
ACCESS TO POSTSECONDARY EDUCATION FOR UNDOCUMENTED IMMIGRANTS

**Parkdale Community Legal Services
Fall 2008 Term Paper**

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**Submitted To: Prof. Shelley Gavigan
Submitted On: January 5th, 2009**

ABSTRACT

A decade has passed since the term paper of a former Parkdale community Legal Services (PCLS) student, Daniel Fogel, ignited a campaign that was eventually successful in securing the right of undocumented minors to elementary and secondary education in Ontario. It is fitting that, as the undocumented minors of ten years ago may now be reaching high school graduation, PCLS was approached for research assistance surrounding the issue of undocumented immigrants' access to postsecondary education.

This paper is in response to a request for a legal analysis of the position of undocumented students wishing to pursue higher education. The request was made by the non-profit organizations, No One Is Illegal and the Education Taskforce, who work closely with PCLS on its "Right to Education Campaign". The paper will fulfill the query by: 1) outlining the regulatory framework that governs foreign nationals' access to postsecondary institutions; 2) thoroughly analyzing the procedural, financial, and employability barriers confronting undocumented immigrants, who desire to pursue a higher education; 3) providing suggestions for advocacy campaigns aimed at enhancing postsecondary accessibility by drawing on approaches in the United States; and 4) addressing the applicable policy concerns and returns. In conclusion, it will be argued that law and policy reform to enhance access to postsecondary education for undocumented students will not only allow deserving individuals to achieve their full potential but will also benefit Canadian society as a whole.

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INTRODUCTION

On October 3rd, 2008, University of Toronto student Saad Alam was deported from Canada.¹ Saad had lived in Canada for over five years and graduated from a Mississauga high school. At the time of his removal, he was enrolled in his third year towards a life sciences and psychology degree and had aspirations of attending medical school in the future.² He was considered an upstanding member of the student community; he had won a scholarship in recognition of his high academic achievements, was the vice-president of the Bangladeshi Students' Federation and had launched a youth magazine on campus.³ It appears that the only quality that Saad lacked was regularized immigration status. Saad Alam is a failed refugee claimant who applied to remain in Canada on humanitarian and compassionate grounds.

As a minor living in Canada without recognized immigration status, students like Saad have the legal right to public elementary and secondary education. However, upon high school graduation, access to education becomes considerably more restricted. Without regularized immigration status, there are major financial and legal barriers to accessing postsecondary education.⁴ The removal of Saad Alam has ignited public discourse surrounding the question of access to postsecondary education for undocumented immigrants and whether the right to education should end at the secondary level.

While mass student protests and media attention in response to Saad Alam's removal indicate that the Canadian public is concerned about the plight undocumented students in

¹ No One is Illegal- Toronto, "UofT Student and his Family Deported! Fight for Don't Ask Don't Tell and Sanctuary Schools Continues", on-line: Education Not Deportation, <http://toronto.nooneisillegal.org/node/225>.

² Lesley Taylor, "Immigration Crackdown Derails Studies" *Toronto Star*, (September 22, 2008).

³ *Ibid.*

⁴ Saad was fortunate to be granted a study permit while he awaited the decision of his application. However, because he lacked legal residence in Ontario, Saad was charged international tuition fees and did not have access to Ontario's Student Loan Program. Saad managed to overcome the substantial financial obstacles by working evenings at a restaurant and with the support of his parents who both worked two jobs. *Supra* note 1.

Canada⁵, there has been very limited scholarly research conducted on the topic. It is thus that, No One Is Illegal and the Education Taskforce, who both work closely with PCLS on its “Right to Education Campaign,” approached the immigration division requesting a comprehensive legal analysis of the position of undocumented students wishing to pursue higher education. The analysis is intended to help direct future advocacy efforts towards enhancing the accessibility of higher education.

This paper begins with an overview of the undocumented immigrant population in Canada and the regulatory framework that governs foreign nationals’ access to postsecondary educational institutions.⁶ The paper then presents an analysis of the procedural, financial, and employability barriers confronting undocumented immigrants who desire to pursue higher education. This is followed by suggestions for further research and advocacy campaigns aimed at enhancing postsecondary accessibility, drawing on examples of how the issue is approached in the United States. Finally, the applicable policy concerns and returns are addressed and weighted. In conclusion, it is argued that law and policy reform, modeled after the example of the United States, will enhance access to postsecondary education for undocumented students at a net benefit to Canadian society as a whole.

METHODOLOGY

⁵ *Supra* note 1. On No One is Illegal’s website there is a list ten newspaper articles written about Saad Alam circumstances and video and photos from student rallies held in protest of his deportation.

⁶ Due limited research time, this analysis will be restricted to *university* institutions in Ontario. Although a lot of the information will be applicable to colleges and possibly universities and colleges outside of Ontario, the author acknowledges that further research is needed for these postsecondary institutions.

In producing the paper, relevant legislation, regulations, policy manuals, and case law were thoroughly reviewed and primary and secondary sources in Canada relating to undocumented students and post-secondary education were explored. When it became clear that the scholarly research conducted on this subject matter in the Canadian context is very limited, the search field was expanded to include American research. This search bore over twenty journal articles, which were selected based on the quality of the source and their potential for comparative analysis.

The Minister of Training, Colleges and Universities and the Ontario Universities Application Centre (OUAC) were emailed during the exploratory stage of the research. The OUAC provided a response very quickly, while the Ministry took over six weeks to reply. The formality of the request for information process and lengthy response time from the Ministry made it impossible to clarify the information provided once received and to ask follow-up questions.

Ontario university websites were reviewed and a questionnaire was developed and sent to every university registrar in Ontario via email. There was only one response. Upon further reflection, it seems that the questionnaire was too lengthy and not of much value to the respondents. Attempts were made to schedule an interview with the registrar at York University. There was no response, likely due to the ensuing CUPE strike. Another Ontario university registrar was interviewed over the phone and subsequently agreed to raise the issue at a meeting with all Ontario registrars. The only feedback was to contact them on a case-by-case basis. A request for information was also sent to York University's Secretary regarding the operations of post-secondary institutions, to which a thorough response was provided.

No One Is Illegal was consulted throughout the research period. The Education Taskforce provided information that it collected from American sources and research regarding the University of Toronto. It also provided media articles related to two Toronto university students who recently received removal orders from Citizenship and Immigration Canada. No One is Illegal also attempted to obtain the contact information of the one student who was undocumented; this was unsuccessful due to the student being deported. The lawyer of this same student was emailed to request further information. There was no response.

SETTING THE STAGE

UNDOCUMENTED IMMIGRANTS

A discussion of the issues surrounding undocumented students and postsecondary education should be situated within the larger topic of unauthorized immigration in general. There are a number of ways that a person can become an “undocumented immigrant” residing in Canada. One is by entering the country clandestinely, usually by crossing land borders but also by permeating the inspection systems of sea and air routes.⁷ This can include illegal human trafficking, with or without the will of those being trafficked.⁸ A person can also become undocumented when one enters using fraudulent documents or when one enters on valid documentation but overstays the authorized period, thus lapsing into undocumented status.⁹ The latter includes failed refugee claimants, visa entrants, and people who were at one time, but are

⁷ D. Papademetriou D. “The Global Struggle with Illegal Migration: no end in sight” *Migration Information Source*, (Washington, DC: Migration Policy Institute, 2005) at 3.

⁸ *Ibid.*

⁹ *Ibid.*

no longer, sponsored by family members. For example, between 1997 and 2007, over 60% of the approximately 250, 000 refugee claims adjudicated in Canada were rejected and many claimants remain in Canada without status.¹⁰

Given the precarious nature of their status, it is impossible to know the exact size of the undocumented population in any country. Canada uses a working estimate of about half a million unauthorized immigrants.¹¹ The Royal Canadian Mounted Police has indicated that this number is on the rise.¹² Unauthorized immigrants who are identified by Citizenship and Immigration Canada become subject to a removal orders. According to a recent Auditor General report, there are 41,000 people who are currently subject to removal orders in Canada and whose whereabouts are unknown.¹³ These statistics, although not definitive, reveal that there is a substantial population of undocumented immigrants working and living in Canada. However, there remains very limited scholarly research conducted on this population.

The lack of information available on the circumstances of undocumented immigrants attests to their marginalization, which belies the important roles that they play in sustaining Canada's informal economy. They comprise an integral portion of farm workers, live-in caregivers, construction workers and, increasingly manufacturers and service providers.¹⁴ Undocumented immigrants work, pay taxes, and sustain industries on which Canadians rely on but in which they prefer not to work. Despite their contribution to Canadian society, undocumented immigrants arguably occupy the most isolated and dangerous positions in the country.

¹⁰ L. Simich, F. Wu, & S. Nerad, "Status and Health Security: An Exploratory Study of Irregular Immigrants in Toronto" (2007) *September-October Canadian Journal of Public Health* at 369.

¹¹ *Supra* note 7 at 4.

¹² Vedra Cook, "Workers of Colour within a Global Economy" (December 2004), online: Canadian Labour Congress <http://canadianlabour.ca/updir/research.pdf>, cited in Emily F. Carasco, *Immigration and Refugee Law: cases, materials and commentary* (Toronto: Edmond Montgomery Publications, 2007) at 135.

¹³ S. Chase and B. Curry, "Thousands of Illegal Immigrants Missing: A-G" *Globe and Mail* (May 6, 2008).

¹⁴ *Supra* note 12 at para 1.21.

One psychologist aptly described undocumented immigrants as “legally marginal, physically deportable and psychologically vulnerable.”¹⁵ While they may be able to find employment, they are more likely to work in conditions that are below occupational health and safety standards for low wages and benefits, and without the protection of employment legislation.¹⁶ The fear of deportation makes them particularly susceptible to exploitation because they are unlikely to report human rights abuses to the police. Their access to social and health services is also restricted by provincial statute and the apprehension of exposing their illegal status.¹⁷ Furthermore, living conditions for these individuals are generally poor. They have been reported as the most likely to occupy substandard housing and pay the highest proportion of their income to acquire it.¹⁸ In sum, while silently contributing to Canada’s economy, undocumented immigrants are amongst the most insecure and exploited populations in the country.

Individuals enter into this insecure situation for various reasons. A 2007 study of twelve undocumented residents of Toronto revealed that the participants’ reasons for coming to Canada were closely aligned with those cited by refugees.¹⁹ Contrary to the popular belief that most migrants come to Canada for economic gain, the majority of study participants reported that their main reason for relocating was to increase their personal security- that is to escape acts of violence such as political terrorism, police harassment, criminal threats and sexual violence.²⁰ In fact, many participants had postsecondary degrees and had held ‘white collar’ jobs in their home countries, while in Canada they were working underpaid manual jobs or involved in informal

¹⁵ Emily F. Carasco, *Immigration and Refugee Law: cases, materials and commentary* (Toronto: Edmond Montgomery Publications, 2007) at 135.

¹⁶ *Ibid* at 136.

¹⁷ *Supra* note 10 at 369.

¹⁸ Platform for International Cooperation on Undocumented Migrants. “Housing for Undocumented Migrants: The Problem,” (26 April 2006), online: http://www.picum.org/HOUSING/Housing_Problem.htm.

¹⁹ *Supra* note 10 at 369.

²⁰ *Ibid* at 369.

care-giving.²¹ There are undoubtedly individuals who migrate to increase their economic well-being, and while this is comprehensible, the study reveals it is not the norm.

Despite some of the compelling motivations for undocumented individuals' immigration and the important roles that they play in the economy, the fact that federal legislation labels them "illegally" within Canadian borders presents these individuals in a negative light. The criminalization of undocumented immigrants has fueled generally unsympathetic public perceptions and made it possible to view them as "others". While undocumented immigrants may have much in common with Convention refugees, their "illegal status" in the country makes it considerably more difficult for them to establish a social foundation. Studies reveal that undocumented immigrants exhibit symptoms of trauma, depression, chronic stress, and other stress-related physical illnesses due to their social isolation, separation from close family and friends, and the insecurity of their day-to-day life.²²

Overall, it seems that undocumented immigrants generally do not intend to circumvent the laws of Canada. They are people who have relocated in the hope of a better life for themselves and their families. Meanwhile, limited immigration options and procedural barriers have left them with precarious status. There are also undocumented immigrants who have no knowledge or control over their lack of documentation. This is often the case of individuals who, for example, arrived as children accompanied by parents or guardians who were unable to regularize their status.²³

UNDOCUMENTED MINORS

²¹ *Ibid* at 371.

²² *Ibid* at 369.

²³ *Supra* note 15 at 134.

The negative public perception often associated with undocumented immigrants becomes more permeable when the focus is directed towards children. The issue of undocumented minors has received considerable attention in recent years, especially regarding their right to education.²⁴ This issue came to a head when a growing number of undocumented Toronto youth were being turned away from public schools.²⁵ A coalition of community workers, lawyers, students, and parents banded together to form an Education Rights Taskforce to advocate on behalf of children being denied the right to attend school. The focus of the Taskforce was to bring to the Ministry of Education's attention the legal right of minors to education, despite their immigration status.

Under sections 21(1) and 49(1) of the *Education Act*, resident minors are *required* to attend school and shall not be refused admission on the basis of they or their parents being in Canada unlawfully.²⁶ Sections 33(1), 44 and 46 of the Act determine the eligibility of resident students and immigration status is not one of the considerations.²⁷ Furthermore, section 30(2) of the *Immigration and Refugee Protection Act* (the *IRPA*) states:

*Every minor child in Canada, other than a child of a temporary resident, not authorized to work or study, is authorized to study at the pre-school, primary or secondary level.*²⁸

This provision authorizes all minor children, who are not the children of individuals holding visitors' visas, to attend school without a study permit up until they reach the age of majority, which in Ontario is eighteen. In essence, the combined reading of these sections protects the right of undocumented minors to education.

²⁴ Education Rights Taskforce, "ERTF in the News". Available on-line at www.educationismyright.ca. This page provides a list of various newspaper and journal articles directed at the issue of access to education for undocumented minors.

²⁵ Maria Babbage, "Ont. Schools Shouldn't 'Pick and Choose' with Illegal Immigrant Kids: McGuinty" *The Canadian Press*, (June 11th, 2008).

²⁶ *Education Act* R.S.O. 1990, c. E.2.

²⁷ *Ibid.*

²⁸ *Immigration and Refugee Protection Act*, SC 2001, c.27 [the *IRPA*].

Through determined advocacy, the Education Rights Taskforce was successful in persuading the then Minister of Education, Gerard Kennedy, to issue Policy Memorandum No. 136 in December 2004.²⁹ This Memorandum clearly set out the responsibilities of school boards under the *Education Act* and the *IRPA* and established a province-wide policy that the criteria for school admissions should be no different for a child who is, or whose parents are, in the country unlawfully. This was an unprecedented assertion on the part of the Ministry towards securing the right to education for undocumented students in Ontario.

Notwithstanding the success of the Education Rights Taskforce, section 30(2) of *IRPA* has been interpreted to mean that children holding visitor's visas are not permitted to study in Canada. Minors who have recently entered Canada as "visitors," but have full intentions to remain,³⁰ are being told by school boards that they must wait until their authorization has expired, or until they have evidence that they applied to have their status made permanent, before they can register for school. This poses a predicament for those who are in the process of saving money to pay the fees for a sponsorship application or simply cannot afford them. It is arguable from the language of the provision that the restriction on children holding visitor's visas is not always lawful. The legal restraint against the authorization for minors to study is only against "a child of a temporary resident, not authorized to work or study." The subject of the qualification is the child's *parents*, not the child. It is therefore arguable that in the rare circumstance in which a child is holding a valid visitor's visa, but his or her parents are not, then he or she is still authorized under the Act to study in Canada. This may be the case if the parents came in advance of their children and lapsed into undocumented status or if the children were sent to stay with other relatives with status in Canada while their parents remained in their home country. The

²⁹ Gerard Kennedy, "Policy/Program Memorandum No. 136" (December 3rd, 2004), on-line: The Ministry of Education, <http://www.edu.gov.on.ca/extra/eng/ppm/136.html> .

³⁰ This is the overarching problem for these minors and will be discussed below.

issue of minor children holding visitor's visas but intending to remain in Canada is still a contentious issue with school boards and remains a focus of advocacy campaigns.

It is clear from legislation, government policy, and community efforts that there is an overarching sentiment that immigration status and the right to education should not be convoluted. In fact in June of 2008, the Canadian Press even quoted Premier Dalton McGuinty as saying:

*If a child shows up at the door looking for an education, our responsibility is to provide that education. If the federal government feels that child, that family, should not be in our province, then that is something they should do something about. But we are not going to start picking and choosing which kids are going to be allowed into the classroom.*³¹

This causes one to wonder then, when it comes to postsecondary education, it becomes acceptable to “pick and choose” which students should be permitted in the schools based on their immigration status? Why after high school graduation do many undocumented, but otherwise academically qualified, students have to stand idle while their peers move on to obtain higher education and the future benefits this can provide? This is the conundrum of access to postsecondary education for undocumented students.

REGULATORY FRAMEWORK

IMMIGRATION LAW

The *Constitution Act, 1867* establishes the distribution of legislative powers amongst the federal and provincial governments. Section 95 of the Act grants jurisdiction to legislate in relation to immigration to both the federal and provincial government, with the qualification that provincial law “shall have effect... as long and as far only as it is not repugnant to any Act of the

³¹ *Supra* note 28.

Parliament of Canada.”³² This qualification ensures that while the provinces have the ability to legislate in matters relating to immigration within their province, federal legislation will always be considered paramount. Furthermore, Section 91(25) of the *Constitution Act, 1867* also grants legislative authority over “Naturalization and Aliens” to the federal legislature.³³ Therefore, when a matter has been defined as relating to “naturalization and aliens,” it is considered exclusively within federal jurisdiction and can operate to invalidate provincial legislation targeted towards the same issue.³⁴ Together Section 95 and 91(25) place the right to legislate in the area immigration quite predominantly within federal jurisdiction.

The *Immigration and Refugee Protection Act* is the federal statute governing immigration in Canada.³⁵ At its core, the *IRPA* defines an individual’s right to enter, remain, work, and study in the country. It is this Act that establishes what constitutes lawful documentation for foreign nationals is within Canadian borders and what activities they are permitted to pursue.

With regards to post-secondary education, section 30 (1) of *IRPA* states that “a foreign national may not work or study in Canada unless authorized to do so under this Act.”³⁶ Subsection 212 of the *Immigration and Refugee Protection Regulations (IRPR)* corroborates s.30 (1) by stating that “a foreign national may not study in Canada unless authorized to do so by a study permit or by these Regulations.”³⁷ Studies, for the purposes of the Act and corresponding Regulations, are considered to be any studying undertaken at a university or college, or any course of academic, professional or vocational training.³⁸ To obtain a study permit one must submit a letter of acceptance from the institution they wish to attend, proof that they have the financial means to

³² *Constitution Act, 1867* (UK), 30 & 31 Vict., c.3. reprinted in RSC 1985, app. II, no.5 [*Constitution Act, 1867*]

³³ *Ibid.*

³⁴ *Supra* note 15 at 141.

³⁵ *Supra* note 28.

³⁶ *Ibid* at s.30(1).

³⁷ *Immigration and Refugee Protection Regulations*, S.O.R./2002-227 [the *IRPR*].

³⁸ *Ibid* at s.1(1).

pay for tuition fees and living expenses, evidence that they will return at the end of their studies, and medical clearance.

Legally, a foreign national can study in Canada *without* a permit if the course is six months or less and is completed during an authorized stay.³⁹ However, very few post-secondary programs are only six months in duration. Therefore, under most circumstances, an individual who wants to become a student at a post-secondary institution in Canada must apply for a study permit from *outside* of the country. A potential student can usually only apply for a study permit from *within* Canada if they are extending an authorized stay or if they are awaiting a decision of an application for permanent residence or a judgment from a Court of law.⁴⁰ Therefore if one is living in the country without valid or pending immigration status, *IRPA* ensures that obtaining legal authorization to study in Canada is very difficult.

THE “BIRTHDAY WINDOW”

There is one exception that allows a student to apply for a study permit if he or she is in Canada without authorization or documentation. Subsection 215 (1)(b) of *IRPR* states that a foreign national may apply for a study permit after entering Canada if they “apply within the period beginning 90 days before the expiry of their authorization to engage in studies in Canada under subsection 30(2) of the Act...and ending 90 days after that expiry.”⁴¹ As mentioned above subsection 30(2) of *IRPA* establishes the right of

³⁹ According to s.188(1) of the *IRPR*, a family member or a private staff of an DFAIT accredited foreign representative who is in Canada carrying out official duties or a member of the armed forces from specified countries may also study without a permit.

⁴⁰ See ss. 215(1) and 207 of the *IRPR* for the exact circumstances under which a student can apply for a study permit from within Canada. They include persons: already holding a work or study permit; that are subject to an unenforceable removal order; that are the subject of a sponsorship application; who are a member of the live-in caregiver class; or are the family member of a person in any of the former circumstances (spouse or common-law partner and dependent child).

⁴¹ *Supra* note 37 at ss. 215 (1)(b).

undocumented minor children in Canada to attend elementary and secondary school.⁴² When these two sections are read together it reveals a window of six months in which undocumented student attending secondary school can apply for a study permit that will allow them to legally register at a postsecondary institution. This six month period surrounds that particular student's eighteenth birthday (at which time they cease to be considered a minor child). The window opens ninety days *before* one's eighteenth birthday and closes ninety days *after*. As will be discussed in the following sections, this window provides a limited but real opportunity for dedicated individuals to regularize their status in Canada; however, does not remove the financial barriers to obtaining a postsecondary education discussed below.

EDUCATION LAW

According to Section 93 of the *Constitution Act, 1867*, provinces have exclusive jurisdiction over matters that relate to “education.”⁴³ The classification of a law for purposes of division of powers involves first identifying the matter of the law or its “pith and substance” and then assigning it to one of the classes of subjects under the Constitution.⁴⁴ By virtue of the provinces' sole responsibility over matters that are in pith and substance related to education, one may argue that Ontario's legislative decisions regarding admissions and funding for postsecondary education take precedence over the federal *Immigration and Refugee Protection Act*. However, it is the responsibility of the court to identify the outer limits of legislative

⁴² *Supra* note 28 at ss. 30 (2).

⁴³ Paragraphs (1) through (4) of Section 93, which protect Roman Catholic and Protestant denominational education, are the only limitations on provincial authority with matters that relate to education.

⁴⁴ *R. v. Morgentaler*, [1993] 3 S.C.R. 463, 125 N.S.R. (2d) 81.

powers and recent constitutional jurisprudence demonstrates that it improbable that this argument would succeed.

There tends to be judicial restraint when adjudicating divisions of powers questions. The pith and substance, necessarily incidental,⁴⁵ and double aspect⁴⁶ doctrines permit valid legislation to have significant incidental effects on the other level of government's area of jurisdiction.⁴⁷ The most recent decision dealing with division of powers in the context of immigration is *Law Society of British Columbia v. Mangat*.⁴⁸ In this case the Supreme Court held that the section of the former *Immigration Act* that allowed non-lawyers to appear before Immigration Tribunals was within the jurisdiction of the federal government because the section was enacted under the power to regulate aliens. The court further concluded that to the extent that the provisions were inconsistent with provincial legislation, they would prevail due to the paramountcy doctrine.⁴⁹ This is a judge-made doctrine which gives federal legislation precedence over provincial legislation in the case of a conflict and where both laws are valid.⁵⁰ The decision in *Law Society of British Columbia v. Margat* establishes that in the unlikely event that the power to regulate who is permitted to study in Canada is challenged as *ultra vires* the federal government, it is improbable that this challenge would be successful in court.

Unlike elementary and secondary school, which are governed by the provincial *Education Act*, individual postsecondary institutions do have a level of autonomy that could arguably permit them complete control over documentation requirements and tuition rates of

⁴⁵ Necessarily incidental doctrine: a law may have an impact on matters outside of the enacting legislature's jurisdiction, if that impact is "necessarily incidental" to attaining the primary object of the law. For the legal test see *General Motors of Canada Ltd. v. City of National Leasing* (1989) SCC.

⁴⁶ Double Aspect Doctrine: Matters which in one aspect and for one purpose fall within federal jurisdiction, may in another aspect and for another purpose fall within provincial jurisdiction. See *Hodge v. The Queen* (1883) and *Multiple Access Ltd. v. McCutcheon* (1982) SCC.

⁴⁷ Peter Hogg, *Constitutional Law of Canada, 5th Ed. Volume 2* (Toronto: Carswell, 2007).

⁴⁸ *Law Society of British Columbia v. Margat* [2001] 3 S.C.R. 113, [2001] S.C.J. No. 66.

⁴⁹ *Ibid.*

⁵⁰ *Supra* note 47.

foreign nationals. Pursuant to the Ontario's *Post-secondary Education Choice and Excellence Act* 2000, all institutions require an act of the Legislative Assembly of Ontario or the consent of the Minister of Training, Colleges and Universities to offer any program leading to a degree.⁵¹ Once approved by the provincial legislature or Ministry, each institution is granted its own individual act of incorporation, which authorizes the full responsibility over academic and administrative matters to the board of governors at their institution. For example York University is established and operates under the *York University Act* 1965⁵² and the University of Guelph under the *University of Guelph Act* 1964.⁵³

Policies can vary across Ontario's postsecondary institutions because they all operate largely independently and determine their own academic and admissions criteria, programs and staff appointments.⁵⁴ A cursory review of university websites does reveal a common thread when it comes to the admission of students without permanent resident or citizenship status in Canada: the requirement of a study permit. The possibility of a university setting a policy that would allow undocumented students to register without a study permit will be discussed below.

The independence of postsecondary institutions can be beneficial to undocumented students because it allows universities the autonomy to make decisions on a case by case basis. Where one university may be stringent with its documentation requirements, another may be more lenient. However, the fact that a student is able to register does not alleviate the fact that students studying without a valid study permit would put them in violation of s.30 of the *IRPA*.

⁵¹ *Post-secondary Education Choice and Excellence Act*, 2000, S.O. 2000, c. 36, Sch. [*PSECE Act*].

⁵² *The York University Act*, R.S.O. 1965.

⁵³ *An Act to incorporate the University of Guelph*, R.S.O. 1964, c.120 as amended by *The University of Guelph Act* 1965, c. 136.

⁵⁴ Information from correspondence with Harriet Lewis, York University Secretary and General Counsel attached as Appendix 2. She is responsible for the organization and management of the University's legal affairs and coordinates the development and dissemination of University policy.

BARRIERS TO ACCESS FOR UNDOCUMENTED STUDENTS

PROCEDURAL BARRIERS

In order to initiate an application to an Ontario university one must submit an on-line form through the Ontario Universities' Application Centre (OUAC). This application form is then sent to the various university registrars, where the institution applies its own admission criteria to determine whether the applicant is eligible for admission. Assuming one meets all the academic criteria, the main barrier faced by an undocumented student in terms of submitting an on-line application form through the OUAC is the requirement to disclose his or her immigration status. The on-line form contains a drop-down menu that includes an option for individuals to indicate their status as "Other: No-status".⁵⁵ There are no documentation requirements to OUAC when one indicates any of the possible "Status in Canada" options and changes to an applicant's status can be made at any point when the application is active.⁵⁶ This indicates the OUAC has anticipated there will be students applying for Ontario universities that are without immigration status in Canada, and that it is willing to process their application regardless of this lack of status. However, processing the application does not ease the applicant's anxiety of having their immigration status disclosed nor does it guarantee that a university will not require immigration documents for registration once the application is approved.

⁵⁵ Jennifer Paradise-McCurdy, Manager of Processing-Undergraduate Programs, Ontario Universities' Application Centre. October, 2008 email correspondence attached as Appendix 3.

⁵⁶ *Ibid.*

OUAC's power to release information is guided by Ontario's *Freedom of Information and Protection of Privacy Act* (the *FIPPA*).⁵⁷ OAUC has confirmed that it will not disclose an individual's immigration status to anyone other than the universities indicated by the applicant. According to OUAC's Privacy and Confidentiality Statement the only applicable circumstances under which they will release an applicant's personal information is if required to do so by "a search warrant or other legally valid inquiry or order, or to an investigative body in the case of a breach of an agreement or contravention of law, or as otherwise required by law."⁵⁸ OUAC has asserted that its main reasons for collecting immigration information is to generate aggregate statistics and to assist universities in determining what registration fees are applicable and in connecting international students with the relevant services available to them at the institution.⁵⁹ The Manager of Processing has affirmed that applicants can submit an application to OUAC without reservations about their immigration status being communicated to any other government agency, unless a warrant has been presented.⁶⁰ Furthermore, as of 2006 every Ontario university is also governed by the *FIPPA*, so the same legal requirements regarding the release of an applicant's personal information will be applied as with OUAC.⁶¹

With the prerequisite of a warrant to release personal information in place at both OUAC and universities, it is unlikely that an individual's status will be reported outside of the institution. Fear of deportation would only be justified if OUAC or universities indiscriminately reported undocumented applicant's names to Citizenship and Immigration Canada (CIC). If CIC already has an individual's name, it can simply check its own data system to determine if a

⁵⁷ See *Ontario's Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F. 31.

⁵⁸ Ontario Universities Application Centre, "Privacy and Confidentiality Statement", (October 2006), on-line: www.ouac.on.ca/privacy/. It further states that they may disclose personal information to assist in collecting debts to the university, in defense of legal claims, to comply with legal obligations to postsecondary institutions, or to other Canadian universities when fraud has been detected (usually in the case of false transcripts).

⁵⁹ *Supra* note 55.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

person has legal status in Canada or not. It is thus highly unlikely CIC will take the trouble to obtain a warrant in order to acquire information to which they are already privy. It follows that universities are fairly secure in terms of a person's immigration status being reported to CIC; however this is irrelevant if undocumented students are unable to register at the postsecondary institution.

If an undocumented student is accepted at a postsecondary institution then whether they are able to register will largely depend on the individual policy of that institution. One who has self-identified as a citizen or permanent resident, falsely or otherwise, will likely be asked to produce a Social Insurance Number (SIN) in order to receive domestic tuition rates. One who has self-identified as being without status is likely informed of the need to have a study permit to legally study in Canada.⁶² Whether proof of documentation is required depends of the stringency of the institution's registration policy. The two registrars questioned for this paper both stated that their institutions do not require proof of status for registration and students will be admitted regardless of their status.⁶³ However, one affirmed that the institution will check immigration documentation if a student is changing their status from international to resident because they need to prove they qualify for a lower tuition fee.⁶⁴

Although an undocumented student may be able to circumvent the legal requirement of a study permit at the time of registration, they will remain without secure access to postsecondary education in Canada due to their lack of status. They will always remain vulnerable to deportation if discovered by Citizenship and Immigration Canada despite the fact they are attending school. This highlights the overarching barrier to access to postsecondary education for undocumented students; their lack of immigration status.

⁶² As discussed above, foreign national studying without a permit is in contravention of Section 30(1) of the *IRPA*.

⁶³ Telephone interview with Laurier University Registrar and completed Registrar Questionnaire from Algoma University attached as Appendix 5.

⁶⁴ Telephone interview with Laurier University Registrar, Ray Darling.

FINANCIAL BARRIERS

Access to postsecondary education is clearly limited if qualified undocumented individuals lack the financial resources necessary to cover tuition and living costs. As discussed above, undocumented individuals tend to belong to lower income families and hold lower income jobs, largely as a result of their precarious status. In 2007 the average university undergraduate tuition rate was \$4,881.⁶⁵ The average tuition fees for undergraduate international students were \$13,985, almost three times the fees that Canadian students pay.⁶⁶ These statistics do not include ancillary fees and living costs which add substantially to the cost of education. The financial burden of postsecondary education is difficult for any low income individual to overcome. This barrier is significantly exacerbated for undocumented students who, if they are able to register at a postsecondary institution at all, are charged international tuition fees and are ineligible for student loans.

TUITION FEES

As legally autonomous bodies, Ontario universities have full legal authority to establish their own tuition levels. However, Ontario universities are largely funded by provincial grants, which are distributed by the Ministry of Training, Colleges and Universities. The Ministry bases the amount of its grant funding to universities on the number of “eligible” students enrolled at

⁶⁵ Tandom Social Research Consulting, *Literature Review of Postsecondary Education Affordability in Canada*, (Toronto: Council of Ministers of Education, 2007) at 17.

⁶⁶ Statistics Canada, “University Tuition Rates” *The Daily* (October 2007), on-line: <http://www.statcan.gc.ca/daily-quotidien/071018/dq071018b-eng.htm>.

the institution and its sets the criteria for eligibility.⁶⁷ If a person cannot demonstrate that they fall into one of the eligibility categories set by the Ministry then the university does not receive a grant for their attendance and charges the student the equivalent of what it would have received from the government, or what is deemed “international tuition fees.”⁶⁸ Thus, through its spending power⁶⁹, the provincial government is able regulate which students are charged domestic and international tuition rates.⁷⁰

The current policy governing the distribution of government funding to universities is set out in *The Ontario Operating Funds Distribution Manual*. The criteria used for determining whether a university will receive grant funding for a student’s enrollment is based on that student’s or their guardians’ immigration status. Only foreign nationals already approved in principle for permanent resident status or refugee claimants are automatically eligible for grant funding and therefore charged domestic tuition fees.⁷¹ Other foreign national students are only eligible if they fit into an exemption category. Relevant exemptions include dependents of persons automatically eligible and also visitors authorized to work in Canada and their dependents.⁷²

As a result of the provincial government policy, even undocumented minors who are fortunate enough to obtain a study permit through the “Birthday Window” will not be afforded the benefit of domestic tuition rates unless they are the dependents of persons eligible for grant

⁶⁷ John Milloy, Minister of Training, Colleges and Universities, November 21, 2008 correspondence, attached as Appendix 6.

⁶⁸ *Ibid.*

⁶⁹ The province receives a portion of its funding for postsecondary education from the federal government via the Canada Social Transfer. However there are no requirements with regard to the use of the funds, therefore the power to influence tuition rates through funding still lies with the province. See Association of Universities and Colleges of Canada, *Transfer Payments for Postsecondary Education* (2006), on-line: www.aucc.ca/_pdf/english/reports/2006/transfer_payments_02_23_e.pdf

⁷⁰ *Supra* note 54.

⁷¹ Ministry of Training, Colleges and Universities, *The Ontario Operating Funds Distribution Manual*, (Issued December 2004), Section 4.1.

⁷² *Ibid.*

funding. It is plausible that there will be rare situations in which undocumented students may be eligible dependents in terms of the criteria, but it is more likely that undocumented students will fall outside the criteria and be required to pay international tuition fees. Thus high tuition costs are a substantial barrier to postsecondary accessibility for undocumented immigrants. This economic constraint is further intensified by the fact that undocumented students are also ineligible for most financial assistance.

FINANCIAL AID

The lack of financial aid available to undocumented students as a result of their status will place postsecondary education out-of-reach for the majority of them. According to the *Canadian Student Financial Assistance Act*, which is the federal legislation governing student loans, only persons with citizenship, permanent resident, or Protected Person status qualify for government student loans.⁷³ Each provincial student assistance program tends to mirror the criteria provided in the federal Act,⁷⁴ thus it is the determining legal source for access to government student loans.

Ontario's Student Loan Program (OSAP) is the provincial financial assistance plan governed by the Ministry of Training, Colleges and Universities.⁷⁵ Aligned with the *Canadian Student Financial Assistance Act*, one of the criteria used to assess a person's eligibility for an OSAP loan is a student's immigration status while another is their residency in Ontario. Many undocumented students would meet the residency requirement of one year consecutive living in

⁷³ *Canada Student Financial Assistance Act*, 1994, c. 28. S-22.7, s.2(1).

⁷⁴ Caledon Institute of Social Policy, *Equal Access to Student Loans for Convention Refugees* (2000) at 4, on-line: www.caledoninst.org.

⁷⁵ Ministry of Training, Colleges and Universities, *About: Ontario's Student Assistance Program*, on-line: https://osap.gov.on.ca/eng/not_secure/about.htm.

Ontario, however none will be able to meet the requirement of citizenship, permanent resident or Protected Person status. Furthermore, the Ministry specifically states that it will not make exceptions based on a student's citizenship status.⁷⁶ The federal Act and the provincial policy together ensure that all undocumented immigrants and foreign national students holding study permits are ineligible for government financial assistance, in spite of the fact that they may have completed their elementary and secondary education in Canada.

Alternative options of financing postsecondary education through loans and assistance are also improbable for undocumented immigrants. Students without Citizenship or Permanent Resident status in Canada are ineligible for bank loans in Canada.⁷⁷ Thus, unless an undocumented student is able to secure one of the few scholarships for which there is no immigration status requirement, he or she is left without any assistance in funding the substantial cost of postsecondary education. Combined, the lack of assistance with the likelihood of being charged international tuition fees constitute a significant financial barrier to undocumented students' access to postsecondary education.

BARRIERS TO EMPLOYMENT

Even if undocumented students overcome the procedural and financial barriers to access, will they ever reap the benefits of the postsecondary education? To successfully complete a postsecondary program undocumented students generally face more and greater challenges than their peers, with their capacity for academic success weighed down by poverty, gaps in their

⁷⁶ *Ibid.*

⁷⁷ York University, *Student Loan Programs: International Students* (2008), on-line: <http://www.schulich.yorku.ca/ssb-extra/financialaid.nsf/allwebdocuments/studentloanprograms>. Information confirmed at TD Canada Trust, Royal Bank, and CIBC websites.

previous schooling, and language barriers.⁷⁸ Undocumented students may also face additional social and institutional barriers, due to ethnic discrimination and community isolation.⁷⁹ What is more, despite overcoming these additional challenges, the disheartening reality is that for undocumented individual who persevere and complete university is that opportunities of professional employment are few, if any, without a work permit or legal status.

Employers require a SIN or a work permit in order to legally hire a new employee.⁸⁰ Unlike postsecondary institutions, there is an enforcement provision in the *IRPA* that directly targets employers condoning immigrants working without a permit. Section 124 (1)(c) of *IRPA* provides that it is a legal offence to employ a foreign national in a capacity in which they are not authorized under the Act.⁸¹ The penalty for this offence ranges from a fine of not more than \$50,000 to up to two years of imprisonment.⁸² This is a significant deterring factor to employers seeking to hire undocumented graduates. Consequently, unless an undocumented graduate is able to find an employer willing to take the risk of a legal penalty, undocumented student's postsecondary education will be of limited use in Canada.

The options for obtaining a work permit or regularizing status remain to the same for an undocumented immigrant, before and after, obtaining a postsecondary education. Only individuals who began their education as undocumented minors and were able to obtain a study permit through the "Birthday Window" discussed above,⁸³ have a limited prospect of securing legal employment, and possibly regularizing their status in Canada permanently. However, this will be after a long road of overcoming financial as well as academic obstacles.

⁷⁸ P. Morse, & P. Cahape, "Migrant Students Attending College: Facilitating Their Success" (2008), on-line: The Education Resources Information Centre www.eric.ed.gov.

⁷⁹ *Ibid.*

⁸⁰ *Supra* note 28 at ss. 30(1).

⁸¹ *Supra* note 33 at s.124.

⁸² *Supra* note 33 at s. 125.

⁸³ See Subsection 215(1)(b) of the *Immigration and Refugee Protection Regulations*.

CANADA EXPERIENCE CLASS

In 2008, CIC launched a new category under which individuals can apply for permanent residence status from *within* Canada. This category is called the Canada Experience Class (CEC). The CEC was designed to retain temporary foreign workers and international students who recently graduated from Canadian postsecondary institutions and who poses specific skills and experiences.⁸⁴ The stated reason for the creation of the CEC was to place value on an individual's experience in Canada and allow it to be the key indicator of their likelihood to succeed.⁸⁵ This is a step in the right direction in terms of recognizing time spent in Canada as a beneficial quality and providing an opportunity to those who have become settled in Canada to obtain formal permanent residence status.

There are two main requirements for recent postgraduates to qualify for the CEC. The first requirement is that the individual has successfully completed a postsecondary program.⁸⁶ The program must have been at least two years in duration⁸⁷ and the student must have been enrolled as a full-time student for at least two academic school years.⁸⁸ The second main requirement of the CEC is that the individual must also have one year of work experience in Canada in a managerial, professional, or technical occupation or skilled trade.⁸⁹ In order for a

⁸⁴ Citizenship and Immigration Canada, *Canada Experience Class* (2008), on-line: www.cic.gc.ca/english/immigrate/cec/apply-who.asp.

⁸⁵ *Ibid.*

⁸⁶ The program itself must be at an accredited institution (approved by the Ministry of Training, Colleges, and Universities).

⁸⁷ Unless it is a Master's or Doctorate Degree, in which case the student must also have completed another year of postsecondary education in Canada.

⁸⁸ Citizenship and Immigration Canada (2008), "Application for Permanent Residence: Canada Experience Class," Form IMM 5609E. Note: This also applies if the program is longer than sixteen months and the student was enrolled part time for a portion of it

⁸⁹ *Ibid.* Note: Work experience is categorized by the Canadian National Occupation Classification.

recent foreign national graduate to meet the work experience requirement, they must apply for a Post-Graduation Work Permit.⁹⁰ This again is only a possibility for students who were able to obtain a study permit through the “Birthday Window,” because of the requirement for of valid temporary residence status.

Once obtained, the work permit may be valid for up to three years with no restrictions on the location or type of work (unlike a Temporary Work Permit).⁹¹ However, as mentioned above, the work experience must be within one of the designated occupations in order to qualify for the CEC. Obtaining employment in one of the designated areas may not be a simple task in an unfavourable job market or for those who are members of a group that has historically been discriminated against in the work place. Statistics have revealed that among persons aged 25 to 54 with a university degree, unemployment for recent immigrants has consistently been at least triple the rate of their Canadian-born peers.⁹² Thus, the work requirement may not be an easy challenge to overcome.

There are two relevant situations whereby a student would automatically be disqualified from making an application. That is if they have “remained in Canada after the time authorized to do so has expired”⁹³ or “engaged in work or attended school without authorization.”⁹⁴ These restrictions confirm the exclusion of undocumented students who were unable to obtain a study permit through the “Birthday Window.” Albeit very restrictive, the effective use of the “Birthday Window” and the CEC could land a previously undocumented minor student on the road to citizenship, provided not found inadmissible on health or security grounds.

⁹⁰ *Supra* note 85.

⁹¹ *Ibid.*

⁹² D. Galarneau, D. & M. Morissette, *Immigrants: Settling for less?* (Ottawa: Statistics Canada, 2004) at 5.

⁹³ CIC looks at the date of expiration on the study permit and/or Post-Graduation work permit for this qualification.

⁹⁴ *Ibid.*

SUGGESTIONS FOR LAW AND POLICY REFORM

REGULARIZING STATUS

The most obvious and effective solution for enhancing the accessibility of postsecondary education is the legal recognition of individuals' permanency in Canada by providing opportunities for regularizing status. As discussed above, the CEC is only available to undocumented students if they obtain a study permit through the "Birthday Window" and overcome significant barriers related to the fact that their status may not be regularized until years after they complete their degree. The ideal scenario would be for undocumented students to regularize their status before beginning a postsecondary education.

In terms of current regularization opportunities, assuming they do not qualify for other immigration options,⁹⁵ undocumented immigrants are able to submit a permanent resident application on humanitarian and compassionate grounds. However, these applications are expensive and can also take years to process. During the processing time, individuals are able to obtain a study permit but are left with the same financial barriers and insecurity in pursuing higher education as before the application was made. As Saad Alam's deportation demonstrates, academic prowess and community involvement will not guarantee an individual a successful humanitarian and compassionate application nor prevent removal while pursuing postsecondary study.⁹⁶ As a result, it is a rather unappealing in options for undocumented students wishing to pursue higher education and does little in terms enhancing the accessibility of postsecondary education.

⁹⁵ Sponsorship and skilled worker program.

⁹⁶ *Supra* note 1.

One possible alternative is to advocate for the expansion of Ontario's provincial nominee program. Sections 8 and 9 of the *IRPA* allow for federal-provincial agreements on immigration.⁹⁷ The agreements allow the provinces to nominate individuals for selection as permanent residents in order to further their own economic and cultural goals.⁹⁸ In May 2007, Ontario launched a Pilot Provincial Nominee Program.⁹⁹ The pilot program is currently employer driven, meaning one can only apply if approved for a position with a pre-screened employer, with the employer providing the nominee application package.¹⁰⁰ International students are eligible to apply if they have completed half of their studies in Canada, will soon or have already graduated from an approved Canadian postsecondary institution, and have received the nominee application from an employer willing to offer them a position.¹⁰¹ It is arguable that the province could expand this program to include academically qualified undocumented students with approval to a postsecondary institution. The expansion would further the same economic and cultural goals as the current program, provide consistency with the province's policy on undocumented minor children, while recognizing the permanency of these individuals' presence in Canada. It is currently an ideal time for this advocacy initiative because the pilot program is coming under review, but more research is needed to determine appropriate eligibility requirements.

Alternatively, a law reform campaign could be launched requesting a new permanent resident class for qualified undocumented students who have either graduated from a Canadian high school or meet a quantified residency requirement. This would be similar an approach taken in the United States.

⁹⁷ *Supra* note 28.

⁹⁸ *Supra* note 23 at 141.

⁹⁹ Citizenship and Immigration Canada, *Provincial Nominees* (December 12, 2008), on-line: www.cic.gc.ca/english/immigrate/provincial/apply-who.asp.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

APPROACHES IN THE UNITED STATES

The United States is the leading authority on access to postsecondary education for undocumented students. With an estimated undocumented population of seven million people, there is a substantially louder public voice pressing the issue there.¹⁰² It is appropriate then that there is no federal law in the United States prohibiting the admission of undocumented immigrant students to public postsecondary education. So long as a student meets the academic admission requirements and is not receiving a benefit based on residence that a U.S. citizen is ineligible to receive, they will be considered for admission along with everyone else.¹⁰³ However, this does not mean that an undocumented student can automatically receive in-state tuition rates or financial assistance. States have had to take individual approaches to addressing the financial barriers confronting undocumented students.

In June 2001, Texas became the first state to enact legislation that allows undocumented students to qualify for in-state tuition rates. To be eligible under this law a undocumented student must meet four requirements: they must 1) have graduated from a U.S. high school; 2) be accepted at a state institution of postsecondary education; 3) have resided in the state for three or more years; and 4) sign an affidavit stating they will file an application to become a lawful permanent resident at their earliest opportunity.¹⁰⁴ Since the Texas reform, at least nine other states that have passed similar laws to extend resident tuition to specified undocumented students, with three states including provisions for financial aid under the same qualifications.¹⁰⁵

¹⁰² T. Ruge & A. Iza “Higher Education for Undocumented Students: The Case for Open Admission and In-State Tuition Rates for Students Without Lawful Immigration Status” (2005), 15 *Ind. Int’l & Comp. L. Rev.* at 258.

¹⁰³ *Ibid* at 262.

¹⁰⁴ *Supra* note 65 at 270.

¹⁰⁵ *Supra* note 103.

At the U.S. federal level, an innovative piece of legislation entitled the Development, Relief, and Education for Alien Minors Act (DREAM Act) was introduced in Senate in 2001.¹⁰⁶ If passed, it will eliminate the disparities at the state level by unifying the policy towards undocumented students across the country. In general, the DREAM Act would allow eligible undocumented immigrants to secure lawful permanent resident status in the U.S., so they can legally work and obtain educational benefits, such as financial aid. The eligibility qualifiers in the DREAM Act are more restrictive than Texas' criteria for distributing in-state tuition rates, but similar residency and education qualifications are applied. In order to be eligible for status under the DREAM Act, individuals must have lived in the U.S. continuously for five years on the date of enactment, have earned a high school diploma, have no criminal record, demonstrate "good moral character", and be between the ages of twelve and twenty-one at the time they apply.

Arguably, there are problems posed by the eligibility criteria of the DREAM Act, including the restrictive residency requirement, the inclusion of the ambiguous term of "good moral character", and the arbitrary age restriction. Yet, the overall purpose of the proposed legislation, of providing an opportunity for undocumented students to regularize their status based on their residency and academic achievements, make it a worthwhile example to draw on when proposing law reform in Canada. Further research would be needed to draft a bill of this nature for proposal to the federal government.

SUGGESTIONS FOR ADVOCACY INITIATIVES

¹⁰⁶ A. Stevenson, "DREAMing of an Equal Future for Immigrant Children: Federal and State Initiatives to Improve Undocumented Students' Access to Post-Secondary Education" (2004), 46 *Ariz. L. Rev.* at 552.

In lieu of regularization advocacy, non-profit organizations and legal aid clinics, like Parkdale Community Legal Services, can begin narrower campaigns to enhance the access to postsecondary education for undocumented students. This paper can be used as a tool to direct these campaigns to the appropriate authority. The suggestions for possible advocacy efforts are not exhaustive and should only be considered as possible starting points.

In terms of overcoming procedural barriers, three possible activities would be useful. First is the development of an information pamphlet for undocumented minor students and high school career counselors. This pamphlet could include a description of the legal framework governing the right to undocumented minors' right to education and the limited six month period where a student can apply for study permit. The possible opportunities presented by the "Birthday Window" can be emphasized by including information about the CEC, not excluding the obstacles to meeting its criteria.¹⁰⁷ Having this knowledge could motivate undocumented minors, who thought there was no possibility of accessing postsecondary education, to develop innovative approaches for utilizing these limited opportunities.

The second suggestion for overcoming procedural barriers is a campaign aimed at university registrars. Since postsecondary institutions are essentially bound by provincial policies towards tuition rates and financial aid, they are not the appropriate venue for these advocacy efforts, except maybe on a case-by-case basis. Registrars do have the ability to initiate a formal "Don't ask, Don't tell" policy when it comes to students' immigration status. The "don't tell" aspect of the policy would merely be re-enforcing the fact that universities are bound by the *FIPPA* in terms of releasing applicants' personal information. The "don't ask" portion would clarify the ambiguity over whether students are required to produce a study permit at any time

¹⁰⁷ The author is happy to develop this pamphlet once the legal analysis in this paper is approved.

during their studies.¹⁰⁸ The *IRPA* does *not* include a provision that requires postsecondary institutions to exercise due diligence in ensuring students are complying with the Act nor is it an offense for an institution to enroll a student contravening the Act.¹⁰⁹ In essence then, it is a fairly simple policy for an institution to put in place because it only requires negative obligations.

Advocacy efforts geared at overcoming the financial barriers can draw more significantly from approaches taken in the United States. At the federal level, in addition to legislation modeled after the DREAM Act, law reform advocacy should include requesting a change in the definitions section of the *Canadian Student Financial Assistance Act*. Section 2(1) could be amended to include persons who graduated from a Canadian secondary school or those living in Canada for a quantified number of years. Mirrored reforms to Ontario's Student Assistance Program would then need to be advocated for at the provincial level. These reforms would allow undocumented student to access government financial aid.

The issue of tuition rates would only have to be addressed at the provincial level. The Ministry of Training, Colleges and Universities could amend the criteria its uses to determine whether a university will receive grant funding for a student's enrollment.¹¹⁰ The eligibility categories could be also expanded to include persons who have either graduated from a Canadian secondary school or meet a quantified residency requirement, which is similar to the criteria applied in Texas. The expansion of the policy to allow qualified undocumented students to become eligible for grant funding would then afford postsecondary institutions the ability to charge them domestic tuition rates, thereby lowering a significant financial barrier. Again, this campaign will require further research for effective development. In order to successfully

¹⁰⁸ It is understood registrars must ask for documentation when determining if a person is eligible for domestic tuition rates as a result of provincial policy. The "don't ask, don't tell" policy would only apply to students deemed "international" in terms of tuition rates until there is appropriate policy change by the province.

¹⁰⁹ Section 124 (1)(c) would not apply because it only encompasses employers .

¹¹⁰ This is set out in Section 4 of *The Ontario Operating Funds Distribution Manual*.

advocate for any program or government reforms, one must take into consideration and address the public policy concerns.

PUBLIC POLICY AND ENHANCING ACCESSIBILITY

ADDRESSING POLICY CONCERNS

An argument against expanding the accessibility of postsecondary education to undocumented students contends that it would impose an expensive burden on taxpayers and deny opportunities to residents with immigration status. However, beyond the argument that education is a right that should not be convoluted with immigration status, increasing accessibility can come at a minimal cost to the public. Undocumented students will not be attending postsecondary institutions for free; they would still be required to pay tuition and repay government loans. It is true that in affording them domestic tuition based on their residency, the government would be providing a supplement through grant funding to the university. However, this factor becomes less relevant when considering the small number of undocumented students that would be applying, let alone enrolling. Unfortunately, for various reasons, recent immigrants as a whole tend to comprise a small portion of university applicants; in 2006 only 3,743 of the 55,045 university applicants out of secondary school were landed immigrants.¹¹¹ It follows that undocumented immigrants, with additional barriers to overcome, will comprise an even smaller number of applicants- at a minimal public cost. More importantly, increasing the access to postsecondary institutions will allow these institutions to enroll the best qualified, most diverse

¹¹¹ Council of Ontario Universities, *Application Statistics 2006*, (April 2008), on-line: <http://www.cou.on.ca/content/objects/Application%20Statistics%202006.pdf>.

population of students because they would not need to rule out otherwise successful candidates based on their immigration status.

Opponents may also argue that even if students obtain a postsecondary degree, they still cannot legally work in Canada. While this is a pertinent issue that has been discussed above, it is also possible that this will not be the case for many of these students. They could become eligible for permanent resident status in the future through family sponsorship, employment-based immigration, or a change in law. To deny undocumented students of today the opportunity to achieve higher education has the potential to lock future Canadian citizens in a cycle of poverty.

Opponents may also claim that enhancing the accessibility of postsecondary education to undocumented students will reward illegality and induce a larger number of such people to come to Canada to take advantage of this opportunity.¹¹² However, as discussed above, there is no evidence that undocumented immigrants come to Canada for public benefits. Their main motivation seems to be to enhance personal security.¹¹³ In addition, there has been no documented influx of undocumented immigrants since Ontario recognized the right of undocumented minors to education. The reality is there will continue to be undocumented families residing in Canada regardless of access to postsecondary education and qualified provincially-educated students should not be punished for the choices made by their parents.¹¹⁴ It is in the country's best interest to allow undocumented students to obtain postsecondary education.

POLICY RETURNS

¹¹² *Supra* note 105 at 276.

¹¹³ *Supra* note 10 at 370.

¹¹⁴ *Supra* note 105 at 276.

The returns of improving access to postsecondary education are numerous. For the individual, postsecondary education is proven to enhance success in employment through better career opportunities and higher earnings.¹¹⁵ For the economy, a skilled population fosters innovation and improves the country's global competitiveness.¹¹⁶ For society, increased participation in postsecondary education significantly contributes to socially desirable goals related to social inclusion and community empowerment.¹¹⁷ Some of the social benefits cited include reduced welfare dependency, lower crime rates, healthier life styles, increased volunteerism, charitable giving and involvement in community organizations.¹¹⁸

It makes economic sense for the government to extend the right to education to the postsecondary level. After financially investing in undocumented students' education from kindergarten to grade twelve, the government then denies academically qualified students the opportunity to continue their education. This is inconsistent with the government's own policy of not conflating immigration status with students' right to education.¹¹⁹ It makes better sense for the province to educate its residents so they can contribute to the economy and society to the fullest potential.

The returns of increased accessibility to postsecondary education have even been recognized by recent law and policy reforms. In 2003, the federal legislature passed a small but significant change to the *Canada Student Financial Assistance Act* that expanded the definition of students qualifying for government loans to include protected persons. Ontario not only followed suit with reforms to its student loan policies but also with reforms that ensured

¹¹⁵ Marie Drolet, *Participation in Post-secondary Education in Canada: Has the Role of Parental Income and Education Changed over the 1990s?* (Ottawa: Ministry of Industry, 2005) at 5.

¹¹⁶ *Ibid.*

¹¹⁷ Association of Universities and Colleges of Canada, "Building on Our Strengths: Higher Education and Research for Canada's Future (2004) at 5. Available on-line at: www.aucc.ca/_pdf/english/reports/2004/prebud_10_19_e.pdf.

¹¹⁸ *Ibid.*

¹¹⁹ *Supra* note 31.

protected persons do not have to pay international tuition fees.¹²⁰ It was not an easy battle to achieve these reforms; it took five years of committed advocacy from various community organizations and government officials.¹²¹ Yet, the ultimate success of the protect person campaign demonstrates there is space for reform when it comes to improving access to postsecondary education and that the government recognizes the benefit of more inclusive policies.

The policy concerns of increasing accessibility to postsecondary education for qualified students are more than outweighed by the benefits to Canadian society that result from providing determined students with the opportunity to education. To limit undocumented students' education opportunities, would result in a "permanent underclass" of under-educated and under-utilized persons living in Canada.¹²² It is beneficial to Canada as a whole if undocumented students are able to continue to higher education and develop the skills to fully contribute to the economy and society.

CONCLUSION

Within both Canada and the United States, the legal recognition of undocumented minors' basic right to education- regardless of immigration status- has contributed to an increasing population of undocumented students obtaining high school diplomas in both countries. When it comes to postsecondary education, however, the laws in both countries do little to guarantee the ability of these students to continue their studies. An academically

¹²⁰ The Getting Landed Project, *Tuition Fees for Refugee students at Canadian Colleges and Universities* (2003) at 4, on-line: www.settlement.org.

¹²¹ L. Slobodian and H. Kits, H., "Student Loans for Refugees: A Success Story for Policy Change" (2003) at 3, on-line: Caledon Institute of Social Policy, <http://www.caledoninst.org/Publications/PDF/553820711.pdf>.

¹²² *Supra* note 105 at 278.

qualified undocumented student is essentially forced to stand by while their peers pursue higher education and stand to gain the benefits that such an education can provide. Where, exactly, these undocumented students end up as adults, in terms of their socio-economic status, may well depend on whether law reforms are made to ensure they have access to affordable postsecondary education and opportunities through which they can put their education to use as lawful residents.

The United States has made some bone fide attempts to address the disconnect between unconditional access to elementary and secondary education and the limited access to postsecondary. Canada is lagging behind in this regard, and as a result, capable and committed students, like Saad Alam, are being denied the opportunity to achieve their full potential. It is time for the government to address this social inequality by expanding access to postsecondary education.

This paper has identified the merits of extending access to postsecondary education to undocumented immigrants through a comprehensive overview of the position of undocumented students in the current regulatory environment. It assessed the procedural, financial, and employability barriers confronting undocumented immigrants wishing to pursue higher education, identified appropriate venues for advocacy efforts, and suggested next steps forward by drawing on examples from Canada's neighbour to the south. Weighing the policy concerns against policy returns, it was established that expanding access to higher education would not only provide consistency in Ontario's pledge to ensure equal educational opportunities for undocumented students but also benefit Canadian society as a whole. It is a firm commitment to educational opportunities at all levels that is necessary to prevent a permanent underclass of residents in this country and to move Canada towards being a more equitable society.

BIBLIOGRAPHY

LEGISLATION

An Act to incorporate the University of Guelph, R.S.O. 1964, c.120 as amended by *The University of Guelph Act* 1965, c. 136.

Canada Student Financial Assistance Act, 1994, c. 28. S-22.7.

Constitution Act, 1867 (UK), 30 & 31 Vict., c.3. reprinted in RSC 1985, app. II, no.5.

Education Act R.S.O. 1990, c. E.2.

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

Immigration and Refugee Protection Regulations, S.O.R./2002-227.

Ontario's Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F. 31.

Post-secondary Education Choice and Excellence Act, 2000, S.O. 2000, c. 36, Sch.

The York University Act, R.S.O. 1965.

JURISPRUDENCE

Law Society of British Columbia v. Margat [2001] 3 S.C.R. 113, [2001] S.C.J. No. 66.

R. v. Morgentaler, [1993] 3 S.C.R. 463, 125 N.S.R. (2d) 81.

SECONDARY MATERIAL

American Association of State Colleges and Universities, "Should Undocumented Immigrants Have Access to In-State Tuition?" (2005) 2 *Policy Matters* 6.

Association of Universities and Colleges of Canada, "Building on Our Strengths: Higher Education and Research for Canada's Future" (2004), on-line at:
www.aucc.ca/_pdf/english/reports/2004/prebud_10_19_e.pdf.

Association of Universities and Colleges of Canada, *Transfer Payments for Postsecondary Education* (2006), on-line:
www.aucc.ca/_pdf/english/reports/2006/transfer_payments_02_23_e.pdf.

Babbage, Maria, "Ont. Schools Shouldn't 'Pick and Choose' with Illegal Immigrant Kids: McGuinty" *The Canadian Press*, (June 11, 2008).

Caledon Institute of Social Policy, *Equal Access to Student Loans for Convention Refugees* (2000), on-line: www.caledoninst.org.

Canadian Millennium Scholarship Foundation, *Millennium Bursary Program* (2008), on-line at:
<http://www.millenniumscholarships.ca/en/programs/Bursary.asp>.

Carasco, Emily F. *Immigration and Refugee Law: cases, materials and commentary* (Toronto: Edmond Montgomery Publications, 2007).

Chase, S. and Curry, B., "Thousands of Illegal Immigrants Missing: A-G" *Globe and Mail* (May 6, 2008).

Citizenship and Immigration Canada “Application for Permanent Residence: Canadian Experience Class”. *Form IMM 5609E* (09-2008).

Citizenship and Immigration Canada, *Canada Experience Class* (2008), on-line: www.cic.gc.ca/english/immigrate/cec/apply-who.asp.

Citizenship and Immigration Canada, *Provincial Nominees* (December 12, 2008), on-line: www.cic.gc.ca/english/immigrate/provincial/apply-who.asp.

Council of Ontario Universities, *Application Statistics 2006*, (April 2008), on-line: <http://www.cou.on.ca/content/objects/Application%20Statistics%202006.pdf>.

Drolet, M., *Participation in Post-secondary Education in Canada: Has the Role of Parental Income and Education Changed over the 1990s?* (Ottawa: Ministry of Industry, 2005).

The Educational Policy Institute, *Access, Persistence, and Barriers in Postsecondary Education: A Literature Review and Outline for Future Research* (Toronto: Higher Education Quality Council of Ontario, 2008).

Frache, P., CBCA Education Update, “Bob Rae review of Postsecondary Education” (November 2004).

Frenette, M., *Is Post-secondary Access More Equitable in Canada or the United States?* (Ottawa: Minister of Industry, 2005).

Frum, J. “Postsecondary Educational Access for Undocumented Students: Opportunities and Constraints” (2006) 3 *American Academic* 81.

Galarneau, D. & Morissette, *Immigrants: Settling for less?* (Ottawa: Statistics Canada, 2004).

The Getting Landed Project “Tuition Fees for Refugee students at Canadian Colleges and Universities” (2003), on-line: www.settlement.org.

The Getting Landed Project “Helping Refugee Students Apply for Canadian Student Loans for College and University” (2004), on-line: www.settlement.org.

Hogg P., *Constitutional Law of Canada, 5th Ed. Volume 2* (Toronto: Carswell, 2007).

Jimenes, Marina, “Ottawa to Unveil Revamped Immigration Rules to Cut Backlogs” *Globe and Mail* (31 October 2005) A1.

Gerard Kennedy, “Policy/Program Memorandum No. 136” (December 3rd, 2004), on-line: The Ministry of Education, <http://www.edu.gov.on.ca/extra/eng/ppm/136.html> .

Merisotis, J., “Testimony at the Hearing on The Future of Undocumented Immigrant Students and Comprehensive Immigration Reform” (Washington: Institute for Higher Education Policy, 2007).

Ministry of Training, Colleges and Universities, *The Ontario Operating Funds Distribution Manual*, (December 2004).

Ministry of Training, Colleges and Universities, *About: Ontario's Student Assistance Program* (2008), on-line: https://osap.gov.on.ca/eng/not_secure/about.htm.

Ministry of Training, Colleges and Universities, *Ontario's Student Assistance Program: Loan Eligibility Requirements* (2008), on-line: https://osap.gov.on.ca/eng/not_secure/App_elig_req_123.htm.

Morse, P. & Cahape, P., "Migrant Students Attending College: Facilitating Their Success" (2008), on-line: The Education Resources Information Centre www.eric.ed.gov.

No One is Illegal-Toronto, "UofT Student and his Family Deported! Fight for Don't Ask Don't Tell and Sanctuary Schools Continues", on-line: Education Not Deportation, <http://toronto.nooneisillegal.org/node/225>.

Oliveroz, P. et al, eds., *The College & Financial Aid Guide for: AB540 Undocumented Immigrant Students* (California: USC Centre for Higher Education, 2006).

Omidvar R. and Richmond T. (2003) "Immigrant Settlement and Social Inclusion in Canada" in *Working Paper Series: Perspectives on Social Inclusion*, (Toronto: LaidLaw Foundation, 2006).

Ontario Universities Application Centre, "Privacy and Confidentiality Statement", (October 2006), on-line: www.ouac.on.ca/privacy/.

Papademetriou D. "The Global Struggle with Illegal Migration: no end in sight" *Migration Information Source*, (Washington, DC: Migration Policy Institute, 2005).

Platform for International Cooperation on Undocumented Migrants. "Housing for Undocumented Migrants: The Problem," (26 April 2006), online: http://www.picum.org/HOUSING/Housing_Problem.htm.

Ruge, T. & Iza, A., "Higher Education for Undocumented Students: The Case for Open Admission and In-State Tuition Rates for Students Without Lawful Immigration Status" (2005), *15 Ind. Int'l & Comp. L. Rev.* 257.

Salsbury, J., "Evading "Residence": Undocumented Students Higher Education and The States" (2004) *53 Amer. Uni. L. Rev.* 459.

Simich, L., Wu, F., & Nerad, S. "Status and Health Security: An Exploratory Study of Irregular Immigrants in Toronto" (2007), *September-October Canadian Journal of Public Health* 369.

Slobodian, L. and Kits, H., "Student Loans for Refugees: A Success Story for Policy Change" (2003) on-line: Caledon Institute of Social Policy, <http://www.caledoninst.org/Publications/PDF/553820711.pdf>.

Statistics Canada, "University Tuition Rates" *The Daily* (October 2007), on-line:
<http://www.statcan.gc.ca/daily-quotidien/071018/dq071018b-eng.htm>

Stevenson, A., "DREAMing of an Equal Future for Immigrant Children: Federal and State Initiatives to Improve Undocumented Students' Access to Post-Secondary Education" (2004), 46 *Ariz. L. Rev.* 551.

Taylor, Lesley, "Immigration Crackdown Derails Studies" *Toronto Star*, September 22, 2008.

Tandom Social Research Consulting, *Literature Review of Postsecondary Education Affordability in Canada*, (Toronto: Council of Ministers of Education, 2007).

Tremblay, K., "Academic Mobility and Immigration" (2005) 9:3 *Journal of Studies in International Education* 1996.

Vedra, C., "Workers of Colour within a Global Economy" (December 2004), online: Canadian Labour Congress <http://canadianlabour.ca/updir/research.pdf>.

Voakes, V. & Chan, J., "A Higher Education Act in Ontario: Enshrining Access, Affordability and Quality in Post-secondary Education" (2005), on-line: Ontario Undergraduate Student Alliance www.ousa.on.ca/uploaded_files/pdf_files/Policy%20Papers%20and%20Statements/highereducationactpolicy.pdf.

York University, *Student Loan Programs: International Students* (2008), on-line:
<http://www.schulich.yorku.ca/ssb-extra/financialaid.nsf/allwebdocuments/studentloanprograms>.

APPENDIX

APPENDIX 1: CORRESPONDENCE WITH BRUCE RYDER. CONSTITUTIONAL LAW PROFESSOR AT OSGOODE HALL

Emailed Questions

Meghan Wilson <meghanwilson@osgoode.yorku.ca>

Sent by: <meghan.wilson1@hotmail.com>

11/18/2008 10:35 PM

To Bruce Ryder <bryder@osgoode.yorku.ca>

cc <sgavigan@osgoode.yorku.ca>

Subject Division of Powers Question

Hello Prof. Ryder,

How are you? I am sorry to bother you during your sabbatical but there is a interesting division of powers question that I have been struggling with for my Parkdale law reform paper. I believe Prof. Gavigan left a message on your answering machine today regarding this same question. If you have time, I would really appreciate your expert opinion.

The topic of the paper is access to post-secondary education for students without immigration status. Section 30 of the Immigration and Refugee Protection Act (IRPA) states:

30. (1) A foreign national may not work or study in Canada unless authorized to do so under this Act.

Minor children

(2) Every minor child in Canada, other than a child of a temporary resident not authorized to work or study, is authorized to study at the pre-school, primary or secondary level.

Therefore, under the IRPA, minor children without immigration documentation are allowed to attend elementary and secondary education (only children on visitors visa's cannot). However, once they reach high school graduation, according to IRPA, they cannot study unless they have a study permit. A person without legal status in Canada must apply for a study permit from abroad and is then charged international tuition fees.

The question is: Can a University establish a policy that would allow undocumented students to register at their institution without a study permit and pay domestic fees (for example if they sign an affidavit stating they have been living in Canada for x amount of years and intend to regularize their status soon)? This would be contrary to IRPA but feels (in pith and substance) to be an education matter. Can a largely autonomous institution, operating in an area of exclusive provincial jurisdiction, issue a policy that is contrary to federal legislation? There is nothing within IRPA that is directed towards an education institution aiding or accepting a person in violation of the Act.

Any assistance you can offer with this question is greatly appreciated. The reason I am writing my paper on this topic is because a local NGO has been dealing with a number of undocumented youth in this difficult situation.

Hope you and your family are doing well and that you are having a relaxing break. Thank you very much for your time.

Best wishes,
Meghan

Email Response from Bruce Ryder (Constitutional Law Professor at Osgoode Hall)

From: **Bruce Ryder/osgoode** (BRyder@osgoode.yorku.ca)

Sent: December 1, 2008 8:42:50 PM

To: Meghan Wilson (meghanwilson@osgoode.yorku.ca)

Cc: meghan.wilson1@hotmail.com; sgavigan@osgoode.yorku.ca

Hi Meghan, Hi Shelley,

Thanks for your messages and my apologies for taking so long to respond to your interesting problem.

I think the answer to your question is that a university may issue a policy contrary to federal legislation, but that doesn't change the fact that the students who are foreign nationals may be found to be in violation of s.30 of the IRPA.

Section 30 of IRPA would likely be found to be a valid exercise of the federal immigration power, even though it deals with education, a matter within provincial jurisdiction. That is because IRPA as a whole is in pith and substance in relation to immigration law (s.95) or in relation to naturalization and aliens (s.91(25)) , and its provisions may validly have incidental effects on areas of provincial jurisdiction. See, e.g., *Law Society of B.C. v. Mangat*, [2001] 3 S.C.R. 113 for a discussion of these federal powers in the context of federal immigration legislation.

A university policy that allowed undocumented foreign students to register would be in pith and substance in relation to education (s.93) or immigration (s.95), and thus within provincial jurisdiction - if universities are even subject to the division of powers when developing policies, which I think is highly debatable. A university in this context may not be clearly exercising delegated legislative authority, and the division of powers only limits law-making by the legislature or bodies, like municipalities, exercising delegated legislative authority. In any event, even if the university policy is in constitutional terms the equivalent of provincial legislation, to the extent that a provincial law conflicts with federal legislation, the federal legislation will prevail (see the discussion on this point in *Mangat*, supra). In other words, it doesn't seem to me that the existence of a university policy changes the legal jeopardy arising for foreign students under s.30 of the IRPA (unless the IRPA itself authorizes such policies as exceptions to s.30).

Hope that helps in some way.

All the best,

BR

APPENDIX 2: CORRESPONDENCE WITH HARRIET LEWIS, YORK UNIVERSITY SECRETARY AND GENERAL COUNSEL

Email Questions

Sent by:
meghanwilson@osgoode.yorku.ca

11/04/2008 05:14 PM

To hlewis@yorku.ca

Subject Question on University Governance

Hello Mrs. Lewis

I am a student at Osgoode and currently participating in the poverty law clinical program at Parkdale Community Legal Services. I am developing a paper on access to post-secondary education for undocumented immigrants and I have a couple questions I am hoping you will be able to assist me with.

I am having trouble wrapping my head around the legal framework under which universities in Ontario operate. I am specifically interested in whether there is any law or regulations that govern the criteria used by universities in deciding admissions, particularly relating to immigration status? Also, if there is any law or regulation that governs or influences who is charge domestic and international tuition fees? If it is up to the individual universities discretion to make these decisions, who at the institution makes these decisions and is there a specific university policy directed at these questions?

Your help in answering these questions is greatly appreciated.

Thank you in advance for your time.

Best wishes,

Meghan Wilson

Email Response from Harriet Lewis (York University Secretary and General Counsel)

From: **Harriet Lewis** (hlewis@yorku.ca)

Sent: November 5, 2008 9:50:51 AM

To: Meghan Wilson (meghanwilson@osgoode.yorku.ca)

Cc: Harriet Lewis (hlewis@yorku.ca)

Meghan, it is no wonder that you are having trouble comprehending the legal framework of Ontario universities, because it is not that easy to understand. Each institution has its own governing legislation and is autonomous from the others and from the government, though some institutions (U of T notably) have several Lieutenant Governor in Council appointees. Still, we do not have "public" system like the US does: each institution is different from the others.

York is established and operates under the York University Act 1965 which is on our web site. We are fully autonomous, i.e we have no LGIC appointees and both our Board and Senate can appoint their own members. We are entitled to confer degrees, so although there is a Degree Granting Act, our legislation takes precedence.

In terms of the provincial funding regime the issue is not whether someone is Canadian or not, but whether they are Ontario residents. The government does not provide grant funding for non Ontario residents, and thus, if the universities want to admit students who are not at the time of application resident here, they must "take them for fees" (the expression used) as they will not get provincial grants. That is why there are different fee structures for non Ontario students, including non Canadian students. (called non residents). Because the Ontario government gives grants per student to universities, it in effect "regulates" tuition. It sets guidelines as to how much we can charge if we want to get their grants.

In each year the university, in a multi levelled way, makes an enrollment plan. Obviously the capacity of the university to take students depends on many things, and the needs of the university for income affect the number of the students (new, returning and non resident) that they plan to take. The Vice President Academic and Provost, along with the Vice President Students and the Deans create the enrolment plans, understanding that they need and want to make a certain budget, and that to deliver the curriculum appropriately, they should only take so many students.

York's Academic Plan also speaks to internationalization and having students from other jurisdictions is desired for many reasons, so certain measures (the details of which I do not know) are put in place to ensure that we have numbers of non-resident students, including international students. There is recruitment of international students, particularly in some Faculties. The Federal government determines by its own processes and criteria which of those students we admit will be given appropriate visas.

I hope the foregoing is of assistance. For more detail, I think you might speak to the VP Students, Rob Tiffin, or to the Registrar, Joanne Duklas. Best of luck with your research.

APPENDIX 3: CORRESPONDENCE WITH MANAGER OF PROCESSING, UNDERGRADUATE PROGRAMS AT ONTARIO UNIVERSITIES' APPLICATION CENTRE (OUAC)

Initiating Email to OUAC

Hello,

I am writing as a law student at Parkdale Community Legal Services. I am developing a paper on access to post-secondary education for non-status immigrants. I noticed that on both of your undergraduate applications potential students must indicate their immigration status. I was wondering what happens to this information and if OUAC takes any action to communicate this information to immigration authorities? I note that on your website it states:

"The OUAC may disclose your personal information to regulatory authorities, law enforcement or other persons, as authorized or required by law."

Can you clarify what this means in practice?

When status information is communicated to postsecondary institutions, do you know what actions they take?

Is there any way to remove the requirement to reveal immigration status if students have attended high school in Canada and meet all the academic requirements?

Your assistance in answering these questions is greatly appreciated.

Thank you for your time.

Best wishes,

Meghan Wilson

Response to Email from Jennifer Paradise-McCurdy (OUAC: Manager of Processing, Undergraduate Programs)

To: meghanwilson@osgoode.yorku.ca
Subject: Re: Fw: Communication of immigration status?
From: jen@ouac.on.ca
Date: Thu, 9 Oct 2008 11:57:00 -0400

Hello Meghan,

Your inquiry was forwarded to my attention. I tried to give you a call because I thought it may be easier than via email but I haven't been able to reach you. So, here are some responses to your questions.

The "Status in Canada" information is collected on the application to assist the universities. Since I do not work at a university I cannot fully address how they use the information but I believe that some uses are:

- it may help the university determine what registration fees are applicable (domestic vs international)
- it may be used to quickly connect international applicants to services available to them at the

university.

- it may be used to generate statistics to aid with enrollment management.
- etc.

The OUAC also generates statistics in aggregate form which may be used by, the universities, Ministry of Training College and Universities, for various initiatives to improve pathways for people into post-secondary institutions.

We do not send this information to immigration authorities. Changes to an applicant's status can be made (without any required documentation) on our application at any time while the application is active, however, these changes may require supporting documentation on the end of the university - likely at the time of registration.

Admissibility is based on satisfying the admission requirements outlined by the institution: academic requirements (courses, grades, degree/diplomas...) and possibly additional criteria such as supplementary applications, interviews, portfolios, auditions etc. Ones Status in Canada is not typically an admission requirement. There are some cases where programs are not available to international applications (and are not listed on our international application form 105F). Why - you would need to ask the universities (it may be related to outside regulations in the industry or gov't - not really sure).

To clarify your questions regarding: "The OUAC may disclose your personal information to regulatory authorities, law enforcement or other persons, as authorized or required by law."

We sometimes receive legal requests to verify that an application has been submitted, the applicant confirmed etc by an applicant's lawyer (this is accompanied by signed consent from the applicant). However, there could arise other occasions where by law (and within FIPPA regulations) we are required to disclose personal information.

I would suggest if you would like further information on how the "Status in Canada" data is used by the universities you may want to start with your own institution's Registrar's Office.

I hope this is helpful, if you have further questions please give me a call - it may be easier than via email.

Regards,
Jennifer

Jennifer Paradise-McCurdy
Manager of Processing, Undergraduate Programs
Ontario Universities' Application Centre
170 Research Lane
Guelph, ON N1G 5E2
Phone: 519- 823-1940 x250

fax: 519-823-5232

Response from Jennifer Paradise-McCurdy to Follow-up Questions

RE: Communication of immigration status?
From: **Jennifer Paradise-McCurdy** (jen@ouac.on.ca)
Sent: October 9, 2008 2:45:06 PM
To: Meghan Wilson (meghanwilson@osgoode.yorku.ca)

Hi Meaghan,

See my responses below...

Jen

Jennifer Paradise-McCurdy
Manager of Processing, Undergraduate Programs
Ontario Universities' Application Centre
170 Research Lane
Guelph, ON N1G 5E2
Phone: 519- 823-1940 x250
fax: 519-823-5232

Hello Jennifer,

Thank you for the quick response. I will contact the universities for more information. I just want to confirm that, although OUAC collects information on immigration status, a potential student who does not have legal documentation to be in Canada (non-status) will:

1. Not have their lack of status impact their ability to apply through OUAC.
They can apply like anyone else; they would indicate that their "Status in Canada" is "Other - no status".
2. Not have their lack of status communicated to any immigration officials. They can submit an application without fear of deportation.

We do not communicate this information to anyone other than the university for the purpose of assessing for admissibility to the program(s) indicated on their application.

You said that there are "other occasions" where you may be required by law to disclose personal

information. Is there any such a situation that would relate to immigration status?

Here is what appears in our Privacy and Confidentiality statement:

"The OUAC may provide your personal information in response to a search warrant or other legally valid inquiry or order, or to an investigative body in the case of a breach of an agreement or contravention of law, or as otherwise required by law. We may also disclose personal information to assist us in collecting a debt owed by you, or otherwise where necessary for the establishment, exercise or defence of legal claims. We may disclose information, including personal information, to comply with contractual or other legal obligations in relation to the services we provide to universities and others.

In addition, as specified in the privacy notices accompanying each application, the OUAC or the universities may share some or all of your personal information with universities and colleges across Canada when application fraud has been detected."

The fraud referred to in the last statement is typically regarding falsified transcripts.

I want to be able to assure any clients that they can disclose their immigration status (or lack thereof) to OUAC free of fear of deportation. **Absolutely!**

Can you direct me to any regulations that guide your privacy policy? What are FIPPA regulations?

Our Privacy and Confidentiality information can be found on our website (www.ouac.on.ca), click on "About OUAC" and you will see a link for "Privacy and Confidentiality". We are guided by FIPPA which is Ontario's Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F. 31. The Ontario universities came under FIPPA as of June 10, 2006.

Thank you for your time.
Yours truly,
Meghan Wilson

APPENDIX 4: CORRESPONDENCE WITH DIRECTOR OF OPERATIONS AT ONTARIO UNIVERSITIES' APPLICATION CENTRE

Email Questions and Response from Trudy Sykes (OUAC: Director of Operations)

From: **Trudy Sykes** (trudy@ouac.on.ca)

Sent: October 15, 2008 3:47:44 PM

To: Meghan Wilson
(meghanwilson@osgoode.yorku.ca)

Hi Meghan, please see below for our response to your questions.

Please let me know if you need more information.

Trudy Sykes
Director of Operations
Ontario Universities' Application Centre
170 Research Lane, Guelph, ON N1G 5E2
Tel: 519-823-1940 ext 225 Fax: 519-822-1682
email: sykes@ouac.on.ca www.ouac.on.ca

Hello,

I am writing from Parkdale Community Legal Services. I am developing a paper on access to post-secondary education for non-status immigrants. I noticed that on both of your undergraduate applications potential students must indicate their immigration status. I was wondering what happens to this information and if OUAC takes any action to communicate this information to immigration authorities? I note that on your website it states:

"The OUAC may disclose your personal information to regulatory authorities, law enforcement or other persons, as authorized or required by law."

Can you clarify what this means in practice?

This simply means that if the 'authorities' show up with a search warrant or other authorized request we will release the data to them.

When status information is communicated to postsecondary institutions, do you know what actions they take?

It is up to the universities to decide how to use this data. The major impact may well be the fees that are charged to the student but there could be others.

Is there any way to remove the requirement to reveal immigration status if students have attended high school in Canada and meet all the academic requirements?

No I do not see this as an option since all schools do need to have this information for several causes.

Your assistance in answering these questions is greatly appreciated.

Thank you for your time.

Best wishes,
Meghan Wilson

**APPENDIX 5: COMPLETED QUESTIONNAIRE FROM ALGOMA
UNIVERSITY'S REGISTRAR**

Questionnaire for the University and College Registrars

Institution Name: Algoma University

Position: International Student Advisor

Contact Information: 705-949-2301 Ext. 4238 Mark.allard@Algomau.ca

1. Does your institution have an admission policy with regards to applicants who do not have any immigration status in Canada?¹¹

No, proof of status is not required for admission.

2. Which, if any, federal and/or provincial laws or policies govern the criteria for admitting students to your institution?

Our criteria is based on the each student's country of origin, and the level of education required in that country to attend university.

3. Are there any laws, regulations, or policies that prohibit your institution from admitting undocumented students?

No.

4. What forms of visa/citizenship/immigration documentation, if any, does your institution ask students to provide in order to register? What happens if they are unable to provide that documentation?

Students are not required produce any immigration documentation in order to register.

5. Do you have statistics on the immigration status of students attending your institution? Do you know if there are currently any "undocumented" students attending your institution?

We have on record the number of students that have identified themselves as holders of study permits or visas. Undocumented students would need to identify themselves as undocumented, we have not had any such students.

6. At your post-secondary institution who determines the criteria for who is charged domestic or international tuition fees?

Admissions and Articulations determines the tuition of the student based on the information provided by the student.

7. Which, if any, federal and/or provincial laws or policies govern or inform the criteria for determining a student's tuition rate?

None

8. What are your current criteria for determining a student's tuition rate?

The student identifies themselves as an international applicant or a Canadian applicant.

9. What is the yearly tuition for a full time student with:

- a) Citizenship status? \$4666.00
- b) Permanent resident status? \$4666
- c) Study Permit status? \$11136
- d) Convention Refugee without landing (not yet considered Permanent Residents)?
- e) Refugee claimant awaiting decision? \$11136
- f) Human and Compassionate ground applicant awaiting decision? \$11136
- g) No status? \$11136
- h) No status and completed secondary school education in Canada? \$11136

10. Are there any financial aid or bursary possibilities open to "undocumented" students? If so, what are they? Do they include entrance scholarships or incentives out of high school?

All financial aid or bursaries for Canadian citizens require a SIN, although the student would have access to any scholarships for international students.

11. Both OUAC and OSAP ask that students disclose their immigration status. If this information is communicated to your office, do you believe that you are ever required to disclose a student's immigration status to any third parties? If so, who?

No, not without consent from the student to release their information.

12. Do you believe your institution n would adopt a “Don’t ask, Don’t tell” policy with regards to immigration status? (A “Don’t ask, Don’t tell” policy would mean that applicants and students are never asked about their immigration status and if it is required and disclosed it is never communicated to anyone outside of the institution.)

We require the student to disclose their immigration status to determine tuition. Our policy on confidentiality dictates that we will not disclose any information about our students to outside parties without their consent.

13. What policies, if any, are in place to insure that your institution is a safe place of learning and a sanctuary zone that is free of immigration enforcement?

Other than a strict policy on confidentiality, to my knowledge, we have no policies in place.

14. If a student is issued a deportation order during their studies, what actions would your institution take in order to support their ability to complete their studies?

Within the law, we would do what we could to support the student.

Thank you very much for your time in completing this questionnaire.

^[1] A person “**without immigration status**” or who is “**undocumented**” is someone born outside Canada who resides here without the legal permission of the federal government. This includes many potential students whom have lived in this country for a significant portion of their lives and completed elementary and high school here. Many undocumented students and their families entered the country legally on tourist or work visas and chose to stay in Canada after their visas expired. Others entered without any form of documentation.

APPENDIX 6: RESPONSE FROM MINISTRY OF TRAINING, COLLEGES AND UNIVERSITIES

**Ministry of Training,
Colleges and Universities**

Minister

Mowat Block
Queen's Park
Toronto ON M7A 1L2
Telephone (416) 326-1600
Facsimile (416) 326-1656

**Ministère de la Formation
et des Collèges et Universités**

Ministre

Édifice Mowat
Queen's Park
Toronto ON M7A 1L2
Téléphone (416) 326-1600
Télécopieur (416) 326-1656



November 21, 2008

Ms. Meghan Wilson
200 Balliol Street
Toronto ON M4S 1C6

Dear Ms. Wilson,

Thank you for your correspondence about accessibility to postsecondary institutions for undocumented immigrants. As Minister of Training, Colleges and Universities, I appreciate the opportunity to respond.

Through their individual acts of incorporation, universities in Ontario are autonomous bodies, governed by their boards of governors, and fully responsible for academic and administrative matters at their institutions, including those related to admissions. However, to be allowed to study in a postsecondary institution in Canada, most international students are required by the federal government to obtain a study permit from Citizenship and Immigration Canada. Ontario universities are required to ensure that international students registered at their institutions comply with this requirement.

Under their statutes, universities are authorized to determine the tuition fees charged for their programs. However, to receive operating grant funding from the government, universities must abide by tuition fee policies put in place by my ministry. The current policies provide funding only for eligible students who are charged domestic tuition fee rates, and include Canadian citizens, permanent residents, protected persons, and some international students.

With regard to your other questions, the Ontario Student Assistance Program does not provide financial aid for undocumented students, and is available only to Canadian citizens, permanent residents, and protected persons. As well, the ministry does not collect statistics on the effects of postsecondary education on income levels and types of employment for undocumented students.

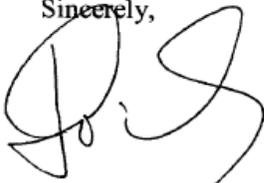
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- 2 -

The remainder of your questionnaire concerns immigration legislation which is a federal responsibility. You may wish to address your questions to Citizenship and Immigration Canada (CIC). According to the CIC website, there may be some cases in which minor children do not need a study permit to study in Canada. However, when minor children studying in Canada without a permit reach the age of majority, they must apply for a study permit if they wish to continue studying. For further information, you may wish to consult the CIC website at: cic.gc.ca/english/study/study-minors.asp

Thank you for writing. Please accept my best wishes for success in your studies.

Sincerely,

A handwritten signature in black ink, appearing to read 'John Milloy', written over a white background.

John Milloy
Minister