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Citation Information

Hucker, John. "Immigration, Natural Justice and the Bill of Rights." *Osgoode Hall Law Journal* 13.3 (1975) : 649-692.
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol13/iss3/2>

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IMMIGRATION, NATURAL JUSTICE AND THE BILL OF RIGHTS

By JOHN HUCKER*

PROLOGUE

Even more than the United States, Canada is the proverbial nation of immigrants. But, as a leading authority has noted,¹ immigration as an area of public policy "has evoked conventional support but little real enthusiasm" in this country. At times in the past we have reacted towards the immigrant with indifference, intolerance and fear,² and even during periods when we officially embraced a policy of large scale immigration as the answer to our agricultural and manpower needs, we were frequently disinterested in the human dimensions of the migration process. The fundamental ambivalence towards immigration which has characterized much of our history was perhaps never better illustrated than by an event which occurred in 1914. In that year, which witnessed the active recruitment of immigrants to the number of 150,000,³ the "SS. Komogata Maru", a vessel carrying some 375 East Indians to Canada, was refused permission to land at Vancouver, while persistent and ultimately successful efforts — including the use of the Royal Navy — continued for a period of two months to ensure that the hapless passengers on board, who had satisfied the formal requirements for admission to this country, did not set foot on Canadian soil.⁴

The publication in February, 1975 of a government Green Paper⁵ on Immigration and coast-to-coast hearings by a Parliamentary Committee fuelled a public debate, and Ottawa found itself in the middle of a cross-fire between those who asserted that immigration should cease or be drastically reduced

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¹ F. Hawkins, *Canada and Immigration: Public Policy and Public Concern* (Montreal: McGill-Queen's University Press, 1972) at 43.

² For an account of the evolution of Canadian immigration laws, see R. Sampat-Mehta, *International Barriers* (Ottawa: Harpell's Press, 1972).

³ See Department of Manpower and Immigration, *Immigration Statistics 1973*, Table 2, Immigration to Canada by Calendar Year, 1852-1973.

⁴ See Sampat-Mehta, *supra*, note 2 at 152 *et seq.*

⁵ A Report of the Canadian Immigration and Population Study, Vol. 1, *Immigration Policy Perspectives*; Vol. 2, *The Immigration Program*; Vol. 3, *Immigration and Population Statistics*; Vol. 4, *Three Years in Canada - First Report of the Longitudinal Survey on the Economic and Social Adaptation of Immigrants*. The study as a whole constitutes the Green Paper on Immigration, and was tabled by Robert Andras, Minister of Manpower and Immigration, on Feb. 8, 1975.

and others who believed that recent changes in selection policy⁶ and some of the language in the Green Paper itself augured a backlash against non-white immigrants. In addition to arguments over the desirable size and makeup of the immigrant community, recent years have seen growing criticism of immigration procedures, particularly those at ports of entry. Unfortunately, rhetoric has sometimes flourished at the expense of rationality, and broad assertions have usually been precipitated by highly publicized individual instances of arbitrary official conduct rather than by an objective evaluation of procedural shortcomings. Legal commentators have largely ignored immigration as a field of study, with the unfortunate result that there is a very limited body of detached explanation and analysis available to the legal profession, officials or interested members of the public.⁷

The purpose of the present paper is to describe and assess the procedures which now exist for determining and reviewing eligibility for admission to Canada. No attempt is made to examine the substantive grounds for the selection or admission of immigrants or visitors except where this is necessary for a fuller understanding of a particular procedure or decision. The major focus is upon the system of examination and review at ports of entry, where admissibility will normally be determined. The safeguards for the individual which are contained in present immigration legislation or which have been drawn from broader concepts of due process will be described. In particular, the procedural requirements subsumed within the rubric of natural justice and the guarantees contained in the Canadian *Bill of Rights* will be explored and located in the immigration context. It is not suggested that the efficacy of a system can be adequately measured by the present rather formalistic analysis, but it is nonetheless hoped that the information presented herein may serve as a reference point for other, more functional, studies.

A. INTRODUCTION

The *British North America Act*⁸ endowed both the federal and provincial governments with a measure of constitutional authority over immigration. Section 95 provided that:

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.

This section is generally said to embody the concept of concurrent jurisdiction, but the authority of the provinces is clearly subordinate to that of the federal government in two important respects. First, the so-called "repugnancy clause" affirms federal primacy. Secondly, the legislation of any province can

⁶ S.O.R./74 - 113 and S.O.R./74 - 607.

⁷ See J. Hucker, *A Synopsis of Canadian Immigration Law* (1975), 3 *Syracuse J. Int. Law & Comm.* 47; Wm. Janzen & J. A. Hunter, *The Interpretation of S. 15 of the Immigration Appeal Board Act* (1973), 11 *Alta. L. Rev.* 260.

⁸ 30 - 31 *Vict.*, c. 3.

have effect only in and for that province, while the federal power is exercisable over immigration "into all or any of the provinces".

In the immediate post-Confederation years several provincial-dominion conferences were held to discuss immigration matters, and a federal *Immigration Act* was passed as early as 1869.⁹ However, a generally open-door policy prevailed¹⁰ and, with minor exceptions,¹¹ the early legislation was not aimed at limiting the intake of immigrants. The building of the Canadian Pacific Railway and the opening up of the West created an acute labour shortage and prompted an influx of immigrants from China, most of whom settled in British Columbia, which became a focus of anti-Chinese sentiment. In 1884, the British Columbia legislature passed a *Chinese Immigration Act* making it unlawful for any Chinese to come into the province upon pain of arrest without warrant and a penalty of two-hundred dollars.¹² The federal government disallowed¹³ the Act, which was reintroduced with minor changes and again disallowed the following year.¹⁴ Bowing to pressures from British Columbia, however, Ottawa in 1885 enacted its own *Chinese Immigration Act*,¹⁵ which was not finally repealed until after the Second World War.¹⁶

⁹ *Immigration Act*, 1869, 32-33 Vict., c. 10. The Act implemented an agreement reached at the Provincial-Dominion conference of 1868 to the effect that each province would be free to appoint overseas immigration officers, who would be duly accredited by Ottawa (s. 1).

¹⁰ See J. D. Cameron, *The Law Relating to Immigration to Canada, Vol. II 1867-1942* (Ph.D. thesis, University of Toronto, 1945) at 1 - 34.

¹¹ Masters of ships were required to file a report listing the names and ages of all passengers on board who were "lunatics, idiotic, deaf or dumb, blind or infirm, stating also whether they are accompanied by relatives able to support them" (s. 9). If in the opinion of the government's medical officer any such individual was likely to become a permanent public charge, the ship's master could be required to execute a \$300 bond in favour of the public authority concerned (s. 11 (2)). The Act included a discretionary power to prohibit the landing of pauper or destitute immigrants until the master could produce a sum of money adequate for their temporary support and transportation to their place of destination (s. 16). In 1872, legislation was passed empowering the Governor-in-Council to prohibit the landing in Canada "of any criminal or vicious class of immigrant": *Immigration Act 1872*, 35 Vict. c. 28, s. 10.

¹² 47 Vict. c. 3 (B.C.). See Cameron, *supra*, note 9 at 77-91. See also Sampat-Mehta, *supra*, note 2 at 23 *et seq.*

¹³ Hodgins, *Dominion and Provincial Legislation 1867-1895*, v. 1 at 1092-1095.

¹⁴ *Id.* at 1098-1101. Similar Bills from British Columbia were disallowed almost annually between 1902 and 1908. See Cameron, *supra*, note 9 at 77-91.

¹⁵ 48 & 49 Vict. c. 71. The Act imposed a head tax (originally \$50.00 but subsequently increased to \$500.00) on all persons of Chinese origin who entered Canada (s. 4). Diplomats, tourists and students were exempted. Chinese were also required to obtain a landing permit, issuable only upon the showing of a bill of health certifying that the individual was not suffering from leprosy or any other contagious disease (ss. 8 and 9). A Chinese who had obtained a landing permit and paid the head tax was then issued with a certificate which constituted *prima facie* evidence of a right to enter Canada but which could be contested by any immigration official if there was reason to doubt its validity or authenticity (s. 10). Any such dispute was to be resolved by a superior court judge. The Act imposed a maximum penalty of twelve months imprisonment and/or a \$500 fine upon any person who evaded or attempted to evade the provisions of the Act (ss. 16 and 19). See further, Cameron, *supra*, note 9 at 127-39.

¹⁶ Repealed by S.C. 1947, c. 19.

In addition to the possibility of disallowance, provincial efforts to bar Oriental immigration faced challenges before the courts. *Narain Singh*,¹⁷ concerned a number of East Indians who had complied with the requirements of the *Dominion Immigration Act* and had been granted permission to land in Canada. Upon their arrival in Vancouver they were detained by provincial authorities and charged with an infraction of *The British Columbia Immigration Act* 1908. The British Columbia Court of Appeal, affirming the decision of the trial judge, ordered their release on the ground that the provincial legislation was *ultra vires* s.95.¹⁸ In *Nakane and Okazake*¹⁹ the same province was found to have exceeded its constitutional powers by legislating in the face of an Act of Parliament implementing the Canada-Japan Treaty of 1906.

Other constitutional challenges focused on provincial attempts to legislate against particular alien groups, notably Chinese and other Asiatics, and again British Columbia was in the forefront, although not alone. The province's attempts to ban the immigration of Chinese had been accompanied by other legislative steps to make life more difficult for persons from that country who did manage to enter. Notable early efforts included the imposition of an annual tax upon every Chinese person,²⁰ the prohibition from employment on provincially licensed projects of any individual who could not read in a European language,²¹ and the exclusion of Mongolians and Indians from the ranks of those who could be granted liquor licences.²²

In two notable decisions the Privy Council considered the constitutionality of British Columbia legislation affecting aliens. *Union Colliery Company v. Bryden*²³ concerned the validity of the *Coal Mines Regulation Act*, which prohibited the employment of Chinese in coal mines in British Columbia. The Privy Council found the prohibition to be *ultra vires* as trenching upon the Dominion Parliament's exclusive authority over naturalization and aliens, as provided in s. 91(25) of the *B.N.A. Act*. In *Cunningham and Attorney General of B.C. v. Tomey Homma*,²⁴ the question arose of the same province's authority to bar Orientals from the electoral rolls. The legislation was upheld and *Union Colliery* distinguished. Arguments in *Tomey Homma* that this Act too impinged upon the federal government's exclusive powers over naturalization and aliens were rejected, seemingly on the ground that the Act did not

¹⁷ (1908), 13 B.C.R. 477 (B.C.C.A.).

¹⁸ *Per* Morrison J., "The remainder of the field is thus as it were pre-empted, showing, in my opinion, that the Parliament of Canada intended to deal exclusively with the question of immigration into Canada. . . . I do not think that those two Acts can stand together. They meet emphatically and therefore the Dominion Act must prevail". 13 B.C.R. 477 at 479.

¹⁹ (1908), 13 B.C.R. 370 (B.C.C.A.).

²⁰ *Chinese Regulations Act, 1884*. Disallowed by the federal government: see Hodgins, *supra*, note 12 at 1094-95.

²¹ *An Act Relating to the Employment on Works Carried on Under Franchise Granted by Private Acts, 1900*. Disallowed: Hodgins, *supra*, note 12, Vol. 2 at 594-98.

²² *An Act Respecting Liquor Licences, 1900*. Disallowed: Hodgins, *supra*, note 12, Vol. 2 at 595-98.

²³ [1899] A.C. 580 (P.C.).

²⁴ [1903] A.C. 151 (P.C.).

discriminate against aliens alone but, evenhandedly, also barred native born Canadians whose ancestry happened to be Chinese, Japanese, or Indian.²⁵

The first comprehensive overhaul of the immigration laws took place in 1906. Aware of the need for a generous flow of agricultural immigrants, the federal government had become increasingly concerned over the growing numbers of new arrivals who were flocking to the cities in search of industrial work. The *Immigration Act* 1906²⁶ accordingly marked the introduction of a more selective policy, intended to facilitate the admission of agriculturalists and to sift out persons in less desirable categories.²⁷ New machinery was established to administer the controls and the Minister was given broad powers to make orders and regulations.²⁸ The Act expanded and systematized the prohibited classes of immigrants, which hitherto had developed on an *ad hoc* basis.²⁹ The initial legislative recognition of some embryonic procedural safeguards could be seen in the newly established concept of a board of inquiry to consider and decide upon the case of immigrants seeking admission,³⁰ and in the provision of a right of appeal to the Minister.³¹ Of particular importance from another perspective was the introduction of a general power to deport prohibited immigrants and persons who within two years of their landing in Canada became public charges or inmates of a penitentiary.³²

Minor amendments to the 1906 legislation were followed in 1910 by a new Act.³³ Since then there have been two further consolidations, one in

²⁵ A discussion of the implications of the *Union Colliery* and *Tomey Homma* cases (and of the inconsistencies in judicial approach manifested therein) is beyond the scope of this article. Judicial waters were further muddied by the decision of the Supreme Court of Canada in *Quong-Wing v. The King* (1914), 49 S.C.R. 440, 18 D.L.R. 121. See Abel, *Laskin's Constitutional Law* (4th ed. Toronto: Carswell, 1973) at 869-76.

²⁶ R.S.C. 1906, c. 93. An initial consolidating Act had been passed in 1886 (R.S.C. 1886, c. 65). Legislation enacted in 1902 had established a general power to prohibit the landing of any person suffering from an infectious disease: *An Act to Amend the Immigration Act*, 2 Edw. VII, c. 14, s. 1.

²⁷ See: M. Timlin, *Canada's Immigration Policy, 1896-1910* (1960), 26 Can. J. Econ. and Pol. Sci. 517.

²⁸ Provision was made for the appointment of a Superintendent of Immigration, Commissioners of Immigration and other immigration officers: R.S.C. 1906, c. 93, ss. 6 and 7.

²⁹ The following groups were declared inadmissible: feeble minded, idiots, epileptics, insane (s. 26); deaf and dumb, dumb, blind or infirm (unless accompanied by family able to provide permanent support) (s. 26); persons afflicted with any contagious disease dangerous to the public health (s. 27); paupers likely to become a public charge (s. 28); persons convicted of a crime involving moral turpitude, prostitutes, and procurers (s. 29). In addition, s. 30 empowered the Governor-in-Council to prohibit by proclamation or order "whenever he considers it necessary or expedient" the landing in Canada of any specified class of immigrant.

³⁰ *Id.*, s. 31.

³¹ *Id.*, ss. 31(2) and 31(3). No boards of inquiry were in fact appointed until after a revision of the Act in 1910. See: Government Bill Proposing Amendments to the Canadian Immigration Law, 2nd Sess. 11th Parl., (9 - 10 Edw. VII) 1909-1910, Bill 102, Explanatory Note to Clause 13.

³² R.S.C. 1906, c. 93, ss. 32 and 33.

³³ 9-10 Edw. VII, c. 27.

1927,³⁴ and another in 1952.³⁵ The latter remains the basis of our present law. A significant and continuing feature of these laws has been the provision of broad discretionary powers to control the flow of immigration. As an instrument for the effectuation of policy, legislation has consistently been less important than subsidiary law-making in the form of regulations and Orders-in-Council.³⁶ A study commissioned in 1910 by the United States government could conclude admirably:

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 labour in the Dominion at the time.³⁷

This broad reliance on delegated authority continued unabated until 1955, when the Supreme Court decision in *Attorney-General v. Brent*³⁸ sent the legislative draftsmen back to their drawing boards. The case concerned a divorced woman from Buffalo, New York, who came to Canada in 1954 and proceeded to establish a common-law relationship with Mr. Brent, a Canadian resident in Toronto, whom she subsequently married. At a hearing before a Special Inquiry Officer (S.I.O.) held shortly after her arrival but — perhaps significantly — before her remarriage, she was ordered deported on the grounds

³⁴ R.S.C. 1927, c. 93.

³⁵ *Immigration Act 1952*, R.S.C. 1970, c. I-2, as amended by *Immigration Appeal Board Act 1967*, R.S.C. 1970, c. I-3, as amended by S.C. 1973-74, c. 27.

³⁶ Historical examples of the latter included an Order-in-Council of Jan. 8, 1908 (promulgated pursuant to R.S.C. 1906, c. 93, s. 30), which excluded persons who came to Canada otherwise than by continuous journey from their country of origin (*i.e.* the vast majority of immigrants from Asia), and an Order-in-Council of June 3, 1908 (promulgated pursuant to R.S.C. 1906, c. 93, s. 20), which provided as follows:

And whereas Canada is looking primarily for immigrants from the agricultural class to occupy vacant lands, and as immigrants from Asia belong as a rule to labouring classes, and their language and mode of life render them unsuited for settlement in Canada where there are no colonies of their own people to ensure their maintenance in case of their inability to secure employment, it is necessary that provision be made so that such immigrants may be possessed of sufficient money to make them temporarily independent of unfavourable industrial conditions when coming into Canada.

The Order went on to increase to \$200.00 the minimum amount of money required to be in the possession of Asian immigrants (for non-Asians the prescribed figure remained \$25.00).

³⁷ *Report by the United States Immigration Commission on the Immigration Situation in Canada* (presented to 61st Congress, 2nd Session, Document No. 469, April 1, 1910), at 10. The Report went on to acknowledge (*id.*, at 47) that the Order-in-Council of June 3, 1908 (referred to in note 35, *supra*) "illustrates in a striking way the possibilities of immigration control under s. 20 generally. . . . The special significance of this order lies in the fact that it erects a formidable barrier against the immigration to Canada of East Indian or Hindu laborers".

³⁸ [1956] S.C.R. 318, *aff'g* [1955] 3 D.L.R. 587 (Ont. C.A.).

that she did not comply with the Immigration Regulations in effect at that time, which empowered any S.I.O. 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, educational, labour, health or other conditions or requirements existing, temporarily or otherwise, in Canada or in the area or country from or through which such person comes to Canada, or
- c) his probable inability to become readily assimilated or to assume duties and responsibilities of Canadian citizenship within a reasonable time after his admission.³⁹

The Order-in-Council promulgating the regulation had simply reproduced the language of the authorizing section in the Act, and in effect the Cabinet had sub-delegated to individual immigration officers its authority to define prohibited classes of immigrants. In quashing the deportation order against Mrs. Brent, 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, ever changing 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.⁴⁰

The major result of the *Brent* decision was that the existing Regulations had to be re-written in such a way as to make more explicit the grounds for removal or rejection. The subsidiary legislation has since undergone several revisions, and immigration officers no longer possess their earlier unbridled discretion in this area.⁴¹

B. NATURAL JUSTICE

Traditional international law places no restrictions upon the right of any state to exclude or expel aliens and to provide whatever machinery it deems necessary for exercising this prerogative.⁴² Immigration has accordingly been viewed as a privilege to be bestowed or withheld as the host state chooses, and in most countries procedural safeguards for the immigrant have been slow to

³⁹ [1956] S.C.R. 318 at 320.

⁴⁰ [1956] S.C.R. 318 at 321, *per* Kerwin, C.J.C.

⁴¹ This is not to suggest that immigration officials, particularly Special Inquiry Officers, do not continue to enjoy broad powers to deny admission at ports of entry. However, the factors sufficient to support exclusion or removal are now found solely in the *Immigration Act* (ss. 5 and 18) and as formulated therein do not lend themselves as readily to the translation of personal predilections into official acts.

⁴² See *Vaaro v. R.*, [1933] 1 D.L.R. 359 at 362 (S.C.C.).

emerge.⁴³ In Canada, the move towards a selective immigration policy, under which admission was restricted to persons who were able to satisfy clearly defined selection criteria which emphasised such factors as family relationship, education, job skills and employment opportunities, led inevitably to the erection of an extensive apparatus to administer the necessary controls. Meanwhile, the advent of jet travel and other advances in communications contributed to a quantum leap in the number of persons wishing to enter Canada as tourists or for some other temporary purpose.⁴⁴ The search has consequently been one for machinery which will effectively guard against the entry of those who are unable to satisfy the substantive requirements for admission as immigrants, but which remains capable of processing with a minimum of delay the large numbers of visitors arriving each day.

We have gradually come to expect that immigration procedures should embody certain minimum standards of fairness, and these expectations have led to the establishment of a statutory scheme which seeks to minimise opportunities for the arbitrary exclusion of persons seeking admission. At the same time, the courts have fashioned certain safeguards for the individual under the general head of natural justice. Although its precise implications will depend upon the particular context and the nature of the interests involved, natural justice can be seen to embody at its core two basic requirements for the adjudication of legal rights and responsibilities: first, the person or persons concerned should have the right to be heard, and secondly, the adjudicator should be fair and unbiased.⁴⁵

1. *The Right to be Heard (Audi Alteram Partem)*

The right to be heard before being deprived of property, liberty, or one's office apparently goes back at least as far as the early seventeenth century.⁴⁶ Later judicial decisions extended the rule to govern the conduct of arbitrators and other professional bodies, and the growth of government, with a cor-

⁴³ As admission procedures in Canada became increasingly formalized, the government sought to preclude challenge through the courts by the use of privative clauses. Until repealed in 1967, s. 39 of the *Immigration Act* R.S.C. 1952, c. 325 provided as follows:

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.

⁴⁴ In recent years the annual total of persons arriving in Canada has approximated 70 millions. See Department of Manpower and Immigration, *Immigration Statistics*, Table 12 (Volumes published annually). The *Ottawa Citizen*, January 16, 1975, at 15, carried figures issued by Statistics Canada which indicated that in 1974 tourists in Canada spent an estimated total of \$5.7 billions, of which an estimated \$1 billion was spent by visitors from other countries, primarily the United States.

⁴⁵ de Smith, *Judicial Review of Administrative Action* (3rd Edition, 1973), at 134 *et. seq.*

⁴⁶ *Id.*

responding increase in the powers of public authorities, prompted the English courts to strong endorsements of the *audi alteram partem* principle. A distinction was, however, drawn between judicial or quasi-judicial decisions, where the right to be heard was generally affirmed, and executive or purely administrative actions, which did not carry with them such a right.⁴⁷ The impetus towards due process slackened as the courts deferred to national interest arguments invoked in support of the sometimes arbitrary exercise of various emergency powers during and after the First World War, and *audi alteram partem* enjoyed mixed fortunes in Britain until undergoing a revival during the past decade.⁴⁸

To a considerable extent, judicial developments in Canada have paralleled those in England and other common law jurisdictions, and in his treatise on Canadian Administrative Law, Reid suggests that "natural justice has required a prior hearing, though not necessarily an oral hearing, in countless instances of the exercise of quasi-judicial functions, notwithstanding the absence of provisions for one in the statute".⁴⁹ In circumstances where the legislation itself mandates a hearing — as at certain stages in the immigration process — the courts have been ready to intervene where a defect in the proceedings has denied the individual an adequate opportunity to present his case.⁵⁰

Immigration Admission Procedures

Only Canadian citizens have the right to come into Canada.⁵¹ Non-citizens may apply for admission as either immigrants or non-immigrants, but every person seeking to come into Canada "shall be presumed to be an immi-

⁴⁷ In *Nakkuda Ali v. Jayaratne*, [1951] A.C. 66, the Privy Council drew a further distinction between deprivation of a right and revocation of a privilege. In the latter event the right to a hearing would not generally be inferred. This approach has been criticised as overly conceptualistic (see de Smith, *supra*, note 44 at 149-50), and in any event may not have survived *Ridge v. Baldwin*, [1964] A.C. 40 (H.L.).

⁴⁸ The landmark case in the revival was *Ridge v. Baldwin*, *id.*, in which the House of Lords held that a chief constable was entitled to prior notice of charges made against him and which formed the basis for his dismissal from office. For other decisions, see de Smith, *supra*, note 44 at 154-55.

⁴⁹ R. F. Reid, *Administrative Law and Practice* (Toronto: Butterworths, 1973) at 213.

⁵⁰ See Reid, *id.*, Chap. 6. Even during the low period of natural justice in England, the Supreme Court of Canada strongly reaffirmed the right to notice and a hearing before a party's legal rights could be revoked: *L'Alliance des Professeurs Catholiques de Montréal v. Labour Relations Board (Quebec)*, [1953] 2 S.C.R. 140. (But see *Guay v. Lafleur*, [1965] S.C.R. 12; 47 D.L.R. (2d) 226, rejecting a claim by a taxpayer that he was entitled to be present and represented by counsel at an inquiry into his affairs held by an officer of the Department of National Revenue.) It is arguable, however, that recent developments in England, which have seen a general requirement of fairness extended by the courts beyond quasi-judicial to purely administrative acts (see, e.g., *Re K. (H) (an infant)*, [1967] 1 A11 E.R. 226) have yet to be matched in Canada.

⁵¹ *Immigration Act*, R.S.C. 1970, c. I-3, s.3(1). With certain minor exceptions, persons with Canadian domicile "shall be allowed to come into Canada" (s. 3(2)). Canadian domicile is acquired for the purposes of the Act "by a person having his place of domicile for at least five years in Canada after having been landed in Canada" (s. 4(1)).

grant until he satisfies the immigration officer examining him that he is not an immigrant".⁵² Immigrant and non-immigrant are mutually exclusive categories, and it is a ground for deportation if an individual seeks admission as a member of the class to which he does not rightfully belong.⁵³ All persons, including Canadian citizens, who wish to enter this country are required to appear before an immigration officer, who may either admit the person concerned or set in motion procedures for his exclusion.⁵⁴ Where the officer after examining an individual is of the opinion "that it would or may be contrary to a provision of the *Immigration Act* or the Regulations" to admit him or her, he is required by s. 22 of the Act to make a report of his findings to a Special Inquiry Officer.⁵⁵

Subsequent procedures will depend upon whether the applicant for admission is arriving from overseas or from contiguous territory. In the case of a person from elsewhere than the United States or St. Pierre and Miquelon,⁵⁶ the S.I.O. after reviewing the s.22 report may either admit the applicant or detain him for an immediate inquiry.⁵⁷ The hearing before a Special Inquiry Officer is held "separate and apart from the public but in the presence of the person concerned wherever practicable".⁵⁸ At the conclusion of the inquiry,

⁵² *Id.*, s. 6.

⁵³ *Id.*, s.5(p). Legislative authority (Immigration Regulations, s.28) exists for requiring immigrants and non-immigrants to obtain a visa from a Canadian immigration office abroad before commencing their journey to this country, but the growing importance of the tourist trade has led Canada, in common with many other countries, to reduce travel formalities, and, with the exception of visitors from the Communist bloc and certain Asian and African countries, visa requirements for non-immigrants have now been waived. Partly as a result of the loosening of these restrictions, recent years have seen the arrival of large numbers of persons, many of whom while ostensibly seeking admission as tourists are in reality intent upon remaining permanently.

⁵⁴ *Immigration Act*, s. 19(1). To deal expeditiously with the large numbers involved, major ports of entry have adopted procedures for a preliminary immigration screening of all arrivals. This function is usually performed at a primary inspection line by customs officers, and is the only contact most persons will have with the Immigration Department. Routine perusal of travel documents and fairly cursory questioning of the individual's purpose in coming to Canada will generally lead to his or her admission without further formalities. However, in cases where the officer manning the primary inspection line entertains some doubt, he will refer the person concerned for a secondary examination by an immigration officer. Sometimes the secondary examination will be quite brief and lead to the clarification of an ambiguity in a person's travel documents. However, the majority of secondary examinations will result from a suspicion that the person concerned falls within one of the twenty classes of persons prohibited from entry into Canada (s. 5).

⁵⁵ S. 11(1) of the *Immigration Act* provides that: "Immigration officers in charge are Special Inquiry Officers and the Minister may nominate such other immigration officers as he deems necessary to act as Special Inquiry Officers". At major ports of entry, high traffic volume and staff turnover have necessitated the appointment of relatively junior immigration officers as S.I.O.'s.

⁵⁶ Persons arriving from the United States or St. Pierre and Miquelon are subject to somewhat different procedures. See *Immigration Act*, s. 23(1) and text following note 58. Henceforth, references in the text to arrivals from the United States should be taken to include arrivals from St. Pierre and Miquelon.

⁵⁷ *Immigration Act*, s. 23(2).

⁵⁸ *Id.*, s. 26(1).

the S.I.O. must render his decision as soon as possible, either admitting the person or ordering his deportation.⁵⁹

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 contiguous arrivals. As with individuals from overseas, if the immigration officer forms the opinion that it would or may be contrary to the *Immigration Act* to admit a person from the United States, he is required to make a report of his findings under s.22 to a Special Inquiry Officer.⁶⁰ When the S.I.O. receives this report, "he shall, after such further examination as he may deem necessary" admit the person or make a deportation order against him.⁶¹ A person arriving from the United States is not entitled to an inquiry, although the further examination is intended to operate as a similar review of an initial determination that entry should probably be refused. There are, however, significant differences between the two procedures. First, in the case of arrivals from the United States the S.I.O. possesses a discretion as to whether any further examination shall take place. If he decides on such a course, the further examination may be as long or short as the officer determines, subject presumably to an overriding requirement of good faith and fairness.⁶² Secondly, the right to counsel which is available to the subject of an inquiry does not extend to a further examination,⁶³ even though the consequences of the procedures will be the same — i.e. admission to Canada or the making of a deportation order.

Between 1967 and 1973 any person against whom a deportation order was made had the right to appeal to the Immigration Appeal Board on a question of law or fact. However, since 1973 appeals have been restricted to permanent residents, persons possessing a valid immigrant or non-immigrant visa, and persons claiming to be refugees or Canadian citizens.⁶⁴ The majority of exclusions involve persons seeking non-immigrant status, most of whom will be from countries where visa requirements have been waived, and who will therefore not enjoy a right of appeal. Consequently, most cases will not progress beyond the further examination or inquiry stage, where an adverse decision by the presiding S.I.O. *must* result in a deportation order being issued against the subject. Deportation remains the sole mechanism for excluding or removing a person from Canada, and a Special Inquiry Officer has no discretion to withhold issuance of an order once he has found the person to be a prohibited immigrant. An administrative practice has evolved whereby an in-

⁵⁹ *Id.*, s. 27. An inquiry may be re-opened to hear and consider additional evidence. (*id.*, s. 28).

⁶⁰ *Id.*, s. 22.

⁶¹ *Id.*, s. 23(1).

⁶² See text at note 92 *et seq.*

⁶³ *Ex Parte Paterson* (1971), 18 D.L.R. (3d) 84 (B.C.S.C.). See text at note 72 *et seq.*

⁶⁴ *Immigration Appeal Board Act*, R.S.C. 1970, c. I-3, s. 11, as amended by S.C. 1973-74, c. 27, s. 5. On the scope of the appeal rights conferred see *Srivastava v. Minister of Manpower & Immigration*, [1973] F.C. 138 and *Gana v. Minister of Manpower & Immigration* (1971), 13 D.L.R. (3d) 699 (S.C.C.).

dividual may be permitted, prior to the inquiry, to withdraw his application for admission and depart voluntarily from Canada, but this option does not rest upon a legislative base and the Federal Court of Appeal has recently held that it is foreclosed by the commencement of the inquiry.⁶⁵ Accordingly, a person who has not withdrawn in good time or who remains intent upon proceeding with his application inevitably risks deportation, with its accompanying disqualification from future entry,⁶⁶ even though his ultimate classification as a prohibited immigrant may result merely from technical non-compliance with the statutory requirements.

Notwithstanding past efforts by Parliament to exclude courts from the field of immigration,⁶⁷ attacks upon the validity of deportation proceedings enjoyed intermittent success over the years.⁶⁸ The route to judicial review now lies via s.28(1) of the *Federal Court Act*,⁶⁹ which empowers the Federal Court of Appeal to set aside a decision where a federal tribunal:

- (a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- (b) erred in law in making its decision or order, whether or not the error appears on the face of the record; or
- (c) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

The same section excludes from the Court's purview decisions or orders "of an administrative nature not required by law to be made on a judicial or quasi-judicial basis". The scope of s.28(1) in the immigration context was considered by the Federal Court of Appeal in its 1973 decision in *Srivastava*,⁷⁰ where Jackett, C.J. concluded that:

Both the immigration officer and the special inquiry officer are performing acts of an administrative nature. They are part of the Department of Manpower and Immigration . . . , one of whose tasks is the administration and enforcement of the rules established by Parliament as to what persons may be admitted to Canada. They have certain powers to obtain information for the purpose of making decisions necessary to carry out that task; and they have a duty to use those powers to best of their ability to obtain the information necessary to enforce the rules established by Parliament concerning admission of persons to Canada.⁷¹

The Court subsequently devoted its attention to defining the nature of a special inquiry, which was the main point at issue in *Srivastava*,⁷² but the clear implication remained that the examination and any decision to make a report under

⁶⁵ *Morris v. Minister of Manpower & Immigration* (1974), 50 D.L.R. (3d) 454 (F.C.A.). See also *Moore v. Minister of Manpower & Immigration* (1968), 69 D.L.R. (2d) 273 (S.C.C.).

⁶⁶ *Immigration Act*, s. 35. A person who has been ordered deported is, by this section, not admissible to Canada without the consent of the Minister.

⁶⁷ See *supra*, note 42.

⁶⁸ See, e.g., *Samejima v. R.*, [1932] 4 D.L.R. 246 (S.C.C.) and other cases referred to hereinafter, *passim*.

⁶⁹ R.S.C. 1970, 2d. Supp., c. 10.

⁷⁰ *Srivastava v. Minister of Manpower & Immigration*, [1973] F.C. 138 (F.C.A.).

⁷¹ *Id.*, at 143.

⁷² See text at note 81 *et seq.*

s.22 of the *Immigration Act* are purely administrative functions. Since a denial of admission is not involved at this preliminary stage and the individual is accordingly not deprived of any right or status, such a proposition would appear generally unexceptionable.

However, as already noted,⁷³ persons from the United States who are the subject of a s.22 report are not entitled to an inquiry; instead they will receive only a 'further examination'⁷⁴ — *i.e.* a prolongation of the examination process, performed this time by a Special Inquiry Officer — before they may become deportable. Doubts have been expressed by the Immigration Appeal Board whether the further examination constitutes a 'hearing' at all.⁷⁵ Unlike an inquiry, there is no requirement that a full transcript be kept of the proceedings⁷⁶ and the right to counsel is not guaranteed,⁷⁷ leading the Board to hold that the erroneous use of a further examination instead of an inquiry constitutes a 'fundamental defect' in deportation proceedings, rendering them null and void.⁷⁸ On the other hand, the incipient entrant from the United States is unlikely to encounter much success with the argument that he cannot be denied admission until there has been a hearing — *i.e.* an inquiry — rather than merely an extended examination. As McRuer, C.J.H.C. indicated in *Re Robinson*,⁷⁹ "It is for Parliament to decide the terms on which aliens may have the privilege of entering Canada or remaining here and those who enjoy this privilege take the laws of Canada as they find them".

If, for an important category of entrants, Canadian law may prescribe a further examination instead of an inquiry, the manner in which this procedure is undertaken assumes particular significance. There does not appear to be Canadian authority directly affirming the duty of an immigration officer or an S.I.O. to discharge his duties fairly, but expectations of due process clearly counsel such a requirement at the further examination stage, where the crucial decision to admit or deport will be made. In England, the issue of the fairness of examination procedures was directly raised in a case before the High Court,⁸⁰ leading Lord Parker, C.J. to conclude that:

[E]ven 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 . . . and for that purpose let the immigrant know what his im-

⁷³ See text at note 60 *et seq.*

⁷⁴ *Immigration Act*, s. 23(1).

⁷⁵ *Cain v. Minister of Manpower & Immigration* (I.A.B. No. 73 - 3473, March 26, 1974, unreported).

⁷⁶ Immigration Inquiries Regulations S.O.R./67-621, s. 10.

⁷⁷ *Ex Parte Paterson* (1971), 18 D.L.R. (3d) 84 (B.C.S.C.). *Seroff v. Minister of Manpower & Immigration*, [1970] 1 I.A.C. 104: "[A] further examination is simply an interview by an Immigration Officer stationed at a border point to determine if a person . . . may be admitted to Canada. It is not a formal inquiry, and a person being examined under further examination procedure has no right or entitlement to have counsel present".

⁷⁸ *Belt-Y-de Cardenas v. Minister of Manpower & Immigration* (I.A.B. No. 68 - 6174, March 17, 1969, unreported).

⁷⁹ [1949] 1 D.L.R. 115 at 118.

⁸⁰ *In Re H.K. (an infant)*, [1967] 1 A11 E.R. 226.

mediate impression is so that the immigrant can disabuse him. That is not, as I see it, a question of acting or being required to act judicially, but of being required to act fairly.⁸¹

It is suggested that in spite of the language of s.28(1) of the *Federal Court Act*, Canadian courts should not be deterred by the distinction between administrative and quasi-judicial acts from relying upon the precepts underlying natural justice to require a similar standard of good faith and fairness for immigration procedures in this country.

Inquiries

The inquiry is the key stage in the immigration process for persons from overseas whose admissibility is questioned,⁸² and it must also precede the execution of a deportation order against any individual who has already been admitted to Canada.⁸³ As we have seen, the Federal Court of Appeal in *Srivastava*⁸⁴ was not prepared to classify an immigration inquiry as quasi-judicial. At an earlier stage in the case, the Immigration Appeal Board had refused to hear additional evidence concerning the validity of a deportation order, on the ground that, unless the new evidence could not have been adduced before the S.I.O., the appeal should be decided solely on the record of the proceedings at the inquiry. In rejecting this approach, Jackett, C.J.F.C. emphasized that:

While this hearing, which must precede the making of a deportation order by a special inquiry officer, has some of the trappings of a judicial hearing, it is only, in my view, an inquiry by an administrative officer with a view to ensuring that that officer has available to him the facts necessary for the application of the law as well as that can be accomplished by an 'immediate inquiry' held 'apart from

⁸¹ [1967] 1 A11 E.R. 226 at 231 (*per* Parker, L.C.J.). In the same case, Salmon, L.J. delivered an even stronger judgment:

I have no doubt at all that in exercising his powers under that section, the immigration officer is obliged to act in accordance with the principles of natural justice. That does not of course mean that he has to adopt judicial procedures or hold a formal inquiry, still less that he has to hold anything in the nature of a trial, but he must act, as Lord Parker, C.J., has said, fairly in accordance with the ordinary principles of natural justice. (*Id.* at 232-33).

Salmon, L.J. went on to emphasize that the decisions of immigration officers were "of vital importance to the immigrants since their whole future may be affected. In my judgment it is implicit in the statute that the authorities in exercising these powers and making decisions must act fairly in accordance with the principles of natural justice". (*Id.* at 233).

⁸² *Immigration Act*, s. 23(2).

⁸³ *Immigration Act*, s. 25, provides for the holding of an inquiry where the Director has received a report under s. 18 of the Act. Section 18 enumerates those circumstances — e.g., conviction of a criminal offence, involvement in subversive activities, ceasing to be a member of the class in which he was originally admitted, being a member of a prohibited class at the time of admission, eluding examination or entering with false or improperly issued travel documents, etc. — which constitute sufficient grounds for initiating deportation proceedings. Section 25 confers a discretion upon the Director, whereby he may refrain from causing an inquiry to be held (and so call a halt to deportation proceedings) in appropriate cases, for example, those involving trivial instances of criminality or where strong compassionate considerations exist.

⁸⁴ [1973] F.C. 138 (F.C.A.).

the public' under the exigencies of keeping a person under restraint pending a decision as to admission or deportation. The imposition of some of the requirements of a judicial hearing make it more likely that the true facts will be ascertained but such an inquiry is not the equivalent of a judicial hearing.⁸⁵

It should be noted that *Srivastava* was concerned primarily with re-affirming the right of an individual to raise before the Board any issue relevant to his deportation and not to be denied this opportunity as a result of that body's overly formalistic conception of its role. For this reason it was necessary for the Court to highlight the limitations inherent in an inquiry, but the Chief Justice went on to observe that, while the special inquiry officer was performing an administrative task, this included "the making of decisions on a quasi-judicial basis".⁸⁶ The line between true quasi-judicial proceedings and an administrative function performed quasi-judicially may be a fine one, but the end result appears to be that immigration inquiries will continue to be subject to judicial review under s.28(1) of the *Federal Court Act*.

The subject of an inquiry has the right to be represented by counsel retained at his own expense, and where he is not represented⁸⁷ at its commencement, the officer presiding is required to inform him of this right and, upon request, must adjourn the hearing to enable counsel to be retained and instructed.⁸⁸ At the hearing the Special Inquiry Officer must base his decision upon evidence considered credible or trustworthy by him in the circumstances of each case,⁸⁹ and the burden of proving that he is not prohibited from coming into Canada rests upon the person seeking admission.⁹⁰

Provided that no obvious departure from judicious conduct appears on the record, the courts will not second-guess the findings of fact which emerge from an inquiry, nor will they require the application of strict rules of evidence. In *Re Robinson*,⁹¹ the High Court of Ontario rejected an application for *certiorari* by an individual who had been ordered deported as a person "who believes in or advocates the overthrow by force or violence" of the government. The applicant claimed that there had been no evidence before the board of inquiry to warrant a finding that he was such a person. McRuer, C.J.H.C. declared that:

By the very nature of the inquiry wide discretion is, as it should be, vested in the Board as to what it will receive and treat as evidence. The nature of the investigation here under review is one that involves not only the actions of the applicant but his beliefs. On these matters the Board must make a finding. To apply to such an inquiry the rules of evidence applicable to a court of law would be to frustrate the purpose of the provisions of statute and would be contrary to well established authority applicable to administrative tribunals. The Act applies to all aliens

⁸⁵ [1973] F.C. 138 at 144.

⁸⁶ [1973] F.C. 138 at 156.

⁸⁷ *Immigration Act*, s. 26(2). The counsel selected need not be, and frequently is not, legally qualified.

⁸⁸ Immigration Inquiries Regulations, S.O.R./67-621, s. 3.

⁸⁹ *Immigration Act*, s. 26(3). A Special Inquiry Officer possesses all the powers of a commissioner appointed under Part I of the *Inquiries Act* (s. 11(3)).

⁹⁰ *Id.*, s. 26(4).

⁹¹ [1949] 1 D.L.R. 115.

coming to Canada from any country in the world. Information respecting their antecedents must necessarily come from abroad. . . . Parliament has left entirely to the Board to base its decision upon any evidence, considered credible or trustworthy by such Board in the circumstances of each case. There is no power given by Parliament to this court to substitute its decision for that of the Board as to what evidence is to be considered trustworthy.⁹²

With some regularity the courts have emphasized that an inquiry must conform to broader notions of a fair hearing, and have intervened when this compliance is absent. In *Re Veregin*,⁹³ the applicant had been arrested and detained for an inquiry, which commenced at 2.30 p.m. on the following day. His counsel did not arrive until 2.45 p.m. and immediately requested an adjournment in order that he might obtain instructions from his client. The request was refused, the inquiry was continued and a deportation order was issued the same afternoon. The order was quashed on the ground that the proceedings were not consistent with the fair hearing which the law required.

In *Moshos*,⁹⁴ the Supreme Court of Canada considered the validity of a deportation order issued against the wife of a man who had taken employment in Canada contrary to the Immigration Regulations. The wife was called as a witness at a hearing held to consider the deportation of her husband. She had not been present during the time he was testifying, but upon being sworn and before giving her own evidence she was informed that, as a dependant, she could, by virtue of s.37(1) of the *Immigration Act*, be included in a deportation order made against the head of the family. On appeal, the order as against her and her children was set aside. In his judgment for the court, Martland, J. was of the view that the woman had not received the hearing to which she was entitled:

[A]t no point was she told that she had the right to an opportunity to establish that she should not be included in the order. I do not regard the mere reading of s.37(1) to her, when she was on the stand as a witness, followed by questioning by the special inquiry officer, as constituting the giving of such an opportunity.⁹⁵

In *Leiba*,⁹⁶ the Supreme Court held that the use of a so-called "check-out" letter to inform an applicant that he had failed to meet the required level of assessment for admission as an immigrant and should therefore leave Canada on pain of an inquiry and possible deportation, did not conform to the statutory duty imposed by the present s.22 of the *Immigration Act*, which mandated that an officer who was of the opinion that the applicant was not admissible "shall report him to a Special Inquiry Officer". The earlier denial of full procedural safeguards rendered invalid subsequent deportation proceedings based upon the original assessment.⁹⁷ Further, the applicant's intervening departure from the country and failure to exercise his right of appeal after the initial

⁹² [1949] 1 D.L.R. 115 at 123-24. On the question of subversive activities, see *Immigration Act*, ss. 5(l), (m) and (n).

⁹³ [1933] 2 W.W.R. 409.

⁹⁴ *Moshos v. Minister of Manpower and Immigration* (1970), 7 D.L.R. (3d) 180.

⁹⁵ *Id.* at 184. See also: *Re Rodney*, [1972] F.C. 663; 27 D.L.R. (3d) 180.

⁹⁶ *Leiba v. Minister of Manpower & Immigration* (1972), 23 D.L.R. (3d) 476 (S.C.C.).

⁹⁷ *Per Laskin, J., id.* at 482-83.

examination did not affect his continuing entitlement to a proper assessment of his admissibility.⁹⁸

The right to a fair hearing presupposes that an opportunity will be afforded the party concerned to rebut any allegations made against him.⁹⁹ In the context of immigration this means that the reasons for a person's deportation must be indicated with sufficient particularity for him to be able to formulate a response. The courts and the Immigration Appeal Board have nullified deportation orders in situations where there was not adequate disclosure. In the important case of *Samejima*,¹⁰⁰ the Supreme Court granted *habeas corpus* to a Japanese who had entered Canada in 1928, ostensibly to work as a domestic servant for his uncle in Nanaimo, but had subsequently taken different employment and had been ordered deported. In his majority judgment, Lamont J. noted that only at the very close of the inquiry had the appellant been briefly questioned about his failure to take domestic employment:

This was the first time so far as the material before us discloses that he was made aware that the charge against him was entering Canada by misrepresentation. Had he known that he had to face that charge he could have had the evidence before the board of inquiry which he subsequently placed before Murphy, J. on *habeas corpus* proceedings, namely, that of Mr. Uyeno, who had carried on business in Nanaimo for twenty-five years and who, in his affidavit, stated not only that the appellant was to be employed by him as a domestic servant, but that more than a year before the landing of the appellant he (Mr. Uyeno) had applied to the Japanese Consul at Vancouver for a permit for the appellant's entry into Canada as his domestic servant.¹⁰¹

Duff, J. concurred and went on to express a more general uneasiness over the manner in which inquiries were sometimes performed:

Indeed, unless the person concerned is to have a reasonable opportunity of knowing the nature of the allegations, what is the purpose of requiring his presence? The deportation order must fully state the reasons for the decision, in respect of allegations. The spirit, as well as the frame, of the whole statute, evinces the intention that these provisions are mandatory.

I gravely fear that too often the fact that these enactments are, in practice, most frequently brought to bear upon Orientals of a certain class, has led to the generation of an atmosphere which has obscured their true effect. They are, it is needless to say equally applicable to Scotsmen. I admit I am horrified at the thought that the personal liberty of a British subject should be exposed to the hugger-mugger which, under the name of legal proceedings, is exemplified by some of the records that have incidentally been brought to our attention.¹⁰²

Duff, J.'s concern for human rights may have been of less than universal application, but his strictures against "hugger-mugger" proceedings have found

⁹⁸ But cf. *Ex parte Washington* (1969), 3 D.L.R. (3d) 518, in which the British Columbia Court of Appeal held that a person who would otherwise be entitled to an inquiry under what is now s. 24 of the *Immigration Act*, loses that right if he voluntarily departs from the country. The *Washington* case was distinguished in *Leiba* (1972), 23 D.L.R. (3d) 476 at 481.

⁹⁹ See de Smith, *supra*, note 44 at 178 *et seq.*

¹⁰⁰ *Samejima v. R.*, [1932] 4 D.L.R. 246 (S.C.C.).

¹⁰¹ *Id.* at 259, *per* Lamont, J.

¹⁰² *Id.* at 251.

an echo in subsequent judicial decisions. In *R. v. Spalding*,¹⁰³ the British Columbia Court of Appeal unanimously rejected an appeal by the government against the quashing of a deportation order on the grounds that it had violated the essentials of justice. The subject had been excluded from the room where the inquiry was held while a witness was questioned:

She had no opportunity to hear his testimony and to examine him thereon. Moreover, it does not appear she was informed of the reason for the special inquiry, nor of the specific ground upon which the deportation order was made. In true effect therefore it was not a valid legal hearing at all.¹⁰⁴

The Immigration Inquiries Regulations now require every s.22 report and deportation order to set out the provisions of the Act or Regulations upon which it is based.¹⁰⁵ The Immigration Appeal Board has suggested that in general this information will be sufficient, but that where a report relies upon a provision which could involve various charges, the principles of natural justice impose upon an immigration officer the obligation to set out more precisely those allegations which are being invoked against the person concerned.¹⁰⁶ The Board has indicated that an S.I.O. may base a deportation order on a ground that was not set out in a s.22 report;¹⁰⁷ proper notice must, however, be given to the person concerned, and, where necessary, an adjournment granted to enable him to meet any new allegation.¹⁰⁸

In *Silvini*,¹⁰⁹ an Italian who had originally entered Canada as a non-immigrant and later applied for permanent residence¹¹⁰ was ordered deported under s.5(t) of the *Immigration Act, inter alia* because "in the opinion of an immigration officer there was good reason why the norms set out in [the Immigration Regulations] do not reflect your chances of establishing yourself successfully in Canada". The appellant argued that the "good reasons" referred to in the deportation order should be produced, and that failure to produce them was contrary to s.2(e) of the *Bill of Rights*, which required "a fair hearing in accordance with the principles of fundamental justice". The Board upheld this contention, decreeing that the appellant was entitled to examine all the facts, including the reasons leading up to the opinion formed by the immigration officer who interviewed him.¹¹¹ The decision is significant as showing a willingness on the part of the Immigration Appeal Board to require

¹⁰³ [1955] 5 D.L.R. 374.

¹⁰⁴ [1955] 5 D.L.R. 374 at 375; *per O'Halloran, J.A.*

¹⁰⁵ S.O.R./67 - 621, ss. 5 and 11.

¹⁰⁶ *Ho Wai Hung v. Minister of Manpower & Immigration* (1975), 8 I.A.C. 142; *Dos Santos v. Minister of Manpower & Immigration* (1974), 7 I.A.C. 31. A provision which will require additional particulars is s. 5(t) of the *Immigration Act*, which prohibits entry to "persons who cannot or do not fulfill or comply with any of the conditions or requirements of this Act or the regulations".

¹⁰⁷ *Haughton v. Minister of Manpower & Immigration* (I.A.B. No. 69 - 209, May 6, 1969, unreported).

¹⁰⁸ *Id.*

¹⁰⁹ *Silvini v. Minister of Manpower & Immigration* (1974), 6 I.A.C. 50.

¹¹⁰ Application within Canada for landed immigrant status was permitted by the Immigration Regulations, s. 34 (revoked by S.O.R./72-443).

¹¹¹ (1974), 6 I.A.C. 50 at 54.

broad disclosure of all information which may pertain to the issuing of a deportation order. Although the s.22 report itself or its contents will generally be made available to the person concerned at the inquiry, information which does not appear in the report — for example, notes taken by the examining officer during or after an examination — has undoubtedly constituted a significant factor in past decisions to deport. The concept of a fair hearing would indeed require that all such information should be made known to the individual, so that any weaknesses or inaccuracies may be identified at the inquiry and not continue to serve as a possibly unjustified basis for official action.¹¹²

One important area where the right to a hearing encounters a potentially conflicting interest is that of state security. The *Immigration Act* prohibits the admission of past or present members of subversive organisations and anyone who has engaged in or advocated the use of subversion.¹¹³ A person so categorised will of course be entitled to the normal pre-deportation hearing before a Special Inquiry Officer, including an opportunity to challenge any evidence relied upon as the basis for his exclusion or removal.¹¹⁴ In addition, permanent residents and those in possession of a visa will enjoy a right of appeal to the Immigration Appeal Board.¹¹⁵

In spite of these safeguards, the Supreme Court has recently affirmed¹¹⁶ that individuals may be denied access to an important form of relief with-

¹¹² In recent unreported decisions the Federal Court of Appeal held that the person who is the subject of a Special Inquiry is entitled to inspect and copy any notes made by an immigration officer and leading to a s. 22 report (*Da Silva v. Minister of Manpower & Immigration*, judgment dated October 3, 1974); and that declining to disclose the contents or substance of a memorandum or notes made by the immigration officer and communicated to the S.I.O. either as part of the s. 22 report or otherwise would be sufficient ground for setting aside a deportation order (*Tichy v. Minister of Manpower & Immigration*, judgment dated September 19, 1974).

¹¹³ *Immigration Act*, ss. 5(l) and (m). The Act also prohibits the admission of persons who are believed, on reasonable grounds, to be "likely to engage in espionage, sabotage or any other subversive activity directed against Canada or detrimental to the security of Canada" (s. 5(n)), as well as those convicted of espionage (s. 5(q)) or treason (s. 5(r)). For the corresponding provisions applicable to persons already admitted to Canada, see s. 18(1)(a), (b) and (c).

¹¹⁴ *Cronan v. Minister of Manpower & Immigration* (1973), 3 I.A.C. 42. This decision of the Immigration Appeal Board dismissed an appeal against a deportation order made under s. 5(l). The appellant contended *inter alia* that he had been denied a fair hearing, but this contention was rejected upon a finding that he had been informed that his previous membership in the Communist Party constituted the basis for invoking s. 5(l) (see *id.* at 52-57).

The deportation order in *Cronan* was also attacked on the ground that the subject had not been able to ascertain from the Department how he could bring himself within the class of persons who would be admissible if they were able to "satisfy the Minister that they have ceased to be members of or associated with [subversive] organizations . . . and whose admission would not be detrimental to the security of Canada" (s. 5(1)). The Board held that this proviso to s. 5(l) conferred an absolute discretion on the Minister, which did not need to be exercised in a quasi-judicial manner, and would only be reviewable upon a showing of bad faith (*id.* at 59-73).

¹¹⁵ *Immigration Appeal Board Act*, R.S.C. 1970, c. I-3, s. 11, as amended by S.C. 1973-74, c. 27, s. 5.

¹¹⁶ *Prata v. Minister of Manpower & Immigration*, 52 D.L.R. (3d) 383 (S.C.C.).

out an opportunity to ascertain the precise basis for this denial. Under s. 15¹¹⁷ of the *Immigration Appeal Board Act*, the Board is empowered to quash or stay a deportation order on compassionate or humanitarian grounds and to direct the grant of entry or landing to the person against whom the order was made. This so-called "equitable jurisdiction" has proved bountiful for large numbers of immigrants and is the relief at which many appeals alleging errors of law or fact are in reality aimed. However, the filing under s. 21 of the Act¹¹⁸ of a certificate signed by the Minister and the Solicitor General will operate to bar the Board from the exercise of its s. 15 discretion "notwithstanding anything in this Act". Such a certificate need only state that in the opinion of the Ministers based upon security or criminal intelligence reports it would be "contrary to the national interest" to take any action under s. 15.¹¹⁹ Further, the certificate itself "is conclusive proof of the matters stated therein".¹²⁰ Perhaps not surprisingly, this broadly cast Ministerial discretion has been attacked, though so far without success.

¹¹⁷ R.S.C. 1970 c. I-3, s. 15, as amended by S.C. 1973 - 1974, c. 27, s. 6.

Where the Board dismisses an appeal against an order of deportation or makes an order of deportation pursuant to paragraph 14(c), it shall direct that the order be executed as soon as practicable, except that the Board may,

- (a) in the case of a person who was a permanent resident at the time of the making of the order of deportation, having regard to all the circumstances of the case, or
- (b) in the case of a person who was not a permanent resident at the time of the making of the order of deportation, having regard to
 - (i) the existence of reasonable grounds for believing that the person concerned is a refugee protected by the Convention or that, if execution of the order is carried out, he will suffer unusual hardship, or
 - (ii) the existence of compassionate or humanitarian considerations that in the opinion of the Board warrant the granting of special relief,

direct that the execution of the order of deportation be stayed, or quash the order and direct the grant of entry or landing to the person against whom the order was made.

¹¹⁸ R.S.C. 1970, c. I-3:

Security

S. 21 (1) Notwithstanding anything in this Act the Board shall not,

- (a) in the exercise of its discretion under section 15, stay the execution of a deportation order or thereafter continue or renew the stay, quash a deportation order, or direct the grant of entry or landing to any person, or
- (b) render a decision pursuant to section 17 that a person whose admission is being sponsored and the sponsor of that person meet the requirements referred to in that section,

if a certificate signed by the Minister and the Solicitor General is filed with the Board stating that in their opinion, based upon security or criminal intelligence reports received and considered by them, it would be contrary to the national interest for the Board to take such action. . . .

¹¹⁹ *Id.*

¹²⁰ *Id.*, s. 21 . . .

- (2) a certificate purporting to be signed by the Minister and the Solicitor General pursuant to subsection (1) shall be deemed to have been signed by them and shall be received by the Board without proof of the signatures or official character of the persons appearing to have signed it unless called into question by the Minister or the Solicitor General, and the certificate is conclusive proof of the matters stated therein.

In *Prata*,¹²¹ the appellant contended that the pre-empting of the Board's equitable jurisdiction by the filing of a s.21 certificate offended against the requirements of natural justice and guarantees contained in the Canadian *Bill of Rights*. Specifically he argued that the deportation made against him was invalid because he had been denied an opportunity to see and rebut the allegations contained in the criminal intelligence reports on which the s.21 certificate was based. The Federal Court of Appeal dismissed his appeal. Jackett, C.J. (Sweet, D.J. concurring)¹²² was of the view that, if it existed at all, any right on the part of the appellant to confront the evidence against him could be operative only prior to the signing of the certificate by the two Ministers, and did not extend to proceedings before the Board.¹²³ He concluded that responsibility for security matters had been entrusted to the Ministers

for the traditional reasons . . . for example, (a) because the information on which such decision must be based is not of such a character that it can be established by the sort of evidence that can be put before a judicial tribunal in the ordinary way, and (b) because the sources of such information will dry up if a practice is not followed of protecting their identity.¹²⁴

The *Prata* decision was recently affirmed by the Supreme Court,¹²⁵ which held that access to the Board's discretionary powers under s.15 of *Appeal Board Act* was a privilege and that the Board enjoyed only that limited and defined jurisdiction conferred by the Act.¹²⁶ In his judgment for the Court, Martland, J. observed that the section 21 certificate "is a certificate of an opinion. It is not a decision on an issue *inter partes*".¹²⁷ He went on to declare that:

the Board in the present case, upon the filing of the certificate, had no option in view of the wording of s. 21, save to rule that it could not deal with the appellant's request for relief under s. 15 in the way which it did. I do not see how a statutory board, with a defined jurisdiction, would have any authority to declare invalid the certificate which had been filed with it.¹²⁸

It is perhaps unfortunate that the Supreme Court chose not to address itself to the more fundamental aspects of the issue presented by *Prata*, a case which raised in the immigration context the transcendent question of how far individual rights must be sacrificed for the perceived welfare of the body politic. One can sympathise with the dilemma of the Immigration Appeal Board, which had little choice but to decline to hear the appellant's claim for relief. However, in downgrading the significance of this denial by classifying access to the Board's s.15 discretionary jurisdiction as merely a privilege the

¹²¹ *Re Prata v. Minister of Manpower & Immigration* (1972), 31 D.L.R. (3d) 465 (Fed. C.A.); (1975) 52 D.L.R. (3d) 383 (S.C.C.).

¹²² Thurlow, J. dissented on the ground that s. 21 denied the appellant equality before the law as required by s. 1(b) of the *Bill of Rights*: 31 D.L.R. (3d) 465 at 477. (See further, discussion of s. 1(b)).

¹²³ 31 D.L.R. (3d) 465 at 469.

¹²⁴ *Id.* at 470.

¹²⁵ *Aff'd sub nom Prata v. Minister of Manpower & Immigration* (1975), 52 D.L.R. (3d) 383 (S.C.C.). See text at note 213.

¹²⁶ *Id.* at 383-86.

¹²⁷ *Id.*

¹²⁸ *Id.* at 386-87.

Supreme Court placed form over substance,¹²⁹ particularly since the Board is on record¹³⁰ as regarding itself under an obligation to consider on their merits all claims made by appellants under this section.

2. Bias

Natural justice requires "not only that those whose interests may be directly affected by an act or decision should be given prior notice and an adequate opportunity to be heard, but also that the tribunal should be disinterested and impartial".¹³¹ Bias may involve either a particular relationship between the decision-maker and the parties or specific conduct on his part. Traditionally the former circumstance would arise where a judge had any direct pecuniary or personal interest in the outcome of the matter before him — for example, if he owned stock in a company involved or had family or friendship ties with one of the parties. The second kind of bias arises from the conduct of the adjudicator rather than from any particular relationship or office. In either case, the proceedings will be fatally flawed if there is a reasonable suspicion or real likelihood¹³² that the adjudicator did not or could not conduct the proceedings with an open and dispassionate mind.

Some uncertainty remains over the question of precisely what must be shown in order to nullify proceedings on the ground of bias. While a conceptual distinction undoubtedly can be maintained between bias arising from a relationship or special interest and that which results from the conduct of the proceedings, it is probably going too far to assert that actual bias, in the sense of a specific prejudice against one of the parties, must be shown. It will ordinarily be sufficient if — whether from special interest or overt action — the appearance of impartiality is absent.¹³³ In other words, the law will not inquire

¹²⁹ Cf. Thurlow, J. in *Lazarov v. Secretary of State* (1974), 39 D.L.R. (3d) 738 (Fed. C.A.): "It is not a case of depriving a person of his property and it is true that the applicant can apply again after two years, but the status of citizenship carries with it rights and advantages and to refuse the application of a person to whom it would otherwise be granted on the basis of matters of which he is not apprised and which he is given no opportunity to dispute is shocking to one's sense of justice. . . . It suggests that the applicant is not being fairly dealt with and that fairness demands that he at least be afforded an opportunity to state his position on them". (*Id.* at 749).

The Federal Court of Appeal here set aside a decision of the Secretary of State refusing to grant a certificate of citizenship to the appellant. But see *Dowhopoluk v. Martin*, [1972] 1 O.R. 311.

¹³⁰ *Agouros* (1974), 6 I.A.C. 58.

¹³¹ de Smith, *supra*, note 44 at 215.

¹³² *R. v. Moore, ex parte Brooks* (1969), 6 D.L.R. (3d) 465 at 471. Per Stewart, J., who adopted the tests outlined by de Smith, *supra*, note 44, 2nd ed., at 235, to the effect that:

A real likelihood of bias means a probability or at least a substantial possibility of bias perceived by right-minded persons cognizant of all material circumstances including those not only ascertained by the party complaining but such further circumstances as might readily have been ascertained and easily warranted.

¹³³ *Id.* at 472, *per* Stewart, J.:

The statement that actual bias must be established goes, I think, much too far, for many appointees have denied being biased and, I have no doubt have perfectly honestly felt that they could act quite impartially, although all their experiences may have lain in activities which favoured one side rather than the other. . . .

into the internal motivations of an adjudicator where there is no apparent evidence of bias, nor will the purity of such a person's motives salvage proceedings which would otherwise be defective.

An example which might serve to clarify the above guidelines is found in the case of *Ex parte Brooks*,¹³⁴ in which the Oakville Police Association sought an order prohibiting a county court judge from acting as chairman of an arbitration board appointed to settle a salary dispute between the Association and the Oakville Commissioners of Police. The basis for an allegation of bias against the judge was that he himself served as a Police Commissioner in several other communities. In agreeing that the chairman should be disqualified, Stewart, J. explained that:

With the best will in the world, he will be subject to bias, if not actual at least subconscious

Quite obviously it cannot be shown that Judge Garth Moore is *actually* biased and I am quite sure that he would spare no effort to be as dispassionate as he was capable of being. It is to be noted, however, that the bias dealt with in the cases does not necessarily mean a conscious bias but that such bias may be unconscious It is of vital importance to our system of justice that all such steps as possible should be taken to eliminate both injustice or the fear of injustice. The salutary rule I think should be that if a real apprehension be raised in the mind of a reasonable and intelligent man, fully apprised of the circumstances, that an appointee might well be swayed by bias, albeit unconscious, then such appointment should be set aside.¹³⁵

One may contrast this holding with the situation which exists under the present immigration procedures. As has already been observed, with the exception of the limited number of persons who enjoy a right of appeal to the Immigration Appeal Board, the only hearing which is afforded an immigrant prior to his deportation is that before the Special Inquiry Officer. While theoretically a distinct and senior category, S.I.O.'s in practice are sometimes relatively junior officials who, when not conducting inquiries, work as regular immigration officers alongside colleagues the propriety of whose actions they may at other times be called upon to judge. It seems not unreasonable to suppose that peer group pressures and expectations of conformity could create at least as great a suspicion of institutional bias as that which disqualified Judge Moore in the *Brooks* case. However, here as elsewhere, the law is reluctant to take cognizance of systemic deficiencies until these can be shown to have worked an injustice in a particular instance.

Under existing procedures a Special Inquiry Officer's functions are a somewhat ambivalent combination of the prosecutorial and the quasi-judicial. He presides at the hearing and must adjudicate between the conflicting claims of the person hoping to enter or remain in Canada and the Immigration Department which seeks his expulsion. At the same time, he is an employee of that Department and — perhaps more important — must present the Department's case. He is entitled to call upon the services of counsel to act for the Department when he deems this to be necessary,¹³⁶ but is unlikely to do so

¹³⁴ *Supra*, note 132.

¹³⁵ *Id.* at 471-72.

¹³⁶ *Immigration Act*, s. 11(3)(d).

except in rare situations. In rejecting one challenge to the propriety of these procedures, the Immigration Appeal Board held that the S.I.O. was in no sense a prosecutor or a judge,¹³⁷ and went on to declare that the failure of the S.I.O. to call counsel to present the Department's case did not contravene the principles of natural justice, because the record did not indicate that the person concerned had as a result suffered any prejudice.¹³⁸

The leading judicial pronouncement on bias in immigration matters is to be found in the decision of the Manitoba Court of Appeal in *Re Gooliah*.¹³⁹ The applicant came to Canada from Trinidad in 1963 as a student and enrolled in a course in electronics in Winnipeg. After performing unsatisfactorily in the course, he was advised by his instructor that an apprenticeship, which combined "on-the-job" training with attendance at certain trade courses, would be more beneficial to him than repeating his electronics course. Upon successfully completing a pre-apprenticeship trial in September 1964, Gooliah sought the permission of the Department to enter upon the apprenticeship program. This permission was denied, and deportation proceedings were subsequently brought against him on the ground that he had ceased to be in the class — *i.e.* student — under which he had been admitted¹⁴⁰ and that he was not taking vocational training approved by the Minister.¹⁴¹ The applicant claimed that he had entered upon the pre-apprenticeship trial with the knowledge and consent of the Immigration Branch, but this was disputed. A further question arose as to whether the apprenticeship program constituted vocational training consistent with his original admission as a student of electronics. In his majority judgment, Freedman, J.A. stated as follows:

I feel bound to say that the Special Inquiry Officer apparently approached the matter with a mind made up. Noting that there was no written record evidencing the Branch's permission to Gooliah as claimed, he called as a witness one Farr, an officer of the Immigration Branch, for the purpose of establishing that there had in fact been no such permission. To this witness he first of all made a preliminary statement that Gooliah had no evidence of permission. Against that

¹³⁷ *Turpin v. Minister of Manpower & Immigration* (1974), 6 I.A.C. 1: "He has certain judicial functions, but in general, if his inquiry elicits evidence of facts which bring the subject within one or more of the provisions of the *Immigration Act*, the special inquiry officer must make a decision in accordance with the Act". (*Id.* at 9).

¹³⁸ *Id.* at 10. The Board also reiterated the well established view that the *Immigration Act* is not a criminal statute and that therefore analogies could not be drawn between a complaint under the Act and a criminal indictment (*Id.* at 9).

¹³⁹ (1967), 63 D.L.R. (2d) 224.

¹⁴⁰ Now R.S.C. 1970, c. I-2, s. 18(2): "Every person who is found upon an inquiry . . . to be a person described in [s. 18(1)] is subject to deportation". Section 18(1)(e)(vi) refers to a person who "entered Canada as a non-immigrant and remains therein after ceasing to be a non-immigrant or to be in the particular class in which he was admitted as a non-immigrant".

¹⁴¹ *Immigration Act*, s. 7(1): "The following persons may be allowed to enter and remain in Canada as non-immigrants . . . (f) students entering Canada for the purpose of attending and, after entering Canada, while they are in actual attendance at any university or college authorized by statute or charter to confer degrees or entering Canada for and, after entering Canada, while they are actually taking some other academic, professional or vocational training approved by the Minister for the purposes of this paragraph".

background he then put a series of questions clearly inviting, as indeed they received, the concurrence of the witness in the conclusion that Gooliah had not been given the consent of an Immigration Officer to work in pre-apprenticeship trial.¹⁴²

Freedman, J.A. went on to point out that the S.I.O.'s preconception rested on the false premise that the officer who was supposed to have granted the consent was Mr. Farr, whereas the applicant's contention had been that permission had been issued by another officer:

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.¹⁴³

On the matter of Gooliah's alleged change to a different class from that in which he had been admitted, Freedman, J.A. strongly criticised the deferential attitude manifested by the S.I.O. towards testimony by a senior official from the Department of Immigration¹⁴⁴ and agreed with the following observations of the Chief Justice made at the trial:

An impartial judge does not confer on a witness the right to rule on the questions he shall answer. Mr. Gunn made a rather picturesque and not inapt comment that this exchange 'shows who wore the pants in that office'.¹⁴⁵

Freedman, J.A.'s objections to the conduct of the inquiry were further buttressed by the evasions of the Regional Admissions Supervisor when counsel for the applicant endeavoured to show that the apprenticeship did constitute vocational training within the meaning of the *Immigration Act*:¹⁴⁶

- Q. What is the instruction respecting vocational training approved by the Minister?
 A. These instructions are contained in our Manuals.
 Q. What does the Manual say respecting vocational training?
 A. This information is considered confidential.
 Q. But you apply these confidential instructions to a particular case in determining whether or not the Immigration Act has been complied with. Correct?
 A. The instructions contained in the Manual concerning students outlines the classes of students that are admissible, including those attending vocational training.
 Q. Are these students advised of the class in which they fall?
 A. By issuing them a Student Entry Certificate is [*sic*] evidence that we are satisfied that they are students.

¹⁴² (1967), 63 D.L.R. (2d) 224 at 233.

¹⁴³ *Id.* at 234.

¹⁴⁴ *Id.* It was the heart of the applicant's contention that apprenticeship was but a further step in the field of electronics leading towards his original goal of becoming a journeyman electrician. To help establish that contention his counsel tried to ascertain from the witness Mr. McLeod, Regional Admissions Supervisor, whether apprenticeship came within s. 7(1)(f) of the Immigration Act and in that connection what Regulations had been approved by the Minister respecting vocational training. What followed from that attempt reveals and exposes the improper spirit in which the inquiry was conducted. At first the Special Inquiry Officer sought to prevent examination in this area on the view that it would be "beside the point". Pressed by the applicant's counsel to allow such examination the officer yielded to this extent. He said, "I will leave this up to Mr. McLeod and if he has any objection, it will be duly registered in the minutes".

¹⁴⁵ *Id.*

¹⁴⁶ *Immigration Act*, s. 7(1)(f), *supra*, note 140.

- Q. By revoking a Student Entry Certificate and asking them to leave the country, you are, in a sense, adjudicating on their status with respect to these confidential instructions?
- A. Yes. This step is only taken when a person fails to remain, in our opinion, in the category in which he was admitted to Canada.
- Q. In a sense then, you revoke his Student Entry Certificate if he fails to remain in the category of a student, as set out in these instructions that you claim are confidential?
- A. Yes.¹⁴⁷

Looking at the record as a whole, Freedman, J.A. concluded that it disclosed a hostile attitude on the part of the Special Inquiry Officer towards the applicant:

Perhaps in this case he convinced himself that Gooliah had become 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.¹⁴⁸

Successful attacks against deportation orders on the ground that the inquiry was tainted by bias have been rare. However, the *Gooliah* case was applied by the Immigration Appeal Board in its 1970 decision in *Janvier*.¹⁴⁹ Here the alleged bias appeared during a conversation between the Special Inquiry Officer and lawyers acting for the appellant. While the hearing was adjourned, the S.I.O. observed that "[e]very Haitian who comes to this country gives us trouble."¹⁵⁰ He went on to assert that such immigrants maintained their traditional life-styles after coming to Canada, that three or four families would live together, not spending anything but putting a lot of money in the bank, and after four or five years they would own a house and a car whereas after working for 25 years, he did not possess any of these things.¹⁵¹

In considering the standards to be applied in determining whether there was bias on the part of the officer, the Chairman of the Appeal Board referred to *Gooliah* and to various non-immigration decisions. She concluded that the S.I.O.'s observations on Haitian life-styles could not give rise to a suspicion of a reasonable likelihood of bias. The words might have been used in a complimentary manner, and the Chairman was not prepared to admit a statement by one of the lawyers to the effect that the emphasis with which the officer had spoken precluded such an interpretation:

[T]he test of real likelihood of bias is objective [*sic*] "the reasonable apprehension of a reasonable man apprised of the facts" and a court cannot go so far as to consider witnesses' impressions of the tone of voice or facial expression of the person making the statement complained of. The Court can go no farther than to examine the words used to see if they would arouse a reasonable apprehension of

¹⁴⁷ (1967), 63 D.L.R. (2d) 224 at 235.

¹⁴⁸ *Id.* at 236.

¹⁴⁹ *Janvier v. Minister of Manpower & Immigration* (1974), 7 I.A.C. 385.

¹⁵⁰ *Id.* at 389.

¹⁵¹ *Id.*

bias in the mind of a reasonable man. [The S.I.O.'s] remarks on the subject of immigrants generally cannot be said to arouse such a reasonable apprehension.¹⁵²

However, the other statement made by the Special Inquiry Officer, to the effect that all Haitians caused trouble, was regarded as more serious. The Board referred to a passage by Professor de Smith¹⁵³ in which the author asserted that:

general expressions of hostility towards a group to which a party belongs . . . do not disqualify . . . [unless] . . . an adjudicator expresses his general sentiments so vehemently as to make it likely that he will be incapable of dealing with an individual case in a judicial spirit . . . as where an arbitrator said that in his experience all persons of the nationality of one of the parties for him were untruthful witnesses¹⁵⁴

In the present case the Board concluded that the Special Inquiry Officer had:

expressed a sentiment or preconception respecting persons of Haitian nationality that can only lead to the irresistible conclusion that he was prejudiced against such persons to such an extent that he would be unable to act 'judicially' in the inquiries respecting [the appellant].¹⁵⁵

Such clear-cut instances of prejudice will undoubtedly be infrequent. More subtle forms of bias will be less easy to identify, often manifesting themselves in matters of attitude or emphasis which will not appear on the record.¹⁵⁶ As a minimum safeguard, however, it is suggested that *any* expression of hostility by a Special Inquiry Officer towards a racial or national group to which an applicant for admission belongs should operate to nullify the former's decision. Professor de Smith's more cautious approach to disqualification reflects an apparent faith in the ability of judges to put aside preconceptions which are extraneous to the matters before them. Even if we concede the validity of this somewhat dubious proposition, it seems unrealistic to expect an equivalent self-purification from immigration officials whose biases, if any, are unlikely to disappear as a result of daily exposure to those groups which are the focus of their prejudice. Furthermore, it is difficult to see how governmental adherence to principles of equal treatment in immigration matters can tolerate any level of actual or apparent departure from this standard.¹⁵⁷

C. THE CANADIAN BILL OF RIGHTS

The *Bill of Rights*¹⁵⁸ represented a flowering of concern for civil liberties in this country, but in the decade and a half since its proclamation in 1960 it has not had a profound impact upon our jurisprudence. The initial judicial

¹⁵² *Id.*

¹⁵³ de Smith, *supra*, note 44, 1st ed. at 152; cited (1974), 7 I.A.C. 385 at 396.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 401.

¹⁵⁶ It should also be noted that a failure to object promptly to bias on the part of the S.I.O. may preclude a later attack on the proceedings (*Id.* at 401).

¹⁵⁷ The government's commitment to a non-discriminatory immigration policy has been reiterated by the Minister in various public statements and is expressed in the Green Paper (*supra*, note 5) Vol. 1 at 17.

¹⁵⁸ S.C. 1960, c. 44 (received Royal Assent August 10, 1960).

response was to avoid direct pronouncements upon the Bill whenever an alternative basis for decision presented itself,¹⁵⁹ and to express doubt that it had created any new rights which were not found in existing laws.

As yet the Supreme Court has not addressed itself to the general question of the applicability of the *Bill of Rights* to immigration procedures. However, in the course of his judgment in *Curr*¹⁶⁰ — a case challenging the use of compulsory breathalyzer tests¹⁶¹ — Laskin, J. in considering the meaning of the phrase 'other authority' in s. 2(d) of the Bill observed that:

. . . taking the words 'other authority' in isolation, they have subject matter in such legislation as the Immigration Act . . . This Act provides that immigration officers may administer oaths and take evidence under oath in connection with the examination of persons seeking admission to Canada. It also provides for inquiries by a Special Inquiry Officer, likewise authorized to administer oaths and take sworn evidence, which may lead to an order of deportation. Even if the Special Inquiry Officer could be considered a 'tribunal' or a 'board' within s.2(d), it is my opinion that the immigration officer in his conduct of an examination fits more appropriately in the category of 'other authority' than in any of the categories of 'court, tribunal, commission or board'.¹⁶²

This passage suggests a willingness on the part of the present Chief Justice to assume that the *Bill of Rights* will apply to immigration procedures, but caution should probably be exercised before attaching undue weight to *obiter* observations which were made by way of illustrating the non-applicability of the Bill in a different context. One immigration case, *Rebrin v. Bird*,¹⁶³ was appealed to the Supreme Court shortly after the Bill's enactment. Here the substance of the complaint was that in reviewing an appeal against a deportation order, as he was at that time empowered to do, the Minister had been motivated by improper considerations. The legal effect, so the appellant now argued, had been to deny her due process. In dismissing her appeal, Kerwin, C.J.C. devoted only a brief paragraph to consideration of the *Bill of Rights*, whose applicability appears to have been assumed, although in the result the procedures adopted were found to have complied therewith.¹⁶⁴

Several lower court decisions have affirmed the applicability of the *Bill of Rights* to immigration proceedings, but they have at the same time found the proceedings in question to have conformed thereto.¹⁶⁵ Characteristically, where the *Bill of Rights* has been employed in tandem with natural justice to

¹⁵⁹ See Tarnopolsky, *The Canadian Bill of Rights* (Toronto: Carswell, 1966) at 95-98, and Tarnopolsky, *The Canadian Bill of Rights from Diefenbaker to Drybones* (1971), 17 McGill L.J. 437 at 442-43.

¹⁶⁰ *Curr v. The Queen* (1972), 26 D.L.R. (3d) 603. Abbott, Martland, Jackson, Hall, Spence and Pigeon, J.J. concurred with Laskin, J. Ritchie, J. (Fauteux, C.J. concurring) delivered a separate opinion.

¹⁶¹ *Canadian Bill of Rights*, s. 2(d).

¹⁶² (1972), 25 D.L.R. (3d) 603 at 618. See also: "The immigration officer[s] under the Immigration Act . . . in their character as officers presiding over an examination and an inquiry are carrying out duties of a different order than what a peace officer is empowered to do under s. 223(1) of the Criminal Code." (*per* Laskin, J., *id.* at 619):

¹⁶³ (1961), 27 D.L.R. (2d) 622 (S.C.C.).

¹⁶⁴ *Id.* at 626.

¹⁶⁵ *R. v. Wolfe, ex parte Vergakis*, [1965] C.C.C. 344; *Fouche v. Landry*, [1960] Que. P.R. 337; *Re Kokorinis* (1967), 60 W.W.R. 439; *Re Vinarao* (1968), 66 D.L.R. (2d) 736.

attack a deportation order, the tribunal concerned — whether the courts or the Immigration Appeal Board — has preferred to rest its conclusion upon the latter ground.¹⁶⁶ With the exception of two decisions by the Board, which will now be discussed, there appears to be no judicial authority refusing to apply the Bill to immigration matters. Several cases have resulted in the handing down of somewhat ambiguous reasons for judgment which on first reading might seem to adopt a negative stance, but on closer study these can be seen to have involved a finding that the evidence did not disclose any infringement rather than a suggestion that the *Bill of Rights* did not apply.¹⁶⁷

In two recent decisions the Immigration Appeal Board threw into doubt the relevance of the *Bill of Rights* in the immigration context. The first of these, *Cronan*,¹⁶⁸ involved an appeal against a deportation order based on s. 5(1) of the *Immigration Act*. The appellant argued that in ordering him deported for his past membership in the Communist Party, the Department had denied him a fair hearing as required by s.2(e) of the *Bill of Rights*. He had been informed that his prior political background constituted the reason for refusing him admission, but had been unable to obtain from the Department any indication as to how he could satisfy the Minister that he had ceased to be associated with any subversive organisation (which would have removed him from the prohibited class).¹⁶⁹ A large part of the judgment in *Cronan* is devoted to an analysis of the nature and scope of the Minister's discretion under s. 5(1), which was found to be non-reviewable in the absence of bad faith. However, the Board also considered the broader question of whether the *Bill of Rights* had any application to immigration matters. After acknowledging the undoubted fact that the basic character of Canadian immigration legislation is exclusionary, the Board concluded that the admission of aliens into Canada had to be seen as a privilege and not a right.¹⁷⁰ Consequently, the appellant could not claim the protection of the *Bill of Rights*:

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.

¹⁶⁶ See: *Dos Santos v. Minister of Manpower & Immigration* (1974), 7 I.A.C. 31; *Ho v. Minister of Manpower & Immigration* (1975), 8 I.A.C. 142; *Cylien v. Minister of Manpower & Immigration* (1975), 9 I.A.C. 72.

¹⁶⁷ E.g. *Re Shea*, [1970] 5 C.C.C. 107 (N.S. Sup. Ct.).

¹⁶⁸ *Cronan v. Minister of Manpower & Immigration* (1973), 3 I.A.C. 42.

¹⁶⁹ *Immigration Act*, s. 5:

No person . . . shall be admitted to Canada if he is a member of any of the following classes of persons . . . (1) persons who are or have been, at any time before or after the commencement of this Act, 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.

¹⁷⁰ (1973), 3 I.A.C. 42 at 79.

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.¹⁷¹

The Board then turned its attention to the possible complications for its right/privilege dichotomy which might arise from the statutory creation of a right of appeal for certain groups seeking admission to Canada. In *Cronan* the Minister had issued a certificate under s.21 of the *Immigration Appeal Board Act*,¹⁷² thereby precluding the Board from exercising its s.15 discretion in favour of the appellant. Did the issuance of such a certificate infringe Mr. Cronan's rights under s.2(e) of the *Bill of Rights*? The Board thought not:

The fact that Parliament has provided in the Immigration Appeal Board Act, which is the machinery and authority for the exercise of the right of appeal, an additional means and a privilege by which special relief under certain specified conditions can be granted does not make of that privilege an acquired right, nor is there any incompatibility, legal or otherwise, in having, in an Act which establishes a statutory right of appeal, a special section which provides for a remedy of exception through the exercise of discretionary powers by the Board for the solution of specific problems Parliament, in the wording of s.21 of the Immigration Appeal Board Act, distinguishes markedly, it would seem, between the statutory right of appeal in law from an order of deportation and the privilege of being granted special relief under s.15 of the same Act. The Minister's certificate under s.21 of the Immigration Appeal Board Act, therefore, cannot be considered as a denial of the determination of Mr. Cronan's right because the Board's discretionary power provided for in s.15 of the Immigration Appeal Board Act, as well as the admission of the appellant to Canada, are privileges and are not rights.¹⁷³

Perhaps surprisingly, the Board went on to suggest that "overriding the reasons already given on the subject . . . the very nature and purpose of the *Canadian Bill of Rights* make it readily and easily adaptable to the whole body of Canadian law, including the very restricted but complex sector of immigration law . . .",¹⁷⁴ and referred to the Bill's preamble as constituting a "built-in defensive shield against possible irrational and abusive interpretation of the universally accepted principles of the Bill".¹⁷⁵ In the result, the rationale underlying the *Cronan* decision, while not entirely clear, appears to rest upon the premise that even if the appellant's rights had been infringed, this was justified out of concern for the preservation of the body politic and, by implica-

¹⁷¹ *Id.* at 80.

¹⁷² *Cf. Re Prata, supra*, text at note 124, and *infra*, text at note 213.

¹⁷³ (1973), 3 I.A.C. 42 at 82.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 82-83. The Preamble to the *Bill of Rights* reads as follows:

The Parliament of Canada, affirming that the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions;

Affirming also that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law;

And being desirous of enshrining these principles and the human rights and fundamental freedoms derived from them, in a Bill of Rights which will reflect the respect of Parliament for its constitutional authority and which shall ensure the protection of these rights and freedoms in Canada. . . .

tion, human rights writ large. Without belabouring the issue, one might note the logical trap which awaits those who proceed along this particular analytical path.

The second Appeal Board case to consider in some depth the applicability of the *Bill of Rights* was *Jolly*.¹⁷⁶ Again the appeal involved a deportation order issued on the basis of s. 5(1). The appellant, a member of the Black Panther Party in the United States, contended that s. 5(1) infringed the guarantees of freedom of speech and freedom of the press found in ss.1(d) and 1(f) of the *Bill of Rights*. He also attacked the order on the ground that the evidence adduced at the inquiry did not support a finding that he was a member of the prohibited class in question. In a lengthy judgment, the Board rejected the contention that the *Bill of Rights* applied to the *Immigration Act*. Counsel for the Immigration Department had suggested that if the *Bill* were applicable at all, it could only assist persons who had already been lawfully admitted to Canada and were not resisting efforts to deport them: individuals seeking admission for the first time — even if physically present in this country — could not, he suggested, avail themselves of its protection. The Chairman was not prepared to accept this distinction:

Here [counsel for the respondent] seems to be making a distinction between the application of the *Bill of Rights* to an alien seeking admission to Canada, which Mr. Jolly was, and an alien in Canada presumably with some more permanent status than that enjoyed by Mr. Jolly when he applied for landed immigrant status. For the purposes of the *Bill of Rights*, I do not think this distinction is a valid one It seems to me that if the Canadian *Bill of Rights* applies to aliens as aliens it must apply to all aliens, regardless of their status in Canada or even if they have none.¹⁷⁷

The Board subsequently reiterated the conceptual distinction 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”.¹⁷⁸ Concern was also expressed that to apply the *Bill* to immigration procedures would result in “vitiating or rendering inoperative almost the whole of the *Immigration Act*”.¹⁷⁹

It is suggested that the Board may have over-dramatised the consequences of applying the *Bill of Rights* to immigration laws. In considering the extent of its reach, the obvious place to begin is with the language of the *Bill* itself.

¹⁷⁶ *Jolly v. Minister of Manpower & Immigration* (I.A.B. No. 72-3934, March 4, 1974, unreported). An appeal by the Minister was allowed by the Federal Court of Appeal on Feb. 13, 1975 and the case sent back to the Board for rehearing.

¹⁷⁷ *Id.* at 3-4.

¹⁷⁸ *Id.* at 9.

¹⁷⁹ In my view, the *Bill of Rights* applies to what may be termed the internal (federal) law of Canada (in respect of which it might well operate to protect aliens). It cannot be invoked to change a privilege (immigration or naturalization) to a right, which it was not at the time the *Bill* was passed and never has been. To hold that the rights guaranteed by the *Bill of Rights* extend to aliens, as aliens, would have . . . the effect of vitiating or rendering inoperative almost the whole of the *Immigration Act*, and this cannot have been the intent of Parliament. (*Id.* at 12).

Section 2 begins by stating that "Every law of Canada¹⁸⁰ shall, unless it is expressly declared . . . to operate notwithstanding the Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe . . . any of the rights or freedoms herein recognized and declared". It seems clear, therefore, that *prima facie* every federal law — including the Immigration Act — is subject to the Bill of Rights. Furthermore, the Supreme Court has indicated that s.1 "is given its controlling force over federal law by its referential incorporation into s.2".¹⁸¹ In its decision in *Jolly*, the Board appears to have merged two separate questions: first, is the *Bill of Rights as a legislative instrument* applicable to the *Immigration Act*, and secondly, if so, do any of the guarantees contained therein operate to invalidate a deportation order based on s. 5(1)?

If we concede for the moment the applicability of the *Bill of Rights* to the *Immigration Act* as a 'law of Canada', it then becomes necessary to examine the precise nature and reach of the guarantees which it enumerates. Section 1, which was relied upon by the appellant in *Jolly*, is declaratory of rights and freedoms 'in Canada'. With reference to the specific guarantees of freedom of speech and freedom of the press, it may be strongly suggested that *Jolly* was at no time denied the present or prospective enjoyment of these rights in Canada. A parallel might be drawn with the position of the individual convicted of a criminal offence in a foreign country, who seeks to enter Canada. Under s.5(d) of the *Immigration Act* the conviction, if it is for a crime involving moral turpitude, will operate to prohibit his admission. Evidence to the effect that he was denied due process at the trial in his own country (as would be guaranteed in Canada under s.1(a) of the *Bill of Rights*) would not improve his legal standing as a would-be immigrant to this country.¹⁸² The analogy is not perfect, because under s.5(d) Canada will generally accept the external classification of an act as criminal, whereas s. 5(1) refers to the existence of 'reasonable grounds' for believing that an organisation promotes or advocates subversion. In *Jolly*, the Board clearly indicated that the results of governmental proceedings abroad will not necessarily be a decisive factor in establishing such reasonable grounds. It refused to regard a transcript of hearings on the Black Panthers conducted by a Congressional Sub-Committee as proof that they advocated subversion 'or as proof of anything respecting the Black Panther Party'.¹⁸³ What needs to be emphasized,

¹⁸⁰ Emphasis added. S. 5(2) of the *Bill of Rights* provides:

The expression 'law of Canada' in Part I means an Act of the Parliament of Canada enacted before or after the coming into force of this Act, any order, rule or regulation thereunder and any law in force in Canada or in any part of Canada at the commencement of this Act that is subject to be repealed, abolished or altered by the Parliament of Canada.

¹⁸¹ *Curr v. The Queen* (1972), 26 D.L.R. (3d) 603 at 611, *per* Laskin, J.

¹⁸² See *Zuchelli v. Minister of Manpower & Immigration* (I.A.B. No. 69-196, June 25, 1969, unreported).

¹⁸³ *Jolly*, *supra*, note 182. Reasons for judgment of I.A.B. at 44. In reversing the Board's decision, the Federal Court of Appeal indicated that the Board had addressed itself to the wrong question. Instead of inquiring whether the evidence adduced would support a finding of "reasonable grounds" for believing the Black Panther to be an organization which promotes or advocates subversion, the Board had erroneously asked whether the evidence established that the Panthers were *in fact* a subversive organization. (See Federal Court of Appeal Reasons for Judgment, February 13, 1975, at 12).

however, is that in neither the s. 5(d) nor s. 5(1) situation can applicants expect the Canadian *Bill of Rights* retrospectively to envelop past actions committed abroad which would otherwise bar them from admission.

It is hardly surprising that difficulties should beset the Board in attempting to define the relevance of the *Bill of Rights* to immigration. In part these problems result from the failure of the Supreme Court to articulate with a clear voice the Bill's jurisprudential impact.

In *Drybones*,¹⁸⁴ which remains the only decision to strike down part of a federal statute on the grounds of its conflict with the Bill, Ritchie, J. in his majority judgment rejected the contention that s.2 was simply a rule of construction which could not operate to nullify substantive statutory provisions:

This proposition appears to me to strike at the very foundations of the *Bill of Rights* and to convert it from its apparent character as a statutory declaration of the fundamental human rights and freedoms which it recognizes, into being little more than a rule for the construction of federal statutes . . .¹⁸⁵

Neither did Ritchie, J. accept the interpretation which, appeared to have been favoured in an earlier Supreme Court decision,¹⁸⁶ to the effect that the rights and freedoms enumerated in the Bill were necessarily circumscribed by the laws of Canada as they existed on the date when the Bill came into effect.¹⁸⁷

The minority view in *Drybones* was exemplified by the dissent of Pigeon, J., who was of the opinion that s.2 was indeed simply an interpretative aid; and that reference in s.1 to human rights and fundamental freedoms 'recognised and declared' to 'have existed' in Canada precluded the possibility that the *Bill of Rights* had created any new rights or freedoms.¹⁸⁸ In spite of his implicit rejection of the Pigeon approach in *Drybones*, Ritchie, J. in his majority opinion in *Curr*¹⁸⁹ a few years later appeared to have come remarkably close to accepting the latter's narrower conception of the Bill, and it seems clear that the Supreme Court will remain reluctant to invalidate federal legislation through use of the *Bill of Rights*.¹⁹⁰ Accordingly, we may expect

¹⁸⁴ *R. v. Drybones* (1969), 9 D.L.R. (3d) 473 (S.C.C.).

¹⁸⁵ *Id.* at 481.

¹⁸⁶ *Robertson and Rosetanni v. The Queen* (1963), 41 D.L.R. (2d) 485.

¹⁸⁷ (1969), 9 D.L.R. (3d) 473 at 483-84.

¹⁸⁸ *Id.* at 490.

¹⁸⁹ *Curr v. The Queen* (1972), 26 D.L.R. (3d) 603 at 607, per Ritchie, J.:

I prefer to base this conclusion on my understanding that the meaning to be given to the language employed in the *Bill of Rights* is the meaning which it bore in Canada at the time when the Bill was enacted, and it follows that, in my opinion, the phrase 'due process of law' as used in s. 1(a) is to be construed as meaning 'according to the legal processes recognized by Parliament and the courts in Canada'.

¹⁹⁰ The recent decision of the Supreme Court in *Prata* (1975), 52 D.L.R. (3d) 383, (*supra*, note 124, *infra*, text at note 213) lends weight to this prognosis. The portents were perhaps signalled most clearly by the judgment of Laskin, J. in *Curr*. Although usually regarded as the member of the Court most likely to adopt a pro-civil rights stance, the present Chief Justice there cautioned that "compelling reasons ought to be advanced to justify the court . . . to employ [sic] a statutory (as contrasted with a constitutional) jurisdiction to deny operative effect to a substantive measure duly enacted by a Parliament constitutionally competent to do so . . .". (1972), 26 D.L.R. (3d) 603 at 613.

that a *modus vivendi* will usually be sought between the substantive policies of Parliament as embodied in legislation and the Bill's prescriptive norms, although, despite its reluctance to invalidate statutory provisions, the Court has been prepared on several occasions to nullify the legal consequences of particular proceedings where these were shown to have infringed clauses in the *Bill of Rights*.¹⁹¹

Undoubtedly, a resident alien will 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 view of immigration as a privilege is unduly formalistic and ignores the gradual accretion of rights to the individual as he forges ties with this country through lawful residence here. When official action is initiated¹⁹² to deport someone who has been admitted to this country and who may have resided here for some time, it would seem both consistent with community expectations and not unduly burdensome to require that the steps taken should conform to the norms embodied in ss.1 and 2 of the *Bill of Rights*. Indeed, much of the machinery established by the *Immigration Act* itself appears to embody aspirations entirely consistent with such an approach.

The legal status 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 or boat (in fact, for certain purposes he would be regarded as being within Canadian jurisdiction prior to disembarking), he is not lawfully 'admitted' until he has complied with all immigration requirements, including any necessary examination. It is difficult to contend, however, that an airport reception lounge is some sort of no-man's-land. Clearly, the airline terminal in Vancouver or Toronto and the dockside in Montreal are parts of Canada, to which *prima facie* all Canadian laws apply. For example, it is under the Canadian *Criminal Code* that charges would be laid in the event of an offence being committed within any of these areas. The fact that immigration remains a privilege to be conferred or withheld by the host state does not alter the reality that from the moment he steps on to Canadian soil, an arriving passenger becomes subject to various legal obligations and also acquires certain rights. Thus, he must submit himself for examination by immigration officers, but, if arriving from overseas, he is entitled to a hearing before a Special Inquiry Officer before he can be sent out of the country. We may therefore agree with the initial conclusion of the Immigration Appeal Board in *Jolly*¹⁹³ that no formal distinction should be drawn between the person applying for admission at a port of entry and the individual whose earlier status is about to expire and who is now seeking an extension thereof at an inland immigration office. But it needs to be emphasised once more that the suggested applicability of the *Bill of Rights* to both situations does not imply that the new arrival will in all respects be in the same position as the individual who has been a lawful resident here for some

¹⁹¹ E.g. *Brownridge v. The Queen* (1972), 28 D.L.R. (3d) 1; *Lowry and Lepper v. The Queen* (1972), 26 D.L.R. (3d) 224.

¹⁹² See *Immigration Act*, ss. 18 and 25.

¹⁹³ I.A.B. No. 72-3934, March 4, 1974, unreported.

months or years. The Bill, as a legal instrument, would govern all immigration proceedings within Canada, but its guarantees would not necessarily have a uniform impact on all immigrants.

In effect a three-tier level of protection can be seen to exist. By way of illustration, we may refer again to the consequences for an immigrant of a criminal conviction. An alien resident in Canada, who has earlier satisfied the requirements for lawful admission to this country, may become subject to deportation as a result of the making of a report under s.18 of the *Immigration Act* alleging that he has been convicted in Canada of a *Criminal Code* offence.¹⁹⁴ As well as reinforcing his procedural rights to a fair hearing under the *Immigration Act*, the *Bill of Rights* would permit him to attack the conviction if he could show, for example, that he had been denied the right to counsel during the criminal process.¹⁹⁵ He has, as it were, a two-fold guarantee: that the immigration proceedings themselves will conform to minimum standards of fairness and that the legal ground used to invoke them can itself withstand similar scrutiny. By contrast, a person arriving at a port of entry would be able to invoke only the first of these guarantees — *i.e.*, that the immigration proceedings must conform to the standards embodied in the *Bill of Rights*. As long as the basis for refusing admission, which will ordinarily involve events occurring outside of Canada, corresponds to one of the prohibitions listed in s.5 of the *Immigration Act*, the person concerned cannot expect the decision maker to evaluate its conformity to the Canadian *Bill of Rights*.¹⁹⁶ Thus if he has been convicted abroad of a crime involving moral turpitude, it will not avail him to claim that he had been denied counsel or otherwise been unfairly dealt with during his trial.¹⁹⁷ A third category — those persons who at all relevant times remain outside of Canada — will fall entirely outside the purview of the *Bill of Rights*, both with regard to the substantive basis for their exclusion and also the manner in which the decision to exclude was arrived at. As the Bill can have no extraterritorial effect, it will not assist the person who feels he has been unfairly denied a visa at an overseas immigration office.¹⁹⁸

It might be contended that these dividing lines are themselves arbitrary and bestow an unfair advantage upon the individual who, intent on settling permanently in Canada, is prepared to stake the cost of an airline ticket against a possible refusal of admission on arrival here. Admittedly, the gambler is not

¹⁹⁴ *Immigration Act*, s. 18(1)(e)(ii).

¹⁹⁵ *Bill of Rights*, s. 2(c)(ii).

¹⁹⁶ *Immigration Act*, s. 5(d).

¹⁹⁷ *Soares v. Minister of Manpower & Immigration* (I.A.B. No. 72-6220, Oct. 17, 1972, unreported).

¹⁹⁸ Under s. 17 of the *Immigration Appeal Board Act*, a Canadian citizen who sponsors a relative for admission to Canada may appeal to the Board against a refusal to approve the application. It might plausibly be suggested that although the intending immigrant remains outside Canada, he (or, more accurately, his sponsor) should be able to invoke the protection of the *Bill of Rights*. However, a possible conceptual hurdle arises from the lack of confluence in the right to appeal (which is possessed by the sponsor) and the interest affected (that of the overseas immigrant) which remains extra-territorial.

intrinsically deserving of preferential treatment over that afforded the person who remains in his own country and consistently follows the lawful but more protracted process of applying for an immigrant visa. But the former, however dubious his motives, has arrived in Canada and become subject to all its other laws. He should and probably will be deported if found to be in non-compliance with the *Immigration Act*, but it would surely be anomalous and short-sighted to conclude that in his case we need not adhere to standards of fair administration, which, while not part of our constitution, are nevertheless of broad constitutive significance.

Particular Guarantees under the Canadian Bill of Rights

s.1(a) 'the right . . . not to be deprived [of liberty or security of the person] . . . except by due process of law.'

s.2(e) '[. . . no law of Canada shall be construed or applied so as to . . .] 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.'

The place of due process as a cornerstone of the Canadian legal system is reaffirmed by s.1 (a) of the *Bill of Rights*, but the courts have been reluctant to attach any special significance to the term itself.¹⁹⁹ It appears that the various clauses of s.2 furnish in aggregate the particulars absent from s.1(a) and might therefore be expected to have a greater long-term impact upon judicial decision-making.²⁰⁰ However, a coherent body of judicial doctrine has been slow to emerge and its progress has not been significantly advanced by decisions in the field of immigration.

While its potential scope is arguably broader,²⁰¹ s.2(e) would appear at least to subsume the natural justice requirements of a full and unbiased hearing, and in fact, the subsection has on occasion been invoked in appeals to the Immigration Appeal Board, usually in conjunction with arguments based on natural justice. In *Turpin*²⁰² the appellant argued *inter alia* that the opportunity open to a Special Inquiry Officer to examine the entire file on a person subject to an inquiry, which might contain matters prejudicial to him and which he would have no opportunity to examine and answer, operated to deprive the individual of the right to a fair hearing as guaranteed by s.2(e). The Board avoided a direct pronouncement on the question presented by noting that there was no evidence in the instant case to indicate that the appellant had been prejudiced as a result of the Special Inquiry Officer's access to the file.²⁰³ In *Dos Santos*,²⁰⁴ natural justice and the *Bill of Rights* were also

¹⁹⁹ Brief mention was made of due process in the context of immigration in *Rebrin v. Bird*, [1961] S.C.R. 376. See further, Tarnopolsky, (1971), 17 McGill L.J. 437 at 457-58.

²⁰⁰ Tarnopolsky suggests that the 'right to a fair hearing' under s. 2(e) "has the potential of developing into the Canadian equivalent of the American 'due process of law' clause," but notes that "thus far it has received very little interpretation in Canada". (*Id.* at 470.)

²⁰¹ See Tarnopolsky, *id.* at 470 for a review of cases in which s. 2(e) has been invoked.

²⁰² *Turpin v. Minister of Manpower & Immigration* (1974), 6 I.A.C. 1.

²⁰³ (1974), 6 I.A.C. 1 at 12.

²⁰⁴ *Dos Santos v. Minister of Manpower & Immigration* (1974), 7 I.A.C. 31.

relied upon by an appellant in his attack upon a deportation order. In quashing the order, the Board in its reasons for judgment canvassed both ss.1(a) and 2(e) in addition to the precepts of natural justice. Beyond citing with apparent approval relevant passages from Tarnopolsky's standard work,²⁰⁵ however, it evidenced no inclination to inject any particular context into the clauses or to extend their scope beyond the safeguards which are already implicit in the concept of natural justice.²⁰⁶

s.2(c) [no law of Canada shall be construed or applied so as to] 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, [or]
- (ii) of the right to retain and instruct counsel without delay . . .

It is normal procedure to detain applicants for admission to Canada who, upon examination, appear to fall within one of the prohibited classes enumerated in s.5 of the *Immigration Act*. In the case of persons arriving from overseas, detention will be followed by a hearing before a Special Inquiry Officer. No conflict between the provisions of the *Immigration Act* and s.2(c) of the *Bill of Rights* will ordinarily arise: the Act clearly recognizes the right to counsel (though not necessarily legal counsel) at the inquiry,²⁰⁷ and the person concerned will usually be told why he is not admissible into Canada.

By contrast, persons arriving from the United States are not entitled to either an inquiry or the assistance of counsel, but only to such further examination as a Special Inquiry Officer may deem necessary.²⁰⁸ There is a clear judicial authority to the effect that a failure by the officer conducting the further examination to permit representation by counsel will not invalidate a subsequent deportation order,²⁰⁹ and the courts seem willing to assume that the purpose underlying those provisions in the immigration legislation which differentiate between the rights of persons arriving from overseas and individuals seeking admission from contiguous territory is a valid one, which they should not attempt to impede. For persons in the second category, who need only drive back over the bridge from Windsor to Detroit or some equivalent distance, any period of detention before their departure is likely to be brief and the impact of exclusion, while sometimes significant, will ordinarily be of a lesser magnitude than in the case of a passenger arriving from Europe or Asia. However, the arrival from the United States is denied important procedural safeguards which are available to other individuals, and unless permitted to make a voluntary departure he will, upon issuance of a deportation order

²⁰⁵ Tarnopolsky, *The Canadian Bill of Rights* (Toronto: Carswell, 1966). Cited in *Dos Santos* (1974), 6 I.A.C. 1, *passim*.

²⁰⁶ But see *Silvini* (1974), 6 I.A.C. 50 (*supra*, note 108 and accompanying text).

²⁰⁷ *Immigration Act*, s. 26(2). That the right to counsel may be satisfied through representation by a person other than a lawyer is supported by two decisions of the British Columbia Court of Appeal: *Re Vinarao* (1968), 66 D.L.R. (2d) 736; and *Re Kokorinis* (1968), 62 D.L.R. (2d) 438.

²⁰⁸ *Immigration Act*, s. 23(1).

²⁰⁹ *Ex parte Paterson* (1971), 18 D.L.R. (3d) 84 at 88 (B.C. Sup. Ct.); *Seroff v. Minister of Manpower & Immigration* (1973), 3 I.A.C. 95.

against him, be permanently prohibited from re-admission into Canada.²¹⁰ If, as appears likely, the volume of border traffic precludes the development of uniform exclusion procedures for all arriving passengers, it might be suggested that in situations where a deportation order has resulted from a minor or technical non-compliance with the provisions of the *Immigration Act* or Regulations, it should not operate as a bar against subsequent admission to Canada.

s.1(b) 'the right of the individual to equality before the law and the protection of the law'

Efforts to develop an all-purpose working definition of equality before the law have proven elusive, but at a minimum the concept embodies an expectation that like groups or individuals shall be treated in a like manner, and it militates against the denial of rights on the basis of functionally irrelevant group affiliation. We may properly discriminate between groups or individuals on the basis of criteria which are validated by their relevance to agreed social goals and values, and in this way the Ph.D. graduate will enjoy an understandable advantage over the high school drop-out in competing for various types of employment. What we will not tolerate — and the broad array of provincial human rights codes, as well as the Canadian *Bill of Rights*, attest to this developing consensus — is the denial to an individual of access to a specific position or resource — for example, employment or housing — on the basis of such unacceptable factors as race, colour or national origin.

To what extent have these expectations been translated into legislative and administrative action in the field of immigration? It must be acknowledged at the outset that our present immigration laws embody an extremely selective approach towards the granting of landed immigrant status (permanent residence) in Canada. The Immigration Regulations²¹¹ place a high premium on such factors as education, training, occupational skills and family relationships. It is inconceivable, however, that these considerations, which reflect values intrinsic to most if not all societies, would be deemed to deny equality before the law in any sense contemplated by the Canadian *Bill of Rights*.²¹² The legislation has created a hierarchy of preferred immigrant groups, but entry into a group is governed by the uniform application of clearly prescribed criteria and norms of assessment.

In the past Canada has undoubtedly shown a preference for immigrants

²¹⁰ *Immigration Act*, s. 35. The consent of the Minister is necessary before the subject of a deportation order can be admitted into Canada.

²¹¹ P.C. 1967-1616, ss. 31-33, as amended by S.O.R./74-113 and S.O.R./74-607.

²¹² P.C. 1967-1616, (ss. 31, 32 and 33) as amended by S.O.R./73-443, S.O.R./74-113 and S.O.R./74-607. There are three admissible classes of immigrant: sponsored, nominated and independent. The first category is confined to close relatives of Canadian citizens or residents, and once the requisite consanguinity has been established no further qualifications, save that of passing a medical examination, are required for admission (s. 31). Canadian citizens or residents may 'nominate for admission more distant relatives, but such persons must meet additional admission requirements, notably in the area of occupational skills and job demand (s. 33). Independent applicants — i.e. persons with no relatives in Canada — must achieve a somewhat higher score than nominated applicants under applicable norms of assessment (s. 32).

from certain regions and countries — notably the United Kingdom and Western Europe. These priorities have been reflected in the number and location of overseas immigration facilities, and the suggestion has on occasion been made that this uneven allocation of administrative resources in itself constitutes discrimination against individuals from certain, predominantly under-developed, regions. However reprehensible, it is difficult to see how such disparities can amount to a denial of equality before the law. The law remains the same and the norms of assessment identical for the immigrant from the Caribbean, Asia or Africa as for the English or French person.²¹³

Arguments based upon the alleged abrogation of s.1(b) by immigration procedures have met with little success before the courts.²¹⁴ The most important pronouncements are to be found in the recent case of *Prata*,²¹⁵ in which both the Federal Court of Appeal and the Supreme Court remained unpersuaded by the appellant's contention that in fighting a deportation order, he had been denied equality before the law at his appearance before the Immigration Appeal Board. It will be recalled from the earlier discussion of this case²¹⁶ that it involved an assertion by the appellant that the filing of a certificate under s.21 of the *Immigration Appeal Board Act* had deprived him of a full hearing before the Board, in that it purported to strip that body of its jurisdiction to consider his case under s.15 of the Act — the so-called 'equitable jurisdiction' clause. In dismissing his appeal, the Federal Court of Appeal rejected an argument based on s.1(b) of the *Bill of Rights*:

Certainly, the phrase 'equality before the law' has always suggested to me that one person must not be treated differently from another *under* the law. It is a novel thought to me that it is consistent with the concept of 'equality before the law' for Parliament to make a law that, for sound reasons of legislative policy, applies to one class of persons and not to another class. As it seems to me, it is of the essence of sound legislation that laws be so tailored as to be applicable to such classes of persons and in such circumstances as are best calculated to achieve the social, economic or other national objectives that have been adopted by Parliament. Application of a substantive rule of law to one class of persons and not to another cannot, as it seems to me, of itself, be objectionable discrimination from the point of view of s.1(b) of the Canadian *Bill of Rights*.²¹⁷

The Supreme Court has upheld the majority decision of the Federal Court of

²¹³ If we assume that the immigrant overseas does possess certain rights *vis-à-vis* Canada (which is probably not the case) he would appear to be in a position at best analogous to that of the plaintiff in a law suit who must contend with the delays and inconvenience resultant from a backlog in the court calendars.

A report in the *Montreal Gazette*, December 3, 1974, headed "Accord to boost Francophone Migrants", stated that "a new Quebec — Ottawa immigration agreement now being drafted is designed to increase substantially the flow of French-speaking immigrants to Quebec". At present this desired class is not granted any exemption from the general requirements for admission as an immigrant.

²¹⁴ *Re Prata and Minister of Manpower & Immigration* (1972), 31 D.L.R. (3d) 465 (Fed. C.A.), *aff'd* (1975), 52 D.L.R. (3d) 383 (S.C.C.). *Hatefi v. Minister of Manpower & Immigration* (1973), 3 I.A.C. 130; *Re Shea*, [1970] 5 C.C.C. 107 (N.S. Sup. Ct.).

²¹⁵ *Supra*, note 212.

²¹⁶ *Supra*, note 124.

²¹⁷ (1972), 31 D.L.R. (3d) 465 at 473, *per* Jackett, C.J.F.C. (Sweet, J. concurring). Thurlow, J. dissented.

Appeal,²¹⁸ though regrettably without addressing itself to the far-reaching questions which had been raised there in the dissenting judgment of Thurlow, J.²¹⁹

s.2(d) '[no law of Canada shall be construed or applied so as to] authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self incrimination or other constitutional safeguards.'

A potentially significant and as yet unresolved issue is the applicability to immigration proceedings of the protection against self-incrimination contained in s.2(d) of the *Bill of Rights*. In assessing an applicant's admissibility, the Immigration Department is forced to rely to a considerable extent upon information provided by the person concerned. The *Immigration Act* accordingly imposes a duty upon every individual to answer truthfully all questions put to him by an immigration officer, and provides that a failure to do so will be sufficient ground for deportation.²²⁰ This means that a person may be required to provide information about himself which can adversely affect his legal status.

²¹⁸ (1975), 52 D.L.R. (3d) 383. In his judgment for the Supreme Court, Martland, J. adopted the *Burnshine* approach in concluding that s. 21 of the *Immigration Appeal Board Act* was safe from attack because "it seeks to achieve a valid federal objective" (*id.* at 6). In *Burnshine* (1974), 44 D.L.R. (3d) 584, a clear majority of the Supreme Court (6:3) had upheld the indeterminate sentencing provisions of the *Criminal Code* in the face of a strong argument that by permitting the sentencing of juveniles in British Columbia to a prison term longer than that which could have been imposed upon adults or on juveniles elsewhere for the same offence, such persons were denied equality before the law. The Court (*per* Martland, J.) emphasized what it regarded as the legitimate rehabilitative policies underpinning the law (*id.* at 593). Predictably, the considerations of national security which underlie s. 21 of the *Immigration Appeal Board Act* were deemed no less worthy of judicial protection in *Prata*. Of course, as Laskin, J. noted in his dissent in *Burnshine* (*id.* at 589) the result of such an approach is to circumscribe the language of s. 1(b) of the *Bill of Rights*.

²¹⁹ Thurlow, J. dissenting, did not disagree that a valid purpose might be found to underlie the statutory exception, but he could not see his way around the fact that the person concerned was thereby denied the right to have his case for relief considered on the same basis as others:

In such a situation, as I see it, he is put at a disadvantage and treated more harshly than other aliens not on the basis of the applicability by its terms to disqualifying facts of his case of a defined rule of law, but on the basis of a rule of law becoming applicable to his case because of the filing of a certificate stating the opinion of two Ministers of the Crown following consideration by them of certain matters concerning him in a procedure in which the *audi alteram partem* rule has no place. Such a system of dealing with the problem of security may well be necessary but to my mind it does not afford to the individual equality before the law and the protection of the law and if it is not to contravene the Canadian Bill of Rights an express declaration that the statutory provisions creating it are to operate notwithstanding the Canadian Bill of Rights is required by s. 2 of that Act. (31 D.L.R. (3d) 465 at 477).

It is difficult to dispute Thurlow, J.'s conclusion that the person named in a s. 21 certificate is denied access to a form of relief which would otherwise be available to him. The suggestion that the discretionary nature of the Board's s. 15 powers means that the individual has not been denied any legal rights overlooks the importance of s. 15 as a form of relief and the Board's own clearly expressed position that it will invariably consider a case under s. 15 when requested, and indeed regards itself as obliged to do so: *Agouros* (1974), 6 I.A.C. 58.

²²⁰ *Immigration Act*, s. 19(2). See *Agiris v. Minister of Manpower and Immigration*, [1974] F.C. 290. S. 11(3) of the Act confers upon Special Inquiry Officers all the powers of a commissioner appointed under Part I of the *Inquiries Act*, including authority to summon witnesses, order the production of relevant documents and administer oaths.

In *Ex parte Vergakis*,²²¹ the applicant, a deserting seaman, challenged a deportation order which had been made against him, on the ground *inter alia* that the inquiry leading to the issuing of the deportation order had violated s.2(d) of the *Bill of Rights*. Prior to the inquiry charges had been laid²²² against him of failing to report to an immigration officer and coming into Canada by force or stealth. At the inquiry, the applicant refused to answer any questions on the ground that to do so would incriminate him in relation to these charges. The court dismissed his application for *certiorari*, holding that he was required to answer questions put to him and, had he done so, he would have been entitled to the protection of s.5 of the *Canada Evidence Act*, so that his answers could not have been subsequently used against him.²²³

If *Vergakis* is followed, as seems likely, it would appear to preclude an applicant for admission from utilising his possible future liability in other proceedings as a justification for refusing to answer questions at an inquiry. However, the decision leaves unresolved the separate question of whether the protection against self-incrimination in s.2(d) of the *Bill of Rights* can serve to immunize a person from the direct consequences — *i.e.*, deportation — of a refusal to answer questions at his initial examination. In *Curr*,²²⁴ Mr. Justice Laskin suggested that both the inquiry and the examination stages of the immigration process fell within the purview of s.2(d), but he gave no indication whether the subsection would operate to restrict the compellability which is clearly envisaged by s.19(2) of the *Immigration Act*.²²⁵ However, on the basis of the indication given by the present Chief Justice of Canada that he sees “no basis for introducing into administrative proceedings for deportation, albeit they are invested with the procedural safeguards of a judicial hearing, the very different considerations which govern criminal charges”,²²⁶ it may be doubted that any interpretation of the *Bill of Rights* which could have the effect of seriously compromising immigration procedures at ports of entry will be adopted.²²⁷

²²¹ *R. v. Wolfe ex parte Vergakis*, [1965] 1 C.C.C. 343.

²²² *Immigration Act*, ss. 50(a) and (b).

²²³ [1965] 1 C.C.C. 343 at 353.

²²⁴ (1972), 26 D.L.R. (3d) 603 at 618.

²²⁵ Whether the protection against self-incrimination afforded by s. 2(d) of the *Canadian Bill of Rights* extends to preclude compellability is considered in E. J. Ratushny, *Is There a Right Against Self Incrimination in Canada?* (1973), 19 McGill L.J. 1 at 72-74. The author concludes that s. 2(d) does not have this additional effect.

²²⁶ *Minister of Manpower and Immigration v. Brooks* (1973), 36 D.L.R. (3d) 522 at 525, *per* Laskin, J.

²²⁷ See *Devries v. Minister of Manpower & Immigration* (1975), 9 I.A.C. 1. In this case the Immigration Appeal Board rejected an appeal by noted author and *bon vivant* Xaviera Hollander, against a deportation order based upon s. 5(d) of the *Immigration Act*. At an inquiry under s. 22 of the Act, the Special Inquiry Officer had relied upon the appellant's book “The Happy Hooker”, and her affirmation of the factuality of certain events depicted therein as constituting an “admission” of various crimes involving moral turpitude. Counsel for the appellant argued unsuccessfully that the proceedings at which these admissions were elicited had violated s. 2(d) of the *Bill of Rights*. A further appeal to the Supreme Court of Canada was dismissed. See *Toronto Globe and Mail*, October 15, 1975, at 11: “Court Rejects Bid to Stay by Xaviera”.

Other Guarantees

A number of other clauses in the Canadian *Bill of Rights* have been considered, usually briefly, in challenges to deportation orders. The apparently immutable supposition²²⁸ that deportation proceedings are not criminal in nature means that s.2(f) of the Bill, which assures a person charged with a criminal offence of the right to be presumed innocent and to a fair and public hearing will not operate in regard to a special inquiry or other immigration procedures.²²⁹ It further appears that the attachment of a condition that he will not take employment to the release on bail of an applicant for admission does not constitute cruel and unusual punishment.²³⁰ The right to the assistance of an interpreter is guaranteed under existing immigration legislation²³¹ as well as by s.2(g) of the *Bill of Rights*.

D. SOME RESIDUAL QUESTIONS

The focus of this paper, and of most jurisprudence, has been upon the legal rights of persons at a port of entry or who are already in Canada. However, individuals intending to become permanent residents of this country will normally be required to obtain an immigrant visa before commencing their journey.²³² In the case of such persons, any denial of a visa will result from an administrative decision taken on the basis of information contained in the completed application form, supplemented by any other knowledge which the Department may have acquired about the applicant. Sometimes, though not always, the rejection of a visa application will be preceded by an examination of the individual at an overseas immigration office, but as someone who at all relevant times remains outside Canada, it is doubtful that he possesses any procedural rights *vis-à-vis* this country.²³³

The only example of judicial affirmation of at least a minimal standard of treatment for the overseas visa applicant is found in the Supreme Court decision in *R. v. Leong Ba Chai*.²³⁴ A naturalized Canadian sponsored the

²²⁸ *Vaaro v. R.*, [1933] 1 D.L.R. 359.

²²⁹ On the other hand, s. 2(d) is not expressly limited to criminal proceedings, and deportation – particularly as it affects persons already resident in Canada, who will usually have established family, personal and economic ties to this country, and notwithstanding *Vaaro*, [1933] S.C.R. 36 – frequently entails a disruption of life which is at least as great as that resulting from a prison sentence.

²³⁰ *Bill of Rights*, s. 2(a). *Lignos v. Minister of Manpower & Immigration*, [1972] F.C. 1301.

²³¹ Immigration Inquiries Regulations, S.O.R./67-621, s. 4.

²³² Immigration Regulations, s. 28(1).

²³³ Although not always the case in the past, it is now the usual practice of the Immigration Department to provide reasons, in general terms, for the refusal of a visa. For example, a letter informing an applicant that he cannot be issued with a visa may include reference to the failure of the applicant to meet current educational or employment requirements. A person who falls within one of the prohibited classes listed in s. 5 of the *Immigration Act* will be informed of this fact.

admission to Canada of his son, who was temporarily resident in Hong Kong. The Department of Citizenship and Immigration refused to process the application on the ground that the requisite family relationship had not been established. The Court was not prepared to countenance this peremptory rejection and, affirming the respondent's right to have his application fully considered under the *Immigration Act*, rejected the government's appeal against an order of *mandamus*.²³⁵ It is clear, however, that *Leong Ba Chai* went only so far as to affirm the right of an applicant to have his case *considered* in accordance with the provisions of the legislation. That it did not envisage any extension of his rights appears to have been borne out by a later decision of the High Court of Ontario in *Re Iantorno*.²³⁶ The applicant, an Italian who had been informed by letter that he would not be admitted to Canada because of his failure to comply with "the requirements of the Canadian regulations", sought an order of *mandamus* directing the Minister to order the holding of a special inquiry under what is now s.23 of the Act, hoping at such a hearing to elicit an explanation of the reasons behind his exclusion, which the Department had declined to divulge. In dismissing his action, Hughes, J. rejected the implicit contention that the procedural machinery established by the Act could be given an extra-territorial effect:

But do these sections apply to the applicant situated as he is, not at a port-of-entry, but in his country of origin? It seems clear to me from looking at [sections 22 and 23(2)] that both enactments contemplate the detention of the person seeking to come into Canada pending the inquiry for which a provision is made in this Part. The public reaction in a foreign country to any attempt on the part of a Canadian immigration officer to detain one of its nationals pending an inquiry by a Canadian official can be readily imagined and in my opinion the procedure contemplated by these sections only applies to actions to be taken at a Canadian point of entry . . .²³⁷

Mr. Iantorno might have been more than willing to accept any brief detention incidental to the holding of an inquiry at which his application could have been reviewed, but the judge's conclusion that such procedures were designed for domestic rather than overseas operation seems incontestable.

While various constraints, including the possibility of an appeal or of judicial review, not to mention the occasional press headline, may operate as a check upon the authority of domestic immigration officers, the powers of officials overseas to veto the admission to Canada as an immigrant of any individual remain largely unrestricted. One might consider whether some type of mechanism should be established to review denials of a visa. Such an approach has found little support in Canada²³⁸ or elsewhere, but it is not

²³⁴ [1954], 1 D.L.R. 401 (S.C.C.).

²³⁵ *Id.* at 404.

²³⁶ (1959), 123 C.C.C. 143, *aff'd* (1959), 124 C.C.C. 397 (Ont. C.A.).

²³⁷ *Id.* at 149-50.

²³⁸ It should be noted, however, that a Canadian citizen may appeal to the Immigration Appeal Board against the refusal of an application for the admission to Canada of a sponsored dependant: *Immigration Appeal Board Act*, R.S.C. 1970, c. I-3, s. 17. A right of appeal is not enjoyed by non-citizen sponsors, nor by the nominators (citizen or otherwise) of more distant relatives.

entirely without precedent. As one aspect of its review of immigration legislation, the United Kingdom in 1971 established procedures whereby an applicant overseas who was refused an entry clearance certificate (visa) could file an appeal to an independent review board in the United Kingdom.²³⁹

Of profound importance are the questions raised by the broad discretionary powers which are still possessed by the Minister and other senior immigration officials. For example, a person against whom a deportation order has been made will not be admissible to Canada except by consent of the Minister.²⁴⁰ Such a decision would appear to be of a purely administrative nature and therefore not subject to review in the absence of some evidence of bad faith. Similarly, the ability of many individuals to remain in Canada will depend upon their entitlement to take employment. In the case of non-immigrants, this will necessitate possession of an employment visa.²⁴¹ Again, an administrative decision, not subject to the constraints imposed by judicial review, would seem to be involved. The issue has not been squarely presented to the courts in the immigration context, but on the basis of certain analogous decisions, it seems unlikely that any redress is available to the individual who feels that he has been unjustly treated as a result of the exercise of ministerial discretion.²⁴²

This century has seen the emergence and maturation of a body of procedural safeguards for the person seeking to visit or remain in this country. However, aspects of the immigration machinery at ports of entry remain subject to persistent criticism, and in particular nagging doubts surround the adequacy of the special inquiry as an independent review procedure. While the vast majority of Special Inquiry Officers undoubtedly discharge their functions conscientiously and fairly, their role remains an uneasy mix of the prosecutorial and adjudicatory. Moreover, with the best will in the world the ability of an adjudicator to approach a case with an open mind is scarcely enhanced by his previous access to a file which may contain a mixture of factual data and untested assertions concerning the subject of the inquiry.

A considerable number of inquiries involve attempts by a visitor to persuade the Special Inquiry Officer of his intention to depart from Canada upon completion of his trip. Differences in language and culture undoubtedly compromise the ability of many individuals to present their own case in its most favourable light, and in such circumstances the availability of adequate representation, at reasonable cost to the person concerned, assumes particular importance.²⁴³

²³⁹ *Immigration Act* (U.K.), 1971, c. 77, s. 13, and *Immigration Appeals (Procedure) Rules* (U.K.), S.I. 1972-1684. Although not personally present to argue his case an appellant may be represented by counsel or a nominee, or alternatively may submit a written representation.

²⁴⁰ *Immigration Act*, s. 35.

²⁴¹ *Immigration Regulations*, Part I, Amendment S.O.R./73-20.

²⁴² See e.g. *R. v. Smythe* (1971), 19 D.L.R. (3d) 480 (S.C.C.) See also *Howarth v. National Parole Board*, [1973] F.C. 1018.

²⁴³ Ottawa acknowledged its interest in this question by funding duty counsel schemes at Toronto and Montreal airports, in the summers of 1974 and 1975 respectively. Under these programs, legal advice and representation was made available to arriving passengers who initially failed to satisfy an immigration officer of their eligibility for admission.