

A SYNOPSIS OF CANADIAN IMMIGRATION LAW*

John Hucker**

I. INTRODUCTION

Under Section 95 of the British North America Act,¹ authority over immigration into Canada is shared between the federal and provincial governments, with the powers of the former paramount. Although the provinces have from time to time directed their efforts at the recruitment and settlement of immigrants,² Ottawa has retained exclusive control over immigrant selection and admission. During the century which has elapsed since Confederation, a continuing feature of Canadian law has been the extensive use made of subordinate legislation and administrative powers to control the flow of immigrants. As well as being few and far between,³ successive Immigration Acts have included broad regulation-making authority, which has permitted the implementation and adjustment of governmental policy without the necessity of statutory amendment. To obtain a realistic picture of contemporary Canadian immigration law it is, therefore, necessary to examine a considerable array of regulations, whose practical significance frequently outweighs that of the legislation itself.⁴

* This article is written in a personal capacity and should not be taken to represent the views of the Department of Justice.

**LL.B. (Wales) 1962, LL.M. (Yale) 1966; Barrister and Solicitor, Ontario; Consultant on Immigration Law; Department of Justice, Ottawa.

1. BRITISH NORTH AMERICA ACT of 1867, 30 & 31 Vict., c. 3, s. 95:

In each Province the Legislature may make Laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time make Laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces, and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far as it is not repugnant to any Act of the Parliament of Canada.

2. Quebec is the only province with immigration legislation extant. *See* Immigration Department Act [17 Eliz. II, c. 68 (Que.)] *as amended*, by Bill 46, 1974.

3. In addition to various minor acts, there have been three major consolidations of Canadian immigration laws: Immigration Act 1906, CAN. REV. STAT. c. 93 (1906); Immigration Act 1927, CAN. REV. STAT. c. 93 (1927); and Immigration Act 1952, CAN. REV. STAT. c. I-2 (1970), *as amended* Immigration Appeal Board Act 1967, CAN. REV. STAT. c. I-3, *as amended*, STAT. CAN. c. 27 (1973-74).

4. The more important regulations include the following: Immigration Regulations, Part I, P.C. 1962-86, *as amended*, P.C. 1966-525, P.C. 1967-1616, STAT. R. & O. 72-443, STAT.

The present Canadian Immigration Act,⁵ enacted in 1952, represents a further revision of an earlier consolidation undertaken in 1927.⁶ The new Act did not herald any significant conceptual advances, nor did it depart from the earlier tradition that admissibility to Canada was an administrative decision, resting in the first instance with immigration officers and in the final analysis with the Minister. The magnitude of the discretionary powers which continued to reside in immigration officers after 1952 was graphically illustrated by the important 1955 Supreme Court of Canada decision in *Attorney-General v. Brent*.⁷ The case concerned a divorced woman from Buffalo, New York, who came to Canada in 1954 and established a common-law relationship with Mr. Brent, a Canadian living in Toronto, whom she subsequently married. At a hearing before a Special Inquiry Officer held shortly after her arrival but—perhaps significantly—before her remarriage, she was ordered deported on the grounds that she did not comply with the Immigration Regulations in effect at that time. The regulations empowered an officer to classify an individual as a prohibited immigrant whenever, in his opinion, the person should not be admitted by reason of, *inter alia*:

- a) the peculiar customs, habits, modes of life or methods of holding property in his country of birth or citizenship . . .
- b) his unsuitability having regard to the climatic, economic, social, industrial, education, labour, health or other conditions or requirements existing, temporarily or otherwise, in Canada or in the area or country from or through which such persons comes to Canada, or
- c) his probable inability to become readily assimilated or to assume the duties and responsibilities of Canadian citizenship within a reasonable time after his admission.⁸

R. & O. 73-20, STAT. R. & O. 74-113, STAT. R. & O. 74-607; Immigration Inquiries Regulations, STAT. R. & O. 67-621, *as amended*, STAT. R. & O. 73-470. Of historical interest is a study commissioned in 1910 by the United States Government, which concluded that:

The Canadian Immigration law is admirably adapted to carrying out the immigration policy of the Dominion. Under its terms no immigrants are specifically denied admission solely because of their race or origin, or because of the purpose for which they have come to Canada, but the discretion conferred upon officials charged with the administration of the law does make discrimination entirely possible. With this discretionary authority Canadian officials are able to regulate the admission of immigrants according to the demand for immigrant labor in the Dominion at the time.

REPORT BY THE UNITED STATES IMMIGRATION COMMISSION ON THE IMMIGRATION SITUATION IN CANADA, S. DOC. NO. 469, 61st Cong., 2d Sess. 10 (1910).

5. See CAN. REV. STAT. c. I-2 (1970).

6. CAN. REV. STAT. c. 93 (1927).

7. [1956] CAN. S. CT. 318.

8. *Id.* at 320.

The Order-in-Council establishing the regulation had simply reproduced the language of the authorizing section in the Act, and the government had in effect sub-delegated to individual immigration officers its power to determine admissibility. As a result, the latter enjoyed an almost blanket discretion to deny admission to persons they regarded as unsuitable. Since Mrs. Brent had already provided fairly strong evidence of her ability to become assimilated and it is difficult to postulate significant disparities between the climatic and other conditions prevailing in Buffalo and Toronto, it can only be supposed that the sensibilities of the officer concerned had been offended by Mrs. Brent's divorce and her current living arrangements. In quashing the deportation order, the Supreme Court observed that:

. . . Parliament had in contemplation the enactment of such regulations relevant to the named subject matters, or some of them, as in His Excellency-in-Council's own opinion were advisable and not a wide divergence of rules and opinions, everchanging according to the individual notions of Immigration Officers and Special Inquiry Officers. There is no power in the Governor General-in-Council to delegate his authority to such officers.⁹

Following *Brent*, the regulations were rewritten to make more explicit the grounds for removal or rejection, and they have since undergone several revisions¹⁰ with the result that admissibility is no longer dependent upon the personal predilections of immigration officers.

Canadian law had early adopted from the United States the concept of a review by a Special Inquiry Officer of any refusal to admit, but the 1952 Act eschewed any formal system of appeals against deportation orders and attempted through the inclusion of a broad privative clause to preclude judicial review.¹¹ A Board of Immigration Appeals did exist, but its function was purely advisory

9. *Id.* at 321 (Kerwin, C.J.C.).

10. See note 4 *supra*.

11. CAN. REV. STAT. c. 325, s. 39 (1952), *repealed by* STAT. CAN. c. 90, s. 30 (1966-67). No court and no judge or officer thereof has jurisdiction to review, quash, reverse, restrain or otherwise interfere with any proceeding, decision or order of the Minister, Deputy Minister, Director, Immigration Appeal Board, Special Inquiry Officer or immigration officer had, made or given under the authority and in accordance with the provisions of this act relating to the detention or deportation of any person, upon any ground whatsoever, unless such person is a Canadian citizen or has Canadian domicile.

and final responsibility for admissions continued to rest with the Minister. A 1966 study¹² recommended the establishment of an independent tribunal to review all deportation orders, and the government's acceptance of this recommendation may have been prompted in part by the relief which it promised from the political and other pressures which were frequently brought to bear upon the Minister and Departmental officials in deportation cases. In any event, amending legislation¹³ was enacted in 1967, establishing the present Immigration Appeal Board. Initially the Board heard appeals from all persons order deported, but there has since been a retreat from this position, largely precipitated by the influx of persons into Canada after 1967, when it was possible to enter as a visitor and then apply for landed immigrant status. The possibilities inherent in this procedure did not pass unnoticed by large numbers of would-be immigrants who were unwilling to subject themselves to the delays or the chances of rejection which faced them if they applied outside Canada for an immigrant visa. By arriving in Canada ostensibly as tourists, then seeking adjustment of status and exercising their appeal rights, they were soon assured of an extended stay even if they ultimately were found not to qualify as immigrants. As the backlog of appeals before the Board mounted, it became clear that this widespread abuse was seriously compromising the system of immigration controls. Accordingly, the government acted on two fronts, in 1972 removing the possibility of obtaining adjustment of status¹⁴ and the following year restricting the right of appeal against deportation to certain defined categories.¹⁵

Until 1962 Canadian immigration law reflected a clear preference for immigrants from particular regions—notably the United Kingdom, France, Western Europe and the United States.¹⁶ New

12. J. SEDGWICK, REPORT ON IMMIGRATION, Part II, (submitted to Minister of Manpower and Immigration, 1966).

13. Immigration Appeal Board Act, c. 90 (1966-67), *as amended*, STAT. CAN. c. 27 (1973-74).

14. STAT. R. & O. 72-443, Schedule, s. 2, *revoking* Reg. 34 of P.C. 1967-1616 (effective November 6, 1972).

15. An Act to Amend the Immigration Appeal Board Act, STAT. CAN. c. 27, s. 5 (1973-74).

16. See D. CORBETT, CANADA'S IMMIGRATION POLICY: A CRITIQUE 45 (1967):

The geographic bias is clearly written into the policy. The admissible categories are arranged by countries, and are broader for some countries and narrower for others. Even the classes of relatives admissible depend on the area. For some countries "relatives" are broadly defined, but the definition narrows down when applied to India, Pakistan, Ceylon and the rest of Asia.

regulations promulgated in 1962 diminished this reliance upon country of origin in determining admissibility, but elements of racial discrimination were retained until 1967, when universally applied selection criteria were introduced.¹⁷ The 1967 regulations¹⁸ and the norms of assessment they established (the points system) remain the basis of the present admissions system, although, as will be explained, they have recently been refined and made more sensitive to the economic and labor needs of particular industries and regions.¹⁹

II. ADMISSIBILITY

A. Immigrants

Canadian law recognizes three classes of immigrant—sponsored, nominated and independent. Under the first category, a Canadian citizen or permanent resident who is at least 18 years of age may sponsor for admission to Canada certain close dependents, including a husband or wife, fiancé(e), any unmarried son or daughter under 21 years of age, and parents or grandparents who are aged 60 or over.²⁰ Once the requisite family relationship has

The same study went on to observe that "selection on geographic lines is only another way of selecting according to race and culture." *Id.*

17. See F. HAWKINS, CANADA AND IMMIGRATION: PUBLIC POLICY AND PUBLIC CONCERN 125-28 *passim* (1972).

18. STAT. R. & O. 67-434, ss. 31-33 and Schedules A, B.

19. See STAT. R. & O. 74-113, STAT. R. & O. 74-607, and discussion *infra*.

20. STAT. R. & O. 67-434, as amended, STAT. R. & O. 74-113, provides:

31(1) Subject to this section, every person residing in Canada who is a Canadian citizen or a person lawfully admitted to Canada for permanent residence and has reached the full age of eighteen years is entitled to sponsor for admission to Canada for permanent residence any of the following individuals (hereinafter referred to as "sponsored dependent"):

- a) the husband or wife of that person;
- b) the fiancé or fiancée of that person and any accompanying unmarried son or daughter of that fiancé or fiancée under twenty-one years of age;
- c) any unmarried son or daughter of that person under twenty-one years of age;
- d) the father, mother, grandfather or grandmother of that person 60 years of age or over or under 60 years of age if incapable of gainful employment or widowed, and any accompanying immediate family of that father, mother, grandfather or grandmother;
- e) any brother, sister, nephew, niece, grandson or granddaughter of that person who is an orphan and under eighteen years of age;
- f) any adopted son or daughter of that person who was adopted under the age of eighteen years and who is under twenty-one years of age and unmarried;

been established, the sponsored immigrant does not have to meet any additional selection criteria, and, provided he observes certain formal requirements,²¹ the most notable of which is passing a physical examination, he will generally be issued an immigrant visa²² and admitted to Canada. Although the sponsorship provisions are aimed primarily at facilitating family reunification, and education, skills and other personal attributes play no part in the selection process, a sponsored dependent is as free as other landed immigrants to take employment and otherwise to participate in all facets of Canadian life.

With the exception of the sponsored class, all other intending immigrants are assessed according to norms established in 1967²³ and revised in February and October of 1974.²⁴ In order to explain the important recent changes to the selection criteria, a brief description of the 1967 scheme is necessary. As already mentioned, the

g) any child under the age of thirteen years whom that person intends to adopt and who is

- i) an orphan,
- ii) an abandoned child whose parentage cannot be determined,
- iii) a child born out of wedlock who has been placed with a welfare authority for adoption, or
- iv) a child whose parents are separated with little or no prospect of reconciliation and who has been placed with a welfare authority for adoption; and

h) where the sponsor does not have a husband, wife, son, daughter, father, mother, grandfather, grandmother, brother, sister, uncle, aunt, nephew, or niece

- i) whom he may sponsor for admission to Canada,
- ii) who is a Canadian citizen, or
- iii) who is a person admitted for permanent residence, one relative, regardless of his age or relationship to the sponsor, and the accompanying immediate family of that relative; and
- iv) where a relative sponsored pursuant to paragraph (h) is unable to comply with the requirements of the Act and these Regulations or predeceases the sponsor, one other relative, regardless of his age or relationship to the sponsor, and the accompanying immediate family of that relative.

21. STAT. R. & O. 434, s. 31(2), *as amended*, STAT. R. & O. 74-113, s. 2(3). Every person seeking admission to Canada as an immigrant must be in possession of an unexpired passport or other prescribed identity or travel documents. Immigration Regulations, Part I, Amendment (STAT. R. & O. 74-321), Schedule, s. 2, revoking and replacing STAT. R. & O. 67-434, s. 27.

22. Every immigrant who seeks to land in Canada must be in possession of a valid and subsisting immigrant visa. Immigration Regulations, Part I, Amendment (STAT. R. & O. 72-443), Schedule, s. 1, revoking and replacing STAT. R. & O. 67-434 s. 28(1).

23. STAT. R. & O. 67-434.

24. STAT. R. & O. 74-113 and STAT. R. & O. 74-607.

government in that year replaced the previous regional preferences with a universally applied 'points system.' All independent applicants—*i.e.*, persons with no relatives in Canada able or willing to sponsor or nominate them—were henceforth assessed according to the following numerically weighted criteria:²⁵

(a) Education and training	(maximum points)	20
(b) Personal assessment (by an immigration officer, following an interview with the applicant)		15
(c) Occupational demand		15
(d) Occupational skills		10
(e) Age (one unit deducted for each year of age over 35)		10
(f) Arranged employment		10
(g) Knowledge of English and French		10
(h) Relative in Canada willing to assist in establishment but unprepared or unable to sponsor or nominate		5
(i) Employment opportunities in area of destination		5
	Total points:	<u>100</u>

In order to be admissible, an independent applicant had (and still has) to obtain a score of at least fifty points²⁶ out of the possible 100.

Nominated immigrants are persons related to citizens or residents of Canada but not members of the immediate family unit—for example, sons or daughters over 21, brothers and sisters, parents or grandparents under 60 years of age and more distant relatives such as nephews or nieces.²⁷ The system established for nominated relatives was essentially similar to that for independent applicants, except that only factors (a)—(e), above, were applied and the criteria of arranged employment, employment opportunities and knowledge of English and French were discounted.²⁸ Depending on the closeness of his relationship to the nominator, an applicant might be required to obtain as few as 20 out of a possible total of 70 points,²⁹ broken down as follows: education and training (maximum 20 points); personal assessment (maximum 15 points); occupational demand (maximum 15 points); occupational skill (maximum 10

25. STAT. R. & O. 67-434, s. 32(1) and Schedule A.

26. *Id.* Schedule A, s. 3.

27. *Id.* s. 33(1).

28. *Id.* Schedule B, s. 1.

29. *Id.* Schedule B, s. 2.

points); and age (maximum 10 points). In other words, an applicant could receive, on the basis of kinship ties,³⁰ a bonus of as many as 30 out of a necessary 50 points. Meanwhile, the nominator assumed no effectively enforceable financial or other responsibilities for the immigrant, who in turn was not even required to settle in the city or region where the nominator resided.

B. Arranged Employment or Designated Occupation

Under the 1967 norms it was entirely possible for an independent and, particularly, a nominated applicant to qualify for admission without arranging definite employment in Canada. Many independents could compensate for a failure to obtain any points for occupational demand or employment opportunities in their area of destination by scoring highly in other categories of assessment. For the nominated class, their employment potential under (f) and (i), above, did not even constitute a factor in the selection system. By the early 1970's it was apparent that the particular and regional needs of the Canadian economy were not being met by an inflow of immigrants who were succumbing in ever-increasing numbers to the attractions of the major urban centres of Toronto, Vancouver and Montreal while chronic employment vacancies in other areas of the country remained unfilled. Accordingly, in February 1974 the government amended the norms of assessment by requiring independent and nominated applicants to provide some evidence of occupational demand and by placing greater emphasis upon arranged employment, which was expanded to include the new concept of "designated occupation."³¹ The effect of the February 1974 changes was to tie the admissibility of both independent and nominated immigrants more closely to labour market needs.

In October 1974, this labour-demand approach was carried further by additional changes to the Regulations.³² Under the present revised points system, ten units are deductible from the total number of units received by a nominated or independent applicant unless he has arranged employment in Canada or is a member of a designated occupation.³³ The "arranged employment" criterion, which in the past had been rather loosely applied, was redefined to

30. *Id.*

31. STAT. R. & O. 74-113, Schedule, s. 3 (independent applicants) and s. 4 (nominated applicants).

32. STAT. R. & O. 74-607.

33. *Id.* Schedule, s. 3 (nominated) and s. 4 (independent).

operate only where the applicant had arranged "definite employment in Canada that, based on information provided by the National Employment Service, offers reasonable prospects of continuity and meets local conditions of work and wages that normally prevail in that occupational category," and where "based on information provided by the National Employment Service, there is no Canadian citizen or permanent resident qualified" and willing and available to engage in that employment.³⁴ As an alternative to producing a specific job offer, an applicant can obtain the requisite 10 units if he is qualified and intends to work in an occupation that

may from time to time be designated by the Minister as being in demand in a particular locality or area, and offers employment that has reasonable prospects of continuity and meets local conditions of work and wages that normally prevail in that occupational category³⁵

Although no internal controls exist to ensure its achievement, and, once admitted, the immigrant is free to move wherever he chooses, the basic aim of both 1974 amendments to the regulations was to channel immigrants to those industries and areas of the country where manpower shortages existed. In the result, the invigorated factor (*f*) has advanced from its former insignificant position to a point closer to the apex of the selection system. By virtue of its two-fold weighting—*i.e.* it provides the applicant with ten points towards his required total, while its absence mandates the deduction of ten units from the total number which he has obtained under the other criteria—application of the arranged employment/designated occupation factor will in many cases now mean the difference between satisfying or failing to meet the requirements for admission to Canada as a nominated or independent immigrant. It should be noted, however, that in spite of the current more stringent points system, an immigration officer retains a discretionary power to approve the admission of an independent or nominated applicant who does not attain the required number of units if in his opinion there are good reasons why these norms do not reflect the individual's chances of successful establishment in Canada.³⁶

34. *Id.* s. 4(1).

35. STAT. R. & O. 74-113, s. 5.

36. STAT. R. & O. 67-434, ss. 32(4), 33(5).

C. *Non-Immigrants*

In contrast to the case of immigrants, whose admissibility is largely relegated to the regulations, Section 7 of the Immigration Act lists a number of categories—including tourists,³⁷ students³⁸ and temporary or seasonal workers³⁹—under which a person may be admitted as a non-immigrant. As with immigrants, the legislation has established a general requirement that any person seeking admission to Canada as a non-immigrant must be in possession of a passport or other travel document and a visa.⁴⁰ However, except for persons from parts of Asia and eastern Europe, the non-immigrant visa requirement has been waived by Ministerial directive.⁴¹ Tourists from the majority of countries, including the United States, therefore do not now require any advance documentation and will be admitted to Canada upon satisfying immigration officials at a port of entry that they have made adequate financial and other arrangements for their stay and that they intend to depart from Canada upon the conclusion of their visit.⁴² There is a legal presumption under the Immigration Act⁴³ that every person seeking to come into Canada is an immigrant, *i.e.* that he intends to remain permanently—and the onus is on the person concerned to satisfy the immigration officer that this is not the case. Ordinarily this formal presumption will not be an obstacle to prompt admission as a tourist, but individuals from certain areas of the world—notably the developing nations—have undoubtedly encountered more difficulty in satisfying the Immigration Department of their ultimate intention to depart.

37. Immigration Act, CAN. REV. STAT. c. 1-2, s. 7(1) (c) (1970).

38. *Id.* s. 7(1) (f).

39. *Id.* s. 7(1)(i). The Act also lists a number of other non-immigrant categories of lesser numerical significance: diplomats [s. 7(1)(a)]; members of allied armed forces [s. 7(1)(b)]; persons in transit [s. 7(1)(d)]; clergymen [s. 7(1)(e)]; entertainers [s. 7(1) (g)]; persons entering to perform temporary professional services [s. 7(1)(h)]; persons entering for medical treatment [s. 7(2)(a)]; and persons entering under a permit [s. 7(2)(c)].

40. Immigration Regulations, Part I, STAT. R. & O. 62-36, s. 28(3) (visa); and Immigration Regulations, Part I, Amendment, STAT. R. & O. 74-321, Schedule, s. 2 (revoking and replacing STAT. R. & O. 62-86, s. 27) (passport or identity or travel document).

41. The broad exemptions were no doubt prompted in part by hopes of assisting the Canadian tourist industry; they also reflected a general international trend towards the loosening of travel restrictions, from which there has been a retreat in recent years by, among other nations, the United States.

42. STAT. R. & O. 74-321, Schedule, s. 2 [revising Immigration Regulations, STAT. R. & O. 62-36, Part I, s. 27(2)(a)].

43. Immigration Act, CAN. REV. STAT. c. 1-2, s. 6 (1970).

A student who otherwise complies with the requirements of the Immigration Act and the Regulations will be admissible upon presentation of an official letter of acceptance from an academic institution and upon satisfying an immigration officer that he has sufficient funds to maintain himself, and any dependents accompanying him, during the period for which he seeks admission.⁴⁴ A person admitted as a student is not permitted to take employment in Canada without the written permission of the Immigration Department⁴⁵ and will not be admitted for longer than 12 months in the first instance, although his status may be extended for further periods not exceeding 12 months each as long as he remains in good standing at his school or college and observes the conditions of his entry.⁴⁶

On January 1, 1973, new regulations⁴⁷ came into effect prohibiting any person other than a Canadian citizen or permanent resident from taking employment in Canada unless he or she has obtained an employment visa.⁴⁸ The institution of an employment visa system, together with a new requirement that all visitors entering Canada for a period longer than three months must register with an immigration officer,⁴⁹ marked a departure from the previous *laissez-faire* attitude towards non-immigrants. It was prompted by the mounting strains placed upon the Canadian labour market as a result of the steep rise in the number of non-immigrants entering Canada after 1967, who took employment either while their applications for immigrant status were being processed or while remaining as non-immigrants for extended periods.

Under Section 3D of the Employment Visa Regulations a visa will be issued unless the National Employment Service certifies that there is a Canadian citizen or permanent resident available to fill the position.⁵⁰ The visa, which will not be issued for longer than

44. *Id.* s. 7(1)(f) and Immigration Regulations, Part I, STAT. R. & O. 67-434, s. 35(1).

45. STAT. R. & O. 67-434 s. 35(2).

46. *Id.*, s. 35(3).

47. Immigration Regulations, Part I, Amendment STAT. R. & O. 73-20 [hereinafter referred to as the Employment Visa Regulations]. In announcing the new regulations, the Minister of Manpower and Immigration pointed out that "most developed countries employ a similar type of permit to control foreign labour within their borders. The United States, Britain and France have comparable systems." (Press Release, Department of Manpower and Immigration, December 28, 1972.)

48. Immigration Regulations, Part I, Amendment, STAT. R. & O. 73-20, s. 3C(1). Certain limited exemptions from the visa requirement are set out in s. 3F. By s. 3C(1)(b)(iii), a person who enters Canada under a Minister's permit (Immigration Act, s. 8) is not required to obtain an employment visa if the permit itself authorizes him to work.

49. *Id.* s. 3A.

50. *Id.* s. 3D.

a 12-month period, specifies the nature and place of work, so that someone who wishes to accept a new position with a different employer must, even if he intends to remain in the same occupation, ensure that his visa is adjusted to reflect this change. A breach of any of the conditions attached to an employment visa will serve to invalidate it from the time the violation occurs.⁵¹

D. Minister's Permits and Order-in-Council Landings

In order to qualify for admission as either an immigrant or non-immigrant, an individual must ordinarily comply with all the formal requirements of the Immigration Act or any regulations made thereunder. Until fairly recently the ultimate responsibility for deciding on admissions rested with the Minister, and an important residue of this discretionary power is retained in the present Immigration Act. By Section 8(1), the Minister of Manpower and Immigration may issue a permit authorizing the admission of any person for a specified period of up to 12 months. Although it may be supposed that departmental guidelines govern the exercise of this discretion, they are not published. It appears, however, that a permit

(2) Where an issuing officer receives an application for an employment visa, he shall issue the employment visa unless

(a) it appears to him from information provided by the national employment service that

(i) a Canadian citizen or permanent resident qualified for the employment in which the applicant wishes to engage in Canada is willing and available to engage in that employment and, in the case of a person other than a self-employed person, there is no reason to believe that the prospective employer will not, for a reason relating to the nature of the employment, accept a Canadian citizen or permanent resident for such employment,

(ii) a lawful strike is in progress at the place where the applicant wishes to engage in employment and the employment in which the applicant wishes to engage would normally be carried on by a person who is on strike, or

(iii) a labour dispute or disturbance other than a lawful strike is in progress at the place of employment and the chances of settling the dispute or disturbance are likely to be adversely affected if the applicant engages in employment at that place; or

(b) the applicant has violated the conditions of any employment visa issued to him within the preceding two years.

The Regulations provide limited exceptions to the so-called manpower certification requirement of s. 3D(2), *inter alia*, where a person enters Canada pursuant to an agreement between Canada and a foreign country [s. 3G(a)], or where in the opinion of the Minister the certification requirement should not be applied "because of the existence of special circumstances." [s. 3G(d)].

51. *Id.* s. 3E(2).

will be issued in situations where the public interest or humanitarian considerations justify the entry into Canada of a person who would otherwise be inadmissible. Frequent examples have included individuals who fall within the prohibited classes listed in the Immigration Act⁵² by reason, for example, of a medical or other disability or as a result of a criminal conviction (It is thus the mechanism of a Minister's permit which Canadians will have to thank for the privilege of being able to hear the post-sentence ruminations on the meaning of life by various personages from the Watergate extravaganza.). Admission on permit has also been employed where circumstances militate against the use of regular, more protracted, procedures—for example, in dealing with persons seeking asylum or with the victims of political upheaval, as occurred in Chile in 1973.

It has already been pointed out that with the revocation in 1972 of the provision under which persons could apply within Canada to become landed immigrants,⁵³ the Immigration Act no longer permitted adjustment of status. Accordingly, the tourist, student or worker who wishes to settle here permanently must ordinarily return to his own country before he can apply to become a landed immigrant. Unfortunately, rules which tolerate no exception have a habit of being overtaken by events, and such has proven to be the case with the recent seemingly implacable decision against adjustment of status. Humanitarian considerations and common sense have dictated a more flexible approach, and a workable, if unwieldy, procedure has been established whereby, notwithstanding the legal barriers in the Act, a visitor may, under certain exceptional circumstances, remain in Canada as a permanent resident. A typical situation could arise when an immigrant to Canada of some years standing, who has established himself in this country and perhaps acquired Canadian citizenship, wishes to sponsor his elderly parents as immigrants but encounters some reluctance on their part to spend the remainder of their days in a country they have never seen. A practical solution to this dilemma is for the parents to visit Canada before deciding whether or not to sever all ties with their home country. Having entered as non-immigrants, the Immigration Act does not permit them to remain.⁵⁴ However, where it appears that for valid

52. Immigration Act, CAN. REV. STAT. c. I-2, s. 5 (1970).

53. See note 14 *supra*.

54. Every intending immigrant must be in possession of an immigrant visa, which is issuable abroad: Immigration Regulations, Part I, Amendment STAT. R. & O. 72-443, Schedule, s. 1, revoking and replacing STAT. R. & O. 62-36, s.28(1). By virtue of the Immigration Act, s. 5(t), anyone who does not comply with this condition—including a person who applies within Canada to become an immigrant—is deportable.

family or personal reasons a non-immigrant wishes to stay on in Canada, a Minister's permit⁵⁵ may be issued, permitting him to remain for up to 12 months. If there are no additional barriers to his remaining, the individual's position can ultimately be regularized through the conferral of landed immigrant status by an Order-in-Council. Although a total of several thousand persons have been landed in this way during the past two or three years,⁵⁶ an Order-in-Council landing remains an extraordinary procedure and is limited for the most part to sponsored dependents, where no norms of assessment are involved and any suggestion of line-jumping is consequently not a factor.

E. Prohibited Classes

The perceived need to safeguard Canadian society from different types of threat has led to the establishment and gradual expansion of a number of categories of persons who are inadmissible to Canada. The prohibitions, which are now found in Section 5 of the Immigration Act,⁵⁷ are essentially a consolidation of earlier ad hoc legislative initiatives and, perhaps unsurprisingly, include a number of obsolete and anachronistic provisions.⁵⁸ In terms of overall numbers, the prohibitions of greatest significance are probably those against persons who are not bona fide immigrants or non-immigrants [Section 5(p)]; persons who fail to comply with any conditions or requirements of the Immigration Act or Regulations [Section 5(t)]⁵⁹; and persons who have been convicted of or who

55. Immigration Act, CAN. REV. STAT. c. I-2, s. 8 (1970).

56. These high figures for adjustment of status via Order-in-Council landings are a direct result of the processing of a backlog of approximately 50,000 illegal immigrants who entered Canada before November 30, 1972, and whose cases qualified for consideration under an 'amnesty' program initiated by Ottawa during 1973. See Toronto Globe and Mail, Sept. 11, 1973, at 5, for a notice by the federal government, setting out the rules governing amnesty. The amnesty program lasted for sixty days, expiring on October 15, 1973. See Toronto Globe and Mail, October 24, 1973, at 1.

57. Parallel but not identical grounds for the deportation of persons who have been lawfully admitted, but who have not acquired Canadian domicile or citizenship, are set out in the Immigration Act, CAN. REV. STAT. c. I-2, s. 18 (1970).

58. Examples of prohibitions which have arguably outlived their usefulness or whose continued validity is at best doubtful in the light of contemporary social norms and medical knowledge include those against: idiots, imbeciles and morons [Immigration Act, CAN. REV. STAT. c. I-2, s. 5(a)(1)]; persons afflicted with tuberculosis or trachoma [s. 5(b)]; homosexuals [s. 5(e)]; professional beggars or vagrants [s. 5(g)]; and chronic alcoholics [s. 5(i)].

59. In recent years, growing use has been made of the prohibition against persons who are engaged in or suspected on reasonable grounds of being likely to engage in drug trafficking [Immigration Act, CAN. REV. STAT. c. I-2, s. 5(k)]. Also of considerably more than historical importance are the provisions aimed at excluding persons involved in or advocating subver-

admit having committed any crime involving moral turpitude [Section 5(d)].

The Section 5(p) prohibition against non bona fide arrivals serves as a screening mechanism at ports of entry, where it is used to prevent persons who are intent on settling permanently in Canada from circumventing the regular selection procedures by gaining admission as tourists and then remaining for an indefinite period, either through repeated renewals of their tourist status or by going underground. Section 5(p) is also employed, but considerably less frequently, to prevent the admission of persons purporting to be immigrants but who in fact intend to use Canada as a staging post in an effort to obtain entry into the United States.

The Section 5(d) prohibition against persons who have been convicted of a crime involving moral turpitude⁶⁰ entered Canadian law from the United States by way of the 1906 Immigration Act. In large part, the task of defining moral turpitude has fallen to the Immigration Appeal Board, which has placed on record its "entire disapproval" of this elusive concept. In the leading case of *Turpin v. Minister of Manpower and Immigration*,⁶¹ the Board acknowledged the traditional assumption that the term connoted some element of "baseness, vileness or depravity"⁶² in the crime in question, and went on to consider whether the phrase should be read in a general or a particular sense. Somewhat reluctantly, it deferred to

sive activity [*id.* ss. 5(l), (m) and (n)]. See in this regard the important decision of the Federal Court of Appeal in *Prata v. Minister of Manpower and Immigration* [1972] 31 D.L.R.3d 465, recently affirmed by the Supreme Court of Canada (January 28, 1975, unreported).

60. Immigration Act, CAN. REV. STAT. c. I-2, s. 5(d) (1970):

[P]ersons who have been convicted of or admit having committed any crime involving moral turpitude, except persons whose admission to Canada is authorized by the Governor in Council upon evidence satisfactory to him that:

(i) at least five years, in the case of a person who was convicted of such crime when he was twenty-one or more years of age, or at least two years, in the case of a person who was convicted of such crime when he was under twenty-one years of age, have elapsed since the termination of his period of imprisonment or completion of sentence and, in either case, he has successfully rehabilitated himself, or

(ii) in the case of a person who admits to having committed such crime of which he was not convicted, at least five years, in the case of a person who committed such crime when he was twenty-one or more years of age, or at least two years, in the case of a person who committed such crime when he was under twenty-one years of age, have elapsed since the date of commission of the crime and, in either case, he has successfully rehabilitated himself. . . .

61. [1969] 1 I.A.R. 1, 17.

62. *Id.* at 17.

earlier Canadian and United States precedents⁶³ in concluding that moral turpitude must be given a generic meaning, with the result that the merits or otherwise of specific cases could not be examined unless they disclosed a complete departure from accepted procedural standards:

Though the Board must interpret the particular section of the Act before it, this interpretation must be made in the light of the Act as a whole. The phrase 'crime involving moral turpitude' must therefore be taken to refer to the inherent nature of the crime, which will be analysed in its generic sense to see whether, in the abstract, it necessarily involves moral turpitude.⁶⁴

Section 5(t) of the Immigration Act is a residual provision, embracing those persons who in some way or other fail to comply with the Act or any of the regulations. It may be used in situations where the individual possesses inadequate documentation—for example he may lack a requisite visa or present an out-of-date passport⁶⁵—and is often employed in conjunction with other, more spe-

63. The Board referred to a number of decisions and then cited with approval (*id.* at 19) the following passage from the judgment of Noyes, Circuit Judge, in *United States ex. rel. Mylius v. Uhl*, 203 F. 152, 153 (S.D.N.Y. 1913):

In determining whether aliens are entitled to admission, the immigration authorities act in an administrative and not in a judicial capacity. They must follow definite standards and apply general rules. Consequently, in classifying offenses I think that they must designate as crimes involving moral turpitude those which in their inherent nature include it. Their function is not, as it seems to me, to go behind judgments of conviction and determine with respect to the acts disclosed by the testimony the questions of purpose, motive and knowledge which are often determinative of the moral character of acts. Besides, the testimony is seldom available and to consider it in one case and not in another is to depart from uniformity of treatment. In my opinion when it has been shown that an immigrant has been convicted of a crime, the only duty of the administrative officials is to determine whether that crime should be classified as one involving moral turpitude, according to its nature and not according to the particular facts and circumstances accompanying a commission of it. I do not think the immigration law intends that where two aliens are shown to have been convicted of the same kind of crime, the authorities should inquire into the evidence upon which they were convicted and admit the one and exclude the other. It is true that if they do not take such course some aliens who have been convicted of high crimes may be excluded although their particular acts evidence no immorality and that some who have been convicted of slight offences may be admitted although the facts surrounding their commission may be such as to indicate moral obliquity. But such results always follow the use of fixed standards and such standards are, in my opinion, necessary for the efficient administration of the immigration laws.

64. *Turpin v. Minister of Manpower and Immigration*, [1969] 1 I.A.R. 1, 21.

65. *STAT. R. & O.* 62-36, ss. 27, 28, *as amended*, *STAT. R. & O.* 74-321 and *STAT. R. & O.* 72-443.

cific prohibitions.⁶⁶

The majority of the grounds for prohibiting admission to Canada are applicable to non-immigrants as well as to immigrants. Thus, for example, a past conviction for a relatively minor offence, which nonetheless happens to fall within the definition of moral turpitude, will operate to bar the admission of the person concerned even for a brief visit.⁶⁷ Under the Immigration Act no discretion is reserved to immigration officers to relax a prohibition where the circumstances seem to warrant this, and an individual who falls within Section 5(d) or any other of the broad array of prohibitions—for example, those against homosexuals [Section 5(e)], chronic alcoholics [Section 5(i)], or “idiots, imbeciles or morons” [Section 5(a)]—will find himself barred unless or until he can secure a Minister’s permit.⁶⁸

III. PROCEDURES

Any person seeking to enter Canada must appear before an immigration officer, who may either admit him or set in motion procedures for his exclusion.⁶⁹ Where an officer, after examining an individual is of the opinion “that it would or may be contrary to the provisions of the Immigration Act or the Regulations” to admit him or her, he is required by Section 22 of the Act to make a report of his findings to a Special Inquiry Officer. From this point the procedure to be followed depends on whether the individual is arriving from overseas or from contiguous territory.

A. Inquiries

In the case of a person arriving in Canada from overseas, the Special Inquiry Officer (S.I.O.) after reviewing the Section 22 report may either admit him or detain him for an immediate inquiry.⁷⁰ At

66. Section 5(t) may constitute an additional ground for deportation consequential to a finding under s. 5(p) that a person is not a bona fide non-immigrant. The person who is deemed to be seeking admission as an immigrant when presenting himself as a tourist will invariably not possess an immigrant visa as required by s. 28 of the Regulations *supra* note 65 and so will fall into the class of persons prohibited from admission under s. 5(t) of the Act.

67. Unless he can provide satisfactory evidence of his rehabilitation. See note 60 *supra*.

68. Immigration Act, CAN. REV. STAT. c. I-2, s. 8 (1970).

69. *Id.* s. 19(1), (3). Under s. 19(2), every person is required to answer truthfully all questions put to him, and his failure to do so will in itself be sufficient ground for deportation.

70. *Id.* s. 23(2). This procedure is applicable to all persons other than those arriving from the United States or from St. Pierre and Miquelon [*id.* s. 23(1)]. Inquiries may also be held pursuant to s. 25 in the case of persons already admitted to Canada who are the subject of a

the inquiry the S.I.O. must base his decision upon evidence considered credible or trustworthy by him in the circumstances of each case,⁷¹ and the burden of proving that he is not prohibited from coming into Canada rests upon the person seeking admission.⁷² At the conclusion of the inquiry, the S.I.O. must render his decision as soon as possible, either admitting the person or ordering his deportation.⁷³ Hearings before a Special Inquiry Officer are held "separate and apart from the public but in the presence of the person concerned wherever practicable."⁷⁴ The individual has the right to be represented by counsel retained at his own expense,⁷⁵ and where he is not represented at the commencement of the inquiry, the S.I.O. presiding is required to inform him of this right and upon request must adjourn the inquiry to enable the person to retain and instruct counsel.⁷⁶

If an inquiry results in a finding that the person seeking admission is a member of one of the prohibited classes, a deportation order will issue against him.⁷⁷ Even in cases of minor or inadvertent failure to comply with the requirements for admission into Canada—for example, arriving with an out-of-date passport—the S.I.O. has no discretion under the Act to withhold issuance of a deportation order, which remains the sole mechanism provided by the Act for securing the exclusion or removal of a prohibited immigrant or non-immigrant. An administrative practice has developed whereby an individual may be permitted to withdraw his application for admission and depart voluntarily prior to the holding of an inquiry, but this remains an extralegal procedure, further weakened by a recent decision of the Federal Court of Appeal holding that a person may not depart voluntarily once an inquiry is under way.⁷⁸ Accordingly, anyone who has not withdrawn in time or who remains intent upon proceeding with his application inevitably risks deportation with its accompanying disqualification from future entry.⁷⁹

report under s. 18 of the Immigration Act. Section 18 reports may be made when a person other than a Canadian citizen or a person with Canadian domicile has *inter alia* been convicted of a Criminal Code Offence [*id.* s. 18(1)(e)(ii)] or has ceased to be a non-immigrant or to be in the particular class in which he was admitted as a non-immigrant [*id.* s. 18(1)(e)(vi)].

71. *Id.* s. 26(3).

72. *Id.* s. 26(4).

73. *Id.* s. 27.

74. *Id.* s. 26(1).

75. *Id.* s. 26(2). Counsel need not be legally qualified.

76. Immigration Inquiries Regulations, STAT. R. & O. 67-621, s. 3.

77. Immigration Act, CAN. REV. STAT. c. I-2, s. 27(3) (1970).

78. *Morris v. Minister of Manpower and Immigration* (November 18, 1974, unreported).

79. Immigration Act, CAN. REV. STAT. c. I-2, s. 35 (1970). It is now a criminal offence

B. Further Examinations

The existence of a 4,000 mile border and an extremely high volume of traffic have necessitated the adoption of special procedures to deal expeditiously with arrivals from the United States. In common with all others seeking admission, a person from the United States is required⁸⁰ to appear before an immigration officer who may admit him or, if of the opinion that this would or may be contrary to the Act or regulations, must make a report under Section 22 to a Special Inquiry Officer. When the S.I.O. receives the report, "he shall, after such further examination as he may deem necessary," admit the person or make a deportation order against him.⁸¹ In the latter event, the person concerned "shall be returned as soon as practicable to the place whence he came to Canada."⁸²

An individual arriving from the United States is not entitled to an inquiry prior to deportation. The further examination is intended to operate as a review in cases where the admissibility of contiguous arrivals is questionable, but it differs in important respects from an inquiry. First, the Special Inquiry Officer possesses a discretion as to whether there shall be any further examination at all prior to the making of a deportation order; if he decides on this course, the further examination may be as long or as short as the S.I.O. determines. In addition, the right to counsel which is available to the subject of an inquiry does not extend to a further examination,⁸³ even though the consequences are the same—*i.e.* admission to Canada or the making of a deportation order. There is no requirement that a full transcript be kept of the proceedings of further examination,⁸⁴ and the Immigration Appeal Board has understandably held that the erroneous use of a further examination instead of an inquiry constitutes a "fundamental defect" in deportation proceedings, rendering them null and void.⁸⁵

for a person who has been deported from Canada to re-enter without the consent of the Minister: An Act to amend the Immigration Act, 23 Eliz.II, c. 9, s. 1 (1974). The amending Act came into force on December 13, 1974, and provides a maximum penalty of two years imprisonment for a person convicted on indictment or a maximum of six months imprisonment and/or a \$500 fine on summary conviction.

80. Immigration Act, CAN. REV. STAT. c. I-2, s. 19 (1970).

81. *Id.* s. 23(1).

82. *Id.*

83. See *Ex parte Paterson*, [1971] 18 D.L.R.3d 84.

84. The Immigration Inquiries Regulations, STAT. R. & O.67-621, s. 10, specify that "a full written report shall be made of the evidence at the inquiry," but no equivalent provision is applicable to further examinations.

85. *Belt-Y-De Cardenas v. Minister of Manpower and Immigration* (I.A.B. decision,

C. Appeals

The Immigration Appeal Board was established in 1967⁸⁶ as an independent body with broad powers to review deportation orders. The Board is a court of record⁸⁷ and operates entirely independently of the Department of Manpower and Immigration. It can require the attendance of witnesses and the production and inspection of documents.⁸⁸ The Chairman of the Board and a minimum number of members must be lawyers of at least ten years standing, but other members need not be legally qualified.⁸⁹ The normal quorum of the Board is three members⁹⁰ but a 1973 statutory amendment authorized the hearing of appeals by a single member.⁹¹

The right of appeal against a deportation order is now possessed by Canadian residents, persons in possession of a valid Canadian immigrant or non-immigrant visa, persons claiming to be refugees, and persons claiming to be Canadian citizens.⁹² These categories constitute only a small percentage of all individuals ordered deported and do not include, for example, the vast majority of arrivals from the United States. The Minister enjoys a right of appeal to the Board against a decision by a Special Inquiry Officer that a person is not within a prohibited class or is not subject to deportation.⁹³ Appeals by individuals or the Minister may be based upon an alleged error of law, fact or mixed law and fact.⁹⁴

In the past there was some uncertainty about the precise nature of immigration appeal proceedings. Until recently the Board itself maintained the position that, as a formal court of appeal, it was constrained to act upon the record of the earlier proceedings—*i.e.* the special inquiry or further examination—and could not

March 17, 1969, unreported).

86. Immigration Appeal Board Act 1967, CAN. REV. STAT. c. I-3 (1970), *as amended*, CAN. STAT. c. 27 (1973-74).

87. *Id.* s. 7(1).

88. *Id.* s. 7(2).

89. *Id.* s. 3. A 1973 amendment to the Immigration Appeal Board Act authorized the appointment of a number of temporary members, to aid in the processing of the backlog of appeals which had arisen: CAN. STAT. c. 27, s. 2(2)(1973-74).

90. CAN. REV. STAT. c. I-3, s. 6(3) (1970).

91. CAN. STAT. c. 27, s. 4(1)(1973-74).

92. Immigration Appeal Board Act, CAN. REV. STAT. c. I-3, s. 11 (1970), *as amended* CAN. STAT. c. 4(1), c. 27, (1973-74). Sponsors enjoy a right of appeal under the 1967 Act from a refusal to approve the application for admission to Canada of a relative *Id.* s. 17.

93. *Id.* s. 12.

94. *Id.* ss. 11, 12. The Board may order a hearing before a Special Inquiry Officer reopened to receive additional evidence which was not available to him (*id.* s. 13). A further appeal on any question of law lies, by leave, to the Federal Court of Appeal [*id.* s. 23(i)].

properly hear evidence concerning the validity of a deportation order unless this could not have been adduced earlier or unless it related to a plea for special relief under Section 15 of the Immigration Appeal Board Act.⁹⁵ However, in a notable decision the Federal Court of Appeal in 1973 rejected this assumption.⁹⁶ Affirming the right of an appellant to adduce before the Board evidence which was relevant to the question of whether he was a person eligible to enter or remain in Canada,⁹⁷ the Court noted that the earlier hearing before a Special Inquiry Officer was of an administrative nature, that it could not be assumed that the record compiled was necessarily complete and accurate, and that the same considerations applied a fortiori where the appeal was brought by a person deported to the United States pursuant to a further examination, in which event no full transcript would be available.⁹⁸

The Board may allow or dismiss an appeal or may render the decision and make an order which the Special Inquiry Officer should have made.⁹⁹ In addition, the Board enjoys under Section 15 of the Immigration Appeal Board Act certain broad discretionary powers which, in practical terms, have proven to be of far greater significance than its authority to review the legal validity of a deportation order. Under Section 15, where the Board dismisses an appeal it may nonetheless stay or quash a deportation order, in the case of a permanent resident, "having regard to all the circumstances of the case,"¹⁰⁰ or in the case of a non-resident, having regard either to evidence that the person concerned "will be punished for activities of a political character or will suffer unusual hardship,"¹⁰¹ or if of the opinion that special relief is warranted by "the existence of compassionate or humanitarian considerations."¹⁰² It is undoubtedly this discretionary or equitable jurisdiction at which the majority of appeals against deportation are in fact aimed.¹⁰³ The Board

95. Note 86 *supra*.

96. *Srivastava v. Minister of Manpower and Immigration* [1973] F.C. 138.

97. *Id.* at 149-50.

98. *Id.* at 150-52. The Federal Court of Appeal also observed that the Board's own rules conferred upon it the right to adduce evidence and that it was a court of record with full powers to summon witnesses and otherwise determine all questions of fact or law (*id.* at 151-52).

99. Immigration Appeal Board Act, CAN. REV. STAT. c. I-3, s. 14 (1970).

100. *Id.* s. 15(1)(a).

101. *Id.* s. 15(1)(b)(i).

102. *Id.* s. 15(1)(b)(ii).

103. The Supreme Court has recently held in *Prata v. Minister of Manpower and Immigration* (January 28, 1975, unreported), *aff'g* [1972] 31 D.L.R.3d 465, that the exercise by

has used its Section 15 powers in a considerable percentage of cases which have come before it and has attached particular importance to the ties—family, personal or employment—which an appellant has forged in Canada.¹⁰⁴

D. Judicial Review

The Immigration Act¹⁰⁵ and regulations¹⁰⁶ made thereunder have established a detailed code of procedure for special inquiries, and the courts have emphasized in addition that such proceedings must conform to broader notions of a fair hearing. The route to judicial review now lies via Section 28(1) of the Federal Court Act,¹⁰⁷ which empowers the Federal Court of Appeal to set aside a decision of a federal tribunal acting in a judicial or quasi-judicial manner, whenever it is shown that the tribunal in question failed to observe a principle of natural justice, acted beyond its jurisdiction, made an error in law or acted upon an erroneous finding of fact made in a perverse or capricious manner. The review powers provided by Section 28(1) do not extend to purely administrative decisions, and except upon proof that an Immigration officer acted with complete absence of good faith, it appears unlikely that a deportation order made pursuant to a further examination will be reviewable.¹⁰⁸ On the other hand, the courts have repeatedly asserted that a special inquiry is subject to review¹⁰⁹ and must comply with the standards of procedural fairness that are subsumed within the rubric of natural justice. In essence this means that an individual is entitled to a full and fair hearing before an impartial adjudicator of any facts or allegations which are relevant to his deportability.

The courts have held that the requirement of a fair hearing was absent where an S.I.O. refused to adjourn an inquiry in order that the subject could adequately instruct his lawyer;¹¹⁰ where the wife

the Board of its s. 15 discretionary powers to quash a deportation order can be precluded by the filing of a certificate under s. 21, signed by two Ministers, attesting that it would be contrary to the public interest for the Board to take such action.

104. For a critique of the Board's approach in this area, see Janzen and Hunter, *The Interpretation of Section 15 of the Immigration Board Act*, 11 ALTA. L. REV. 260 (1973).

105. See Immigration Act, CAN. REV. STAT. c. I-2, Part III, ss. 19-28 (1970).

106. IMMIGRATION INQUIRIES REGULATIONS, STAT. R. & O. 67-621.

107. CAN. REV. STAT., 2d Supp., c. 10(1970).

108. *But cf.* the English decision of *Re K (H)* (an infant), [1967] 1 All E.R. 226 (Q.B.), per Lord Parker, C.J.: "... I myself think that even if an immigration officer is not acting in a judicial or quasi-judicial capacity, he must at any rate give the immigrant an opportunity of satisfying him" of relevant matters. *Id.* at 231.

109. *E.g.*, *Srivastava v. Minister of Manpower and Immigration*, [1973] F.C. 138.

110. *In re Veregin*, [1933] 2 W.W.R. 409 (K.B., Man.).

of a person ordered deported along with her husband was not afforded an adequate opportunity to establish that she should not be included in the order;¹¹¹ and in a number of situations where the person concerned was not informed with sufficient particularity of the grounds underlying his deportation order.¹¹² The Immigration Inquiries Regulations¹¹³ now require¹¹⁴ that every Section 22 report and deportation order must set out the relevant provisions of the Act or Regulations which form the basis for the report or order, and the Immigration Appeal Board has suggested that in general this information will be sufficient.¹¹⁵ However, where a report is based upon a provision which could involve various charges, the Board has asserted that an immigration officer must set out with some precision those particular allegations which are being invoked against the person concerned.¹¹⁶

The existence of bias on the part of an adjudicator offends one of the basic tenets of natural justice and will operate to nullify the result of the proceedings in question. In *Gooliah*,¹¹⁷ the leading case on bias in immigration proceedings, Freedman, J.A., concluded that the S.I.O. approached the matter in question—which involved a conflict in testimony between the applicant and various immigration officials—with his mind made up:

The performance of the Special Inquiry Officer on this matter was not that of one engaged in an objective search for truth. Rather it appeared to be an attempt to find justification or support for a point of view to which, in advance of the relevant testimony, he was already firmly committed.¹¹⁸

In setting aside the deportation order, the Court criticized the deferential attitude adopted by the S.I.O. towards a senior official who testified at the inquiry and his hostility towards the applicant concluding that:

[p]erhaps in this case he convinced himself that *Gooliah* had be-

111. *Moshos v. Minister of Manpower and Immigration*, [1970] 7 D.L.R.3d 180 (S.C.C.). See also *Leiba v. Minister of Manpower and Immigration*, [1972] 23 D.L.R.3d 476 (S.C.C.).

112. *Samejima v. The King*, [1932] 4 D.L.R. 246 (S.C.C.).

113. STAT. R. & O. 67-621.

114. *Id.* s. 5.

115. *Ho Wai Hung v. Minister of Manpower and Immigration*, [1970] 1 I.A.C. 25.

116. *Id.* See also *Dos Santos v. Minister of Manpower and Immigration*, [1971] 1 I.A.C.

64.

117. *Re Gooliah and Minister of Citizenship and Immigration*, [1967] 63 D.L.R.2d 224 (C.A.Man.).

118. *Id.* at 234.

come disentitled to remain in Canada and ought therefore to be deported. That attitude may have controlled his approach to the inquiry and caused him, in a spirit of excessive zeal, to deal with the issues in such a way as to ensure the attainment of the objective he was seeking. Unfortunately, however, the result was something less than justice for Mr. Gooliah. It exposed him to an inquiry which fell below the standard of objective impartiality and adherence to natural justice which the law demands and to which he was entitled.¹¹⁹

There has so far been no direct pronouncement by the Supreme Court of Canada on the relevance in the immigration context of the Canadian Bill of Rights,¹²⁰ although there have been at least oblique

119. *Id.* at 236. Successful attacks upon deportation orders, alleging that the inquiry was tainted by bias, have been infrequent. But see the decision of the Immigration Appeal Board in *Janvier v. Minister of Manpower and Immigration*, [1974] 7 I.A.C. 385, a case involving alleged racial bias against a Haitian immigrant.

120. The Canadian Bill of Rights, CAN. STAT. c. 44 (1960), provides that:

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

- (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
- (b) the right of the individual to equality before the law and the protection of the law;
- (c) freedom of religion;
- (d) freedom of speech;
- (e) freedom of assembly and association; and
- (f) freedom of the press.

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

- (a) authorize or effect the arbitrary detention, imprisonment or exile of any person;
- (b) impose or authorize the imposition of cruel and unusual treatment or punishment;
- (c) deprive a person who has been arrested or detained
 - (i) of the right to be informed promptly of the reason for his arrest or detention,
 - (ii) of the right to retain and instruct counsel without delay, or
 - (iii) of the remedy by way of *habeas corpus* for the determination of the validity of his detention and for his release if the detention is not lawful;
- (d) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self crimination or other constitutional safeguards;

indications¹²¹ that the Bill may apply to immigration procedures. Moreover, in a recent case¹²² in which a deportation order was contested, *inter alia*, on the grounds that the appellant's right to equality before the law¹²³ had been infringed, the Court, while rejecting the appeal, did not avail itself of the opportunity afforded to declare the Bill inapplicable to immigration. However, no would-be immigrant has yet succeeded in overturning a deportation order by an argument based upon the Bill of Rights, and whenever the Bill of Rights has been employed in tandem with natural justice to attack a deportation order, the tribunal concerned has preferred to rest its conclusion upon the latter ground.¹²⁴

In two recent decisions the Immigration Appeal Board held that the Bill of Rights could not be enlisted by an alien to support an attack upon a deportation order. In the first of these, *Cronan*,¹²⁵ the Board held that since the Bill of Rights dealt with the determination of "rights" and in view of the fact that immigration was a privilege, the Bill did not govern the admission of aliens to Canada.¹²⁶ The

(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

(f) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause; or

(g) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted.

121. *Curr v. The Queen*, [1972] 26 D.L.R.3d 603, 611 (S.C.C.) (Laskin J.). In *Rebrin v. Bird*, [1961] 27 D.L.R.2d 622, (S.C.C.), the Supreme Court appeared to assume that the Bill of Rights could apply to immigration procedures although it found no evidence that the appellant's rights had been abrogated.

122. *Prata v. Minister of Manpower and Immigration* (Judgment pronounced January 28, 1975, unreported).

123. Bill of Rights, CAN. STAT. c. 44, s. 1(b) (1960).

124. *E.g.*, *Dos Santos v. Minister of Manpower and Immigration*, [1970] 1 I.A.C. 83; *Ho Wai Hung v. Minister of Manpower and Immigration*, [1970], I.A.C. 26.

125. *Cronan v. Minister of Manpower and Immigration*, [1973] 3 I.A.C. 42.

126. Under the circumstances, even if the appellant had proven or could prove that he no longer was a member of the Communist Party and that his admission to Canada would not be detrimental to the security of Canada, would Mr. Cronan have acquired the "right" to enter Canada? The answer is no, because all immigrants or non-immigrants, who are admitted, enter Canada not by right but as a privilege. S.2(e) of the Bill of Rights therefore, which deals specifically with the determination of "rights" is not applicable to the admission of Mr. Cronan to Canada, which is a privilege.

Id. at 80.

second case, *Jolly*,¹²⁷ involved an appeal against a deportation order by a former member of the Black Panther Party in the United States, who contended that his prohibition under Section 5(1)¹²⁸ of the Immigration Act infringed the guarantees of freedom of speech and freedom of the press found in Sections 1(d) and 1(f) of the Bill of Rights.¹²⁹ The Board reiterated the earlier distinction which it had drawn between privileges and rights and concluded that "the Bill of Rights does not apply, and never was intended to apply, to aliens in respect of their relationship *as aliens* to the state."¹³⁰ The Board also expressed concern that to apply the Bill to immigration procedures would result in "vitiating or rendering inoperative almost the whole of the Immigration Act."¹³¹

It is suggested that the Board's fears were exaggerated and that its legal conclusions were questionable. By its express terms, Section 2 of the Bill of Rights¹³² requires that "every law of Canada"—including, presumably, the Immigration Act—shall be construed and applied so not as to abrogate or abridge the rights enumerated therein. It therefore appears that in *Jolly* the Board confused two separate questions: first, is the Bill of Rights *as a legislative instrument* applicable to the Immigration Act, and secondly, if so, do the guarantees contained therein operate to invalidate a deportation order based on Section 5(1) of the Immigration Act? If the issue is posed in this way it becomes necessary to examine the precise nature and reach of the particular guarantees contained in the Bill of Rights. The Supreme Court has indicated that the rights listed in Section 1 are by necessary implication incorporated into the canon of construction established by Section 2.¹³³ However, Sec-

127. *Jolly v. Minister of Manpower and Immigration* (March 4, 1974, unreported). The case is now on appeal to the Federal Court of Appeal.

128. Immigration Act, CAN. STAT. c. 44, s. 5(1) (1960):

[P]ersons who are or have been, at any time before, on or after the 1st day of June 1953, members of or associated with any organization, group or body of any kind concerning which there are reasonable grounds for believing that it promotes or advocates or at the time of such membership or association promoted or advocated subversion by force or other means of democratic government, institutions or processes, as they are understood in Canada, except persons who satisfy the Minister that they have ceased to be members of or associated with such organizations, groups or bodies and whose admission would not be detrimental to the security of Canada.

129. See note 120 *supra*.

130. *Jolly v. Minister of Manpower and Immigration* at 9 (March 4, 1974, unreported).

131. *Id.* at 12.

132. *Supra* note 120.

133. *Curr v. The Queen*, [1972] 26 D.R.L.3d 603, 611 (Laskin J.).

tion 1 refers specifically to the enjoyment of rights "in Canada," and it is arguable that in deporting the appellant in *Jolly* for his past association with the Black Panthers in the United States, his positive right to freedom of association *in Canada* was in no way abrogated.

A resident alien will undoubtedly enjoy the benefits of the Bill of Rights in his other legal relationships and there seems no a priori reason why this protection should suddenly lapse the moment his alien status comes into issue. The legal position of an individual seeking admission for the first time at a port of entry is ambiguous. Although he is physically present in Canada from the moment he drives across the border or steps off the plane (in fact, he may be within Canadian jurisdiction prior to disembarking), he is not lawfully "admitted" until he has complied with all immigration requirements, including any necessary examination. To suggest, however, that the procedures which may be invoked to exclude him from Canada need not conform to community expectations as embodied in the Bill of Rights seems unwarranted.¹³⁴

IV. CURRENT PERSPECTIVES

In early 1975, the federal government published its long-awaited Green Paper¹³⁵ on immigration. Ottawa had earlier indicated that although reform of the immigration laws was an item fairly high on its list of priorities, future legislative change would take place in the context of a comprehensive reassessment of Can-

134. This is not to suggest that persons outside of Canada—*e.g.*, overseas applicants for visas—could invoke the Bill of Rights in support of any claim to admissibility. In the important case of *Prata v. Minister of Manpower and Immigration* (January 28, 1975, unreported), which involved an appeal against a deportation order, the government filed a certificate under s. 21 of the Immigration Appeal Board Act precluding the Board from exercising its discretionary powers to quash and direct the grant of landing. The s. 21 certificate is issued under the signature of two Ministers in situations where in their opinion "based upon security or criminal intelligence reports" it would be contrary to the national interest for the Board to exercise its s. 15 discretion. The appellant, who had not been informed of the substance of these reports, argued that he had been denied a hearing before the certificate was made and that issuance of the certificate denied him equality before the law under s. 1(b) of the Bill of Rights. His claim was rejected by the Supreme Court, which, however, did not suggest that the Bill of Rights argument was inappropriate or that the issues involved fell totally outside the Bill's purview.

135. A REPORT OF THE CANADIAN IMMIGRATION AND POPULATION STUDY, IMMIGRATION POLICY PERSPECTIVES (Vol. 1); THE IMMIGRATION PROGRAM (Vol. 2); IMMIGRATION AND POPULATION STATISTICS (Vol. 3); THREE YEARS IN CANADA—FIRST REPORT OF THE LONGITUDINAL SURVEY ON THE ECONOMIC AND SOCIAL ADAPTATION OF IMMIGRANTS (Vol. 4) (Publication date, December 1, 1974). The term "Green Paper" is used to refer to the study as a whole, although public debate has centered on Vol. 1, which summarizes most of the fundamental issues.

ada's demographic goals. The Green Paper was therefore intended to serve as a catalyst for a public debate which in turn would lead to the formulation of an appropriate Canadian immigration policy for the final quarter of the twentieth century.

The government's study located the present law in its socio-historical context and posited alternative approaches which might be considered for future adoption. Although it did not commit the government to any particular course of action, the tone of the Green Paper undoubtedly marked a departure from Canada's earlier expansionist philosophy towards immigration.¹³⁶ It emphasized "the need to study ways to introduce into the immigration program mechanisms that will permit confident long-term planning about the size and other characteristics of the flow of immigrants to this country, in order to ensure that it is in harmony with national demographic objectives as these are developed at many levels."¹³⁷ The report touched rather gingerly upon the changes in the composition of immigrants to Canada in recent years, noting that between 1966 and 1973 the proportion of immigrants from Europe had fallen from 76 to 39 per cent of the annual flow, while during the same period Asia's share of the movement had climbed from 6 to 23 percent.¹³⁸ Also noted was a rise in the proportion of immigrants from the sponsored and nominated categories (particularly the latter), a downward trend in the overall skill level and the accentuation of uneven patterns of immigrant settlement in Canada.¹³⁹ Various policy alternatives were non-committally canvassed, including gearing the immigration program even more intensively than at present to economic and labour market objectives (and, by implication, bringing to an end the nominated category of immigrant), introducing some form of quota system which would place limits on the number of visas issued annually, or establishing an overall global ceiling for the total immigration movement.¹⁴⁰

Some of what is said, and a great deal of what is left unsaid, in the Green Paper has implications for any new immigration law. Most notably, the effective implementation of demographic goals could involve the introduction of a system whereby the admission of an individual might be made conditional upon his settling in a

136. *Id.* IMMIGRATION POLICY PERSPECTIVES, (Vol. 1), at 26.

137. *Id.* at 12.

138. *Id.* at 32.

139. *Id.* at 32-33.

140. *Id.* at 42-45.

designated area of the country; after a period of time, upon proof that a permanent residence had been established, his status could be adjusted to that of landed immigrant. Clearly, such an approach, which would constitute a restriction on the basic right of freedom of movement within Canada, poses serious questions of legal principle and enforcement.

Whatever the ultimate outcome of the Green Paper consultations and debate, certain aspects of existing legislation seem ripe for change. For example, the present distribution between statute and regulations does not reflect the generally accepted goal that the major legislative instrument should contain all matters of principle, with only administrative detail left to subsidiary legislation. Such can hardly be the position when the substantive requirements for admission as an immigrant are found nowhere in the Immigration Act.

Deportation, which carries with it a permanent prohibition against re-entry (except by way of a Minister's permit) is the only technique now available for excluding or removing a person from Canada. Existing legislation does not distinguish between serious criminals, persons who are prohibited from admission on medical grounds or persons who fail to comply with a technical requirement such as possession of a passport or a visa. While deportation should probably be retained for use in more serious cases, less drastic procedures could with advantage be developed to cover situations of minor or technical noncompliance with the Act or regulations. Thus, use might be made in appropriate circumstances of some sort of exclusion order which does not prejudice the right of the person concerned to re-apply for admission. At the same time, thought might appropriately be given to rationalizing the present grounds for prohibiting admission to Canada and particularly to removing the more striking anachronisms in this area.

With the experiences of 1967-73 still fresh in the government's mind, any expansion of appeal rights in the near future seems unlikely. However, the present law requires an attack upon the legal validity of a deportation order as a precondition to the exercise by the Immigration Appeal Board of its discretionary power to order admission or landing. This circuitous and illogical procedure could be simplified by the establishment of separate appeal routes which distinguish between legal and humanitarian considerations.

With the curtailment of appeal rights in 1973, the inquiry regained its place as the key component in the review process. The

inquiry system has not, however, escaped criticism. In particular, suggestions have been made that the Special Inquiry Officer should be more effectively insulated from the regular examination function and that hearings should assume more of the qualities of an adversarial proceeding. The danger in the latter suggestion is that to work effectively an adversary system requires an even balance of expertise between the parties. Such would not be the case unless immigrants were provided with lawyers or a competent corps of non-lawyers to represent them at hearings. Absent this safeguard, an increased formalism is likely to provide only illusory protection for the person concerned.

The pressure point in the present control system remains the port-of-entry, where immigration officers and S.I.O.'s must pronounce upon admissibility under less than ideal circumstances. Where questions of intention arise, decisions are necessarily based upon impressionistic indicators and can engender understandable resentment from the visitor who is unable to satisfy a Special Inquiry Officer of his *bona fides*. The United States has for many years operated a comprehensive visa system in an attempt to effectively pre-screen visitors as well as immigrants. Undoubtedly such an approach has advantages, although it remains to be seen whether these outweigh the consequential inconveniences to the traveller as well as the additional costs which would undoubtedly be involved.

The present Canadian Immigration Act dates only from 1952, but its governing assumptions and conceptual framework can be traced back to the turn of the century. The need to respond to changing domestic and international conditions and to meet particular exigencies has resulted in the accretion of a largely shapeless mass of prescriptions with no clear unifying thread. Whatever form it may finally take, it is hoped that any new Immigration Act will be framed in the light of objectives which are clearly defined and future oriented, but whose macrocosmic focus does not overlook the continued need for individual safeguards.