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The Reasonableness of Assessing "Genuineness" in Canadian Spousal Sponsorship Permanent Residence Applications

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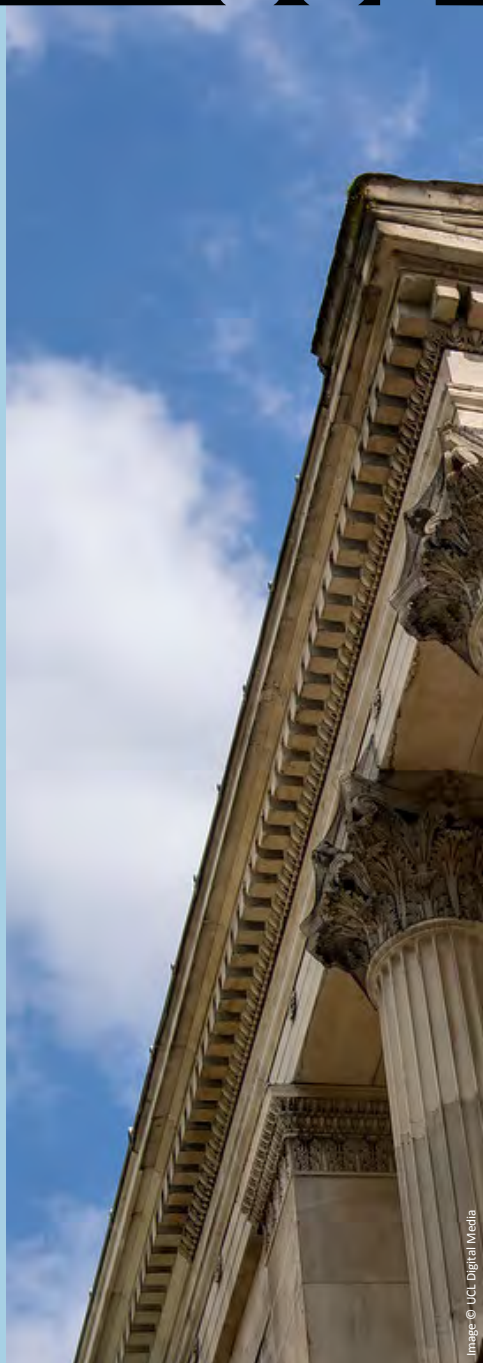

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The Reasonableness of Assessing "Genuineness" in Canadian Spousal Sponsorship Permanent Residence Applications

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Abstract:

Acknowledging that immigration schemes have a profound effect on the ability of migrants to exert agency over their own lives, this dissertation critically looks at the ways in which the Canadian spousal sponsorship scheme is administered. Through discourse analysis, this dissertation examines whether immigration decision-makers display any observable patterns in how they approach who will be granted a spousal visa, and more importantly, who will not. Keeping in mind the relevant literature around how love, culture, and marriage are conceptualized in postcolonial theory; how the Canadian government acts to control marriage and migration; what Canadian immigration law actually says about the way the spousal sponsorship system should work; and administrative law reflections on the role of judicial review and deference in immigration decision-making, this dissertation aims to live at the intersection of these topics.

The analysis conducted by this dissertation confirms that there does remain an institutional bias in the way that Canada's spousal sponsorship scheme is used to deny hopeful migrants family reunification in Canada. Through a distrust of migrants that is legitimized by political rhetoric and judicial deference, the use of stereotypes, and a lack of cultural sensitivity, immigration decision-makers have set a very high bar for hopeful migrants to jump over. To truly make Canada's immigration process fairer, continued research is required to highlight the ways in which institutional biases get in the way of facilitating family reunification, which remains a key objective of Canada's immigration scheme.

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“I don't care a damn about men who are loyal to the people who pay them, to organizations...I don't think even my country means all that much. There are many countries in our blood, aren't there, but only one person. Would the world be in the mess it is if we were loyal to love and not to countries?”

— Graham Greene, Our Man in Havana

Introduction

Few countries today appear to have weathered the tide of anti-immigrant sentiment running through the globe as well as Canada. Canada's own current Prime Minister regularly takes to social media and international platforms to declare the country open to migrants and refugees (BBC). Consequently, it may come as a surprise to read that at the same time that Canada professes to welcome more migrants, the country has also consistently and systemically tightened its controls over migration to Canada, especially in the context of family reunification. Canadian governments of the recent past and present have placed many institutional roadblocks to family reunification in the country by constricting the parameters through which individuals can use family migration as a pathway to citizenship.

My professional background as a Canadian immigration lawyer means that I have had to stay abreast of these changes in order to effectively represent my clients. I have seen first-hand how Canada's state controls on migration profoundly affect people's fundamental ability to live ordinary lives. Through limitations posed on family reunification, they affect one's ability to exercise the basic instinct to love. For instance, the definition of who qualifies as a sponsor able 'family member' has been tightened, with siblings and extended family disallowed from the current immigration scheme (Liew, pg. 285).

At the same time that Canada's family reunification process is becoming stricter, there is also a steady effort to prioritize the admission of economic immigrants. This "downgrading of family immigration in Canada was possible because of the executive branch's dominance over parliament… a similar policy shift in the United States would almost certainly be run through a vigorous legislative and political gauntlet" (Triadafilopoulos, pg. 33). The ability for Canadian immigration rules to be set by the executive branch without full parliamentary scrutiny demonstrates the need for academic study in this area to ensure that government actions are being examined and analysed, so that they can be improved.

This is especially true in the context of family reunification rules, analyses and decisions. After all, "love is so subjective and diverse that it is impossible to establish it objectively. This means that checks for fraudulent marriages are always inherently problematic and hazardous. That is why these practices deserve to be more critically scrutinized by lawyers, legal scholars, and [courts]" (de Hart, pg. 306). This is a salient point in the Canadian context, where immigration and administrative law is set up to provide immigration decision-makers with considerable latitude. This dissertation casts a critical light on the issues raised by academics in the past with respect to value judgments in family reunification applications and demonstrates that those same issues remain a source of concern in the contemporary Canadian immigration landscape. It does so by focusing on how Canadian immigration decision-makers assess whether or not an individual qualifies for sponsorship to Canada as a spouse. By focusing on spousal sponsorship applicants from the Asian continent, this dissertation fulfills an academic need for further sharp analysis of the tropes that are used by immigration decision-makers

It is also useful to frame academic research such as this, which delves into the power that the Canadian state exerts over its citizens and permanent residents, and foreign nationals alike, in the context of Canada's colonial history. As a former British colony that has integrated many aspects of the UK's legal system (Harrington, pg. 177), addressing the manner in which Canada now exerts control over others through an awareness of postcolonial analysis, as this dissertation has done, is important to contextualize why and how immigration decision-makers may be being unfair to hopeful migrants. This is also important considering the fact that the research conducted for this dissertation has focused on Asian migrants, most of who are from countries heavily impacted by their own colonial histories.

This dissertation addresses the topics outlined above across three chapters. The first chapter examines the existing body of academic research, legislation and jurisprudence that forms the foundation of this research project and Canada's spousal sponsorship process. By discussing various themes such as: postcolonial conceptions

of love, marriage, and coupling; Canadian controls on marriage and migration; the legislative framework for Canadian spousal sponsorship applications; and the concepts of judicial review and reasonableness, this chapter provides the contemporary context necessary to engage with the data that was collected and the research questions that have been asked by this dissertation.

In the second chapter, the dissertation examines the research methodology that was used for the development of this paper. A justification is provided for using discourse analysis to explore the themes outlined above. Further explanation is also provided on the methods used to collect data, the limitations of this project, and the ethical considerations that were factored into this dissertation.

Finally, the third chapter explores the data that was gathered for this dissertation and outlines four ways in which the spousal sponsorship assessment process is being restricted by a rigid, colonialist approach to love, marriage, and migration. The chapter establishes that spousal sponsorship applicants are treated unfairly because: there is an institutional presumption that marriages between a Canadian citizen or permanent resident and a foreign national are not genuine; the two-prong test spousal sponsorship applications are assessed against is disjunctive, which works against some applicants; immigration decision-makers routinely refer to stereotypical depictions of love and foreign cultures; and foreign cultures are seen as unchanging, uniform entities. The dissertation concludes by summarizing the findings of this research project and reflecting on how further academic study and policy changes can assist in making the Canadian spousal sponsorship scheme a fairer process.

Chapter I: Research Framework for Assessing Canadian Conceptions of Genuine Marriages

In this chapter, I will be exploring the key theoretical frameworks that underlie conceptions of love and marriage in a modern Canadian context, through the lens of immigration law and jurisprudence. My goal in this chapter is not to create a grand unified theory on Canadian state controls on migration, but rather, to provide the necessary context for understanding why and how Canada currently limits family migration through its spousal sponsorship scheme. After all, the political landscape that underpins any country's immigration policies can, and often does, change from administration to administration, and decade to decade. This limits the ability to speak of immigration law or migration policy as a monolithic constant. Rather, it is informed and changed repeatedly by a myriad of external, contextual forces. This dissertation looks specifically at the theoretical and academic frameworks regarding: conceptions of love, marriage, and coupling through a postcolonial lens; Canadian state controls on marriage and migration; the legislative framework that Canada's spousal sponsorship applications operate within; and the role of judicial review and the administrative law concept of "reasonableness".

Postcolonial Conceptions of Love, Marriage, and Coupling

"You and your sponsor (husband) do not appear well matched… You are three years older than him, he comes from a town four hours from where you live and you are not related, so it is unclear to me why the match was made" (Canadian Press, pg. 1). These words formed part of an immigration decision-maker's refusal of a spousal sponsorship application for a Pakistani national, processed through the Canadian High Commission in London, England. They provide the perfect illustration of the rigid concepts often relied on by immigration decision-makers regarding what the 'ideal' couple should look like.[1] They also highlight one of the key questions for this

[1] Under this light, I wonder what the same immigration decision-maker would have to say about my own interracial relationship, as I am 3 years older than my partner; he comes from a town 3500km (or a 7-hour transatlantic flight) from my home base; and we had no family or friends in common before meeting.

dissertation: how is 'love' defined, measured, and assessed for credibility by state actors, and specifically, Canadian immigration decision-makers?

The academic foundation for the topic suggests that Western assessments of 'true love', particularly in relation to Asian couplings, are troublingly narrow. Human geographers like Raksha Pande note that there is a diversity in the Asian experience, and especially in the contemporary female Asian experience, that is often discounted or unacknowledged by the West (Pande, pg. 181). Women may, for example, even in the context of a traditional process such as an arranged marriage, still be able to exert varying levels of agency over their families, tribes and cultures regarding who will be a favourable match for them – i.e. a cultural tradition can exist while women exert independence and their own brand of feminism into moulding their experience (*Ibid*, pg. 172). As this dissertation will reveal, the experiences of Pande's subjects are similar to those that form the subject of the cases reviewed for this dissertation in so far as they reflect a diversity within the cultural experiences of women who may nonetheless be linked by a general South Asian set of traditions. Unfortunately, as this dissertation will also demonstrate, this diversity is often ignored by immigration decision-makers, if not explicitly used against applicants, in assessing hopeful Canadian spousal migrants.

By and large, "norms on love and relationship are employed [in migration] that would never stand outside the migration context", with state "control practices [starting] from the assumption of a 'romantic ideal of marriage'" (de Hart, pg. 285). Consequently, spousal sponsorship applications in Western countries like Canada are predominantly judged against conceptions of "a vision of the household (the 'oikos') as a series of effective economic and social relationships" (Turner, pg. 637). Marriages are thereby reduced to either being deemed legitimate if they can demonstrably conform to strict notions of 'love', or deemed illegitimate if they cannot accomplish this.

The conceptions of love and marriage that are accepted as norm in the West, and against which potential immigrants are judged, find their roots in Western colonial history and colonial cultural supremacy. As Homi K. Bhabha notes, it is important to acknowledge that the post-colonial West as it stands today was nonetheless formed in the fires of its colonial past (Turner, pg. 625). For example, in the 1960s in the UK, "the border was used as a tool to both manage and foster the intimate site of the 'migrant family'. For Chris Walters, this reflected the hope that 'well-adjusted' migrants would adopt a 'western model of the egalitarian family and companionate marriage'" (Ibid, pgs. 632-633). This desire to force or encourage the subaltern to adapt to the standards of colonial thinking is still present today in the very act of screening who should be granted a spousal residence visa and demarking some applicants as not deserving of one yet. Doing this allows a state to control what kinds of families are let into their borders, often leading to attempts to create a homogenous society where individuals are selected at least in part of their perceived likelihood to conform to Canadian cultural standards, which are in turn affected by Canada's colonial history. Applicants are screened by their ability to demonstrate that their pre-Canadian lives have not deviated far from those standards already (Nobe-Ghelani, pg. 50).

To truly reach past Canada's colonial roots, immigration decision-makers must accept not only that Canada should open its doors to multiculturalism, but also, that it should allow hopeful migrants to be as diverse and colourful within their traditions as Canadians are. Unfortunately, at this moment, Western assessments of non-Western women, men and relationships still fail to acknowledge the nuances that exist *within* foreign cultures (Panke, pg. 182). Instead, in examining the details of a given applicant's relationship through qualities such as the length of time spent dating; number of wedding guests; knowledge of the everyday details of one another's lives; signs of physical affection; etc., immigration decision-makers often rely on "what the academic literature [typifies] as 'technologies of love', the search for the 'pure relationship', or 'romantic marriage ideal' which are building on – often rather traditional – conceptions of what a genuine couple should look like and how they

should behave" (de Hart, pg. 296). Knowing that there is a presumption towards seeing assessments of foreign cultures as lacking in internal diversity is essential context for approaching the evaluations that immigration decision-makers continue to make on whether a given relationship is 'genuine'. The research conducted for this dissertation supports the argument that this presumption is alive and well amongst Canadian immigration decision-makers, who continue to take a narrow approach to how a foreign national from a given culture 'should' act.

Canadian Controls on Marriage and Migration

The *Immigration and Refugee Protection Act* ("*IRPA"*), Canada's primary piece of legislation controlling migration, includes a clear objective that immigration law in the country is to be used "to see that families are reunited in Canada" (*IRPA*, s. 3(1)(d)). However, even with this overarching, seemingly inclusive mission statement in mind, Canadian immigration law has not left a wide open door for family reunification. Notably, while the U.S. has generally moved in favour of increasing family migration over the last 70 years, Canada has instead committed to encouraging economic immigration. This "reflects [a] longstanding, if understated, antipathy to family immigration, which has driven several important changes, including the IRPA's narrowing of the range of family members who fall under the family class, and raising of financial requirements for sponsorship" (Triadafilopoulos, pg. 31). This is apparent in the broader progression of Canadian immigration policy, which has consistently been wary about opening the floodgates for non-economic migration, and at the same time, wanted to protect a perceived state of privilege for Canadian citizenship (Daniel, pg. 686).

Further restricting Canada's sincerity in facilitating family reunification is the prevalent view that only some individuals deserve access to being Canadian. There is a presumption that applicants are disingenuous in their respect for Canadian law and that immigration decision-makers should keep a close eye on migrants trying to 'cheat' their way into Canada. Anecdotally, legal professionals like Madam Justice

Avvy Go, former Director of the Metro Toronto Chinese and South Asian Legal Clinic and current Justice of the Federal Court of Canada, have long commented that there exists "a very strong bias among officers in that they that immigrants from certain countries [come] here using marriage as a ticket to immigration to Canada, in particular, countries such as India and China" (Satzwich, pg. 1027). The former Minister of Citizenship and Immigration, Ahmed Hussen, set the tone for those in his department when he said that a key role of visa officers was "to uphold measures to safeguard against marriage fraud and other program integrity risks" (The Canadian Press, pg. 2). Minister Hussen's comments are not unique and similar ones can be found from the individuals who previously held his role as well (Nobe-Ghelani, pg. 54). In a highly bureaucratic system like that of a government ministry that operates in a country with a strong executive branch, the tone set at the top easily permeates down the chain of command to frontline decision-makers. This is reflected in the findings of this dissertation, where Canadian immigration decision-makers often approach spousal sponsorship applicants with suspicion as they see themselves as vital gatekeepers against fraud. As this dissertation demonstrates, this approach unfortunately means that decision-makers often paint with a very broad brush as they apply overly restrictive and narrow standards in order to protect against the possibility of even one 'undeserving' application being approved.

This is an attitude seen throughout the West, where restrictions on spousal immigration have long been accepted as "a way of monitoring and enabling certain familial relations for colonial authorities" (Turner, pg. 628). Although Canada has taken leaps and bounds towards opening its doors to migrants from around the world, and "overtly racist systems are no longer acceptable in modern liberal democracies, practices that exclude particular bodies are still key to the Canadian nation-building project" (Nobe-Ghelani, pg. 50). Academic research into the immigrant selection processes has found biased decision-making, as outlined above. In support of the existing body of literature on this topic, this dissertation establishes that the Canadian immigration scheme continues to operate in a biased manner. There remains an inherent institutional mistrust directed towards individuals who

are in relationships that are not easily reconcilable with Western conceptions of love and marriage, or stereotypes of their own cultural traditions.

The belief by immigration decision-makers that hopeful migrants are inherently distrustful is further solidified in jurisprudence. In fact, it is now well established in law that the onus is placed on applicants to present their best case for why they deserve a visa - the implication being that it is their job to present enough evidence to overcome a decision-maker's instinct to refuse an application (*Dhindsa*, pg. 6). The courts have taken great care to point out that it is difficult to judge the true intentions of hopeful migrants in a context where people "who are committing a form of deceit to gain the highly valuable status of Canadian permanent residence will conduct themselves to make the relationship look outwardly genuine, when it is not" (*Patel*, pg. 8). In doing so, the courts and Canadian politicians alike have "discursively [framed] sponsored spouses and partners as [potential] fraudsters" (Nobe-Ghelani, pg. 55). Keeping this context in mind is key to understanding the analyses that are conducted by immigration decision-makers as they try to assess whether or not the relationship underlying a spousal sponsorship application is genuine. The court's willingness to accept that immigration decision-makers have a difficult job in differentiating between those who deserve a pathway to citizenship through this stream and those who do not, is also important to consider when evaluating the deference that is given institutional and individual assessments of what a 'real' marriage can or should look like.

The Legislative Framework for Canadian Spousal Sponsorship Applications

Prior to moving onto the case study, it is worth exploring the legislative framework that immigration decision-makers have to operate within. As noted earlier, the main piece of legislation governing Canada's immigration scheme is the *Immigration and Refugee Protection Act* ("IRPA"), which sets out that family reunification is a key goal of Canada's immigration law (*IRPA*, s. 3(1)(d)). The primary process for facilitating family reunification in Canada is through the Family Class Sponsorship Program,

specifically the "Application to Sponsor a Member of the Family Class". The definition of who qualifies as a member of the family class is found in the *Immigration and Refugee Protection Regulations* ("IRPR"), which allow for permanent resident applications from a Canadian sponsor's "spouse, common-law partner or conjugal partner" (*IRPR*, s. 117(1)(a)). The regulations found in the IRPR are issued by Ministerial declaration. While they are laid before the Canadian Parliament as required by ss. 5(1) to 5(4) of the IRPA, they are not the subject of debate nor votes and therefore do not receive the same level of parliamentary scrutiny that changes to other pieces of legislation might. This presents an opportunity for academics to step into this gap, as research such as this dissertation provides the necessary review of government actions that may not otherwise occur.

To be granted a Canadian permanent resident visa as a spouse, applicants are put through a disjunctive two-prong test where they have to meet two requirements. First, they must prove that the relationship was not "entered into primarily for the purpose of acquiring any status or privilege under [IRPA]" (*IRPR*, s. 4(1)(a)). Second, they must prove that the marriage is "genuine" (*IRPR*, s. 4(1)(b)). Applicants have the burden of satisfying the immigration decision-maker reviewing their application that they meet both parts of the test – i.e. if a marriage is entered into without love, solely for the purpose of acquiring a visa and love later develops over time, the spousal sponsorship application will be refused (Satzwich, pgs. 1025-1026). This dissertation will demonstrate that there are significant flaws to approaching spousal sponsorship applications through a disjunctive test like this, as it excludes families that may have an honest desire to be together in Canada.

There is no definition provided in either the *IRPA* or *IRPR* on how to define 'genuine' and the final declaration on whether a marriage fits this criterion is left up to the discretion of the visa officer reviewing a given application. As will be discussed below and throughout this dissertation, Canadian administrative law provides a significant amount of latitude and deference to visa officers with respect to such assessments.

The decisions of visa officers are usually final, with two exceptions. If the application was filed while both spouses are in Canada and refused, then they can seek Judicial Review from the Federal Court of Canada. The Federal Court cannot substitute their own approval for the original decision; however, they can review whether or not the original decision was 'reasonable' and if they find it was not, send the matter back to the original decision-maker for redetermination. If the application was filed while the hopeful migrant is outside Canada and refused, they can first appeal to the Immigration Appeal Division ("IAD") of the Immigration and Refugee Board ("IRB"). Unlike the Federal Court, the IAD does have the power to substitute a new decision for the previous one. If an applicant is unhappy with the IAD's decision, then they can also request Judicial Review from the Federal Court who will assess the IAD Board Member's decision based on the whether it was 'reasonable' (*Parmar*, pg. 10). While the Federal Court relies on the original reasoning of either the original visa officer or IAD Board Member who refused a given application, they also add their own analysis onto what each got right and wrong.

Judicial Review and Reasonableness

Immigration decisions are primarily made behind closed doors, through administrative tribunals, international visa offices, and national case processing centers. The decisions are overwhelmingly kept private, delivered only to the individual who is being approved or denied the right to enter or remain in Canada. IAD decisions are published; however, they are not available to the general public as they are primarily published behind the paywalls of various legal databases. The Federal Court is therefore a unique, public window into the way that immigration decision-makers are acting. This is especially important because, over time, Canadian specialised administrative tribunals have been given expanded powers and are being relied on to make more decisions (Cromwell, pg. 285).

The ability for the Federal Court to intervene with respect to an administrative body's decision is limited, however. Based on a seminal ruling from the Supreme

Court of Canada in 2008, *Dunsmuir v. New Brunswick*, it is well established that when reviewing immigration decisions, the Federal Court should look into whether or not a decision is "reasonable" (Klinck, pg. 42). This is because immigration decisions are not only based on law, but also the subjective assessment of an immigration applicant's credibility and intention. Specifically, it has been held that "whether a marriage is genuine or is entered into for the primary purpose of immigration is a question of mixed facts and law and a highly factual determination" (*Shahzad*, pg. 14). At the end of the day, the "court must be satisfied as to the existence of justification, transparency and intelligibility within the decision-making process, and find that the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Cai*, pg. 13). It is not the role of the Federal Court to substitute its own decision, but rather, to conduct an analysis based completely on evidence that was previously submitted for consideration to the original immigration decision-maker (Gruber, pg. 304).

This concept was expanded in *Canada (Minister of Citizenship and Immigration) v. Khosa*, where the Supreme Court of Canada held that the concept of reasonableness is best understood as "a single standard that takes its colour from the context" of a given case (Klinck, pg. 43). In other words, judicial review of two administrative decisions by the same administrative body, no matter how similar they seem to be, cannot be guaranteed the same result. A reasonable refusal on an immigration application in one context may not be in another.

However, there are outcomes that are more likely than not when the Federal Court is reviewing administrative bodies. As Canadian lawyer David E. Gruber notes, when an administrative tribunal or body "is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity, deference will usually apply" (Gruber, pg. 309). This is based on the understanding that specialized administrative tribunals that focus on a singular area of law like immigration are in the best position to be engaged with the true meaning of the legal scheme that they operate in (Cromwell, pg. 287). This is one of the primary reasons

that this dissertation focuses on the discourse created by immigration decision-makers and the ways in which this discourse is challenged or legitimized by the Federal Court. If an administrative decision-maker normally has the opportunity to operate behind closed doors, and at the same time be owed deference when their usually private deliberations are brought into a public forum, it is important for academic literature and research projects like this dissertation to analyse whether their thought processes are fair, ethical, and unbiased. As this dissertation demonstrates, immigration decision-making over spousal sponsorship applications is still a flawed, problematic process.

Chapter II: Research Methodology

As an immigration lawyer, the creation and analysis of written discourse has played a large role in effectively representing my clients. After all, as has been pointed out by the Canadian courts, the burden is on individual applicants to put forward the strongest case for being granted a visa – there is no presumptive right to one, and an immigration lawyer will often hold the pen (*Dhindsa*, pg. 6). The main vehicle for doing this is through the written submissions and paper-based documentation that is provided to a visa officer, with there being "no statutory right to an interview" or the ability to provide oral submissions for Canadian visa applications (*Li*, pg. 11). As a result, I know that significant power is given to written words in the field of immigration law and have therefore grounded my research in discourse analysis. However, discourse should not just be seen as a compilation of words, but rather, as an active construction of a particular moment, locality, and history. In considering the discourse created by Canadian immigration decision-makers, it is important to consider "what historical ideas are lined to the construction of the problem?" (Nobe-Ghelani, pgs. 51-52). Discourse analysis, then, is an important tool to consider not just what is being said, but what is being considered important.

Research Questions and Methodology

To start, I devised three research questions through which to frame my analysis:

1. What narratives around love and marriage define the way Canadian immigration decision-makers evaluate hopeful spousal immigrants from around the world?
2. Is there an observable bias in the way that immigration decision-makers determine what is a "genuine" marriage?
3. If a bias does exist, what more can (or should) be done on a policy level to address this?

Through my legal experience, I know that the thought processes of immigration decision-makers are often made part of the public record when the Federal Court of Canada reviews their decisions. As a result, I focused my efforts on reviewing court judgements that discussed assessments of whether the marriage underlying a spousal sponsorship application was genuine. Discourse analysis is uniquely suited to such an examination, since it "demands asking questions about the ways in which distinct social realities' become naturalized" (Waitt, pg. 218). How is "genuineness" assessed? How are immigration decision-makers allowed to create definitions of "true love"? What, if any, of these constructions regarding what constitutes a "real" relationship are legitimized in binding, legal precedent? Knowing that Federal Court judgements could provide a clear picture of "the power-laden process through which particular knowledge [in this case, constructions of the idea of "marriage"] is deployed by institutions as a mechanism of social control", I focused my data gathering on the discourse created by the Federal Court (*Ibid*., pg. 234).

There are thousands of cases at the Federal Court level regarding spousal sponsorship applications that are in the public record. In order to create a suitable sample size for the purposes of this dissertation I limited my search to those decided within the last 3 years. From this, I was presented with 65 cases, which I then coded by various parameters such as the case name, the nationality (or nationalities) of the Applicant and Sponsor (if known), and how the Federal Court decided the case. My hope was that in doing so, I would be able to identify a group of 20-30 cases with a common theme. What I saw was that there were 29 cases from the Asian continent, concerning individuals from China, Vietnam, India, Pakistan, Nepal, Cambodia, and Bangladesh. After reviewing these cases in full, I discovered that 2 were decided on irrelevant grounds for the purposes of my review as they related to either the Sponsor or Applicant being deemed inadmissible.[2] As a result, I was left with 27 cases to review:

[2] In both of these cases, the refusals being reviewed by the Federal Court were grounded in findings of *res judicata*, and not regarding whether or not there was a genuine marriage (*Tiwana,* pg. 14; *Tang* at pg. 8).

Case	Citation	File No.	Review of	Sponsor Status in CAN	Nationality of Applicant	Overturned
Hayter v Canada	2016 FC 762	IMM-2317-15	IAD	Citizen	China	Yes
Vo v Canada	2018 FC 230	IMM-3057-17	IAD	Citizen (Vietnam)	Vietnam	No
Le v Canada	2016 FC 330	IMM-3159-15	IAD	Citizen (Vietnam)	Vietnam	No
Tiwana v Canada	2016 FC 831	IMM-161-16	IAD	PR (India)	India	No - irrelevant grounds
Kaur Nahal v Canada	2016 FC 81	IMM-3149-15	IAD	PR	India	No
Cai v Canada	2016 FC 1227	IMM-522-16	Visa office	Citizen (China)	China	No
Uddin v Canada	2016 FC 314	IMM-3831-15	IAD	Citizen (Pakistan)	Pakistan	Yes
Shahzad v Canada	2017 FC 999	IMM-445-17	Visa office	Unknown	Pakistan	No
Kalsi v Canada	2016 FC 442	IMM-4468-15	IAD	PR (India)	India	Yes
Momi v. Canada	2017 FC 50	IMM-2817-16	IAD	PR (India)	India	Yes
Lamichhane v Canada	2016 FC 957	IMM-706-16	IAD	Refugee (Nepal)	Nepal	No
Dhindsa v Canada	2017 FC 232	IMM-3554-16	IAD	Citizen (India)	India	No
Chen v Canada	2016 FC 61	IMM-2123-15	IAD	PR (China)	China	Yes
Yu v Canada	2016 FC 540	IMM-4470-15	IAD	Citizen (China)	China	No
Top v Canada	2015 FC 736	IMM-8322-14	Visa office	Citizen (Cambodia)	Cambodia	No
Patel v Canada	2017 FC 212	IMM-3637-16	IAD	PR (India)	India	No
Parmar v Canada	2018 FC 323	IMM-4051-17	Visa office	Citizen (India)	India	No
Huang v Canada	2015 FC 905	IMM-3728-14	Visa office	Unknown	China	Yes
Mai v Canada	2018 FC 304	IMM-3130-17	Visa office	Citizen (China)	China	No
Chen v Canada	2017 FC 814	IMM-856-17	IAD	PR (China)	China	No
Akter v Canada	2015 FC 974	IMM-5099-14	IAD	Citizen (Bangladesh)	Bangladesh	No
Nguyen v Canada	2016 FC 1207	IMM-5781-15	IAD	Unknown	Vietnam	No
Dhudwal v Canada	2016 FC 1124	IMM-1548-16	IAD	PR (India)	India	Yes
Truong v Canada	2017 FC 422	IMM-3644-16	IAD	Unknown	Vietnam	No
Tang v Canada	2016 FC 754	IMM-112-16	IAD	Citizen (China)	China	No - irrelevant grounds
S.S.R. v Canada	2016 FC 279	IMM-3570-15	IAD	PR (India)	India	No
Rahimi v Canada	2015 FC 988	IMM-150-15	Visa office	Citizen (Afghanistan)	Pakistan	Yes
Soroya v Canada	2016 FC 414	IMM-3078-15	IAD	Citizen (India)	India	Yes
Singh v Canada	2016 FC 240	IMM-8340-14	IAD	PR (India)	India	Yes

Table 1: Case List for Final Review

Using grounded theory, I analyzed the judgements listed above to see if there were any general frames or patterns used for assessing the genuineness of a marriage, and how widely or narrowly immigration decision-makers allowed for the breadth of human relationships and experiences. I further noted what factors went into the genuineness decision-making (i.e. presence of a child, length of relationship, cultural compatibility, etc.).

As a preliminary finding, I discovered that none of the cases were brought on behalf of the Federal government – i.e. all of the cases examined involved spousal sponsorship applications being refused, and appealed by the sponsor and applicant.[3] Of the 27 cases examined, 10 applications for Judicial Review were allowed, which meant that the Federal Court found something unreasonable in the refusal of the application. These 10 cases were sent back to the visa office or IAD for reconsideration. Unfortunately, for privacy reasons, it is not possible to know whether or not these specific cases were ultimately approved. 17 applications for

[3] This was expected, since it is rare for the Federal Government to seek judicial review of a decision made by one of its own decision makers.

Judicial Review were dismissed, which means that the Federal Court found that the original refusal to grant a spousal visa was reasonable. The Federal Court applies the same jurisprudential and legislative analysis to the decision that it is reviewing, regardless of whether it originates from a visa office or the IAD. Consequently, this dissertation will use the term "immigration decision-maker" to refer generally to both the visa officers and IAD Board Members who made the decision to deny a particular spousal sponsorship application. Where academic research or case law are being quoted and refer specifically to each role, the term should be understood to apply equally to both visa officers and IAD Board Members, since Canadian administrative law does treat them both the same.

Research Limitations

I have considered that there are limitations to taking the aforementioned approach to gathering and analyzing data. The cases reviewed are those that were seen through to completion. Other cases that may have been more damming in the biases utilized by immigration decision-makers may have been settled by the Department of Justice and voluntarily sent back for redetermination. Others may not have been brought to the Federal Court at all, as the process is not only lengthy but also expensive due to it requiring legal representation. One criticism of relying on the legal system to offer insight into a population set is that "the legal system itself is extremely skewed in favour of those who have financial resources while legal aid services are significantly underfunded and utilized by low income and racialized populations" (Nobe-Ghelani, pg. 58). Notably, applications for judicial review before the Federal Court do not qualify for legal aid, so that further limits the diversity found in the subject matter of Federal Court judgements. The fact of the matter is that millions of further stories remain locked behind closed doors, since not every applicant is going to have the time, means, or ability to bring their experiences into the public record.

Another factor that was considered before starting this dissertation was that the standard of review used by the Federal Court in judging the discourse created by

immigration decision-makers is one of "reasonableness". Ultimately, this means that the strength or weakness of a particular analysis is entirely dependent on the evidence that was put before the original decision-maker, and not whether a given refusal is independently right or wrong (*Dhindsa*, pg. 8). Spousal sponsorships that were inadequately prepared by the applicants, or through ineffective legal representation, will affect the likelihood of an application being approved by the original decision-maker and the quality of the analysis that the Federal Court can undertake.

However, these considerations should not negatively impact my research and analysis since I am looking at what Canadian immigration decision-makers consider when judging spousal sponsorship applicants from Asia, and not whether their decisions are legally right or wrong. This compliments the academic tradition in postcolonial studies set by Bhabha, who states that his "reading of colonial discourse suggests that the point of intervention should shift from the ready recognition of images as positive or negative, to an understanding of the *process of subjectification* made possible (and plausible) through stereotypical discourse" (Bhabha, pg. 95, emphasis in original). Inspired by Bhabha, this dissertation will look at the ways in which colonial attitudes are used to legitimize the stereotyping of subaltern identities, experiences, and cultures.

An additional limitation in my research approach comes from the fact that the cases I examined only represent heterosexual relationships, primarily married ones. Notably, the definition of spouse in family class sponsorships includes common law and conjugal partners, and same-sex relationships (Belleau, pg. 101). While I did not specifically set out to exclude non-heterosexual relationships, the search parameters I used (i.e. cases that were examined by the Federal Court within the last 3 years, where at least one applicant was from the Asian subcontinent) did not lead to a diverse range of sexualities or family units being represented. I understand that there can be tremendous value found in exploring the experiences of a more diverse set of

sponsors and permanent resident applicants and do hope that this will be explored in the future by other academics.

Ethical Considerations

I approached my research knowing that I would be examining very personal details regarding both the sponsor and sponsored spouses. However, as a law student and lawyer, I helped to prepare dozens of Applications for Judicial Review and know that a large part of my professional obligation involved obtaining clear consent from my clients to not only gather the information needed to make their case, but also, submit as many details as necessary to the Federal Court to represent them effectively. Clients are advised as a matter of routine that any submissions to the Federal Court will become part of the public record, except under exceptional circumstances (Federal Court of Canada, *Policy on Public and Media Access*).

Since all of the cases I analyzed were found online, through a free, publicly accessible database hosted by all of Canada's law societies through the Canadian Legal Information Institute ("CanLII"), I did not seek individual consent from the sponsors and spouses seeking legal redress before using their personal histories for this dissertation. Additionally, all of the individuals whose cases I examined were represented by lawyers, and would therefore presumably have been counselled on the consequences of filing an application, including the public disclosure of their personal histories, as explained above.

I am also aware that I cannot completely remove myself from the subject matter of this dissertation. In conducting research and analysis on whether the Canadian immigration authorities impose stereotypes on Asian migrants, I cannot fully disengage with this subject matter to be a wholly impartial researcher, since I myself am a first generation South Asian immigrant to Canada. My interactions with immigration decision-makers throughout the course of my legal career may also colour the research being conducted for this dissertation. I am hopeful that being

aware of these research biases will ultimately help me to look at the material as objectively as possible.

Chapter III: Are There Colonial Narratives Adversely Affecting Canadian Spousal Sponsorship Applications?

"It is well-established that when assessing genuineness of arranged marriages, in particular, the IAD must be careful not to apply Western conceptions of marriage to the case before it. Rather, the *bona fides* should be evaluated within the cultural context in which it took place" (*Elahi*, pg. 4). After noticing a pattern of them doing just this, the Federal Court warned immigration decision-makers in 2011 through *Elahi* not to judge marriage narratives through a Western lens. Although immigration decision-makers have been given general guidelines not to stereotype applicants or impose a North American standard on their actions and relationship, ultimately, they do not get comprehensive cultural training. If a spousal applicant wants an immigration decision-maker to consider the cultural context for their relationship, it is their responsibility to provide that context (*Top*, pg. 6). The idea of what constitutes a "genuine" marriage is one that is as much informed by subjective markers, as it is objective ones (de Hart, pg. 306). As noted by the Federal Court, when determining genuineness, "it is not a science but is fact driven and nuanced" (*Cai*, pg. 34).

With this in mind, this chapter will explore the narratives and analyses found in the 27 cases that I selected for this dissertation, as outlined above. What this chapter will not do is undertake a legal analysis of whether the immigration decision makers examined by the courts were right or wrong. Instead, the focus of this chapter and dissertation at large is on dissecting the discourse that has been discussed, legitimized and challenged recently by the Federal Court around marriages and relationships where a hopeful spousal migrant originates from Asia.

Guilty Until Proven Innocent

As noted earlier, immigration decision-makers often begin their analysis from a place of mistrust. It is not that spousal visa applicants are entitled to a visa unless there is a reason for suspicion, but rather, the other way around – the hopeful migrant has the burden of proving that they are not worthy of suspicion (*Dhindsa*, pg. 6). For the purposes of spousal sponsorship applications, the implication is that it is the applicant's responsibility to satisfy the officer that they are in a genuine relationship, and not the officer's responsibility to give them the benefit of the doubt that this is true.

This is not a universal starting point in the West for spousal sponsorship applications. In the EU, for instance, member states are directed that even as they set their own individual state policies around spousal migration:

> an assumption of innocence is required and it cannot be asked from applicants to prove that their marriage is not one of convenience. They are required to prove that their marriage is valid and still existing, not that it is genuine. There needs to be a well-founded suspicion that the marriage is not genuine in order to justify check on couples' motives. (de Hart, pg. 294).

But in Canada, the burden of establishing the existence of a genuine relationship, and one that has not been entered into for the primary purpose of obtaining a Canadian visa, is placed squarely on the hopeful migrant's shoulders. The Ministry of Citizenship and Immigration's own guidelines, which are issued to immigration decision-makers, advise that visa officers use "some version of the phrase 'I am not satisfied that you meet the requirements of the Act and the Regulation'" when rejecting an application, thereby reinforcing that it is the applicant's job to satisfy an immigration decision-makers inherent concerns from the very time that they submit a spousal sponsorship application (Satzwich, pg. 1026).

Starting from this position of mistrust, immigration decision-makers often parse through an applicant's statements with a bias towards assuming that the applicant's sole priority is obtaining access to Canada. This was displayed in *Hayter*, where an immigration decision-maker determined that an applicant had married primarily for the purposes of obtaining a visa since her pet name for her husband was "Canada Man" (*Hayter*, pg. 21). In the absence of other evidence, the Federal Court determined that the immigration decision-maker was blind to the veracity of the relationship, unreasonably choosing to see duplicitous intentions instead of affection (*Hayter*, pg. 20). Immigration officers see overly affectionate behaviour suspiciously, even when the signs of affection are not centered around one party's status as a Canadian.

Decision-makers have held that "romantic talk" early into a relationship, especially in when the match has been arranged, "is unusual" (*Saroya*, pg. 23-24). The Federal Court has generally not accepted this restrictive view of how applicants are supposed to behave, declaring although one may reasonably expect "romantic interest" to "develop over time" in an arranged marriage, it is unacceptable to hold that some of these marriages will not have "romantic talk" between partners from early stages (*Ibid*). Paradoxically, it is also held against hopeful migrants if they are not affectionate enough, with negative inferences drawn from a lack of "online chats, letters or photographs" displaying affection between partners (*Lamichhane*, pg. 4).

Another way that the bias against issuing a visa is demonstrated by immigration decision-makers is found in the way that they interpret the desire to leave one's home country. Instead of seeing a desire to be with one's spouse, who happens to be Canadian, immigration decision-makers often solely see a desire to be in Canada. For example, one applicant testified that she would have happily stayed in India but for the mistreatment she received at the hands of her sister-in-law; testimony which was corroborated by her father-in-law (*Kalsi*, pg. 6). Unfortunately, when immigration decision makers start from a position of believing an applicant to be disingenuous, statements like these are simply seen as excuses to get the benefits

of Canadian residence, instead of as a valid reason to want to immigrate to the be closer to the emotional support of one's spouse (*Ibid*).

For immigration decision-makers, the presumption that migration for the sake of arriving in Canada, and not migration for the sake of getting to be with one's spouse, is the primary motive for a spousal sponsorship application is so strong that not even the birth of a child is determinative of a genuine marriage (Vo, pg. 29). This holds true whether the child in question is the biological child of the married pair, or one that is a result of a previous relationship but nonetheless embraced by the current couple (*Uddin*, pg. 39). The procedural hurdle for hopeful migrants is set so high that not even the lifelong commitment to raise a child together is enough to vault applicants over the threshold. This is a direct result of seeing spousal sponsorship applicants through a mistrustful lens.

The biases outlined above can also lead to immigration decision-makers ignoring the evidence of the bona fides of a relationship as they instead embark on a fishing expedition to validate a refusal. In one case examined for this dissertation, the Federal Court found a reviewable error in the immigration decision-maker's original analysis after it became clear that they ignored the plethora of evidence in front of them that the family seeking reunification in Canada was, in fact, a family.

> the Applicant financially support[s] his wife in China, that he visits her at least once a year for a few weeks and on these occasions takes care of her first son as if the boy were his own child, that the couple remained married despite the wife's infidelity, that they conceived a child together and intend on raising their child and Ms. Zhou's child born outside of the marriage together despite the negative sponsorship application. (*Chen*, 2016, pg. 8).

Starting from a position of mistrust means that even traditional markers of familial unity such as those listed above are ignored in favour of seeing an applicant as calculating the easiest route to Canada. The findings noted above support the work of previous researchers in this field, who have also held that state controls on

immigration can be rooted in the "gendered process of border making and the exclusions built into notions of Canadian citizenship" (Nobe-Chelani, pg. 55). Demanding that foreign nationals shoulder the burden of validating their experiences in a demonstrable way while also mistrusting them does not create a fair migration scheme.

The Two-prong Test Behind Every Canadian Spousal Sponsorship Application

One of the reasons that not even the presence of children may satisfy immigration decision-makers is that the nature of the Canadian spousal sponsorship assessment itself works against applicants by being disjunctive instead of conjunctive. In other words, "in order to be considered a spouse, the marriage needs to be genuine ***and*** the relationship must not have been entered into primarily for immigration purposes [emphasis in original]" (*Nguyen*, pg. 6). Therefore, immigration decision-makers have two opportunities to deny an application: 1) if they find the relationship is not currently genuine; and 2) if they find that it was entered into for the purposes of acquiring a visa (*Tiwana*, pg. 7). While the presence of children may satisfy an immigration decision-maker that the former condition has been met, it does not necessarily speak to the later.

This disjunctive test reinforces the prejudices that immigration decision-makers can hold in Canadian spousal sponsorship cases. It denies the right for hopeful migrants to marry for any reason other than the "romantic marriage ideal" that is rooted in modern, Western conceptions of coupling (de Hart, pg. 296). In doing so, this disjunctive test becomes a mechanism for the Canadian government to use immigration controls in a way that "appropriates, directs and dominates [a migrant's] various spheres of activity" (Philips, pg. 130). Hopeful migrants are reduced to not only needing to prove that they love each other according to markers that immigration decision-makers are familiar with, but also, that they have loved one another from the start.

This approach limits the experiences of a couple who require a Canadian visa in order to be together in a manner that is unique to immigration law, with couples who do not require access to a sponsorship visa being free to marry and develop a relationship for any reason (de Hart, pg. 285). This denies full agency to hopeful migrants under the auspices of protecting a Canadian immigration system from the alleged harms of individuals marrying in order to 'illegitimately' get a Canadian visa (Nobe-Ghelani, pg. 53).

This can have devastating effects on migrant families, who, although they develop a genuine connection and interdependence to one another, may not be able to overcome both prongs of the sponsorship test outlined above. For example, in *Akter*, the applicants were married for 7 years by the time their case was heard by the IAD and they had a child together; however, the application was ultimately refused because the sponsored spouse had a history of attempting to get a Canadian visa (*Akter*, pg. 5). Consequently, he failed half of the spousal sponsorship test. Considering the letter of the law, the immigration decision-maker could not factor the fact that the couple had been in a committed relationship for a significant length of time, and that the Canadian spouse was essentially rendered a single-mother while her husband's visa was in limbo.

In other cases, the Federal Court has clearly pointed out that despite the fact that the creation of a child within a relationship is not alone enough proof to guarantee a spousal visa, "great weight should be given to the birth of [a] child as the 'consequences of a mistake [in determining the genuineness of a marriage] will be catastrophic to the family'" (*Chen*, 2016, pg. 11). However, while this can speak to the genuineness of a relationship, it will rarely address concerns about the intentions of either party when they entered into the relationship.

This is particularly problematic for South Asian applicants, where arranged marriages are common and notions of love can legitimately grow over time (Pande, pgs. 178-179). Not allowing for this, the Canadian immigration scheme imposes a

colonial rigidity on such South Asian applicants. It is an unfortunate reality that marriages that become genuine over time may be precluded from family reunification because the disjunctive test will always ask whether it was *entered into* for the purposes of obtaining a visa, with such an individual being labelled as undesirable in Canada (*Tiwana*, pg. 13). Ultimately, this speaks again to the issue of who is entitled to be Canadian (*Vo*, pg. 44) and the colonial preference for only the most honest and honourable migrants, as demonstrated by their similarity to the colonial or Western experience, for integration into Canadian society (Philips, pg. 125).

An Adherence to Stereotypes

The differentiation between the 'right' types of spousal immigrant for Canada is further reinforced when immigration decision-makers expect applicants to act in a familiar Canadian, or North American, way. If applicants deviate from the 'usual' hallmarks of love, an immigration decision-makers mistrust of their relationship is reinforced (de Hart, pg. 296). In *Cai*, where the applicants met as a result of an affair, there was an expectation for "at least some evidence of a long standing 'secret affair' such as transportation documentation to see each other, cards, texts, emails, gifts or even pictures (*Cai*, pg. 18). Absent these traditional markers of love, which could also have reasonably been destroyed so as to conceal the affair from their former spouses, the immigration decision-maker was mistrustful of the genuineness of the couple's relationship. The Federal Court has repeatedly upheld the requirement by immigration decision-makers that spousal applicants have to show evidence of the "genesis and evolution of [the] relationship" in order to have it count (*Truong*, pg. 5).

Spousal sponsorship applications are also judged on the basis of proving a relationship timeline under the presupposition that there are certain moments, such as the day the couple first met or the day they got engaged, that are the most important and should be either corroborated with vivid memories or physical documentation (*Le*, pg. 3). Immigration decision-makers expect that certain "basic memories" will be clearly depicted when a couple is establishing the genuineness of

their relationship (*Mai*, pg. 9). But, in examining the details of a given applicant's relationship through details such as the length of time spent dating; the number of wedding guests who attended the ceremony; recorded displays of affection through cards, letters, or presents; or knowledge of little details in one another's lives like the colour of one another's toothbrushes, immigration decision-makers fall into a specific trap. These "hints or indicators point to what the academic literature [typifies] as 'technologies of love', the search for the 'pure relationship', or 'romantic marriage ideal' which are built on – often rather traditional – conceptions of what a genuine couple should like and how they should behave" (de Hart, pg. 296). As a result, applicants from a different cultural tradition than that depicted in a Hollywood movie may experience extra difficulty in overcoming an immigration decision-makers mistrust.

The Federal Court has recognized that "[b]oth cultural context and the expressed intentions of the parties to a relationship can be relevant to the determination of whether a [genuine] relationship exists, such context representing a lens through which to assess [their] intentions" (*Chen*, 2017, pg. 2). Ultimately, when immigration decision-makers are presented with the "nuances" of a specific culture or cultural tradition, they must consider this context "when assessing whether [the couple is] a 'suitable match'" (*Singh*, pg. 6). But the onus remains on the applicant to provide immigration decision-makers with the cultural context needed to allow them to make a decision without applying a Western lens. Thus, if Cambodian men do not usually speak to their wives about household or personal finances, which is opposite to the cultural norms of the average Western family, then it is up to the applicant to put this cultural context forward and not a responsibility of the immigration decision-maker to seek it out or independently consider it (*Top*, pg. 6). The Federal Court has further explained:

> [immigration decision-makers] should not be quick to apply North American logic and reasoning to a claimant's behaviour as 'consideration should be given to the claimant's age, cultural background and previous social experiences (at

> para 12). At the same time, it is trite law that the burden of proof lies on the party advancing a claim. Since the Applicant submitted no evidence to demonstrate what the cultural norms are for first encounters between potential partners in China, I am not convinced that the [immigration decision-maker] committed an error in this respect. (*Yu*, pg. 8).

Unfortunately, when applicants are forced to legitimize their own cultures for the foreign gaze of a Canadian immigration decision-maker, it only serves to further 'other' them and their Canadian spouse (Nobe-Chelani, pg. 50).

This reinforces the state's ability to control social and cultural norms within Canada even though immigration decisions should be, according to the guidance provided by the Federal Court, "based on both cultural norms and the inherent logic that flows from the context from which the couple originates" (*Rahimi*, pg. 11). Immigration decision-makers are not supposed to myopically assume that a couple who wants to live in Canada would not want to live together anywhere else in the world if it were possible to do so safely, or happily. For example, a Pakistani spouse may want a visa to live with their partner, who is settled in Canada as an Afghan refugee, because living together in Pakistan, with its precarious stability that is due, in part, to "problems imported from Afghanistan" is simply not a viable option (*Ibid*). A Canadian visa may be the primary motive for marriage, without the marriage being a way to gain unemotional, queue-jumping access to Canada.

Foreign Cultures as Static, Monolithic Entities

One reason that immigration decision-makers may be able to easily discount the personal experiences of individual applicants unless they specifically provide evidence of the cultural context they operate in is that there may be an inherent bias to see culture as if it is monolithic. In the context of immigration decision-makers applying a Western lens to the assessment of a relationship unless provided with evidence that a different cultural standard should be used, what happens when an

applicant finds themselves somewhere on a cultural spectrum instead of representative of the medium or average?

Based on the cases reviewed for this dissertation, immigration decision-makers do not presently allow for diversity *within* a culture. Thus, not only are individuals penalized for diverting from Western norms, as outlined above, but also for diverting from their own cultural norms. In one case, the immigration decision-maker specifically noted that it is "unusual in Cambodia for a single male to want to marry a divorcee (twice divorced!)" (*Top*, pg. 6, emphasis in original). Ultimately, the applicant could not provide the immigration decision-maker with the necessary non-Western, cultural context for their relationship because the immigration decision-maker had decided that the "genesis of [their] relationship, including the chance encounter, is not credible; it is not consistent with the local traditions and culture" (*Ibid*). This introduces an interesting concept where reliance on some cultural norms by an applicant, which, in *Top*, included the need to keep the couple's affair a secret (*Top,* pg. 2), are dismissed based on another set of cultural norms that the immigration decision-maker decides is more important as a benchmark for how a couple should be expected to act.

The assessment of divorce and remarriage in South Asian cultures in particular is a source of concern that came out during this research. The prevailing presumption by immigration decision-makers in *Saroya, Parmar, Dhudwal,* and *Dhindsa* is that women, in particular, are supposed to act in a particular way based on 'traditional' cultural norms. For example, negative credibility findings were made against applicants whose family did "not follow tradition by waiting to find a match for [their eldest daughter]" before arranging one for their younger daughter (*Parmar*, pg. 3). The immigration decision-maker would have required evidence from the applicant that her parents were comfortable deviating from this perceived norm in order to satisfy and support their daughters. In another case, it was determined to be up to the applicant to provide testimony and proof that their cultures have modernized to the point where previously taboo behaviours like divorce are no

longer "frowned upon" like they once may have been (*Saroya*, pgs. 21-22). Regrettably, approaches like these lead to diversity in the Asian experience being discounted or unacknowledged by immigration decision-makers as they use deviations from what is perceived to be the 'usual' practice within a culture against spousal sponsorship applicants. In one case, the immigration decision-maker drew an adverse inference from the couple's "breach of local customs of the marriage ceremony, including its size for a second marriage, where it was held outside of the spouse's neighbourhood and the minimal family attendance" (*S.S.R.*, pg. 7)

This also denies women in particular the agency to determine which aspects of their culture they would like to take forward as they move on with their lives in an ever-changing world. Immigration decision-makers often fail to recognize that today, postcolonial feminism and ideas of a woman's role in society, a family, and within a given culture may be "fit for purpose", where each woman can choose their own place within their culture (Pande, pg. 181). This is not a choice that is provided to some Asian spousal applicants, as demonstrated in *Dhindsa*, where the immigration decision-maker discounted the applicant's willingness to let her parents arrange her marriage based on the fact that her sister was able to choose her own spouse (*Dhindsa*, pg. 6). The implication was that in this family, the applicant should have wanted to follow the modern route that her sister did. Ultimately, to be truly 'post' colonial, it is important for Western immigration decision-makers to recognize and acknowledge all of the ways that women may both conform to and rebel against "existing cultural norms" (Pande, pg. 182).

To ignore this is to perpetuate a colonial or Western discourse that stereotypes individuals, and in doing so, "the Canadian state is able to continue to ignore its responsibility for its colonialist, racist, classist and sexist past and present while implementing a complex set of policies that marginalize particular bodies [and experiences]" (Nobe-Ghelani, pg. 59). This supports the academia of postcolonial theorists like Bhabha, who has previously explained that the subaltern is often reduced to a "form of negation which [does not give] access to the recognition of

difference" (Bhabha, pg. 108). Likewise, the cases examined above show that individuals are allowed the opportunity to either wholly conform to a Western conception of love, or be relegated to the experience of the average man or woman in their respective culture. They are not, unfortunately, afforded the right to be independent agents of their own identities and destinies.

Conclusion

The goal of this dissertation was to examine the approach that Canadian immigration decision-makers take in assessing Asian spousal sponsorship applicants. By parsing through 27 Federal Court judgements issued over the last 3 years, all of whom discussed the refusal of a spousal sponsorship application, this dissertation found four tropes that work against hopeful spousal immigrants.

First, this research discovered that Canada's immigration scheme expects applicants to "satisfy" immigration decision-makers that they meet the requirements of IRPA and IRPR. There is no recognized right to enter Canada, and although the public rhetoric is that Canada welcomes immigrants, the private assessments conducted by immigration decision-makers paint a more exclusionary portrait. Second, this dissertation highlighted the ways that the disjunctive test for whether or not an applicant can be considered a member of the family class by virtue of having a Canadian spouse or common-law partner further stacks the deck against some applicants. Even those in relationships that have become genuine over time, sometimes after the conception of children, may still be barred from family reunification if, at the time of their marriage or coupling, the relationship is believed to have been entered into for the primary purpose of getting a Canadian visa. Third, Canada's postcolonial legacy rears its head in the way that immigration decision-makers rely on stereotypical representations of love. Spousal sponsorship applicants who do not conform to Western ideals of how a relationship, marriage, and coupling is supposed to develop, and be demonstrated, face an uphill battle in getting their

relationship recognized as legitimate. Fourth, even when immigration officers allow applicants to break from Western cultural norms, they nonetheless also expect applicants to confirm to the typical, or historical, experiences of their own culture. Deviations from Asian cultural norms are inherently mistrusted and hopeful migrants are not allowed the opportunity to reflect modernity, uniqueness, or agency. In discovering these patterns, this dissertation has cast light on the ways that the Canadian spousal sponsorship evaluation process denies some Canadian citizens and permanent residents the ability to benefit from family reunification.

Considering the deference that is usually granted to immigration decision-makers by virtue of their perceived expertise in applying "statutes closely connected to [their] function", it is crucial to be aware of the institutional biases that they operate with (Gruber, pg. 308). For immigration decision-makers to be able to move past the tendencies noted above, it is important that as a matter of public policy, they are adequately trained on how to be culturally sensitive as they are being asked to make personal judgements that may be, but are not necessarily, rooted in an applicant's cultural identity.

To further enable immigration decision-makers to facilitate family reunification, the disjunctive test of ss. 4(1)(a) and 4(1)(b) of IRPR should be amended by the Minister of Citizenship and Immigration to become a conjunctive test. If Canadian politicians, and their electorate, believe that the sanctity of Canada's immigration scheme and the value of Canadian citizenship is degraded through individuals marrying Canadians solely for the purpose of obtaining a visa, then making the test a conjunctive one will still allow them to sieve out such 'undesirable' migrants. On the flipside, allowing for relationships that may have been entered for the purposes of obtaining a right to live in Canada but have become 'genuine' over time, will allow for real family reunification. As the Federal Court noted, "after all, husbands and wives should live together" (*Dhudwal*, pg. 6). This will also allow for the reunification of families where "the timing of a marriage may indeed be affected by immigration considerations" but which are, nonetheless, based on a genuine desire

for the partners to live together and continue to build their lives together (*Akter*, pg. 8).

In support of these policy recommendations, future academic research can build on the questions that were asked in this dissertation in both qualitative and quantitative ways. It would be interesting to see if the tropes identified above apply consistently across all continents, and not just Asia, through the examination of a larger dataset. It would also be helpful to examine these tropes through a more gendered lens: are female sponsors held to higher standards or required to display more stereotypical behaviour than male sponsors? Does the gender of an immigration decision-maker play a role in the way that they assess what constitutes a 'genuine' relationship? Considering the deference that immigration decision-makers are given and their immense ability to affect people's lives, continued engagement with their decision-making process and the institutional biases that they demonstrate is fundamental towards moving Canada in the direction of being a place where family reunification can sincerely be facilitated.

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Appendix A: Dissertation Proposal

DISSERTATION PROPOSAL

Sharmin Leena Rahman

Title (work-in-progress):

Decolonizing Marriage in Canadian Spousal Sponsorship Applications

Dissertation goals:

In 2011, the Federal Court of Canada warned in a seminal judgment that immigration decision makers "must be careful not to apply Western conceptions of marriage to the case before [them]. Rather, the *bona fides* of a marriage should be evaluated within the cultural context in which [the marriage] took place"[4]. Unfortunately, although this judicial directive was quite clear, my own experience as a Canadian immigration attorney has been that in practice, visa officers outside Canada, and Immigration Appeal Division ("IAD") board members inside Canada, are still applying Western-centric lenses when assessing spousal sponsorship applications. As a result, applications are being refused unjustly and applicants are being forced to go through a long, expensive appeals process before the errors of the original decision makers are pointed out.

My hypothesis would be that even though visa officers are hired from staff local to the visa office itself, and are generally not Canadian expats, they nonetheless apply a colonial bias when assessing the genuineness of a marriage, especially in the context of an application for a citizen of a previously-colonized nation. I would apply postcolonial theory to examine the discourse created through spousal sponsorship application refusals and any subsequent overturning or validating of these decisions from either the IAD or the Federal Court of Canada.

Initial research questions:

- Is there a postcolonial bias in the way that Canadian immigration officers determine what is a "genuine" marriage?
- How do colonial narratives around love and contracts define the way Canadian immigration officers judge hopeful immigrants from the developing (i.e. non-Western) world?
    - How do Canadian immigration authorities and Canadian courts treat oral marriage contracts and ceremonies? What about proxy marriages?
- How have colonial perceptions of the "East" been received by the "East"?
    - Do people (i.e. prospective spousal sponsorship applicants) adjust their behavior based on the way that they assume they'll be received?
- How often do the IAD and Federal Court of Canada overturn initial visa office refusals based specifically on the fact that the initial visa officer fettered his discretion by being unreasonably prejudicial?
- What is the best way to counteract any institutional biases that exist?

[4] *Elahi v. Canada* (Citizenship and Immigration), 2011 FC 858 (CanLII) at para 11.

- What practical policy changes can be made at a visa office level to lessen the need for appeals (i.e. to increase the accuracy of first-instance decision-making)?

Wider context for the study:

By way of background, for a Canadian spousal sponsorship application to be successful it has to pass the following two-part test: 1) the visa officer has to be satisfied that the marriage is *bona fide* (i.e. genuine); and 2) the visa officer has to be satisfied that the marriage was not entered into for the purposes of immigrating to Canada. It is in the assessment of the first part of this test that inconsistent approaches have been taken when visa officers encounter an "unusual" pairing – e.g. a large age difference between spouses; a previously divorced spouse from a conservative or notably religious culture; prominent differences in socioeconomic status between spouses; etc.

Refusals of spousal sponsorship applications submitted abroad that stem from a failure to pass either part of the above test can be appealed to the IAD, and these decisions can then be subjected to Judicial Review. Refusals of spousal sponsorship applications submitted within Canada are only subject to Judicial Review and are not eligible for an appeal through the IAD.

When spousal sponsorship applications are refused and go through either an appeal at the IAD, or Judicial Review, the Board Member or judge, respectively, obtain detailed reasons, and sometimes testimony, from the decision-maker about why the application was refused. These justifications are then examined on the basis of whether they were "reasonable" – i.e. whether the decision-maker 'fettered their discretion' by taking into applying too narrow a lens to the application before them. I hypothesize that when visa officers are found to have fettered their discretion by the IAD or Federal Court of Canada, the discourse around their justifications for refusing a given application can be deconstructed using postcolonial theory. In doing so, I believe that I will be able to see the clear imprint of colonialism on decisions that have already been determined to be biased.

Preliminary references

As a Canadian citizen, I am entitled to request information from the Government of Canada through an Access to Information Request online, although there are some limitations for the data that is released. I have already submitted a few such requests for information:

- The total number of appeals filed with the IAD with respect to spousal sponsorship applications made outside Canada in 2017;
- Information regarding the policies and guides currently in use involved in evaluating the validity of a marriage with a foreign (through the spousal visa sponsorship process);
- Statistics on the number of cases denied in the spousal sponsorship applications and the number of cases of fraud detected once the initial application was accepted in 2017;
- Any documents currently used by immigration officers for determining the genuineness of marital/common-law/conjugal relationships;
- The number of spousal sponsorship applications received from all countries in 2014, 2015, and 2016, broken down by country, and if the application has been finalized, the result.

Subsequent requests for information can be made as I continue with my research. I will also be reaching out to my colleagues in the Canadian Immigration bar, and previous professors from law school (e.g. Sean Rehaag) to see if they have any relevant data or experiences that they would be willing to share.

There is also a body of caselaw that is available online through CanLII, WestLaw and LexisNexis, where both IAD and Federal Court of Canada decisions are posted. If required, I can also request case files and disclosures from the Federal Court of Canada, though these requests will have to be made in person in Canada and I do not anticipate it to be required. Caselaw that I have already found to discuss the issue includes:

- Sandhu v. Canada (Citizenship and Immigration), 2014 FC 1061 (CanLII), <http://canlii.ca/t/gf90t>
- Elahi v. Canada (Citizenship and Immigration), 2011 FC 858 (CanLII), <http://canlii.ca/t/fmcdh>
- Kazi v Canada (Citizenship and Immigration), 2014 CanLII 83460 (CA IRB), <http://canlii.ca/t/ggllg>
- Canada (Citizenship and Immigration) v. Morel, 2012 FC 1404 (CanLII), <http://canlii.ca/t/fvj5l>
- Jahan v. Canada (Immigration, Refugees and Citizenship), 2018 FC 99 (CanLII), <http://canlii.ca/t/hq3lt>

There is also a large body of material discussing postcolonial theory, and critiquing "Western" representations of "Eastern" cultures and peoples through a postcolonial lens. I will be reviewing works such as:

- Bahk, Sarom, "Exploring Perceptions of Cultural Difference in IRB Family Sponsorship Decisions" (2011), *ProQuest Dissertations and Theses*.
- Pellander, Saara, "An Acceptable Marriage" (2015), *Journal of Family Issues*, 36:11, pg. 1472-1489.
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- Turner, Joe, "The Family Migration Visa in the History of Marriage Restrictions: Postcolonial Relations and the UK Border", *The British Journal of Politics and International Relations* (2015), 17:4, pg. 623-643.

Research methods:

- Discourse analysis through examining public caselaw and immigration appeal decisions;
- Quantitative data through Freedom of Information Requests for statistical information from the Ministry of Immigration, Refugees and Citizenship Canada;
- Qualitative data from Canadian immigration practitioners on their experiences moving through the refusal-appeal-judicial review process through short interviews either by phone or in-person.

Proposed timeline:

February – April 2018:	Legal research, data gathering, postcolonial theory literature review.
May – July 2018:	Interviews with Canadian immigration practitioners; analysis of data; and gathering of further data, as required.
August – September 2018:	Writing, editing, and submission of dissertation.

Potential outcomes, rationale and value of the research:

One risk in the legal world is that once a judgment is released, such as *Elahi*, it can often too readily be assumed that subsequent decision-makers will automatically follow the precedent that has been created. I hope that in doing this research I can highlight some of the institutional biases that still exist at the initial Canadian spousal sponsorship application stage from an academic perspective to underscore the fact that biased decision-making still exists, despite judicial directives to be sensitive to avoid exactly that. Bringing these biases to light may help inform policy makers and immigration practitioners on how to avoid prejudicial decision making in the future.

Preferred supervisors, in order of preference:

1) Dr. Ben Page; 2) Dr. Tariq Jazeel.

APPENDIX 1

MSC HUMAN GEOGRAPHY

DISSERTATION PLANS 2017-8

This document is to be submitted at the same time as the dissertation proposal. It must be handed in to your programme/dissertation convenor. This document is not assessed in any way; it provides information needed to enable the tutor to allocate students to supervisors and manage the supervision.

NAME OF STUDENT: Sharmin Leena Rahman

TITLE OF PROPOSAL: Decolonizing Marriage in Canadian Sponsorship Applications

SUMMARY OF PROPOSAL Please give a 100 word summary of the proposal.

I hypothesize that the Canadian visa officers who process spousal sponsorship applications apply a colonial bias in assessing whether or not a marriage is "genuine" and thus, whether or not the application can be approved. This has been a noted phenomenon by the Federal Court of Canada already, e.g. in *Elahi v. Canada*, 2011 FC 858, where the court specifically warned against applying a Western concept of love and marriage to applicants from non-Western cultures. Instead of setting a legal precedent against doing this, I hypothesize that the practice has continued and that visa offices may be institutionally biased.

DOES THIS RESEARCH REQUIRE ETHICS CLEARANCE? IF NO, WHY NOT?

No. My research will be based on discourse analysis of publically available information and statistics.

NAME OF PREFERRED SUPERVISOR: Dr. Ben Page, Dr. Tariq Jazeel.

Appendix B: Case Excerpt

Kalsi v. Canada (Citizenship and Immigration), 2016 FC 442 (CanLII), pgs. 5-8.

C. *IAD's Treatment of the Evidence*

[14] The applicant submits that the IAD erred in ignoring evidence of the genuineness of the marriage such as efforts of the parties to communicate and the time spent together after marriage. In addition, the applicant argues that the IAD erred in finding it implausible that the applicant's intent was to return to India to be with her spouse after having come to Canada because of greater accessibility for people with disabilities. The applicant submits that her evidence that the situation in her brother's home was not good, her bedroom was in the living room, and her sister-in-law was unhappy with her living with them demonstrates why she wished to leave her brother's home for India. This evidence was not addressed by the IAD in reaching its implausibility finding.

[15] The respondent takes the position that there is no reason to believe that the IAD engaged in speculation in finding it implausible that the applicant intended to live in India with her spouse. The respondent argues that this finding is supported in the IAD's reasons and there is no basis to conclude that evidence was overlooked. I respectfully disagree.

[16] The applicant provided the following testimony before the IAD, testimony that is in my view directly relevant to the IAD's finding that it was implausible that the applicant planned to live in India with her spouse (Certified Tribunal Record, Volume 2 at pages 300 and 301):

> **COUNSEL:** What made you to decide to marry at 45, 40 years of age?
>
> **APPELLANT:** I was living with my parents. First I was living with my parents. That was a different kind of environment. Then I came here to my brother and sister-in-law so that is something different. So I was thinking that I'll be staying

> dependent on them all my life. So then I thought that I must need a companion and like a life partner in my life.
>
> **COUNSEL**: Can you go in more detail to explain what problems you anticipated or you were facing at this time when you decided to marry?
>
> **APPELLANT**: Like I cannot go like upstairs; I can't take the steps. Like my bed was in the living room. My closet and other stuff was also in the living room. **So my sister-in-law, she was like upset that you made, you know you turned our living room into a bedroom. So when her friends were you know coming there they were kind of like criticize me. So then I thought that I should remove myself from this place** [emphasis added].

[17] The applicant also explained in her testimony that she originally came to Canada because her parents were coming to Canada to live with her brother. She testified that she would have been alone with no one to assist with her care had she remained in India (Certified Tribunal Record, Volume 2 at page 322).

[18] The spouse's father-in-law, who appeared as a witness before the IAD corroborated the applicant's experiences with her family at page 370 of the Certified Tribunal Record, Volume 2: "my son told me that she wants to come here, she doesn't want to live in Canada. Then I asked why do you want to leave Canada. She said she has a problem in her household, her sister-in-law, she fights with her."

[19] Finally, the applicant was asked if she will continue to live with her brother if the appeal before the IAD is not successful. The applicant's response was that she has not made plans in the event she is not successful before the IAD and so will live with her brother (Certified Tribunal Record, Volume 2 at page 327 and 328). This might be viewed as contradicting her earlier

evidence. However, like the previous evidence relating to the applicant's explanation for intending to live in India and the father-in law's corroborative statement, it is not addressed by the IAD in reaching its implausibility finding.

[20] In *Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at paras 7-8, 208 FTR 267 (TD), Muldoon J held:

> [7] A tribunal may make adverse findings of credibility based on the implausibility of an applicant's story provided the inferences drawn can be reasonably said to exist. However, plausibility findings should be made only in the clearest of cases, i.e., if the facts as presented are outside the realm of what could reasonably be expected, or where the documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant. A tribunal must be careful when rendering a decision based on a lack of plausibility because refugee claimants come from diverse cultures, and actions which appear implausible when judged from Canadian standards might be plausible when considered from within the claimant's milieu.
>
> [8] In *Leung v. M.E.I.* (1994), 81 F.T.R. 303 (T.D.), Associate Chief Justice Jerome stated at page 307:
>
> > [14] Nevertheless, the Board is under a very clear duty to justify its credibility findings with specific and clear reference to the evidence.
> >
> > [15] This duty becomes particularly important in cases such as this one where the Board has based its non-credibility finding on perceived "implausibilities" in the claimants' stories rather than on internal inconsistencies and contradictions in their narratives or their demeanour while testifying. Findings of implausibility are inherently subjective assessments which are largely dependant on the individual Board member's perceptions of what constitutes rational behaviour. The appropriateness of a particular finding can therefore only be assessed if the Board's decision clearly identifies all of the facts which form the basis for their conclusions. **The Board will therefore err when it fails to refer to relevant evidence which**

> **could potentially refute their conclusions of implausibility** [emphasis added].

[21] I recognize that the IAD is an expert tribunal, and this reviewing Court owes it deference (*Burton* at para 13). However as stated in *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* [1998] FCJ 1425 at para 17, 157 FTR 35 (TD) "the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence"".

[22] In this case the IAD failed to directly address relevant and contradictory evidence relating to its finding that it was implausible that the applicant intended to remain in India after her marriage. This implausibility finding was the first made by the IAD and is a finding that is referred to throughout the IAD's analysis, and the decision cannot stand without it. In the circumstances the failure to address the evidence set out above is a reviewable error.

IV. Certified Question

[23] The applicant has proposed the following question for certification:

> Whether section 4(1)(a) of the IRPR requires a decision maker to decide whether or not at the time of entering into a relationship described in the section, including marriage, the intention of one or both of the parties was not *bona fides* for the purpose of entering into the relationship, but was instead a sham, a marriage of convenience or not undertaken in good faith.

Appendix C: Research Diary

Date	Discussion of Task/Supervision	Task Completed
1 June 2018	Meeting on-campus with Ben Page to discuss dissertation presentation and research initiation • Key takeaway: coding my research into a static Excel sheet may not be the most effective way to see the bigger picture. Was suggested to try keeping one long Word doc with notes from all my cases, so that it would be easier to see themes • Was also advised to be on the lookout for key phrases or quotes in my primary source material to flag/copy now, so that it would be easier to reference when it came time to write the paper	First draft of research slides completed
4 June 2018	Meeting via Skype with Tariq Jazeel (supervisor) to discuss dissertation presentation • Key takeaway: don't start research/dissertation assuming a conclusion. Ask open questions to best be able to see what the data says. "Is there a bias in immigration decision-making?" vs. "How are immigration decision-makers biased?"	Research questions and presentation slides updated
7 June 2018	Dissertation Presentation rehearsal (at home)	Be prepared to present dissertation proposal without reading off slides
8 June 2018	Dissertation Presentation	Presentation delivered
25 June 2018	Meeting in-person with Tariq Jazeel (supervisor) to discuss marks and feedback from the dissertation presentation	Presentation feedback was encouraging
29 June 2018	International Student check-in on campus	Attendance registered
29 June 2018 to 31 July 2018	Initial engagement with primary source material	Notes taken on all the cases in my study
13 July 2018	Draft dissertation deadline for feedback from supervisor • Reflection: I underestimated the time it would take to review my primary source material since I left no room in my timeline for getting sick, which is what happened	Deadline missed

25 July 2018	Skype call with Tariq Jazeel (supervisor) to discuss dissertation progress and questions • At this point, I was comfortable with my source material, but uncomfortable with the lit review section of the dissertation as this is the first time I have had to complete this • Key takeaway: lit review is your frame for the dissertation – it's contextual and conceptual remarks about relevant academic debates – try to put own analysis into it too	Possible key themes identified for the literature review: migration and marriage; migration from Asia to Canada; literature on love, marriage, coupling; and legal context
8 August 2018 to 13 August 2018	Independent research of secondary source material conducted for literature review and dissertation at large – used primarily online resources, with a few books	Academic papers and books read, notes taken
13 August 2018	International Student check-in on campus • Key takeaway: dissertation should be a funnel down (big topic first, then get narrower in focus); need to have intro, lit review, methodology review, context chapter (optional), analysis of what research showed, conclusion • Good dissertation should show not only what research says, but also why your research is important – "This gap is key. This is how I attempt to answer it. This is where we need to go next." • Get someone outside the field to review the paper – make sure it makes sense to any reader	Attendance registered and information received about the submission process (don't bind the declaration sheet, just insert it)
14 August 2018 to 24 August 2018	Create essay outline and write dissertation • Wasn't able to see the big picture of the paper until ¾ was written	Dissertation written, preliminary edits made one section at a time
24 August 2018	Ask partner (not in my field) to review draft • Key takeaway: don't forget to show why this research is important	Incorporate edits
25 August 2018 to 1 September 2018	Continue to edit paper (ask partner to reread) • Over this period, paper went through 6 different full edits/read-throughs, with additional section reviews	Incorporate edits, order of lit review changed to be more top-down
1 September 2018	Check the formatting of the paper • Glad I left a full day for formatting, to ensure all pieces were complete (abstract, acknowledgments, etc.)	Ensured bibliography is consistent and complete; case excerpt selected
2 September 2018	Finalize dissertation	Print & bind 2 copies
3 September 2018	Submit dissertation between 11am-12pm	Moodle submission too