC) is a wholly discretionary decision. In this context, irreparable harm flows from the deportation order itself as it results in the deprivation of a meaningful remedy.

As we saw in the dataset, the Court has rejected the notion that irreparable harm should "flow" from the serious issue. The Court has since reiterated that harm "does not necessarily flow from the establishment of a serious issue."[230] Instead, irreparable harm "flows from clear and non-speculative evidence."[231]

However, this may be one issue upon which Federal Court judges do not see eye-to-eye. In *Erhire v Canada (Public Safety and Emergency Preparedness)*,[232] the Applicant was scheduled for removal to Nigeria on September 7, 2021. The stay hearing, heard the day before, was based on an underlying deferral application. The first serious issue raised related to the CBSA officer's rejection that a deferral was necessary to give the Applicant time to arrange for their reception in Nigeria – not because the CBSA disagreed arrangements were needed, but because the CBSA was in the process of making these arrangements. Justice Norris, the presiding judge, believed the rejection of this evidence to be unreasonable because while the officer may have "presumed" that "whatever was ultimately put in place by the CBSA would be suitable and effective," the CBSA did not yet know what those arrangements were. Therefore, it was not a sound basis upon which to refuse the deferral request.[233]

The Court granted the stay. In the judge's analysis of the relationship between serious issue and irreparable harm, Justice Norris cites *Little in Canada (Public Safety and Emergency Preparedness) v Thomas*, where the decision reads: "[i]n these particular motions for interim relief, the first and second stages of the RJR-MacDonald framework are often very closely related, in a way that may not arise in interlocutory injunction or stay applications in other areas of the law."[234] While that decision was taken in the context of a stay to release a party from detention, Justice Norris states that in his view: "this observation is equally applicable to stay applications sought in connection with an application for judicial review of a refusal to defer removal." He goes on to hold:

- […] "[i]f the applicant were to be removed before the final determination of her application for judicial review of the deferral decision, she would suffer irreparable harm <u>because she would be deprived of a meaningful and effective remedy in that proceeding.</u> Having persuaded me that she is raising serious issues on her application for judicial review (on an elevated standard, no less), the applicant has also persuaded me that she will suffer irreparable harm if the status quo is not preserved by staying her removal from Canada. An order setting aside the refusal to defer and

[230] Appendix A, R97.
[231] *Yu v Canada*, *supra* note 99.
[232] *Erhire v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 941 (CanLII).
[233] Described by Justice Norris as "a fundamental gap in the chain of analysis that calls the overall reasonableness of the decision into question." See also *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 at para 96.
[234] Here, the Minister of Public Safety and Emergency Preparedness sought stay of a decision of a Member of the Immigration Division that released the Respondent from immigration detention. The Court applied the tripartite test, resulting in the grant of the Minister's request for a stay: *Canada (Public Safety and Emergency Preparedness) v Thomas*, 2021 FC 456 (CanLII).

> remitting the matter for reconsideration would be meaningless and ineffective if the applicant was already in Nigeria when it was made. No other available remedy could make up for this (emphasis added)."

This judicial opinion seems to align with those lawyers who believe that being deprived of a meaningful and effective remedy should constitute irreparable harm by law.

As discussed in the interviews, decisions such as this one, are a positive development because they account for the actual impact of deportation on an Applicant's ability to pursue their underlying application in Canada. However, in the H&C context, there continues to be a line of jurisprudence related to H&C applications, which upholds the "fiction" that H&C applicants who are deported can have their applications processed from outside of Canada. According to multiple lawyers, the judicial reasoning flies in the face of reality. Applicants face numerous and often insurmountable hurdles in physically returning to Canada. How such an enormous variable could be at play yet not accepted by the Court puts the meaningfulness of stays in this context into question. A more positive development would see the Court explicitly acknowledge that the enforcement of a removal order causes significant barriers to an Applicant's return to Canada, directly damaging the interests they seek to protect. That said, as pointed out by one lawyer – if more judges accepted that enforcement of the removal order in these contexts amounts to irreparable harm, then the tripartite test would ultimately turn on serious issue.

At this point, we have enough data to critically examine what is more important: the maintenance of the interlocutory injunction test or the application of legal instruments responsive to factual circumstances. At minimum, the above suggestions give us a starting point for reflecting on new ways to approach stay law.

3. Unfortunate but Ordinary Consequences

As previously described, stays of removal are considered an extraordinary equitable relief requiring special and compelling circumstances.[235] As a result, harmful consequences considered inherent to removal will likely not justify granting a stay. Those consequences considered "ordinary" similarly may not attract Charter protections. Stays of removal continue to be described as an "exceptional" remedy, requiring compelling circumstances beyond the "ordinary," which paves the way for the Court's justification of harsh consequences.

[235] See *Canada (Minister of Citizenship and Immigration) v Harkat*, *supra* note 21. Also consider this lawyer's comment: "I think that that's probably the reason that *Chiarelli* has been allowed to be propagated. So many DOJ memos start with: "an immigrant doesn't have an unqualified right to be here" – like what does that mean? Then where are they going? And if you're not connected to the corollary of that, then it's actually totally fine to just say that, because you don't understand then what? Where do they go? You understand intellectually but you don't have the same visceral reactions:" See LLM Interview Transcripts.

As one lawyer described, Department of Justice pleadings commonly assert that a particular set of circumstances should not warrant a stay "if the stay is to maintain its meaning as an exceptional remedy." This logic, they explained, can lead to cruel results, especially in the case of what is considered the "ordinary consequence" of family separation. As one lawyer put it:

- "A bunch of the things the Court says are the ordinary consequences strike me as particularly cruel. What does it actually mean for a couple to be separated? What does it actually mean for parents to be separated from their children? What does it actually mean for the elderly and their children to be separated? I think more weight should be given to those factors."

It is important to note that while international human rights documents define the family as "the natural and fundamental group unit of society" and explicitly reference the right to legal protection against the arbitrary interference with the family unit, the sanctity of family life does not apply in the context of removal.[236] Generally, it becomes apparent that the "unfortunate but ordinary" logic expands the range of human consequences ousted from the irreparable harm consideration.

4. The Magnitude of the Harm

Researching stay cases with the serious consequences of deportation in mind exposes the Court's approach to harm, including the limited analysis of the nature and effect of deportation. According to multiple lawyers, one feature of this approach is the law and the Court's refusal or inability to appreciate the magnitude of certain harms – especially those that are not physical in nature. This feature of law may be one contributing factor to the dismissal of alleged harms outside the realm of those strictly related to "life or limb."

For example, on the Court's conception of harm, lawyers referenced how judges respond to family separation. Many discussed how the abstraction of harm allows the Court to minimize that harm. One lawyer gave the example of suddenly becoming the sole provider of one's children, and imagined asking the Court: "is that realistic? Could you do it?" Accordingly, if harms were somehow made more tangible to decision-makers, the conversation may proceed differently:

- "The whole family crumbles […] I think sometimes, because the risks are so abstract in terms of what happens to a person if they're deported, or in terms of the consequences of having to do everything alone as a single parent, it's abstract because you may not have had to do it – like even if you're divorced, you probably had the resources to hire help. Not a lot of our clients do. So, I think

[236] Note however, the Charter makes no explicit reference to the protection of the family.

if there were a way of making people connect more to the lived experience of people in such different circumstances, that would be very helpful."

Another lawyer described this challenge as follows:

- "Trying to make a pitch of how removal will impact a child's development when the H&C officer said they can stay in touch over FaceTime and when the parent is back in the country of origin. Or arguments about the irreparable harm that a person living with addiction or precarious mental health is going to experience by just going through the removal process. It can be really challenging for sure."

Indeed, empathy can be a central ingredient of fair decision-making. As noted by some interviewees, conducting a fair assessment prior to removal requires judges to empathize with the Applicant's potential reality upon removal. Further, these observations validate comments made in the literature regarding the narrow application of the Charter.[237] It appears constitutional protections are reserved for deportations *plus* extreme or grave harm. Otherwise, harmful immigration measures that do not lead to grave human rights abuses do not attract constitutional protection.

5. Stay Motion Procedure Perpetuates Unfairness

Injustices relating to stay motions largely stem from procedures grafted onto a legislative framework rather than directly from an unjust law or government action. Overall, the most common sentiment expressed by lawyers was frustration with Federal Court and CBSA practices. Further, while lawyers suggested changes to the substantive legal test applied by the Court, they more frequently took issue with the way the law is interpreted and applied. Most lawyers expressed frustration with biases or leanings of various judges, which appear to result in vast differences between stay grant rates.

The three most common concerns raised by lawyers with respect to stay motion procedures were:

- The tight timelines;
- The central role played by CBSA in establishing the timelines; and
- The outcome is dependent on the judge, not the evidence.

[237] According to Professor Hudson, the irreparable harm standard relies on "shoddy criteria." This status quo, he argues, serves to legitimize the availability of constitutional protection only when deportations also result in extreme, grave, or irreparable harm. Hudson, *supra* note 35 at 92.

Overall, lawyers emphasized procedure over law as the most challenging and concerning aspect of stay motions. While most lawyers believed the tripartite test to be inappropriate to the deportation context, this concern was outweighed by procedural fairness concerns arising from both CBSA and Federal Court practices. Lawyers noted that cogency of the arguments they might present on behalf of their clients was mainly limited by the lack of time, resulting from CBSA's policy to enforce removals as soon as possible. The sentiment received from most lawyers was: "if only the timelines were more realistic," more would be possible, including greater fairness. Below is a summary of where more time is direly needed, as articulated by lawyers:

- Greater notice for the foreign national of their removal;
- A reasonable timeframe within which lawyers must submit their deferral materials;
- A reasonable timeframe for CBSA to meaningfully engage and respond to deferral requests;
- A reasonable timeframe for counsel to prepare the stay motion record; and
- Reasonable notice to the court of scheduled stays, and a reasonable timeframe for judges to review stay motion records.

The lack of foreseeability with respect to when CBSA will issue a Direction to Report for removal also contributes to the urgency. Court procedures further debilitate a lawyer's ability to present a strong case for their clients. Lawyers cited technical requirements, the judge's apparent misunderstanding of CBSA procedures, and the variance in judge stay grants. The jurisprudence was described as "confusing," "sprawling out of control" and "skewed." The reasons cited for this confusion included a confluence of the following factors: i) a limited number of reported stay decisions; ii) the limited content of a stay order, including the lack of legal citations or reliance unpublished decisions;[238] and iii) the leanings/biases of individual judges presiding over the case.

Federal Court decisions were described as so varied that the identity of the presiding judge becomes the most important factor in predicting the outcome of the stay.[239]

6. The Charter is Restrictively Applied

To persuade the Federal Court that section 7 rights apply upon deportation, it seems an Applicant must present evidence that goes to risks considered in a Pre-Removal Risk Assessment application. The engagement of Charter rights is often conditional on whether an applicant falls within the PRRA definition, such that the risk they are claiming is that of persecution as defined in the *Geneva Convention*, torture, death, or cruel and unusual punishment. The PRRA definition is narrower than life, security, and liberty

[238] See e.g., Rehaag and Thériault, *supra* note 71.
[239] For supporting research see e.g., Rehaag, *supra* note 214.

interests. Further, it is a definition established by Parliament rather than a constitutionally protected right. Technically speaking, the PRRA definition should not legally supersede the Charter. And yet, it does.

Reflecting on examples, one lawyer recalled a case outside of the stay motion context, where they relied on the Charter in a challenge against processing fees for low-income families. The court decided the case on an ultra vires argument. Based on their experiences, the lawyer advanced the belief that the Court prefers non-Charter arguments: "to make the Charter inapplicable and avoid expanding refugee and immigrant rights to Charter protection. Generally, I think the Federal Court is loath to see the Charter apply."[240]

While how the Federal Court responds to Charter arguments outside of the stay motion context is beyond the scope of the paper, it is worth noting how observations on the Court's Charter approach align inside and outside the stay motion context. That stays of removal have been framed explicitly by the jurisprudence as the point at which Charter arguments may become relevant appears largely irrelevant. Whether deliberate or not, the effect is to limit the law's engagement with immigrant rights in a manner that remains largely unjustified by the Court.

PART VII: ANALYSIS & RECOMMENDATIONS

Stay of removal motions carry particularities, making them distinct from applications filed under other areas of law within the jurisdiction of the Federal Court. The particularities associated with stay motions and their placement in the legal regime are important to recall when making recommendations. Specifically, stay motions present a unique legal conundrum because while procedurally designed to be an interim remedy, they commonly result in final decisions. While stay motions are technically preliminary motions, the reality is that if a stay motion is not granted, the dismissal may be dispositive of the underlying application.[241]

Further, the Court's process to have a stay motion heard is extremely time-limited, as evidenced by the jurisprudence, the dataset, and as described by every lawyer interviewed in this research. Accessing the stay remedy requires Applicants to carry out brutal acts of efficiency. Truncated timelines result in limited time to find lawyers, prepare clients, gather evidence, and present cogent arguments. In turn, Federal Court judges also face the undesirable position of making life-altering decisions under a time crunch and with limited time to examine the evidence before them. The Federal Court's attempt to develop guidance for bringing forward a stay motion exacerbates these challenging circumstances by constraining the physical space afforded to counsel to make arguments.

[240] LLM Interview Transcripts.
[241] One lawyer commented that this has consistently been the case throughout their practice, as they have never had a situation where the stay was denied but then subsequently, leave was granted on an underlying application. If it happens, it is in very rare circumstances, for example, due to a Charter issue or a parallel proceeding.

There is no precedent in any other area of law where such high-stakes are determined through a preliminary and truncated process. And yet, immigration law provides no framework for how the stay motion process should proceed. What we have is a uniquely time-limited, space-constrained, high-stakes legal process lacking a regulatory framework and with drastic human consequences. It is not hard to see why this system design raises concerns within the legal community. It should be raising alarm bells.

1. Realistic timelines

The stay process needs more time. Time constraints combined with the Court's directives on stay motion records stifles robust arguments, puts procedural fairness at risk, and presents access to justice issues. Suppose we as a society are motivated to have a legal system that avoids decision-making on short notice and with incomplete records. In that case, shouldn't the spotlight be on the process perpetuating these timelines rather than on the individuals subject to them?

The CBSA, counsel for both parties, and Federal Court judges would all benefit from a process design that allows for more time between the notice of removal and the removal date. Applicants would not have to scramble to find counsel, sometimes over the weekend, to agree to represent them in an expensive and high-stakes court proceeding. Parties would not have to appear before the Federal Court without a decision from CBSA. Counsel would have the time to collect the necessary evidence to make a compelling argument for their clients. Judges would have more time to engage with the arguments and evidence put forward by Applicants in their motion record.[242] As one lawyer put it, "there is no reason that everybody has to be on their back foot – like *everybody* in the system."

Firstly, a timeframe requiring CBSA to provide greater notice of removal arrangements should be established. Given the massive implications associated with deportation, procedural fairness demands fair warning, which the system deprives most deportees given the short turn-around times between the issuance of a removal order and the scheduled removal. I suggest that four weeks' notice would result in a significant improvement to the process. However, when these four weeks interact with the proposed two weeks afforded to counsel to file their motion, the foreign national is once again time pressed to secure legal representation. I propose a minimum of three months' notice, which takes into consideration that Applicants seeking a last-resort immigration avenue to stay in Canada are in a highly vulnerable position, and often resource-strapped. More notice would allow all parties sufficient time to adequately prepare for

[242] Guidance with respect to substantive components of the legal test too, would be more feasible if judges were afforded more time to engage with stay arguments. As discussed by a few interviewees, while appellate level guidance is not possible with the current timelines, it would be worth considering the benefit of challenging certain stay decisions at the appellate level to bring cohesion to certain areas of stay law. However, this would require the Federal Court to certify a question.

the stay motion, including gathering the necessary evidence. The Court could have a reasonable time to engage with the evidence and to adjudicate. More time could also see fewer stay motions dismissed for delay or going unheard.[243] Finally, more notice would allow the CBSA to engage with deferral decisions.

A stay based on a deferral request should compel the CBSA to respond to that request within a certain timeframe. As described in the interviews, CBSA deferral decisions may not be received until the day of the hearing or even during it. Lawyers described this reality as a "CBSA-created emergency" and "being at the mercy of CBSA." A fabricated emergency can be resolved by allowing more time. Assuming CBSA's continued involvement in the process, the agency should be compelled to respond to deferral requests at least two weeks before the removal date.

Thirdly, more time is needed at the conclusion of a stay hearing. The reality of legal proceedings transpiring hours before the scheduled removal of a foreign national is a problem in itself. As seen from the dataset, the majority of stay motions were heard by a judge the day of or the day before the deportation date. Nearly all stay hearings – 95% – were heard within the week of the deportation. Practically speaking, Applicants do not have the opportunity to prepare themselves for a negative outcome – be it selling their house, tying up their employment, or saying their goodbyes. I argue that the proximity of an individual's stay hearing, and deportation is a preventable cruelty and appears to be one symptom of inadequate notice.

2. Regulatory framework

Taking an aerial look at the placement of the stay motions in Canada's immigration regime, it becomes abundantly clear that ensuring a fair process should not be falling on the shoulders of the Applicant, and yet it is. For example, the status quo requires the Applicant to be extremely efficient in order not to lose access to the stay remedy. So how do we justify a system design that allows such high-stakes decisions to occur on truncated timelines and with a clear lack of procedural safeguards? One perhaps obvious antidote to the absence of a fair process is to establish one.

The overall absence of legal authority in the stay context is glaring. The main authority governing stays is the Federal Court Act and ongoing Practice Notices issued by the Federal Court. Otherwise, the IRPA is silent on stay motion procedure. It is unsurprising then, that CBSA becomes the protagonist in the stay of removal process, a perverse reality when CBSA is seeking to speedily enforce the very removal the foreign national is seeking to halt. Moreover, when, if, and how stays are filed by a foreign national is influenced by CBSA's actions preceding the date of removal, including the time available between the Direction to Report and the removal date and the timing of CBSA's deferral decision.

[243] See e.g., Rehaag, *supra* note 214.

Because stay decisions rely on caselaw not codified into statute, it leaves far too open a judicial deference to CBSA. The Federal Court Rules alone do not suffice as a legislative framework for a high-stakes legal remedy. The legal system requires comprehensive change, first and foremost, because of the impact that stay motions have on a person's life. At the very least, legal actors should start imagining a legal structure within immigration legislation that would govern stays, including timelines and procedures toward achieving greater fairness to all parties involved.

As a start, legislative amendments could regulate the procedural/temporal aspects of stay motions to mitigate the procedural unfairness faced by so many Applicants seeking a stay under a time crunch. For example, the timeframes described above could be built into the law, just as they are for other administrative immigration proceedings.

3. Responsive legal doctrine

Research findings indicate that while flexibility in the application of a legal test allows for nuanced decision-making, it also results in a passive approach to law-making. Particularly in the immigration context, this passivity puts the protection of human interests at stake. Applying the tripartite test to stays of removal in immigration is not responsive to the high-stakes analysis at play, including whether the applicant's life is at risk if they are deported from Canada. The tripartite test also carries high evidentiary standards to prove irreparable harm, which appear to be in tension with Federal Court practice directives to file small motion records.

While some lawyers believed the test to be workable, most found it to be inappropriate to the context. Overall, lawyers agreed that the RJR-MacDonald framework should be modified in some way – either substantively or in its application – to produce legally sound results. One common observation among lawyers is that the balance of convenience prong is only legally relevant in context to the extent that it is necessarily injurious to an Applicant. The suggestion to codify the best interests of the child principle into the tripartite test regardless of the underlying application (in the same way it is codified in law) supports the argument that the test could be better designed to respond to the range of harms at play upon deportation, including the harm to children and families.

Deportation is a harsh consequence. Yet, the range of hardships associated with deportation is mostly relegated from the analysis because the law characterizes them as "natural" or "ordinary" consequences and, as such, "inherent" to deportation. A narrow definition of harm endangers lives. The unfortunate but ordinary logic must be critiqued and re-visited to ensure an equitable stay process. Harm should be understood more broadly to account for the full scope of human rights implications upon deportation.

4. Robust constitutionalism

Canadian courts have consistently found that section 7 of the *Charter*, the right to life, liberty, and security, is not engaged by deportation itself. At the same time, access to the Federal Court is described by the jurisprudence as the "last step in a complex process" and one of many "safety valves,"[244] which guarantees that persons are not removed from Canada without due consideration for their Charter-protected interests. The jurisprudence also accepts that these interests would not have been examined in earlier immigration proceedings because the stay motion is the site for ensuring Charter compliance. For this very reason, the Court has stated that a judge's discretion to decline to hear a case should be exercised cautiously. As stated by Justice Grammond in *Beros v Canada (Citizenship and Immigration)*:

> First, in many cases, motions for stay of removal involve a risk to the applicant's life or physical integrity. Those interests are protected by section 7 of the Canadian Charter of Rights and Freedoms. This Court's role has been described as a "safety valve" that guarantees that persons are not removed from Canada without due consideration for their Charter-protected interests: Atawnah v Canada (Citizenship and Immigration), 2016 FCA 144 at para 23, [2017] 1 FCR 153. We are reluctant to expose someone to risks of that nature simply because the person did not act as quickly as we would have expected in challenging the removal.[245]

The data reveals what the jurisprudence does not regarding how the Charter applies to an individual facing removal from Canada. Not only are Charter rights not considered by the court in stay motion hearings, but Charter arguments are at times outright dismissed by presiding judges.

These results indicate the validity of scholarly work describing the Court's engagement with the Charter at the point of removal as illusory. Given the weight placed by jurisprudence on stay proceedings as the forum for immigrants' Charter rights, these findings are confusing as much as they are concerning. The empirical data combined with lawyers' observations allow us to conclude that the Court is largely unwilling to engage with the Charter on a stay of removal. The unwillingness commits the Court to a narrow application of the Charter. Whether an absolute right to remain in Canada exists or not should not lower the standard for providing a rigorous legal analysis prior to deporting an individual from Canada. This research also reinforces the appraisal that ordinary immigration consequences do not cross the threshold of attracting enhanced procedural protection, and instances where the Court will engage with Charter protections are severely limited.

[244] See *Revell v Canada (Citizenship and Immigration), supra* note 125.
[245] Appendix A, R131; *Beros v Canada (Citizenship and Immigration)* 2019 FC 325 (CanLII) at para 7.

We see, then, the relationship between a narrow definition of harm and a narrow application of Charter protections. According to Graham Hudson, irreparable harm is "the crack" in the court's overall logic about the strength of constitutional protections because immigration decisions only attract constitutional scrutiny if a claimant can demonstrate irreparable harm over and above the removal – "the constitution does not recognize immigration consequences simpliciter." Further, as observed by Blum, "the Charter here becomes illusory as at the point of removal" because while finally engaged, it does not mean the Federal Court will "let a refugee go back and constitutionally challenge the validity of their exclusion." [246]

This research further highlights the illusory nature of the Charter at the point of removal. In response to the question of how system design ensures Charter rights of immigrants are protected prior to removal, we can answer that, in large part, it doesn't. In response to whether the final legal frontier just before removal provides an appropriate forum to make Charter arguments, we can answer that, in large part, it doesn't. Recent Court directives appear to further disable or damage an Applicant's ability to bring forward compelling Charter arguments. The Court's more recent limitations on page count combined with the requirement for complete documentation of an Applicant's immigration history is in tension with the Federal Court's role as a final safety valve.

There is a glaring lack of legal justification for the absence of a forum for immigrants to raise Charter concerns *and have them considered*. Within the framework of robust constitutionalism, the immigration regime's treatment of constitutional protections does not provide answers to the "whys."[247] The datasets in this research expose a weak constitutionalism at best and an unlawful process at worst. Stronger constitutionalism would demand justification for why a legal system can push engagement with the Charter to the margins only to leave it unattended. The data supports the argument that the promise of Charter protection at the site of stay proceedings permits Canada's immigration laws to circumvent section 7 at every other stage of the process. Heckman discusses this logic, stating that it has not prevailed in the contexts of other multi-stage proceedings that may result in detention or imprisonment, such as in the extradition and penal contexts. According to Heckman, withholding section 7 rights due to "later" steps in the process implies "a standard of causation more onerous than the "sufficient causal connection" standard adopted by the Supreme Court in Bedford. It requires that state action be a foreseeable and necessary cause of the prejudice to the person's s. 7 interests – a standard expressly rejected in Bedford."[248]

Courts should provide a more comprehensive analysis of what is at stake for the person scheduled for deportation and a meaningful balance of those interests with those of the state. Without this meaningful balancing, courts are making blind assessments rather than compassionate, or even contextualized ones.

[246] See Hudson, *supra* note 35 at 87; and Blum, *supra* note 37.
[247] Grey, *supra* note 45.
[248] Heckman, *supra* note 115.

5. Greater consistency in decision-making

Inconsistency plagues Federal Court jurisprudence on stays. While this may be true of other areas of law, such varied irreparable harm findings are particularly jarring and have not been adequately addressed by the Court. The incoherence between decisions exposes a high degree of judicial variance in stay grants. Interviews conducted for this research further demonstrate that the identity of the presiding judge is the primary factor for determining the outcome of the stay. If the Court acknowledged the variance in stay of removal grants and the serious fairness issues this poses, efforts to reduce the variance could be made.

The high degree of variance between judges on stay matters thrusts corresponding and problematic aspects of stay decision-making into the spotlight, including the dearth of law in this area, the incoherence in stay jurisprudence, and the limited time afforded to all parties involved. The process would appear almost ad hoc in form. While outside the scope of this thesis, the research findings also speak to the blurred distinction between law and discretion. Judicial oversight comes with the promise of objectivity and fairness, in contrast to the arbitrariness of a discretionary administrative decision taken by an immigration officer.[249] However, as we have seen, the exercise of a judge's discretion is the most important independent variable in determining the outcome of a case. The stakes involved, both for the legal system and the Applicant seeking to stay their removal, are simply too high for the status quo to be accepted. An unstable rule of law does not bode well for fair outcomes in the face of enormous stakes. Neither does it bode well for justifying stays as a constitutionally sound "safety-valve" for immigrants seeking to stay in Canada. Finally, this feature combined with the restrictive nature of the Court's approach to immigrant rights puts into question whether the Court currently provides a meaningful remedy at all.

6. Greater judicial awareness of enforcement practices

CBSA's programs, investments, and initiatives have consistently included the goal of facilitating "timely removals."[250] It is the state's prerogative to make removals happen and to make them happen fast. The Federal Court stay process also presents a race against time. The Court process requires Applicants to take proactive legal steps against their removal with near immediacy or risk losing out on the stay motion process entirely. As we saw in *Ocaya v Canada* from the dataset, an Applicant who received notice of his removal arrangements on a Saturday was reprimanded for not requesting a deferral of his removal until the following Thursday, one day before his scheduled removal. His motion was considered a "last minute" motion, wherein the judge cited an unreported case, that such motions "do not give the Minister an adequate opportunity to respond, do not facilitate the work of this court, and are not in the interests of justice

[249] See Anna Pratt, *Securing Borders: Detention and Deportation in Canada*, (Vancouver: UBC Press, 2005) at 55.
[250] CBSA, *Overview of the Removals Program*, *supra* note 12.

(Matadeen v Canada (Minister of Citizenship and Immigration), unreported, June 22, 2000, Court File No IMM-3164-00)."[251]

Most lawyers interviewed believe judges are mostly out of touch with the enforcement reality, which impacts their ability to approach the Applicant's case fairly. Described by one lawyer as "the straw that breaks the camel's back," the disconnect between Federal Court practices and the reality of CBSA conduct creates unfairness. As numerous lawyers expressed, if the Court does not acknowledge the truncated timelines and the unfair process this creates, it perpetuates the inherent power imbalance between a foreign national and the government official enforcing their removal.

As the empirical dataset demonstrates, delay is usually attributed to the Applicant as an individual. It is rather stark that the analysis of procedural fairness is, more often than not, conducted from the perspective of the Court or the Department of Justice instead of from the Applicant subject to the outcomes. However, the timeframes and challenges described in this research with respect to accessing and putting forward a stay motion demonstrate how easy it would be to fail. While there does appear to be greater awareness from the bench regarding the role of CBSA in creating urgent situations, as evidenced by the most recent practice notice, this is just a start. A system re-design based on this awareness is needed if the Court is to act as an accessible and meaningful remedy.

A FINAL NOTE

The challenges involved in persuading the Court to halt a deportation are not well-known beyond the legal community. Understanding why lawyers are concerned about stay motions exposes significant weaknesses of the judicial process, including but not limited to the dominance of enforcement powers even with judicial oversight; the procedural constraints limiting counsel's ability to represent their client fully and fairly; the variance in judicial approaches; and the absence of meaningful engagement with the Charter. However, this research remains narrow in scope. For example, I have focused on one legal proceeding at the tail-end of other critically important immigration proceedings. I have also relied on domestic law and norms resulting in limited engagement with Canada's commitments under international law, which are highly relevant. Moreover, this research lacks context. I have presented an analysis that does not engage with the historical roots of immigration as a form of state violence.

Indeed, glaring deficiencies in the Federal Court process are manifestations of historical and systemic issues.[252] Consider that the law applied in deportation decisions sees its origins in an economic context

[251] Appendix A, R37: *Ocaya v Canada (Citizenship and Immigration)*, 2019 CanLII 8561.
[252] Indeed, while lawyers expressed concerns with the Court process, they also pointed to enforcement at the hands of CBSA as contributing to, and even governing the gravity of the injustice. Further, their comments pointed the current regulatory framework as the larger problem. Other lawyers described deportation as a means to punish people who don't meet certain criteria, including refugee claimants, people who have lived in Canada without status

where business, not lives, was at stake. Consider the talk of a "safety-valve" for those facing deportation without a substantive commitment. If the weighty promise of ensuring Charter protections is not honoured by the system, what other assurances are either non-existent or elusive for immigrants? Such observations underscore that, at its foundation, immigration law has and continues to perpetuate injustice for immigrants. Canada's immigration regime is systematically lacking in procedural safeguards and replete with opportunities for refugees and immigrants to face harm. Future research premised on a deep understanding of the harms made possible by exclusionary frameworks will better serve the goal of designing comprehensive solutions.

Removal is not merely a return migration. Deportation, or even the prospect of it, can potentially cause serious, irreparable physical and psychological harm to individuals living in Canada. For those individuals who have been deported, they have been so under a Canadian determination that they would not be subject to risk, cruel or unusual punishment, extreme hardship, or irreparable harm – but does this determination hold true? In further research, it will be vital to foreground narrative accounts of those directly affected by Canada's deportation program, including the experience of living under the constant threat of deportation. While a data-centered approach to research can identify important and unrecognized patterns and trends, a narrative-centered approach can underscore the human vantage point and avoid abstracting harms incurred throughout the process.[253]

Finally, it is also essential that we, as a society, imagine solutions outside an expulsion-oriented system. We must envision a system that is more interested in inclusion than exclusion; that errs on the side of safety rather than harm; and that seeks not only to stay deportations but to abolish state practices that unjustifiably separate families, endanger lives, and cause incalculable suffering.

for many years, or people who entered Canada through irregular migration routes. The legal consequences were described as completely disproportionate to the "crime" of being in Canada without status. As one lawyer stated: "the only mistake that this person has done is to come into the country without status. They're not criminals. But the deportation process criminalizes them:" LLM Interview Transcripts.

[253] Luke de Noronha's work is a valuable example. His research focuses on the politics of immigration, racism, and deportation, and includes interviews with deportees. In his book, "Deporting Black Britons" he interviews Jamaicans who are deported to Jamaica from the UK and who are then stereotyped and threatened on this basis, which he argues, can be traced back to colonialism and slavery: Luke de Noronha, *Deporting Black Britons: Portraits of deportation to Jamaica*, (Manchester: Manchester Univ Press, 2020).

Appendix A: Empirical Dataset – Case List

R1.	IMM#	STYLE	CanLII CITE
R2.	IMM-6613-18	Brdar v. Canada (Public Safety and Emergency Preparedness)	2019 CanLII 127 (FC)
R3.	IMM-6614-18	Tamang v. Canada (Public Safety and Emergency Preparedness)	2019 CanLII 42 (FC)
R4.	IMM-6604-18	Islas v. Canada (Citizenship and Immigration)	2019 CanLII 129 (FC)
R5.	IMM-5915-18	Sharif v. Canada (Citizenship and Immigration)	2019 CanLII 48 (FC)
R6.	IMM-6413-18; IMM-6414-18	Correia v. Canada (Citizenship and Immigration)	2019 CanLII 132 (FC)
R7.	IMM-1783-18	Gallo v. Canada (Citizenship and Immigration)	2019 CanLII 269 (FC)
R8.	IMM-85-19	Mohammed v. Canada (Citizenship and Immigration)	2019 CanLII 271 (FC)
R9.	IMM-5948-18; IMM-5949-18	Lakatos v. Canada (Citizenship and Immigration)	2019 CanLII 388 (FC)
R10.	IMM-70-19	Ibrahim v. Canada (Public Safety and Emergency Preparedness)	2019 CanLII 539 (FC)
R11.	IMM-117-19	Chukwuji v. Canada (Citizenship and Immigration)	2019 CanLII 538 (FC)
R12.	IMM-71-19	Dosa v. Canada (Citizenship and Immigration)	2019 CanLII 391 (FC)
R13.	IMM-68-19	Kukoyi v. Canada (Public Safety and Emergency Preparedness)	2019 CanLII 270 (FC)
R14.	MM-6418-18	Henry v. Canada (Public Safety and Emergency Preparedness)	2019 CanLII 537 (FC)
R15.	IMM-78-19	Szukenyik v. Canada (Public Safety and Emergency Preparedness)	2019 CanLII 841 (FC)
R16.	IMM-5598-18; IMM-5602-18	Spooner Romero v. Canada (Citizenship and Immigration)	2019 CanLII 843 (FC)
R17.	IMM-244-19	Monday v. Canada (Public Safety and Emergency Preparedness)	2019 CanLII 1007 (FC)
R18.	IMM-251-19	Montique v. Canada (Public Safety and Emergency Preparedness)	2019 CanLII 1611 (FC)
R19.	IMM-253-19	Gebru v. Canada (Public Safety and Emergency Preparedness)	2019 FC 45 (CanLII)
R20.	IMM-248-19	Thuo v. Canada (Public Safety and Emergency Preparedness)	2019 FC 48 (CanLII)

R21.	IMM-292-19	Shakes v. Canada (Public Safety and Emergency Preparedness)	2019 CanLII 1186 (FC)
R22.	IMM-295-19	Dabar v. Canada (Citizenship and Immigration)	2019 CanLII 1185 (FC)
R23.	IMM-109-19	Chaves v. Canada (Public Safety and Emergency Preparedness)	2019 CanLII 1614 (FC)
R24.	IMM-204-19	Chen v. Canada (Public Safety and Emergency Preparedness)	2019 CanLII 1615 (FC)
R25.	IMM-5309-18	Chakanyuka v. Canada (Citizenship and Immigration)	2019 CanLII 7159 (FC)
R26.	IMM-6562-18	Niccon v. Canada (Public Safety and Emergency Preparedness)	2019 CanLII 2693 (FC)
R27.	IMM-6334-18	Poopalapillai v. Canada (Citizenship and Immigration)	2019 CanLII 7164 (FC)
R28.	IMM-5304-18	Chakanyuka v. Canada (Citizenship and Immigration)	2019 CanLII 7158 (FC)
R29.	IMM-6188-18	Ordoñez v. Canada (Citizenship and Immigration)	2019 CanLII 1004 (FC)
R30.	IMM-293-19	Amir v. Canada (Public Safety and Emergency Preparedness)	2019 CanLII 3008 (FC)
R31.	IMM-289-19	Cotter v. Canada (Public Safety and Emergency Preparedness)	2019 CanLII 1622 (FC)
R32.	IMM-995-18	Rasasoori v. Canada (Public Safety and Emergency Preparedness)	2019 CanLII 3005 (FC)
R33.	IMM-350-19	Lopes Cabral v. Canada (Public Safety and Emergency Preparedness)	2019 CanLII 3728 (FC)
R34.	IMM-138-19	Lion v. Canada (Public Safety and Emergency Preparedness)	2019 FC 77 (CanLII)
R35.	IMM-337-19	Alkurdi v. Canada (Public Safety and Emergency Preparedness)	2019 CanLII 2689 (FC)
R36.	IMM-330-19	Mhlanga v. Canada (Public Safety and Emergency Preparedness)	2019 FC 76 (CanLII)
R37.	IMM-394-19	Ocaya v. Canada (Citizenship and Immigration)	2019 CanLII 8561 (FC)
R38.	IMM-5324-18	Edward v. Canada (Citizenship and Immigration)	2019 CanLII 3319 (FC)
R39.	IMM-457-19	Khubashvili v. Canada (Citizenship and Immigration)	2019 CanLII 5090 (FC)
R40.	IMM-6175-18	Anyaso v. Canada (Immigration, Refugees and Citizenship)	2019 CanLII 6719 (FC)
R41.	IMM-445-19	Iyere-Okojie v. Canada (Public Safety and Emergency Preparedness)	2019 CanLII 6713 (FC)
R42.	IMM-407-19	Fraige v. Canada (Public Safety and Emergency Preparedness)	2019 CanLII 6049 (FC)

R43.	IMM-314-19	Balasubramaniam v. Canada (Citizenship and Immigration)	2019 CanLII 4127 (FC)
R44.	IMM-390-19	Daramola v. Canada (Public Safety and Emergency Preparedness)	2019 CanLII 4134 (FC)
R45.	IMM-4719-18	Mohamed v. Canada (Citizenship and Immigration)	2019 CanLII 6362 (FC)
R46.	IMM-464-19	Aujla v. Canada (Public Safety and Emergency Preparedness)	2019 CanLII 6370 (FC)
R47.	IMM-367-19	Ravikumar v. Canada (Public Safety and Emergency Preparedness)	2019 CanLII 6714 (FC)
R48.	IMM-547-19	Geronimo v. Canada (Public Safety and Emergency Preparedness)	2019 CanLII 4591 (FC)
R49.	IMM-498-19	Chen v. Canada (Public Safety and Emergency Preparedness)	2019 CanLII 4592 (FC)
R50.	IMM-519-19	London v. Canada (Public Safety and Emergency Preparedness)	2019 CanLII 5082 (FC)
R51.	IMM-504-19	Kosoko v. Canada (Public Safety and Emergency Preparedness)	2019 CanLII 28178 (FC)
R52.	IMM-5894-18	Demesa v. Canada (Citizenship and Immigration)	2019 CanLII 5342 (FC)
R53.	IMM-526-19	Koos v. Canada (Public Safety and Emergency Preparedness)	2019 CanLII 6721 (FC)
R54.	IMM-597-19	Pickering v. Canada (Public Safety and Emergency Preparedness)	2019 CanLII 6708 (FC)
R55.	IMM-521-19	De La Cruz Payares v. Canada (Public Safety and Emergency Preparedness)	2019 CanLII 6720 (FC)
R56.	IMM-573-19	San Juan v. Canada (Public Safety and Emergency Preparedness)	2019 CanLII 6712 (FC)
R57.	IMM-527-19	Virag v. Canada (Public Safety and Emergency Preparedness)	2019 CanLII 6718 (FC)
R58.	IMM-592-19	Flores v. Canada (Public Safety and Emergency Preparedness)	2019 CanLII 6368 (FC)
R59.	IMM-539-19	Singh v. Canada (Public Safety and Emergency Preparedness)	2019 FC 132 (CanLII)
R60.	IMM-660-19	Anyanawu v. Canada (Public Safety and Emergency Preparedness)	2019 CanLII 6093 (FC)
R61.	IMM-6195-18	Tung v. Canada (Public Safety and Emergency Preparedness)	2019 CanLII 6094 (FC)

R62.	IMM-564-19	Shin v. Canada (Public Safety and Emergency Preparedness)	2019 CanLII 6717 (FC)
R63.	IMM-5449-18	Abdo v. Canada (Citizenship and Immigration)	2019 CanLII 6722 (FC)
R64.	IMM-331-19	Onoh v. Canada (Citizenship and Immigration)	2019 CanLII 6716 (FC)
R65.	IMM-530-19	Varatharasa v. Canada (Public Safety and Emergency Preparedness),	2019 CanLII 6723 (FC)
R66.	IMM-657-19	Aigberaodion v. Canada (Public Safety and Emergency Preparedness)	2019 CanLII 6725 (FC)
R67.		INTENTIONALLY BLANK	
R68.	IMM-659-19	Subashchandrabose v. Canada (Public Safety and Emergency Preparedness)	2019 CanLII 6710 (FC)
R69.	IMM-736-19	Cao v. Canada (Citizenship and Immigration)	2019 CanLII 7088 (FC)
R70.	IMM-686-19	Sukan v. Canada (Public Safety and Emergency Preparedness)	2019 CanLII 28174 (FC)
R71.	IMM-306-19	Williams v. Canada (Citizenship and Immigration)	2019 CanLII 7089 (FC)
R72.	IMM-801-19	Qian v. Canada (Citizenship and Immigration)	2019 CanLII 7160 (FC)
R73.	IMM-716-19; IMM-14-19	Luo v. Canada (Public Safety and Emergency Preparedness)	2019 CanLII 8562 (FC)
R74.	IMM-4440-18	Nur v. Canada (Citizenship and Immigration)	2019 CanLII 7161 (FC)
R75.	IMM-742-19	Bautista Jimenez v. Canada (Public Safety and Emergency Preparedness)	2019 CanLII 12469 (FC)
R76.	IMM-673-19	Paz v. Canada (Citizenship and Immigration)	2019 CanLII 7167 (FC)
R77.	IMM-772-19	Romero Huertas v. Canada (Public Safety and Emergency Preparedness)	2019 CanLII 8563 (FC)
R78.	IMM-6279-18	Fodor v. Canada (Immigration, Refugees and Citizenship)	2019 CanLII 7950 (FC)
R79.	IMM-652-19	Fung v. Canada (Citizenship and Immigration)	2019 CanLII 7954 (FC)
R80.	IMM-785-19	Martinez Prada v. Canada (Public Safety and Emergency Preparedness)	2019 CanLII 12466 (FC)
R81.	IMM-846-19	Balogun-Oloyede v. Canada (Public Safety and Emergency Preparedness)	2019 CanLII 11798 (FC)
R82.	IMM-786-19	Dai v. Canada (Public Safety and Emergency Preparedness)	2019 CanLII 12471 (FC)
R83.	IMM-630-19	Marjalaki v. Canada (Public Safety and Emergency Preparedness)	2019 CanLII 19234 (FC)
R84.	IMM-920-19	Vasquez v. Canada (Immigration, Refugees and Citizenship)	2019 CanLII 9677 (FC)

R85.	IMM-5418-18	Hinds v. Canada (Citizenship and Immigration)	2019 CanLII 12472 (FC)
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