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Remedies for Non-Citizens under Provincial Nominee Programs: Judicial Review and Fiduciary Relationships

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In Canada, more and more people get permanent residency under Provincial and Territorial Nominee Programs (PTNPs). Despite this new reality, there is today no detailed examination of the consequences of PTNPs for immigrants' rights and protections. In this paper, we seek to fill this gap. As we show, PTNPs have no statutory basis and officials who administer these programs do not exercise statutory authority of any kind. An alternative would be that these programs become "law"; then the decisions made under them would be judicially reviewable for conformity with that law. However, it is unlikely to happen because "flexibility" is seen as the key characteristic of PTNPs. We contend that the concept of a fiduciary relationship and fiduciary obligation has evolved greatly in the last decades in Canadian law, and we suggest, as an alternative to judicial review, extending a fiduciary duty to public decision makers. As in any new subject area of research, we hope that our findings will form the basis for further study on this understudied, and yet very important topic.

Les personnes qui obtiennent la résidence permanente par le biais des Programmes des candidats des provinces et des territoires (ci-après PCPTs) sont de plus en plus nombreuses au Canada. Malgré cette nouvelle réalité, il n'existe pas, à l'heure actuelle, d'examen détaillé portant sur les conséquences de ces programmes pour les droits et protections des étrangers. Dans cet article, nous souhaitons combler le vide en la matière. Nous montrons que les PCPTs n'ont pas de fondement législatif et les fonctionnaires administrent donc ces programmes sans autorité légale. Une alternative pourrait être que les provinces ou territoires édictent ces programmes sous forme de loi, ce qui permettrait alors aux tribunaux d'évaluer la conformité de ces décisions en fonction de ce que prescrit la loi. Cependant, il est peu probable que cela se produise, car la caractéristique première de ce programmes, c'est leur « flexibilité .» Nous prétendons que les concepts de « relation fiduciaire » et d'« obligation fiduciaire » ont connu une évolution importante dans le droit canadien au cours des dernières décennies, et nous suggérons qu'une alternative à la révision judiciaire pourrait se trouver dans la reconnaissance d'une obligation fiduciaire du décideur public envers le candidat à l'immigration sous les PCPTs. Comme pour tout nouveau sujet de recherche, nous espérons que nos conclusions susciteront d'autres études sur ce sujet encore peu exploré, et pourtant très important.

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Introduction

Canada shares with Australia, New Zealand and the United States the tradition of being a country of immigrants, and it has long maintained a fairly centralized immigration system to pursue immigration as part of its ongoing project of nation building.[1] Such centralization is supported by a constitutional division of powers: in Canada, immigration is a matter of shared federal/provincial jurisdiction, but in case of a conflict between a federal and a provincial law the former prevails.[2] However, Canada has recently experienced the devolution of some powers to sub-national levels in immigrant selection, as is evident through the development of Provincial and Territorial Nominee programs (PTNPs).[3]

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1. Jeffrey G Reitz, "Tapping Immigrants' Skills: New Directions for Canadian Immigration Policy in the Knowledge Economy" (2005) 11:1 IRPP Choices at 2; Peter J Spiro, "Federalism and Immigration: Models and Trends" (2001) 53:167 Intl Social Science J 67 at 71.
2. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 95, reprinted in RSC 1985, Appendix II, No 5.
3. "In the [mid-90s], some Canadian provinces took advantage of the federal government's offer to develop devolved immigration settlement and integration services and agreements. Thus, according to the existing federal/provincial agreements, Manitoba and British Columbia could manage their own language training and jobs programs for newcomers using federal funds. However, in April 2012, the federal government announced that it would resume management of settlement services in British Columbia (effective April 2014) and Manitoba (effective April 2013), noting that 'integration of newcomers is a nation-building responsibility.' Manitoba Premier delivered a stinging public rebuke in response, claiming the federal government was attempting to destroy a successful program that has brought [more than 100,000] immigrants to Manitoba since its inception in the 1990s. Manitoba Immigration Minister also deplored the fact that this 'unilateral decision' had been made 'without consultation' with the province." Sasha Baglay & Delphine Nakache, eds, *Immigration Regulation in Federal States: Challenges and Responses in Comparative Perspective* (Springer, 2014) at 96. For more on this topic, see Citizenship and Immigration Canada, News Release, "Government of Canada to Strengthen Responsibility for Integration of Newcomers: 'Integration Services Are about Nation Building', says Kenney" (12 April 2012) online: Canada's Economic Action Plan <http://www.actionplan.gc.ca/en/news/government-canada-strengthen-responsibility-integration-newcomers-integration-services-are>. See also "Manitoba angry about federal immigration changes" (12 April 2012), online: CBC <http://www.cbc.ca/news/canada/manitoba/manitoba-angry-about-federal-immigration-changes-1.1174711>.

In Canada, the immigration system comprises three streams, each corresponding to major program objectives: family (reuniting families), economic (contributing to economic development) and refugee (protecting refugees).[4] Provincial and territorial nominees belong to the economic stream. According to section 87 of the *Immigration and Refugee Protection Regulations*, the provincial nominee class is "a class of persons who may become permanent residents on the basis of their ability to become economically established in Canada."[5] Thus, provincial and territorial nominees are considered economic migrants, along with skilled workers, business immigrants and live-in caregivers.[6] Provincial and territorial nominees are workers designated by a province or territory that has entered into agreements with the Government of Canada to select immigrants who will meet their local economic needs. Depending on the stream and category, nominee applicants may apply from abroad or within Canada. While these nominees must meet federal health and security admission criteria, they are not subject to the federal skilled worker selection grid for determining eligibility. Thus, the immigration process under PTNPs involves two major stages: (1) potential immigrants submit applications to a given province/territory which nominates them for immigration; (2) Citizenship and Immigration Canada (CIC) conducts security, criminality and health checks and makes a final decision on whether to issue a visa.[7] Once successful applicants have been issued a visa and present the visa at a Canadian port of entry (or at a CIC office in Canada if the applicant is already here and has valid temporary resident status) they are granted their permanent residence status.[8]

4. These objectives are expressly stated in the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. See, more specifically, s 3 (1) c), d) and s 3 (2).

5. *Immigration and Refugee Protection Regulations*, SOR/2002-227, s 87(1) [*IRPR*].

6. In July 2014 the skilled worker component included immigrants meeting federal selection criteria that assessed the candidate's overall capacity to adapt to Canada's labour market. These criteria took into consideration factors such as education, English or French language abilities, and work experience. The skilled worker component was comprised of the Federal Skilled Worker Program (FSWP), the Canadian Experience Class (CEC) and the Federal Skilled Trades Program (FSTP). The business immigrant component included those who invest their money in an approved venture and those who intend to be self-employed. The live-in caregiver component included previous temporary migrant workers who were granted permanent residence after their participation in the Live-in Caregiver Program.

7. Citizenship and Immigration Canada, *OP 7.b Provincial Nominees, Operational Manuals* (2010), online: CIC <www.cic.gc.ca/english/resources/manuals/op/op07b-eng.pdf>.

8. *IRPR*, *supra* note 5, ss 71 and 87.

Currently, all provinces and territories, with the exception of Quebec[9] and Nunavut, have PTNPs. Over the years that PTNPs have been in existence (since 1999),[10] these programs have grown a great deal, from 477 permanent residents (or 0.9 per cent of the economic stream) in 1999 to 40, 899 (or twenty-five per cent of the economic stream) in 2012 (17,200 principal applicants and 23,699 spouses and dependants).[11] CIC became concerned that as a result of PTNP growth, fewer economic immigrants would be admitted through the federal skilled worker class, which had traditionally (and until recently) been the primary source of economic immigrants. CIC then implemented in 2009 a national limit of 17,065 principal applicants for the country as a whole and for each participating province/territory. However, given ongoing calls from a number of provincial premiers for the limits to be raised, this limit was increased to 20,665 for 2010 and to 22,315 for 2013. For 2014, the target for PTNP admissions (principal applicants, spouses and dependants) has been set at between 44,500 and 47,000. If met, this will constitute a record level for the program.[12] It is also worth noting that several provinces and territories have recently welcomed more permanent residents through PTNPs than any of the other federal immigration streams (94.7 per cent of all permanent residents in Prince Edward Island, 91.1 per cent of all permanent residents in Manitoba, 56 per cent of all permanent residents in Yukon).[13]

The increase in provincial/territorial nominees is driven by three major factors: (1) the pursuit of efficiency of immigration management, (2) the challenges centralized immigration systems face in responding to diverse regional needs/concerns, and (3) recent changes to the Federal Skilled Worker Program (FSWP). The "race for talent" and international

9. Quebec has not established a PTNP. According to the *Canada–Québec Accord relating to immigration and temporary admissions of aliens*, signed in 1991, Quebec possesses its own particular competencies regarding the selection and settlement of immigrants to the province. Quebec establishes its own programs and processes in immigration related matters.

10. Manitoba was the first province to sign an agreement in 1996 and it started operating its PTNP in 1999. The Northwest Territories signed an agreement most recently, in 2009 and consequently has the newest PTNP, see Citizenship and Immigration Canada, *Evaluation of the Provincial Nominee Program*, (2011) at 15 [CIC, *Evaluation*].

11. Citizenship and Immigration Canada, *Facts and Figures 2012—Immigration overview: Permanent and temporary residents* (2013), online: CIC <www.cic.gc.ca/english/resources/statistics/facts2012/permanent/02.asp> [CIC, *Tables 2012*].

12. For more on this topic, see F Leslie Seidle, *Canada's Provincial Nominee Immigration Programs: Securing Greater Policy Alignment*, (2013) IRPP Study No 43 at 8, online: IRPP <irpp.org/wp-content/uploads/assets/research/diversity-immigration-and-integration/canadas-immigration-programs/Seidle-No43.pdf> [Seidle].

13. CIC, *Evaluation*, *supra* note 10 at 20.

competitiveness in immigration matters[14] has created space for Canadian provinces and territories to develop their own immigrant selection programs. The premise underlying this trend is that the provinces and territories are better equipped than the federal immigration system to respond to particular local needs, help quicker labour market integration of newcomers, and resolve uneven newcomer settlement.[15] What is more, the FSWP traditionally allowed for admission of workers in all skilled occupations (based on their prospective employability assessed under the points system). However, following criticisms that this approach was insufficiently linked to existing labour market needs,[16] the federal government introduced in 2012 strict eligibility rules and changed the points system,[17] which has led to a drastic diminution of the pool of those who could apply under the FSWP. Since fewer skilled workers are eligible to apply under the FSWP or qualify under the new points system, they may have an incentive to use PTNPs as an alternative pathway to permanent residency. In addition to the above factors, other current policy trends—increasingly employer-driven admission and growth of two-step migration—support further expansion of PTNPs. In fact, an increasing number of immigration programs in Canada are employer-driven, requiring either a job offer or Canadian experience in order to apply. Further, unlike

14. Ayelet Shachar, "The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes" (2006) 81 NYUL Rev 148.

15. Settlement patterns in Canada are characterized by uneven distribution of newcomers across the country. Between 1995 and 2008, over 80% of newcomers settled in British Columbia, Ontario, Quebec and their metropolises, while other regions often "starved" for newcomers: Citizenship and Immigration Canada, Immigration overview: Permanent and temporary residents (2008), online: CIC <www.cic.gc.ca/english/resources/statistics/facts2008/index.asp>. It should be noted, however, that although these provinces continue to be the top destinations for newcomers, there have been some changes in settlement patterns in Canada over the last decade. For example, the share of newcomers in certain Western provinces, including Manitoba, Saskatchewan and Alberta has increased from 9% of the total annual intake in 2000 to 20% in 2010. At the same time, the number of newcomers destined for Ontario, Quebec and British Columbia has declined from 89% in 2000 to 77% in 2010; see Citizenship and Immigration Canada, *Facts and Figures* 2010—Immigration overview: Permanent and temporary residents (2010), online: CIC <www.cic.gc.ca/english/resources/statistics/facts2010/index.asp>.

16. Delphine Nakache & Paula J Kinoshita, "The Canadian Temporary Foreign Worker Program: Do Short-Term Economic Needs Prevail over Human Rights Concerns?" (2010) IRPP Study No 5.

17. It should be noted that the eligibility criteria under the FSWP are changing regularly. For example, in February 2014 only three groups were eligible to apply under the FSWP: (1) persons with experience in listed occupations in demand; (2) skilled workers with a job offer; (3) international students enrolled in PhD programs in Canada. In July 2014, Citizenship and Immigration Canada requested that every applicant in each of the three groups listed above also has at least one year of continuous and paid skilled work experience in Canada in a single occupation within the last 10 years. What's more, under the revised points system, language has become the most important selection factor; points for Canadian work experience have been increased while points for foreign work experience have been reduced; and the emphasis on younger immigrants has become stronger.

in the past when most candidates applied for permanent residence from abroad, there is an increasing preference for two-step migration whereby a person is first admitted on a temporary basis as an "international student" or "temporary foreign worker," and later allowed to transition to permanent residence. These points are discussed in more detail below, and it is shown that PTNPs fit both of these trends, as they usually make a job offer a precondition for nomination and/or require previous work experience with a local employer. Thus, PTNPs are becoming an integral and long-lasting feature of Canadian immigration programs—a development that requires close scrutiny of their implications.

In the past decade, provinces and territories have been given progressively more leeway in how to design their selection programs and how to administer and evaluate them. This has resulted in great diversity of PTNP streams, criteria and sizes: there are today over 50 PTNP streams operating in 11 Canadian provinces/territories.[18] While "provinces have become active players in devising immigration programs that complement and at times replace their federal counterpart,"[19] this significant change in immigration policy is occurring with little academic study and debate. For a long time, certain aspects of PTNPs were only examined in the context of specific-issue studies such as multi-level governance,[20] attraction and

18. It is worth mentioning, however, that all PTNPs currently have operational Skilled Worker streams, most of which require a full-time job offer from a local employer. Furthermore, every PTNP has, or has had a Business stream in the past. Finally, most PTNPs now have a Semi-Skilled Worker, International Student Graduate and Family Connection stream. See CIC, *Evaluation*, *supra* note 10 at 15-16. See also Delphine Nakache & Sarah D'Aoust, "Provincial and Territorial Nominee Programs: An Avenue to Permanent Residency for Low-Skilled Migrant Workers in Canada?" in Christine Straehle & Patti Tamara Lenard, eds, *Partial Members: Low-Skilled Temporary Labour Migrants in Canada* (Montreal: McGill-Queen's University Press, 2012) at 165.

19. Harriet Nijboer, *Federal-Provincial Relations on Immigration: Striking the Right Balance* (LLM Thesis, Graduate Department of Law, University of Toronto, 2010) [unpublished] at 1.

20. Christopher Leo & Martine August, "The Multilevel Governance of Immigration and Settlement: Making Deep Federalism Work" (2009) 42:2 Can J Political Science 491; Christopher Leo, "Deep Federalism: Respecting Community Difference in National Policy" (2006) 39:3 Can J Political Science 481.

retention of immigrants,[21] labour market integration of newcomers,[22] economic immigration policy,[23] and regionalization of migration.[24] A more critical scholarship on PTNPs has only started to emerge. Seidle, for example, highlights the lack of communication between the federal, provincial and territorial governments regarding PTNPs. He argues that decisions are not sufficiently informed by the experience of other provinces and territories. He also shows that practice is not always consistent with the stated objectives of the program. According to Seidle, the federal and participating provincial/territorial governments should urgently work together to better coordinate their actions in this area.[25] Lewis, writing specifically about the nominee program in Manitoba, explains that the privatized nature of recruitment and settlement that is characteristic of PTNPs (due to great reliance on employers and ethnic community groups) has resulted in ethnocultural inequality of new arrivals, with privileges given to certain ethnic communities (the ones that are better established in Manitoba tend to nominate and provide settlement services to persons with the same ethnocultural affiliation).[26] Dobrowolsky, looking at the Nova Scotia nominee program, raises concerns about the gender and

21. Graeme Hugo & Kevin Harris, *Population distribution effects of migration in Australia*, Report for Department of Immigration and Citizenship, (Adelaide: The University of Adelaide, 2011), online: IMMI <www.immi.gov.au/media/publications/research/migration-in-australia/full-report.pdf>; Tom Carter, Manish Pandey & James Townsend, "The Manitoba Provincial Nominee Program: Attraction, Integration and Retention of Immigrants" (2010) IRPP Study No 10, online: IRPP <irpp.org/wp-content/uploads/assets/research/diversity-immigration-integration/the-manitoba-provincial-nominee-program/IRPP-study-no10.pdf>; Daniel Hiebert & Kathy Sherell, "The Integration and Inclusion of Newcomers in British Columbia" *Metropolis British Columbia, Working Paper Series* (November 2009), online: MBC <mbc.metropolis.net/assets/uploads/files/wp/2009/WP09-11.pdf>; Ather H Akbari & Jennifer S Harrington, "Initial Location Choice of New Immigrants to Canada" *Atlantic Metropolis, Center Working Paper Series* (2007), online: Atlantic Metorpolis <community.smu.ca/atlantic/documents/AkbariandHarringtonWP5.pdf>; Tracy Derwing *et al*, "The Attraction and Retention of Immigrants to Edmonton: A Case Study of a Medium Sized Canadian City" *Prairie Centre of Excellence for Research on Immigration and Integration, Working Paper Series* (2006), online: PCERII <www.ualberta.ca/npcerii/WorkingPapers/WP05-05.pdf>.

22. Manish Pandey & James Townsend, "Provincial Nominee Programs: An Evaluation of Earnings and Retention Rates of Nominees" *University of Winnipeg, Department of Economics Working Paper* (2010), online: The University of Winnipeg, Department of Economics <economics.uwinnipeg.ca/RePEc/winwop/2010-01.pdf>.

23. Naomi Alboim, "Adjusting the Balance: Fixing Canada's Economic Immigration Policies" *Maytree Report* (2009), online: Maytree <www.maytree.com/wp-content/uploads/2009/07/adjustingthebalance-final.pdf>.

24. Graeme Hugo, "Immigrant Settlement Outside of Australia's Capital Cities" (2008) 14:6 Population, Space & Place 553.

25. Seidle, *supra* note 12.

26. Nathaniel M Lewis, "A Decade Later: Assessing Successes and Challenges in Manitoba's Provincial Immigrant Nominee Program" (2010) 36:2 Can Public Policy 241.

class impact of PTNPs.[27] She also highlights the neoliberal nature of the program, designated as a form of "immigration marketization," and its impact on the structure and agency of various actors involved at the sub-national level.[28] Baglay, D'Aoust and Nakache, who have looked at the impact of PTNPs on temporary migrant workers, have shown that PTNPs provide these workers with certain benefits (such as greater opportunities to change from a temporary to a permanent resident status from within Canada), but at the same time have raised a number of concerns, such as an increased dependence on employers and difficulty navigating these programs.[29] Finally, recent conference papers by immigration lawyers have briefly identified specific legal issues related to PTNPs (long processing times, changes to programs without notice and lack of appeals).[30] However, written by and for practitioners, these short papers focus primarily on practical issues faced by immigration lawyers. There is thus no detailed examination of the consequences of PTNPs for immigrants' rights and protections. In this paper, we seek to fill this gap by showing that the absence of a clear legal framework for PTNPs is likely to negatively affect the fundamental right of non-citizens to challenge a negative decision from the province or territory regarding their application to the nominee program.

If an applicant obtains a PTNP nomination at the provincial or territorial level and is subsequently denied permanent resident status at the federal level (i.e., by a federal decision-maker), the available mechanism is clear: the applicant may apply to the Federal Court for leave to judicially review this refusal. This is because the final decision regarding permanent residence lies with CIC (i.e., after the nomination has been granted by the provincial or territorial decision-maker). Thus, "at this point in the process, a [permanent residency] refusal of a provincial nominee is like any

27. Alexandra Dobrowolsky, "The Intended and Unintended Effects of a New Immigration Strategy: Insights from Nova Scotia's Provincial Nominee Program" (2011) 87 Studies in Political Economy 109.

28. Alexandra Dobrowolsky, "Nuancing Neoliberalism: Lessons Learned from a Failed Immigration Experiment" (2013) 14:2 J Intl Migration & Integration 197.

29. Sasha Baglay & Delphine Nakache, "The Implications of Immigration Federalism for Non-citizens' Rights and Immigration Opportunities: Canada and Australia Compared" (2013) American Rev Can Studies 43:3; Nakache & D'Aoust, *supra* note 18 at 165-169.

30. Alan Diner, "Protection Nominee Positions: A review of PNPs and their Jurisprudence" (Paper delivered at the Carleton County Law Association, March 2012) [unpublished]; Mario D Bellissimo, "Provincial Nominee Certificate Refusals: Any Relief?" (2011) 99 Imm LR (3d) 262; Jolene Otieno & Veronica Cheng, "Top 10 Issues in Provincial Nominee Programs: Western Canada (British Columbia, Alberta, Saskatchewan, Manitoba)" (Paper presented to the National Citizenship and Immigration Law Conference of the Canadian Bar Association, 13–15 May 2010), online: CBA <www.cba.org/cba/cle/PDF/Imm10_Cheng_Otieno_paper.pdf>.

other [permanent residency] refusal."[31] The vast majority of the available jurisprudence with respect to provincial nominees focuses on applicants at this stage in the process (i.e., post nomination), who are seeking redress for permanent residence refusals based on failures to fulfill or comply with legislative requirements,[32] principally of the *IRPA*.[33] For example, the most common rejection of an application for permanent residence as a member of the PTNP class is due to inadmissibility, on grounds such as security (*IRPA*, s. 34(1)), criminality (*IRPA*, s. 36(1)), health (*IRPA*, s. 38(1)), or misrepresentations (*IRPA*, s. 40(1)(a)). However, to date, the law does not provide a clear indication as to which remedies are available to an applicant at the provincial/territorial stage should a PTNP nomination be refused by a provincial or territorial decision-maker.[34] Applicants in some provinces may request reconsideration of the PTNP nomination refusal, but this is not a formal appeal process, since the reconsideration takes place at the program level.[35] As we explain further, judicial review to the applicable provincial court is the most viable option for a PTNP applicant who wants to challenge a negative decision at the provincial or territorial level. But unfortunately, because of the very special configuration of PTNPs (i.e., neither the requirements for granting PTNP nomination, nor the authority for provinces to make PTNP nomination decisions are set out

31. Bellissimo, *supra* note 30 at 265.

32. See, e.g., *Moumivand v Canada (Minister of Citizenship & Immigration)*, 2011 FC 157, [2011] FCJ no 354 (QL); *Ma v Canada (Minister of Public Safety & Emergency Preparedness)*, 2009 FC 1042, [2009] FCJ no 1283 (QL); *Baybazarov v Canada (Minister of Citizenship & Immigration)*, 2010 FC 665 [2010] FCJ no 950 (QL); *Ni v Canada (Minister of Citizenship & Immigration)*, 2010 FC 162, 2010 CarswellNat 6177 (WL Can); *Wai v Canada (Minister of Citizenship & Immigration)*, 2009 FC 780, 348 CarswellNat 660 (WL Can); *Guan v Canada (Minister of Citizenship & Immigration)*, 2009 FC 274, cited in Bellissimo, *supra* note 30 at 265. In July 2014, a dozen other cases regarding post-certificate matters have been rendered by the Federal Court (at least since Bellissimo's article was published in Fall 2011).

33. *IRPA*, *supra* note 4.

34. In fact, the Manitoba Court of Queen's Bench did recently render the first Canadian decision regarding the review of a decision under a PTNP: *Jiang v Manitoba (Minister of Labour and Immigration)*, 2013 MBQB 107, 292 Man R (2d) 76 [*Jiang*]. The court rejected an application for certiorari of a PTNP refusal. As stated in para 36 of the decision, "[T]his was the first time a superior court in Canada had been asked to review a decision under a provincial nominee program." To our knowledge, there is also the filed case CI12-01-76940 *Ioc Ip Lau, applicant, and Manitoba (Minister of Labour and Immigration), respondent*, which application has been made in January 2012, regarding the refusal of a Manitoba PNP application on the ground that the applicant did not meet the requirements. The case has been adjourned sine die in March 2012. According to Diner, *supra* note 30 at 7, regarding other pre-nomination matters that have been reported, "the government of Manitoba settled on the first judicial review in 2009" and "in Newfoundland, counsel challenged a nomination withdrawal three years ago under the certiorari provisions of the NL Rules, but the government capitulated."

35. Some provinces provide the PTNP applicant with some kind of internal review process for nomination refusals, but these review processes are not statutorily based and should be more properly seen as "reconsideration requests" or re-applications. For more details, see Diner, *supra* note 30.

in provincial or territorial legislation), this route is not without obstacles for PTNP applicants. Clearly, the structure of PTNPs must be questioned because it leaves PTNP applicants with an unsatisfactory recourse at the provincial stage. But we also need to think outside the traditional box of judicial review, and see how we can best take into consideration the *unique* relationship between PTNP applicants and provincial/territorial decision makers in this area.

Our paper is divided in two parts. In Part I we offer an analysis of possible means of challenging a nomination refusal at the provincial or territorial level and contend that the absence of a legal framework for PTNPs is such that decision makers who exercise public power in their respective province or territory are not held accountable for exercising their power in conformity with law, as is the case at the federal level. Our objective here is not to say that these decision makers exercise their power in abusive, discriminatory or pernicious ways, but rather that this discretionary power is ambiguous and problematic because it is not authorized by law. In Part II we show that the concept of a fiduciary relationship and fiduciary obligation has evolved greatly in the last decades in Canadian law, and that it has clearly expanded beyond its original application to trustees and beneficiaries in the private-law setting. We then suggest that, in the specific context of PTNP applicants, the unique nature, framework, and functioning of the programs could lead the provincial (or territorial) decision maker to owe a fiduciary duty towards applicants, a duty stemming from procedural rights and legitimate expectations. Challenging a possible breach of this duty could become a new path towards recourses for applicants. Our criticism of the absence of a legal framework for PTNPs gives us the opportunity to probe deeper into the unique relationship that exists between provincial and territorial decision makers and non-citizens, and to look at the foundation of this relationship. As in any new subject area of research, we hope therefore that our findings will form the basis for further study on this understudied, and yet very important topic.

I. *Legal recourses for PTNP applicants at the provincial/territorial level: are provinces and territories governing arbitrarily?*

Under the authorities of section 8(1) of the *IRPA* and section 5(1) of the *Department of Citizenship and Immigration Act*,[36] PTNPs operate under individual agreements between the federal government and each province and territory. Subsection 8(1) of the *IRPA* reads as follows:

36. *Department of Citizenship and Immigration Act*, SC 1994, c 31, s 5(1).

> The Minister, with the approval of the Governor in Council, may enter into an agreement with the government of any province for the purposes of this Act. The Minister must publish, once a year, a list of the federal–provincial agreements that are in force.

Thus, in order to establish a PTNP, each province and territory is required to sign an agreement with CIC, which, along with other immigration matters, outlines the specific roles and responsibilities of the province/territory and the federal government. Specific terms of agreement vary between nominee programs, but they generally set out that the province or territory is responsible for assessing and nominating the candidates, and that CIC retains the sole authority to grant permanent resident status to the nominee.[37]

Although provinces and territories are responsible for the nomination of PTNP applicants, the power of the provinces and territories to make these decisions flows *exclusively* from federal legislation (*IRPA*). There is no equivalent provincial or territorial legislation for PTNPs; the programs are solely policy-based. The very particular nature of these programs was recently the subject of a succinct—but very useful—explanation by Schwann J. of the Saskatchewan Court of Queen's Bench in a case related to alleged fraudulent acts of a PTNP consultant. Justice Schwann described the Saskatchewan Immigration Nominee Program as follows:

> 3 [The] Saskatchewan Immigration Nominee Program ("SINP")... is the provincial off shoot of legislative responsibilities and programs administered by the Government of Canada...under the *Immigration and Refugee Protection Act*.... Essentially, the SINP program dovetails and

37. For example, the *Canada–Manitoba Immigration Agreement* stipulates, at s 0.17, "The Parties Hereto agree on the following: ...b. [That] Canada will determine national policy objectives and annual plans for the immigration program; it will be responsible for the selection, admission and control of immigrants and temporary residents and refugee claimants ...c. [That] Manitoba will advise Canada regarding its annual immigration levels plans; and d. [That] Manitoba will exercise its responsibilities in the development and implementation of programs; policies and legislation; facilitating promotion and recruitment of immigrants; determination of provincial nominees; and the provision of settlement and integration services as set out in this Agreement.": Citizenship and Immigration Canada, *Canada–Manitoba Immigration Agreement* (2003), online: CIC <www.cic.gc.ca/english/department/laws-policy/agreements/manitoba/can-man-2003.asp> [CIC, *Canada–Manitoba Agreement*]. Similarly, the *Canada–Ontario Immigration Agreement*, Annex C: Pilot Provincial Nominee program, s 4.1 provides that "Ontario has the sole and non-transferable responsibility to assess and nominate candidates," while s 4.7 stipulates that "Canada will: (a) exercise the final selection; (b) determine the admissibility of the nominee and his or her dependants with respect to legislative requirements including health, criminality and security; and (c) issue immigrant visas to provincial nominees and accompanying dependants who meet all the admissibility requirements of the IRPA and IRPR.": Citizenship and Immigration Canada, *Canada–Ontario Immigration Agreement* (November 2005), online: CIC <www.cic.gc.ca/english/department/laws-policy/agreements/ontario/ont-2005-agree.asp>. See also, generally, Citizenship and Immigration Canada, *Federal–Provincial/Territorial Agreements* (2010), online: CIC <www.cic.gc.ca/english/department/laws-policy/agreements/index.asp>.

> feeds into the federal immigration mandate by enabling Saskatchewan to select provincial nominees for landed immigrant status in Canada. *SINP is not established pursuant to specific legislative authority. It derives its authority pursuant to 'management direction' from the broader, umbrella legislative mandate of the Ministry. In this respect the processes, forms, guidelines, criteria, requirements, evaluation and decision making, etc. were all created and are governed by broad based ministerial policy. As succinctly put by the Ministry, the program has no statutory basis and the officials who administer it do not exercise statutory authority of any kind.*[38]

This legal vacuum negatively affects the right of any PTNP applicant to seek legal remedies at the provincial or territorial stage, should a provincial or territorial decision maker refuse a PTNP nomination. Clearly, a true appeal based on the merit of the case is not an option for any PTNP applicant. First, there must be a statutory provision allowing for such an appeal and determining its scope, and in the case at hand, there is no legislation governing the PTNP process or creating the court, tribunal or other judicial or administrative authority that is competent to hear an appeal. Second, even if some provinces or territories provide PTNP applicants with some kind of internal review process for nomination refusals, as we have explained earlier, these review processes are not statutorily based and should be more properly seen as "reconsideration requests" or re-applications.[39] Administrative review of nomination decisions is not an option either because there is no administrative tribunal to hear matters dealing directly with nomination under the PTNPs.[40] As for judicial review by the Federal Court, it cannot be performed either. Indeed, federal-provincial and territorial agreements are today the *only* source of legislative authority for PTNPs, and subsection 72 (1) of *IRPA* and paragraph 18.1 (3)(*a*) of the *Federal Courts Act*[41] only deal with decisions of federal decision makers, not decisions of provincial/territorial

38. *Kaberwal v Saskatchewan (Ministry of the Economy)*, 2013 SKQB 244, 424 Sask R 144 [emphasis added].

39. For more information on reconsideration processes, see *supra* note 35.

40. See Chris Rootham, "Are there distinct standards of 'Administrative Review'?" *Nelligan O'Brien Payne* (2003) at 3, online: Nelligan <www.nelligan.ca/e/pdf/AdministrativeReview_CR.pdf>.

41. *Federal Courts Act*, RSC 1985, c F-7, s 18.1 (3)(a). Section 18.1 (3)(a) states: "On an application for judicial review, the Federal Court may (a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing...."

decision makers.[42] In fact, application for judicial review at the provincial court level is the only appropriate route, but there are pitfalls along the way, as we show in the following paragraphs.

Judicial review is an essential administrative law process because it does exist to ensure that decision makers have not exercised their power arbitrarily or unreasonably. Recent decisions of the Supreme Court of Canada have made it clear that the standard applicable to most judicial reviews would be one of reasonableness.[43] In fact, in *Mowat*, the norm of correctness has clearly been circumscribed to four particular situations:

> constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator's expertise… '[q]uestions regarding the jurisdictional lines between two or more competing specialized tribunals'…, [and] true questions of jurisdiction or vires.[44]

Since the situation of PTNPs falls outside these categories, deference is likely to be afforded to decision makers, and the reviewing court will intervene only if the decision does not fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."[45]

This deference towards decision makers stems precisely from the discretionary power granted to them. Usually, such discretion has to be expressly attributed, and its scope is normally established in enabling statutes. For example, the broad discretionary power granted to the Immigration Appeal Division of the Immigration and Refugee Board

42. Section 72 (1) of *IRPA*, *supra* note 4, states: "Judicial review by the Federal Court with respect to any matter—a decision, determination or order made, a measure taken or a question raised—under this Act is commenced by making an application for leave to the Court." This position was further clarified by the Federal Court in *Aulakh v Canada (Minister of Citizenship and Immigration)*, [2005] FCJ no 212 (QL), at para 4: "I am satisfied that Manitoba's Provincial nominee program is not a 'Federal Board commission, or other tribunal' as defined by section 2 (1) of the Federal [Court] Act. The decision being the subject of the application for leave and judicial review therefore falls outside the jurisdiction of this Honourable Court to judicially review, as established by the Federal Court Act, s.18.1 (3)(a)."

43. See, e.g., *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53, [2011] 3 SCR 471 [*Mowat*]; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 ; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708; *McLean v British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 SCR 895; and, generally, *Dunsmuir v New Brunswick*. 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*].

44. *Mowat*, *supra* note 43 at para 18 [references omitted].

45. *Dunsmuir*, *supra* note 43 at para 47.

stems from section 67 of the *IRPA*.[46] However, in the case of PTNPs, where does the discretionary power of provincial and territorial decision makers come from? From the division of powers and obligations related to immigration found in federal-provincial agreements, which are of no legislative or regulatory nature?

This question, for which there is no answer, highlights that provinces may govern arbitrarily, not because their civil servants are exercising their power in a abusive manner, but simply because their power is not authorized and delineated by law. An important dimension of provincial and territorial decision makers' discretion is that the requirements for granting a PTNP nomination (i.e., the specific criteria set out by the province or territory to assess nominations) are also not found in any provincial/territorial legislation (since there is no such legislation). All provinces and territories with a nominee program make available, on their individual websites, information regarding the application process, eligibility requirements and necessary forms. Some nominee programs even supply applicants with guidelines and manuals explaining the selection process and the role of every agent, officer or public decision maker involved in the process.[47] Yet none of these documents can be considered as having legal authority.[48] Interestingly, each CIC-provincial and -territorial agreement makes clear that "procedures and criteria for nomination" established by the province or territory must be followed by them.[49] But does this mean that failure to follow such "procedures and criteria" would trigger review? Here again,

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46. *IRPA*, *supra* note 4, section 67 reads as follows: "67 (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,
    (a) the decision appealed is wrong in law or fact or mixed law and fact;
    (b) a principle of natural justice has not been observed; or
    (c) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case."

47. See, e.g., Government of Saskatchewan, Saskatchewan Immigrant Nominee Program, *SINP Procedural Guidelines* (2011), online: Government of Saskatchewan <www.saskimmigrationcanada.ca/sinp-procedural-guidelines> [*Saskatchewan, Guide*]; Nova Scotia Immigration, *Nova Scotia Nominee Program Skilled Workers Stream Application Guide* (2013), online: Nova Scotia Immigration <novascotiaimmigration.com/wp-content/uploads/ApplicationGuideNSNP_SW_1August2014_Final.pds> [*Nova Scotia, Guide*].

48. Bellissimo, *supra* note 30 at 268.

49. See, e.g., Citizenship and Immigration Canada, *Agreement for Canada–Yukon Co-operation on Immigration, Annex A—Provincial Nominees* (2008), online: CIC <http://www.cic.gc.ca/english/department/laws-policy/agreements/yukon/can-yukon-agree-2008.asp> at s 3.3, which states: "In exercising its nomination authority under this Agreement, Yukon will follow the procedures and criteria for nomination established by Yukon, as amended from time to time…." All agreements contain similar dispositions.

contrary to what has been argued elsewhere,[50] there is no absolute answer, because the nature of these "procedures and criteria," being related to policy-based programs, is in itself unclear. Indeed, it seems impossible today to determine whether they should be considered as "procedural guidelines" or "substantive guidelines," and yet, this characterization determines the scope of application of the deference owed to decision makers. For example, if they are considered as equivalent to manuals and operational bulletins set out for federal immigration officers, the rule against the fettering of discretion doctrine could apply. This would mean that we could not expect provincial or territorial decision makers to limit their discretionary power to the requirements for nomination established by their respective province/territory. In other words, an applicant could not seek a review just because the province or territory has rejected the application—even if the criteria set out had been met.[51] But again, since the program has no statutory basis and the decision makers who administer it do not exercise statutory authority of any kind, we cannot assert anything with certainty regarding this point.

On what basis, then, could an applicant contest the application of discretion by a PTNP decision maker if no legal authority grants this discretion and determines its scope? It has been established that discretion can be implied on the grounds of practical convenience (i.e., so the object and purpose of the act/rule/program can be achieved).[52] In the context of PTNPs, this would mean that a decision going against the primary purpose of the nominee programs would trigger review; however, this would seriously limit the core flexibility and liberal management that is at the heart of PTNPs.

In sum, the respective roles of the federal, provincial and territorial governments in the PNTP process are clearly delineated, especially by agreements between the federal government and each province and territory. However, the mechanisms by which an applicant dissatisfied

50. Mario D Bellissimo argues that failure to follow the criteria for nomination established by the province/territory would trigger review. See Bellissimo, *supra* note 30 at 271.

51. The fettering of discretion doctrine states that decision makers cannot limit their discretionary power to guidelines that have a non-mandatory nature. For more on this topic, see *Canada (Citizenship and Immigration) v Thamotharem*, 2007 FCA 198, 366 NR 301; *Restrepo Benitez v Canada (Citizenship and Immigration)*, 2007 FCA 199, [2008] 1 FCR 156. See also France Houle, "Thamotharem and Guideline 7 of the IRB: Rethinking the Scope of the fettering of Discretion Doctrine" (2008) 25:2 Refuge 103 at 104-106, 108.

52. See Lord Greene in *Associated Provincial Picture Houses Ltd v Wednesbury Corp*, [1947] 2 All ER 680, cited in Guy Régimbald, *Canadian Administrative Law*, 1st ed (Markham, Ontario: LexisNexis, 2008) at 178-179. See also Patrice Garant with the collaboration of Philippe Garant & Jérôme Garant, Droit administratif, 6th ed (Montréal: Éditions Y Blais, 2010) at 199; *Interpretation Act*, RSC, 1985, c I-21, s 311(2).

with a decision made by provincial or territorial authorities may seek remedial relief remain unclear. This is so because the PTNP process is not set out in any provincial or territorial legislation, and given that the power of the provinces and territories to make these decisions flows exclusively from federal legislation, key questions remain unanswered. For example, on which basis could an applicant contest the application of discretion by a PTNP decision maker if no legal authority determines its scope? Is it correct to assert that failure of the provincial or territorial decision maker to follow the criteria for nomination established by the province or territory would *automatically* trigger review? At the time of writing (July 2014), this particular legislative structure had not been the subject of examination by case law. In fact, judicial review had been sought two times by PTNP applicants, once in Manitoba regarding a decision under the Manitoba nominee program[53] and once in New Brunswick regarding a delay extension for an application for judicial review of a decision under the New Brunswick nominee program,[54] and the only point made by Keyser J. of the Manitoba Court of Queen's Bench in *Jiang* is that the flexibility of these programs is crucial, thus underlining that program requirements could vary from one PTNP stream to another.[55] Therefore, questions pertaining to the legal ground for provincial decision makers' discretionary powers and the scope of deference owed to them have not yet been addressed. It is to be hoped that this will happen in the near future because it is highly problematic that decision makers who exercise public power at the provincial level are not held accountable for exercising their power in conformity with law (even where that law grants significant discretion), as is the case at the federal level. On that note, it is difficult to see how the federal government can delegate an immigration function by agreement to another level of government, and how that function can be insulated from judicial review when, if the federal government retained it, there is no question that it would be reviewable.

The alternative would be that these programs are "law" (i.e., there is provincial or territorial legislation dealing with the powers and responsibilities of provinces or territories in the PTNP process). Then, the decisions made under PTNPs would be judicially reviewable for conformity with that law. As the Quebec example shows, there are benefits for applicants accruing from an immigrant selection process clearly rooted in legislative authority. In Quebec, the process for obtaining the Quebec

53. See *Jiang*, *supra* note 34.
54. *Lingyun v New Brunswick*, 2013 NBQB 59, 400 NBR (2d) 50.
55. *Jiang*, *supra* note 34 at para 24-26.

selection certificate (CSQ)[56]—the equivalent of a provincial or territorial nomination—is clearly explained and regulated in *An Act respecting immigration to Québec*,[57] its *Regulation Respecting the Selection of Foreign Nationals*,[58] and other appended regulations.[59] Appeal mechanisms for CSQ applicants are clear and straightforward: the minister's decision regarding cancellation of a selection certificate may be contested before the Tribunal Administratif du Québec (TAQ) before the 60th day following the notifications.[60] Section 15 of *An Act Respecting Administrative Justice*, the enabling statute for the TAQ, is written as follows:

> The Tribunal has the power to decide any question of law or fact necessary for the exercise of its jurisdiction. In the case of the contestation of a decision, the Tribunal may confirm, vary or quash the contested decision and, if appropriate, make the decision which, in its opinion, should have been made initially.[61]

As the TAQ is an administrative tribunal, an application for judicial review can be made to the Superior Court.[62] Interestingly, all provinces and territories are perfectly entitled to adopt such legislation, since each

56. An applicant wishing to come as a worker or under a family reunification process must first obtain a selection certificate, as stated in s 3.1 of the *An Act respecting immigration to Québec*, RSQ, c I-0.2 [*Quebec Act*]. Its long section 3.3 also states that the selection criteria may be established under regulations. Thus, ss 2 to 16 of the *Regulation Respecting the Selection of Foreign Nationals*, RRQ, c I-0.2, r 4 [*Quebec Regulation*], deals with the selection certificate's granting process and the authorities implied in it, while Division II (s 23-41) deals with the appreciation of the demands by the Minister. Many references are also made to the various schedules of the Rules, in which the selection requirements and criteria are described (e.g., Schedule A Selection grid for the economic class, Schedule B Sponsor's required minimum income, Schedule C Sponsored person's basic needs, Schedule C-1 Minimum amount required to provide for the sponsored person's basic needs). This regulation also deals with applicable fees to the different demands.

57. *Quebec Act*, *supra* note 56.

58. *Quebec Regulation*, *supra* note 56.

59. Two other regulations to the Act, the *Regulation respecting the weighting applicable to the selection of foreign nationals*, RRQ, c I-0.2, r 2, and the *Regulation respecting linguistic integration services*, RRQ, c I-0.2, r 5, also handle selection matters. The former focuses on weighing the selection criteria (see, e.g., s 1), while the latter establishes languages services offered by the government to help newly selected applicants improve their skills in French to ease their integration to the labour market (see, e.g., s 1).

60. *Quebec Act*, *supra* note 56, s 17(b).

61. *An Act Respecting Administrative Justice*, RSQ, c J-3, s 15.

62. Tribunal administratif du Québec, *Révision d'une décision du Tribunal*, online: Tribunal administratif du Québec <http://www.taq.gouv.qc.ca/fr/audience/decision/revision-d-une-decision-du-tribunal>. See also s 33 of the *Code of Civil Procedure*, RSQ, c C-25, which states that the power of surveillance and control of any public of private legal person lies before the Superior Court.

province is allowed to legislate in immigration matters.[63] However, they seem to have opted instead "to manage their PTNPs by means of policy directives in order to maintain flexibility in adjusting [PTNP] programs to changing economic conditions" (an explanation provided by CIC).[64] Although it is doubtful that this will happen soon, the Quebec example should be followed: provincial and territorial legislation should be introduced to set out in law the powers and responsibilities of provinces/territories in the PTNP process. This is crucial to ensure better protection for PTNP applicants, especially as the PTNP category continues to expand in depth and numbers year after year.

II. *An innovative possibility: Extending the scope of fiduciary relationships within the context of PTNP applications*

As we have shown in Part I, the absence of a legal framework for PTNPs is such that PTNP applicants are not afforded a fair opportunity to seek relief in case of a negative decision by a provincial or territorial decision maker. Based on this assumption, we suggest in this part, as an alternative and innovative mechanism, that a responsibility or "duty" could be owed by provincial/territorial decision makers to PTNP applicants, using the concept of a fiduciary relationship and fiduciary obligation. Fiduciary law is rooted in the interdependency that now defines many relationships in our society. As put forward by Rotman:

> Fiduciary doctrine has expanded its application to fill the increasing need to protect those who are dependent on others for particular tasks and to ensure that relationships created by the push towards interdependency remain viable.[65]

In our opinion, the mechanism of fiduciary duty adequately portrays the *distinctiveness* of the relationship between PTNP applicants and provincial or territorial decision makers, and most importantly, it can give applicants an additional recourse if they face a PTNP refusal at the provincial or territorial level.

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63. According to the *Constitution Act*, *supra* note 2, s 95, immigration being a shared competence, provinces are allowed to "make laws in relation to…Immigration." In addition, the majority of federal/provincial agreements expressly state that the province may legislate to ensure that their responsibility regarding the implementation of immigration programs will be respected, see, e.g., *CIC, Canada–Manitoba Agreement*, *supra* note 37, s 0.17, that states that "[t]he parties hereto agree on the following in order to determine their respective areas of activity relating to immigrants, refugees, and temporary residents in order to meet the needs of Canada and Manitoba: …d. That Manitoba will exercise its responsibilities in the development and implementation of programs; policies and legislation…."

64. CIC, *Evaluation*, *supra* note 10 at 1-2.

65. Leonard Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown–Native Relationship in Canada* (Toronto: University of Toronto Press, 1996) at 152 [Rotman, *Parallel Paths*].

In Canada, even if fiduciary law has evolved throughout the last decades, "it must be said that [this] law is still in its infancy and requires further development."[66] As of today, there is no clear definition of a fiduciary relationship or a fiduciary duty by courts: each fiduciary relationship needs to be considered on its own facts to determine if—and which type of—fiduciary obligations might arise, and that determination rests with the courts, not with the parties themselves.[67] The absence of a clear definition has made it possible for the courts to classify as fiduciaries those who would not have been so regarded in the past. Thus, the circumstances in which fiduciary relationships may be found to exist have stretched to encompass certain factual scenarios, in addition to traditionally recognized categories where fiduciary relationships are presumed to exist like trustee or solicitor-client relationships.[68] However, the Supreme Court of Canada has on several occasions[69] highlighted that a fiduciary duty outside the traditional recognized fiduciary relationship will not be found if the relationship does not possess key characteristics. The three "essential ingredients" giving rise to fiduciary duties, as stated by Wilson J. in *Frame v. Smith*,[70] are as follows:

1. The fiduciary has scope for the exercise of some discretion or power;
2. The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and

66. James I Reynolds, *A Breach of Duty: Fiduciary Obligations and Aboriginal Peoples*, (Saskatoon: Purich Publishing, 2005) at 127.

67. See Paul B Miller, "A Theory of Fiduciary Liability" (2011) 56:2 McGill LJ 235 at para 5. See also Donovan Waters, *Law of Trusts in Canada*, 2nd ed (Toronto: Carswell, 1984) at 406. See finally *Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574 at 647, 69 OR (2d) 287 [*Lac Minerals*]; *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245 at para 91-92 [*Wewaykum*].

68. For example, the Supreme Court of Canada recognizes the existence of fiduciary duties in the doctor–patient relationship. In *Norberg v Wynrib*, [1992] 2 SCR 226, 92 DLR (4th) 449, the Supreme Court found that a doctor breached his fiduciary obligations by pressuring his drug-addicted patient to provide him with sexual favors in exchange for drugs (see also *McInerney v MacDonald*, [1992] 2 SCR 138, 93 DLR (4th) 415). Another example is the Supreme Court's acknowledgment that parents, guardians and priests owe fiduciary duties to children not to abuse them physically and sexually: *M(K) v M(H)*, [1992] 3 SCR 6, 96 DLR (4th) 289. For more on this topic, see Leonard I Rotman, "Fiduciary Law's 'Holy Grail': Reconciling Theory and Practice in Fiduciary Jurisprudence" (2011) 91:3 BUL Rev 921 [Rotman, "Holy Grail"]. See also, generally, Rotman, *Parallel Paths*, *supra* note 65 at 153, and Reynolds, *supra* note 66 at 127.

69. See *Frame v Smith*, [1987] 2 SCR 99, 42 DLR (4th) 81; *Lac Minerals Ltd*, *supra* note 67; *Norberg v Wynrib*, *supra* note 68; *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, 130 DLR (4th) 193. See also *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 SCR 261 at paras 30, 33 and 34 [*Elder Advocates*].

70. *Frame v Smith*, *supra* note 69 at para 60.

3. The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

These characteristics have been clarified in *Elder Advocates* and recently reiterated in *Manitoba Metis*:

> First, the evidence must show that the alleged fiduciary gave an undertaking of responsibility to act in the best interests of a beneficiary.... Second, the duty must be owed to a defined person or class of persons who must be vulnerable to the fiduciary in the sense that the fiduciary has a discretionary power over them....
>
> Finally, to establish a fiduciary duty, the claimant must show that the alleged fiduciary's power may affect the legal or substantial practical interests of the beneficiary.[71]

Among these characteristics, dependency (or vulnerability) to the fiduciary's exercise of discretionary power is a significant factor relevant to the imposition of fiduciary duties. However, there are many relationships in which one person becomes vulnerable to another's actions, which do not sufficiently evidence the fiduciary character of an interaction. An interesting example in this area is the relationship between pedestrians and the operators of motor vehicles. Rotman explains:

> Pedestrians and motorists have unequal power, as the latter are in control of heavy and powerful machinery that can cause serious bodily harm or death. Further, pedestrians become rather vulnerable to motorists once they step off the sidewalk. The law recognizes this inequality by providing a right of way to pedestrians lawfully crossing streets. This does not create a fiduciary relationship, however, but imposes legal weight to enforce a socially valuable norm and prescribes penalties for non-conformity.[72]

Thus, as Rotman puts it, "[t]he simple inequality of parties is not... determinative of the existence of a fiduciary relationship."[73] There must be an "implicit dependency"—inherent in the nature of the relationship itself—where one party is "at the mercy" of the other's discretion.[74] In other words, one party's state of vulnerability should not be understood as resulting from an initial inequality between the two parties, but rather as stemming from the structure and nature of the fiduciary relation itself.

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71. *Elder Advocates*, *supra* note 69 at paras 30, 33 and 34. See also *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 50, [2013] 1 SCR 623 [*Manitoba Metis*].
72. Rotman, "Holy Grail," *supra* note 68 at 931.
73. *Ibid.*
74. *Lac Minerals*, *supra* note 67 at 599, para 34 and 35, citing *Hospital Products Ltd v United States Surgical Corp* (1984), 55 ALR 417 at 488 [*Hospital Products Ltd*].

Even if the fiduciary concept was first used in the context of private relations, the Supreme Court in *Guerin v. The Queen*[75] "introduced a far more expansive concept of the 'fiduciary principle' and took the law into new, uncharted, and uniquely Canadian waters."[76] *Guerin* is a landmark Supreme Court of Canada decision that established the Canadian government's fiduciary duty to First Nations, a trust-like relationship stemming from the *sui generis* right of Aboriginal title.[77] In *Guerin*, the Court ruled that the distinctiveness of the fiduciary relation existing between the Indian band and the Federal Government, based on a mix of private and public interests, could lead to a fiduciary duty.

Since *Guerin*, the presence of a fiduciary relationship between Aboriginal groups and the Crown has been well established. [78] But, as of today, the Supreme Court has been reluctant to extend the scope of fiduciary duties to other matters than the Crown-Aboriginal relationship.[79] In fact, only one recent case, *Authorson*,[80] discussed the application of fiduciary concepts to a public entity (the federal government) outside a Crown-Aboriginal relationship. Disabled veterans were contesting the mismanagement of funds by the Crown, arguing that a breach of a fiduciary obligation had occurred. Both the Ontario Superior Court and the Court of Appeal accepted the applicants' argument. The Supreme Court overturned the Court of Appeal decision, but it did so because "any claims based on this breach were statute-barred."[81] The Supreme Court therefore did not change the recognition made by the inferior courts that the Crown owed a fiduciary duty to the disabled veterans. According to Hogg, Monahan and Wright, this timid unwillingness to extend the concept in the public realm is because there is a tendency by Courts to associate a "public action" to a "public solution" (even if a public action may have private consequences), which brings us back to the traditional mechanism of judicial review.[82] But

75. *Guerin v The Queen*, [1984] 2 SCR 335 at 385 [*Guerin*].

76. Reynolds, *supra* note 66 at 127-128.

77. Aboriginal title refers to the inherent Aboriginal right to land or a territory. The Canadian legal system recognizes Aboriginal title as a *sui generis*, or unique collective right to the use of and jurisdiction over a group's ancestral territories.

78. Reynolds, *supra* note 66 at 143-144.

79. This scope as even become narrower in Crown–Aboriginal relationships. See *Wewaykum*, *supra* note 67; see also *Manitoba Metis*, *supra* note 71.

80. *Authorson v Canada (Attorney General)*, 2003 SCC 39, [2003] 2 SCR 40 [*Authorson*].

81. Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (Oxford: New York: Oxford University Press, 2011) at 155, note 13 [Fox-Decent, *Sovereignty's Promise*].

82. Peter Hogg, Patrick Monahan & Wade K Wright, *Liability of the Crown* (Toronto, ON: Carswell, 2011) at 375, 379. See also: Lorne Sossin, "Class Actions Against the Crown: A Substitution for Judicial Review on Administrative Law Grounds" (2007) 57 UNBLJ 9 at 13 [Sossin, "Class Actions"]. The Court's argument is that "[p]ublic law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship," see *Guerin*, *supra* note 75 at 385.

there also appears to be an emerging consensus within the legal community that "[a] priori assessments are completely inappropriate within the realm of fiduciary law," since the fiduciary doctrine depends by nature on the particular facts and circumstances of the case.[83]

This has brought scholars such as Fox-Decent to argue strongly for an extension of the scope of fiduciary relationships and obligations to public law settings. Fox-Decent believes that administrative law principles, such as procedural fairness and natural justice, should be included in the fiduciary discourse, since fiduciary relationships stem from equitable principles in administrative law. In fact, administrative law principles are included in the fiduciary relationship.[84] Thus, there are good reasons for seeing administrative law, not only through the lens of legality, but also through the lens of equitable relationships. In this context, fiduciary duties could be applied to other important areas, "ranging from social welfare to the immigration and refugee process,"[85] if it can be proven that the fiduciary relationship is a distinctive kind of legal relationship in which one person (the fiduciary) has enough power or discretion to negatively affect the other party's interests (the beneficiary).[86]

Thus, it is clear from the case law and the evolution of fiduciary law that fiduciary relationships and duties have been found outside the private realm. They have indeed been found to apply to relationships between vulnerable groups and public authorities, and the emphasis has been put on the element of *discretion* that is to be exercised by the fiduciary over practical interests of the beneficiary. In the context of PTNPs, we hypothesize that the unique and unusual nature of the relationship between the provincial or territorial government and PTNP applicants may be thought of as a fiduciary relationship. Our reasoning rests on two main characteristics proper to PTNPs: first, their ambiguous legal character and functioning; second, their unique and growing role in Canadian immigration, including

83. Rotman, *Parallel Paths*, *supra* note 65 at 155. See also Lorne Sossin, "Public Fiduciary Obligations, Political trusts, and the Equitable Duty of Reasonableness in Administrative Law" (2003) 66 Sask L Rev 129 at 137-139 [Sossin, "Public Fiduciary Obligations"]. See finally *Guerin*, *supra* note 75 at 384.

84. See Fox-Decent, *Sovereignty's Promise*, *supra* note 81; Evan Fox-Decent, "The Fiduciary Nature of State Legal Authority" (2005) 31 Queen's LJ 259 [Fox-Decent, "Fiduciary Nature"]. See also Evan Fox-Decent & Evan J Criddle, "The Fiduciary Constitution of Human Rights" (2010) 15:4 Leg Theory 301. See finally Sossin, "Public Fiduciary Obligations," *supra* note 83, where he explains (at 131) that the development of administrative law according to the rule of law "has overshadowed [its] development based on equitable principles."

85. Sossin, "Public Fiduciary Obligations," *ibid* at 150.

86. Mark R Gillen & Faye Woodman, eds, *The Law of Trusts, A Contextual Approach*, 2nd ed (Toronto: Emond Montgomery, 2008) at 840. See also *Elder Advocates*, *supra* note 69 at para 26; *Lac Minerals*, *supra* note 67; Sossin, "Public Fiduciary Obligations," *supra* note 83 at 134.

the specific involvement of employers in the application process. As we show in the following lines, these characteristics meet the requirements of undertaking, vulnerability and interest set out in the three-part analysis of *Elder Advocates* and reiterated in *Manitoba Metis*.

As we explained in Part I, the absence of a legal framework for PTNPs (i.e., they have no statutory basis and the officials who administer them do not exercise statutory authority of any kind) is likely to negatively affect the right of PTNP applicants to challenge a negative decision at the provincial or territorial level. But clearly the issue here for PTNP applicants is not only at the level of their right to seek remedial relief. As we have shown elsewhere, selection criteria and processing procedures under nominee programs change frequently and without prior notice. Provinces and territories are even entitled to add a new immigration program (or to remove it) without further notice.[87] This creates an uncertain environment for PTNP applicants. They could miss important deadlines or be misinformed regarding necessary documents or forms, which could be fatal to their application. It is also worth noting that each PTNP has a website with application forms and instructions, but the information provided is not always straightforward or detailed enough. Furthermore, with the exception of some provinces that have produced policy and procedural guidelines on their PTNP websites,[88] most PTNPs do not provide detailed information on their processing procedures. And for the few provinces that supply applicants with guidelines and manuals, these documents cannot be considered as having legal authority.[89] It should also be noted that some PTNPs were already reported to suffer from inefficiencies, processing irregularities and lack of oversight.[90] In sum, the lack of transparency of PTNPs is such that PTNP candidates may not be in a position to form reliable expectations about eligibility requirements or about the ongoing availability of whole program streams. Thus, it is not unreasonable to suggest that the "distinctiveness" of the relationship considered in *Guerin* could be applicable in the case at hand. In other words, the potentially arbitrary power of the province is likely to negatively affect the PTNP applicants' interests in several ways.

87. See mainly Nakache & D'Aoust, *supra* note 18; Baglay & Nakache, *supra* note 29.

88. See, e.g., *Saskatchewan Guide* and *Nova Scotia Guide*, *supra* note 47. Government of Saskatchewan, Saskatchewan Immigrant Nominee Program, *SINP Procedural Guidelines* (2011), online: <http://www.saskimmigrationcanada.ca/sinp-procedural-guidelines>; Nova Scotia, Government of Nova Scotia, Nova Scotia Immigration, *Nova Scotia Nominee Program Skilled Workers Stream Application Guide* (2013), online: <http://novascotiaimmigration.ca/sites/default/files/NSNP_Guide_Skilledworker.pdf> [Nova Scotia, *Guide*].

89. Bellissimo, *supra* note 30 at 268.

90. For more on this topic, see Baglay & Nakache, *supra* note 29.

Another element leading to the *sui generis* character of PTNPs currently lies in the particular role that these programs play in allowing an increasing number of non-citizens to access permanent residency from within Canada. Fiduciary law wished to preserve and protect interdependency and societal balance[91] and PTNPs have in fact been shown to illustrate this balance: while provinces rely on applicants to fulfil specific labour needs, these applicants rely on authorities to provide them with fair and unambiguous conditions under which to apply for permanent residence.

In the past decade there has been an expansion of programs allowing for two-step migration (defined as transition from a temporary to a permanent resident status from within the country), in particular for international students and temporary migrant workers.[92] Many PTNPs allow for two-step immigration. They fit well within this overall trend and likely account for a substantial part of its growth. For example, from 2005 to 2009 between thirty-one and fifty-four per cent of the total PTNP principal applicants who received permanent residency were individuals who had been in Canada on a work permit for four years. Throughout this period, provinces such as British Columbia (eithty-eight per cent in 2009) and Alberta (eighty-three per cent in 2009) had consistently the highest proportions of these principal applicants.[93] Interestingly, while federal avenues for permanent residence are available to skilled temporary migrant workers only,[94] an increasing number of these workers have decided to make their transition from a temporary to a permanent resident status through PTNPs. The reason is simple: many of them are no longer eligible under existing federal streams, due to more stringent eligibility requirements, whereas PTNP streams for skilled migrant workers are usually open to applicants in any

91. Rotman, *Parallel Paths*, *supra* note 65 at 152.

92. For example, in 2012, close to 80,000 former temporary residents transitioned to a permanent resident status, a considerable increase from the 42,000 that made the transition in 2002. Temporary migrant workers accounted for the largest increase: in 2012, 48% of all temporary migrants who transitioned to a permanent status were migrant workers, while in 2002, they constituted only 22.7% : see CIC, *Tables 2012*, *supra* note 11.

93. CIC, *Evaluation*, *supra* note 10 at 24 and 32.

94. As of February 2014, the Federal Skilled Worker Program (FSWP) is assessed under the points system and is open to 3 groups of applicants: (a) persons with work experience in 24 eligible skilled occupations; (b) persons with a job offer from a Canadian employer; (c) international students enrolled or recently graduated from a PhD program in Canada. With the Canadian Experience Class (CEC), applicants must have 12 months of full-time work experience in a skilled occupation in Canada within the last 36 months and the required level of language proficiency. Finally, the Skilled Trades Program (STP) allows for immigration of skilled tradespeople who have a job offer from a Canadian employer, 2 years of work experience in their occupation and a required level of language proficiency. STP was launched in 2013 and is limited to 3,000 admissions in the first year.

skilled occupation.[95] For low-skilled migrant workers, who are excluded from gaining permanent residency through federal avenues, PTNPs are offering unique opportunities to transition to permanent residence. Even if these transition opportunities are relatively limited (the eligibility is limited to a narrow list of specific industries or occupations and is subject to change, depending on local needs), in fact, for the first time, low-skilled migrant workers other than live-in caregivers are given a chance to switch from temporary to permanent immigration status in Canada. This point must be acknowledged, especially now that the federal government has made it even more difficult for low-skilled migrant workers to remain in the country.[96] However, as we discuss further below, one risk associated with the creation of new immigration opportunities through PTNPs is the increased dependence from PTNP applicants on employers, and more significantly for low-skilled PTNP applicants.

The employer being closely involved in the immigration process of the migrant worker constitutes another element of the *sui generis* character of PTNPs. In the case of a PTNP application by a migrant worker, the employer has in fact an ultimate say as to whether this worker should stay in Canada. Thus, this dependence goes far beyond the traditional employee-employer work relationship. To start with, migrant workers of all skill levels who

95. For more on this topic, see Nakache & D'Aoust, *supra* note 18. See also Baglay & Nakache, *supra* note 29. An important point of clarification: in Canada, National Occupational Classification (NOC) is a standard that classifies and describes all occupations in the Canadian labor market according to skill types and skill levels: "0" type are senior and middle-management occupations; "A" level are professional occupations; "B" level are technical and skilled trade occupations; and "C" and "D" levels are occupations requiring lower levels of formal training. The TFWP was traditionally based on the NOC and mainly divided between "high-skilled" (NOC skill type 0 or NOC skill level A or B) and "low-skilled" (NOC skill level C or D). However, in June 2014, the federal government announced that the TFWP will now be administered based on wage instead of the NOC, arguing that "wage is a more objective and accurate reflection of skill level and labour need in a given area." The government explains: "Temporary Foreign workers being paid under the provincial/territorial median wage will be considered low-wage, while those being paid at or above will be considered high-wage" (see Employment and Social Development Canada, *infra* note 96, at 7-8). Given the novelty of this measure and the lack of clarity concerning this measure, we have chosen to refer to the previous categories based on the NOC. Therefore, in this paper, "low-skilled migrant worker' is understood as a worker performing a job in NOC C and D occupations whereas "high-skilled migrant worker" refers to a migrant worker performing jobs in NOC 0, A or B.

96. Except for live-in caregivers who are given the opportunity to apply for permanent residency after having completed two years of authorized full-time employment within three years of their entry into Canada (this provision can be found in *IRPA*, *supra* note 4, ss 110-115), low-skilled migrant workers are currently barred from permanent residency trough other existing federal streams. What's more, in June 2014, the federal government introduced a cap to limit the proportion of low-wage migrant workers admitted to Canada and has reduced their length of stay, sending a clear message that these workers are not welcome to settle in Canada. For more on the most recent changes to the Temporary Foreign Worker Program (TFWP), see: Employment and Social Development Canada, *Overhauling the Temporary Foreign Worker Program: Putting Canadians First (2014)*, online: ESDC <publications.gc.ca/collections/collection-2014/edsc-esdc/Em4-1-2014.eng.pdf>.

apply under a PTNP have to demonstrate that they have a job offer from a local employer. If there is a change in the employment status of the migrant worker prior to attaining nomination (e.g., they lose their job or their temporary work permit expires), the application for nomination may be cancelled.[97] In addition, workers in low-skilled positions are usually required to have worked for their employer for a certain period of time prior to nomination, a requirement that does not normally apply to skilled workers.[98] What is more, employers are often required to undertake specific responsibilities towards nominees in the low-skilled category (such as facilitating the search for housing at a reasonable cost or providing for English or French training where candidates are not proficient in one of these languages) or undertake settlement and retention obligations.[99] Thus, an employer holds significant power over the worker in the nomination process. In the case of low-skilled migrant workers, employers have an even greater effect on the outcome of the process and, consequently, on the possibility for low-skilled migrant workers to eventually reach permanent residence. Although the vast majority of employers are good ones, there is nevertheless a danger that the power given to them within the nomination process may be abused, as temporary migrant workers (especially the low-skilled ones who have virtually no opportunity to independently immigrate to Canada, except under PTNPs) may feel compelled to put up with abusive practices in order not to jeopardize their chances of nomination.[100]

A look at the Alberta Immigrant Nominee Program illustrates the employer's involvement in the application process.[101] In June 2013, an employer who sponsored low-skilled workers in the "Semi-Skilled Workers Category" had to provide a job offer, obtain a Labour Market

97. For more on this topic, see Nakache & D'Aoust, *supra* note 18.

98. For low-skilled workers, see, e.g., Alberta, *Semi-skilled Worker Criteria* (2013), online: Alberta <www.albertacanada.com/immigration/immigrating/ainp-eds-semi-skilled-criteria.aspx> [Alberta, *Semi-skilled*]. See also Nova Scotia, *Guide*, *supra* note 47 at 6. For skilled workers, see, e.g., Alberta, *Skilled Worker Criteria* (2013), online: Alberta <www.albertacanada.com/immigration/immigrating/ainp-eds-skilled-worker-criteria.aspx> [Alberta, *Skilled*].

99. See, e.g., Nova Scotia, *Guide*, *supra* note 47 at 9. See also, Yukon, *Yukon Nominee Program—Settlement and Retention Plan* (2012), online: <http://www.immigration.gov.yk.ca/pdf/ynp_settlement_retention.pdf>; Saskatchewan, Ministry of Economy *SINP Hospitality Sector Project Recruitment and Settlement Plan*, online: <www.saskimmigrationcanada.ca/SINP-500-4/>.

100. Nakache & D'Aoust, *supra* note 18; Baglay & Nakache, *supra* note 29. See also Canadian Council for Refugees, *Migrant Workers—Provincial and federal report cards* (2013), online: CCR <ccrweb.ca/files/migrant-worker-report-cards.pdf> [Canadian Council for Refugees, "Report cards"].

101. Alberta, *Semi-skilled*, *supra* note 98.

Opinion,[102] make sure the candidate fulfills the requirements and establish a settlement and retention plan.[103] This stream also specified that the worker needs to have been working in Alberta for two years on a work permit before applying, something not required for skilled workers.[104]

The fact that PTNPs bind migrant workers so closely to employers has been seen by some critics of the current immigration system as "exacerbating rather than relieving some of the real insecurities that figure prominently in the [Temporary Foreign Worker Program]."[105] For example, in a 2009 report of the Alberta Federation of Labour, the former labour advocate for migrant workers noted:

> A key feature of PNPs is that they are employer driven. The employer starts the process and recommends foreign workers for the program. Their role of pre-selection shapes significantly the makeup of workers accepted into the program. It also creates an impression among workers that they are beholden to the…sponsoring employer. The Advocate has heard reports of unhappy employers threatening to withdraw workers from the PNP….Other employers use this program as a further excuse to exploit workers who desperately want to immigrate. Many dangle the possibility of nomination in the AINP to ensure acquiescence to unreasonable requests such as unpaid work, additional work, etc.[106]

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102. Until recently, a Labour Market Opinion (LMO) was required by the federal government from the employer to show that no Canadian worker is available to perform the job the employer is trying to fulfill, see Citizenship and Immigration Canada, *Labour Market Opinion Basics* (2013), online: CIC <www.cic.gc.ca/english/work/employers/lmo-basics.asp>. In June 2014, the labour market test that allows employers to bring migrant workers to Canada was transformed from a LMO to a new Labour Market Impact Assessment (LMIA) process that is, according to the government, "more comprehensive and rigorous": see Employment and Social Development Canada, *supra* note 96 at 9.

103. As mentioned above, settlement and retention plans for employers can also be found in other provinces, see *supra* note 99.

104. See Alberta, *Skilled* and Alberta, *Semi-skilled*, *supra* note 98. In this regard, it is worth noting that the Alberta government introduced in June 2013 a rule which allowed migrant workers to apply for permanent residency on their own until the end of November 2013. While this announcement was good news for migrant workers, since they no longer needed to be sponsored by their employers, these changes remained limited to very specific in demand jobs and were of a very short duration There is also today no indication that other provinces/territories are willing to follow the Alberta example. For more on this topic, see Canadian Press, *infra* note 114.

105. Jamie Baxter, "Precarious Pathways: Evaluating the Provincial Nominee Programs in Canada. A research paper for the Law Commission of Ontario" (2010), online: Law Commission of Ontario <www.lco-cdo.org/baxter.pdf>. These insecurities are mainly linked to the restrictive nature of the work permit (i.e., migrant workers are often tied to one job, one employer and one location). For more on this topic, see Nakache & Kinoshita, *supra* note 16.

106. Alberta Federation of Labour, "Entrenching Exploitation. The Second Report of the Alberta Federation of Labour Temporary Foreign Worker Advocate" (2009) at 17-19, online: AFL <http://www.afl.org/index.php/View-document/123-Entrenching-Exploitation-Second-Rept-of-AFL-Temporary-Foreign-Worker-Advocate.html>.

Therefore, in the specific context described above, employers' level of power over their workers is expanding far beyond the traditional employer-employee relationship since without the employer migrant workers cannot be nominated and consequently cannot apply for permanent residency. This vast power given to employers has the potential to render migrant workers particularly dependent on employers.

The above discussion illustrates PTNPs' *sui generis* nature, based in their ambiguous legal character and functioning, their unique and growing role in Canadian immigration, and the specific involvement of employers in the application process of a good number of PTNP applicants. All these characteristics meet the three-part analysis set out by the Supreme Court to establish a fiduciary relationship.

First, "the evidence must show that the alleged fiduciary gave an undertaking of responsibility to act in the best interests of a beneficiary." While this undertaking "may be the result of the exercise of statutory powers, the express or implied terms of an agreement,"[107] it can also be implied from the relationship between the parties. As stated in *Galambos*,

> [t]his does not mean…that an express undertaking is required. Rather, the fiduciary's undertaking *may be implied in the particular circumstances of the parties' relationship*. Relevant to the enquiry of whether there is such an implied undertaking are considerations such as professional norms, industry or *other common practices* and whether the alleged *fiduciary induced the other party into relying on the fiduciary's loyalty*.[108]

It is true that outside the Crown–Aboriginal context, "the requirement of undertaking to act in the alleged beneficiary's interest will typically be lacking where what is at issue is the exercise of a government power or discretion."[109] However, based on the assertion that fiduciary relationships

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107. *Galambos v Perez*, 2009 SCC 48 at para 77, [2009] 3 SCR 247 [*Galambos*]. See also *Elder Advocates, supra* note 69 at para 32.

108. *Galambos*, *supra* note 107 at para 79 [our emphasis].

109. *Elder Advocates*, *supra* note 69 at para 42. This wording can be compared to the one used in *Guerin*, *supra* note 75 at 384 ("where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct," as cited in J Timothy S McCabe, *The Honour of the Crown and its Fiduciary Duties to Aboriginal Peoples* (Markham (ON): LexisNexis, 2008) at 47) and in *Hospital Products Ltd.*, *supra* note 74 at 454 ("to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense"), which could be seen as less restrictive. An example of the lack of interest facing government discretion can be found in *Manitoba Metis*, *supra* note 71. In that case, the applicant alleged that the government had not preserve lands facing the arrival of settlers, the Court held that this first criterion was not met, since the interest of the beneficiary did not supersede other legitimate concerns related to broader settlement.

are fact specific and not "pre-established," the assessment of the particular nature of PTNPs is essential. In the case of PTNPs, we could argue that it is the interdependency between the province and the applicant that would support such an undertaking: the necessity for provinces to fulfil labour needs would justify the necessity to provide applicants with a clear and fair application process, therefore acting in their best interest in the particular situation of their immigration to Canada. Moreover, a suggestion could also be made to the effect that discretion always takes part of the fiduciary's mandate and is inherent to this mandate, and should therefore not vary according to the kind of fiduciary relationship analyzed.

The second characteristic is that "[t]he duty must be owed to a defined person or class of persons who must be vulnerable to the fiduciary in the sense that the fiduciary has a discretionary power over them."[110] As discussed above, it must be acknowledged that a fiduciary duty will not arise whenever one person exercises power over another vulnerable person. However, if we look at the particular nature of PTNPs, our previous discussion of the vulnerability of all PTNP candidates within the application process in general (given the lack of reliable information on how to apply, on which criteria, and how to challenge a negative decision by a provincial/territorial decision maker), and of migrant workers in particular, highlights the fact that there is an implicit dependency within the PTNP structure where the PTNP applicant could be seen at the mercy of the decision maker's/employer's discretion.

Finally, the key criterion requires that the claimant must show that the alleged fiduciary's power may affect the legal or substantial practical interests of the beneficiary. This interest "must be a specific private law interest to which the person has a pre-existing distinct and complete legal entitlement."[111] This requirement can be answered by looking more closely at the duty that the fiduciary would owe to the beneficiary. While sufficient interest has been recognized as being ones akin to a property law interest,[112] we believe that, as for the determination of the existence of a fiduciary duty, the scope and content of the duty itself will depend on the context.[113] Facing the vague bundle of criteria and requirements that form part of the application process, the primary duty the provincial decision maker would owe is rooted in procedural rights and on the duty to act reasonably.

110. *Ibid.*

111. *Ibid* at para 51 [emphasis omitted].

112. For example, protection of land in *Guerin*, *supra* note 75, or protection of funds in *Authorson*, *supra* note 80.

113. *Canadian Aero v O'Malley*, [1974] SCR 592 [*Canadian Aero*], cited in Reynolds, *supra* note 66 at 140.

For example, the applicant could expect from the provincial or territorial decision maker the provision of clear, complete and up-to-date information on websites, as well as reasons for refusals and reconsideration process in due form. In various situations, websites provide the list of requirements under which an applicant will be assessed, but this list often features the words "include but is not limited to"[114] and is changed abruptly without notice. In light of that, how can one be sure what criteria are relied upon by the authority to make its decision? The duty to act fairly could also amount to respecting legitimate expectations of an applicant who, when meeting all the requirements presented in guidelines or on websites, legitimately expects to be accepted or to receive an explanation as to why he was refused. And even then, Keyser J. in *Jiang* reminds us that "[n]ot everyone who meets all of the criteria is guaranteed nomination by the Province because of the quota system."[115]

This duty to act fairly has also been extended to the application and respect of legislations that offer certain protections for migrant workers enacted by various provinces. For example, Manitoba's *Worker Recruitment and Protection Act* ensures that employers and recruiters are registered with the provincial government and prohibits the collection of fees from workers.[116] Nova Scotia recently amended its *Labour Standards Code*,[117] providing similar protections, as well as prohibiting employers from confiscating workers' documents (such as passports or work permits).[118] The new section 89F(1), for instance, states that

> no employer shall reduce the wages of a foreign worker employed by the employer, or *reduce or eliminate any other benefit, term or condition of the foreign worker's employment that the employer undertook to provide as a result of participating in the recruitment of a foreign worker*.[119]

This provision seems to suggest that anything the employer does to recruit the worker cannot be subsequently taken back. Along with the duty to act fairly, these provisions could constitute the basis for the beneficiary/applicant's interest, therefore supporting the existence of a fiduciary duty.

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114. See, e.g., Alberta, *Semi-skilled Worker Criteria*, *supra* note 98.
115. *Jiang*, *supra* note 34 at para 41. This quota system is also present in Alberta, see Canadian Press, "Alberta changing rules on foreign workers," *Global News* (20 June 2013), online: Global News <globalnews.ca/news/657739/alberta-changing-rules-on-foreign-workers/>.
116. *Worker Recruitment and Protection Act*, SM 2008, c 23, ss 11(1) and 15(1). See also Canadian Council for Refugees, "Report Cards," *supra* note 100.
117. Labour Standards Code, RSNS 1989, c 246. Enacted in 2011, the amendments entered into force on 1 May 2013.
118. *Ibid*, s 89G(2).
119. *Ibid*, s 89F(1) [emphasis added].

The issue of the nature of potential remedy in the case of a breach of fiduciary duty is also at stake. It could be said that finding the presence of a fiduciary duty would open the door to equitable remedies—fiduciary duty being a creation of equity—such as the possibility of injunction, but answering this question in further detail is beyond the scope of this paper and is left for future research. Suffice it to say here that the Supreme Court has given indication that fiduciaries must "answer for their default according to their gain."[120]

In sum, even if its scope of application remains to be clarified, fiduciary duty is a promising concept in the context of PTNP applications. While the above analysis brings the actual case law to its limits and leads us to think outside the box, it however brings us back to the core elements of fiduciary law: a fact-specific, case-by-case assessment, a particular attention to the situation of vulnerable groups, a step towards the growing recognition of the government as fiduciary, and a duty to provide a fair environment to people with whom we are interdependent.

Conclusion

Facts and statistics show it: the face of Canadian immigration is changing. More and more people get permanent residency under one of the multiple categories of the eleven Provincial and Territorial Nominee Programs, and the annual number of economic immigrants admitted under these streams is about to surpass the annual number of economic immigrants admitted under other federal streams. Facing this new and growing reality, are provinces and territories ready to offer applicants the appropriate legal remedies they deserve in case of contestation of a PTNP decision? Some PTNPs offer an internal reconsideration process, but is it enough?

As we have shown throughout our examination of legal recourse for PTNP applicants, the route to judicial review, which would be the most probable means of challenging a nomination refusal, is not easy. This is because the legal configuration of PTNPs allows for a broad and vague—potentially arbitrary—scope of discretion of decision makers. An alternative would be that these programs become "law"; then the decisions made under them would be judicially reviewable for conformity with that law. However, it is unlikely to happen because flexibility is the key characteristic of PTNPs. Such flexibility is seen as "essential" for the provinces and territories: it allows them (and their employers) to adapt their programs, categories and streams to changing economic and labour needs. But clearly this flexibility comes at a price for PTNP candidates,

120. *Canadian Aero*, *supra* note 112 at 622.

as these programs are extremely difficult to navigate and do not provide applicants with a satisfactory avenue to challenge a province's/territory's decision. Of particular concern is the practical control that employers end up exerting over nominee selection and settlement processes, especially when such control is the only way for low-skilled applicants to get a more secure (i.e., permanent) status in Canada.

If, for the sake of convenience, provinces and territories are indeed not willing to change anything in the current structure of PTNPs, we believe that it is essential to find ways to better protect the rights of non-citizens in the PTNP application process. Following this line of reasoning, we have suggested, as an alternative mechanism, that the unique nature, framework and functioning of these programs could lead provincial and territorial decision makers to owe a fiduciary duty to PTNP applicants. We are aware that our solutions will be objectionable to some, and for various reasons, but given the increasing importance of PTNPs within the Canadian immigration landscape and the lack of legal analysis in this area, we hope that they will help start a much needed discussion on the impact of PTNPs on non-citizens' rights and protections.