

Fundamental (In)Justice: The Deportation of Long-Term Residents from Canada

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Cohen, Russell P.. "Fundamental (In)Justice: The Deportation of Long-Term Residents from Canada." *Osgoode Hall Law Journal* 32.3 (1994) : 457-501.

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Fundamental (In)Justice: The Deportation of Long-Term Residents from Canada

Abstract

Under the Immigration Act, permanent residents and illegal immigrants may, for a number of reasons, be deported from Canada for life. Even after residing in this country for many years, immigrants without the formality of citizenship enjoy only a limited right to remain. The author argues that deportation violates an immigrant's right to life, liberty and security of the person under section 7 of the Charter. And where that person has established fundamental connections with Canada, through family relations, education, employment, culture, etc., deportation, moreover, is not in accordance with the principles of fundamental justice. In determining the principles of fundamental justice as they apply to the deportation of immigrants, the common law alone must not be determinative; one must look to a multitude of sources. These would include other provisions of the Charter, the jurisprudence of free and democratic societies, and customary and conventional international law. All of these sources, when considered together, point to an enhanced recognition of a right to remain for long-term residents.

FUNDAMENTAL (IN)JUSTICE: THE DEPORTATION OF LONG-TERM RESIDENTS FROM CANADA^o

BY RUSSELL P. COHEN*

Under the *Immigration Act*, permanent residents and illegal immigrants may, for a number of reasons, be deported from Canada for life. Even after residing in this country for many years, immigrants without the formality of citizenship enjoy only a limited right to remain. The author argues that deportation violates an immigrant's right to life, liberty and security of the person under section 7 of the *Charter*. And where that person has established fundamental connections with Canada, through family relations, education, employment, culture, etc., deportation, moreover, is not in accordance with the principles of fundamental justice. In determining the principles of fundamental justice as they apply to the deportation of immigrants, the common law alone must not be determinative; one must look to a multitude of sources. These would include other provisions of the *Charter*, the jurisprudence of free and democratic societies, and customary and conventional international law. All of these sources, when considered together, point to an enhanced recognition of a right to remain for long-term residents.

La *Loi sur l'immigration* précise que les résidents permanents et les immigrants illégaux peuvent bien être, pour plusieurs raisons, déportés du Canada à perpétuité. Même après avoir passé plusieurs années dans ce pays, les immigrants n'ayant pas de citoyenneté officielle ne jouissent que d'un droit limité de rester. L'auteur propose que la déportation viole les droits d'un immigré à la vie, à la liberté, et à la sécurité de la personne, garantis à l'article 7 de la *Charte*. Si un individu établit des liens fondamentaux avec le Canada, par rapport à la parenté, à l'éducation, à l'emploi, à la culture, etc., la déportation n'est surtout pas conforme aux principes de justice fondamentale. En déterminant les principes de la justice fondamentale comme ils s'appliquent à la déportation des immigrants, la common law n'est pas déterminante; il faut examiner un grand nombre de sources. Parmi ces sources devraient être les autres articles de la *Charte*, la jurisprudence des sociétés libres et démocratiques, le droit coutumier, et le droit international. Toutes ces sources, si considérées ensemble, mènent à la reconnaissance pointue d'un droit de rester pour les résidents de longue durée.

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I. INTRODUCTION

Under section 6(1) of the *Canadian Charter of Rights and Freedoms*,¹ only citizens have the "right to enter, remain in and leave Canada."² The constitutional recognition of this right to remain ensures that no legislation may be passed that allows for the exile, banishment, or deportation of citizens; a result which accords with various international instruments decrying such expulsion.³ Pursuant to section

¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c.11 [hereinafter the *Charter*]. See also the *Citizenship Act*, R.S.C. 1985, c. C-29.

² Prior to its constitutionalization, a citizen's right to remain was implicitly recognized by the *Immigration Act*, R.S.C. 1985, c. I-2, which makes no provision for the deportation of citizens. Section 5(1) of the *Act* states that "no person, other than a person described in s. 4 [Canadian citizens and permanent residents who are not described in s. 27(1)], has a right to come into or remain in Canada."

³ For the relevant provisions of the international instruments see Arts. 12(2) and (4) of the *International Covenant on Civil and Political Rights*, Can. T.S. 1986 No. 47 [hereinafter the *ICCPR*] (The *ICCPR* was concluded on 16 December 1966 and came into force in Canada on 19 August 1976); Prot. Art. 4 and Arts. 2 and 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (European Convention on Human Rights) 213 U.N.T.S. 222 [hereinafter the *European Convention*] (The *European Convention* was concluded on 4 November 1950 and came into force on 3 December 1953); and Art. 13 of the *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) Art. 13 [hereinafter the *UDHR*] (The *UDHR*

1 of the *Charter*, this right “is subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Extradition has been held by the courts to be one such limit prescribed by law.⁴

Permanent residents,⁵ although vested with a limited right to enter and remain under the *Immigration Act*, do not enjoy a constitutional right to remain. They may be removed from Canada for a breach of any of the conditions imposed under the *Act*. Furthermore, deportation is the *only* order that can be made with respect to permanent residents who have violated the *Act*, regardless of how long they have lived in Canada.⁶ Deportation differs from extradition in so far as its duration is not fixed by the punishment faced abroad; it is a punishment of unlimited duration.⁷ Return is only possible with ministerial permission.⁸

Other individuals who have lived in Canada for long periods of time without legal status⁹ may also be deported. And while it is within an adjudicator’s discretion to mitigate the penalty in those cases by substituting a departure order,¹⁰ only permanent residents can appeal a

was concluded on 10 December 1948).

⁴ See *Re Federal Republic of Germany and Rauca* (1983), 41 O.R. (2d) 225 (C.A.). In that case, extradition for alleged war crimes was upheld as a justifiable limitation to s. 6(1). Extradition has also been justified as a reasonable limit on other constitutional grounds: see *Canada v. Schmidt*, [1987] 1 S.C.R. 500, in which an argument of double jeopardy was rejected; *Argentina v. Mellino*, [1987] 1 S.C.R. 536, in which an argument of unreasonable delay was rejected; *United States v. Allard*, [1987] 1 S.C.R. 564 in which an unreasonable delay argument was again rejected; and *Kindler v. Canada*, *infra* note 7, in which a cruel and unusual punishment argument and a s. 7 argument were rejected. See also Hogg, *infra* note 13 at s. 43.1(b).

⁵ Under s. 2(1), a permanent resident is defined as a person who (a) has been granted landing, (b) has not become a Canadian citizen, and (c) has not ceased to be a permanent resident.

⁶ See s. 32(2): “Where an adjudicator decides that a person who is the subject of an inquiry is a permanent resident described in subsection 27(1), the adjudicator *shall* ... make a deportation order against that person” [emphasis added]. The sole exception is that residents who have violated a condition of their landing may be subject to a departure order only, s. 32(2.1) (which allows for return to Canada immediately following departure).

⁷ Of course, as in *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779 [hereinafter *Kindler*], where the punishment faced is the death penalty, extradition is indeed of a duration comparable to that of deportation.

⁸ Section 55(1) of the *Act* states that “where a deportation order is made against a person, the person shall not, after he is removed from or otherwise leaves Canada, come into Canada without the written consent of the Minister.”

⁹ By doing so, that person has violated the *Act* and can be reported under s. 27(2).

¹⁰ Section 32(6) provides for the deportation of those persons described in s. 27(2); however, subject to s. 32(7), under most circumstances, including that of visitors who overstay, the adjudicator may issue a departure order.

deportation order. Such an appeal would, under section 70(1), be directed to the Immigration Appeal Division (IAD) on the grounds of law, fact, or equitable considerations.¹¹

This paper will examine the constitutionality of the deportation of long-term residents. It will be argued that deportation, under certain circumstances, violates section 7 of the *Charter*. Section 7 states:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The application of section 7 is generally agreed to be a two-step process.¹² Step one of the analysis is to determine whether life, liberty or security of the person have been violated. Step two of the analysis is to determine whether any such violation is in accordance with the principles of fundamental justice. While the courts have, thus far, largely limited themselves to questions of procedural, rather than substantive, justice, this paper will explore the substantive ramifications of section 7. Principally, it is argued that for long-term residents who have become rooted in Canada through their families, communities, and employment, and have little connection to their countries of nationality, deportation is a violation of liberty and security of the person. Moreover, these violations are not in accordance with the principles of fundamental justice.

As arguments that deportation violates sections 12 and 15 of the *Charter* have been considered elsewhere, I will not raise them again here. Nor will I examine section 1 of the *Charter* as all of the factors that would be considered in a section 1 analysis ought also to be considered in a section 7 argument. That is, the identification of the principles of fundamental justice within a particular context and the balancing of individual and state interests, as required under section 7, render much of a section 1 analysis superfluous for the purposes of this paper. It should be noted, however, that the courts have regularly proceeded to a

¹¹ Under particular circumstances involving national security, suspected organized criminal activity, or the deportation of persons responsible for state-sponsored terrorism or human-rights abuses, there shall be no appeal on equitable grounds (s. 70(4)). The constitutionality of the security certificate and of the limited right of appeal was considered in *Chiarelli*, *infra* note 15. Immigration Minister Sergio Marchi has recently announced proposed amendments to the *Act* which would also deny a right of appeal on equitable grounds to those persons convicted of serious criminal offences.

¹² See Evans, *infra* note 51 at 53-55.

section 1 justification in section 7 cases, often retracing many of the steps taken in the earlier analysis.¹³

Immigration law is undergoing significant change. The reasons for this are many and include, among other things, the significant role of immigration for Canada; an increasing acknowledgement by the courts of the profound individual interests engaged by the immigration process; the economic and social globalization, which has resulted from new information technologies and the movement of persons; and, perhaps most importantly, significant shifts in the broader areas of administrative and constitutional law in Canada. This trend must be contrasted with the persuasive and persistent grip of state sovereignty which underlies and continues to influence immigration decisions to a significant degree. Immigration law is thus at a cross-roads: after its early *Charter* victory in *Singh v. Canada (Minister of Employment and Immigration)*,¹⁴ which granted a right to an oral hearing for refugee claimants, the decision of the Supreme Court of Canada in *Chiarelli v. Canada (Minister of Employment and Immigration)*¹⁵ signals an unfortunate set back.¹⁶

In *Chiarelli*, a case that considered, *inter alia*, the constitutionality of the deportation of a long-term resident, the Court failed to recognize the constitutional significance of such state action on the individual. First, the Court inadequately assessed the individual interests that are affected by the deportation of a long-term resident. Second, in looking only to the common law and principles of sovereignty, the Court failed to consider the multiple and varied sources of the principles of fundamental justice. Finally, in determining whether deportation accorded with those narrowly-defined principles, it failed to balance effectively the individual's interests against those of the state. The Court, in relying upon sovereignty as the ultimate source of authority over aliens, effectively foreclosed any countervailing argument drawing upon the significance of long-term community life. However, *Chiarelli*

¹³ As Peter Hogg asks, "Could a law that violated the principles of fundamental justice still be upheld under s. 1 as a reasonable limit prescribed by law that could be demonstrably justified in a free and democratic society?" After citing the *obiter* views of both Lamer J. (as he then was), suggesting that a law *could* be justified, and of Wilson J., suggesting that it *could never* be justified, Hogg concludes that "the Supreme Court of Canada has routinely applied s. 1 before holding that a breach of s. 7 invalidated a law. The s. 1 justification has been upheld in minority opinions, but never by a majority of the Court": P.W. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) at s. 35.14(b).

¹⁴ [1985] 1 S.C.R. 177 [hereinafter *Singh*].

¹⁵ [1992] 1 S.C.R. 711 [hereinafter *Chiarelli*].

¹⁶ This may be seen as part of a wider movement in later decisions of the Court, with the departure of the civil libertarian leadership of Dickson C.J. and Wilson J.

also concerned the issuance of a security certificate and the resultant attenuated right of appeal and perhaps it can be distinguished in future cases on those grounds.

As I shall argue below, the Supreme Court should take a new look at the constitutionality of the deportation of long-term residents. In doing so, it is incumbent on the Court to engage in a meaningful balancing of the individual's interests—not to be severed from family, community, and employment—against the state's interest in order and safety. Only in this way may the Court ever hope to justify the harsh and differential treatment afforded to immigrants when compared with nationals convicted of similar criminal acts.

In this paper, I shall first examine the traditional sources and the role of the deportation power. This will include an examination of the relevant case law, and the slow change gradually taking hold at the Federal Court. In the latter part of this paper I shall discuss the direction that this transformation should take. I shall outline a reconsideration of deportation under the *Charter*, concluding that under certain circumstances, particularly in the case of long-term residents, deportation is not in accordance with the principles of fundamental justice. Throughout this paper I refer to long-term residents. I am referring primarily to permanent residents; however, long-term illegals are also subject to deportation—regardless of how well established in Canada—and raise many similar concerns. In fact, since illegals do not have the benefit of an appeal before an independent tribunal, their plight is worse than that of permanent residents. Admittedly, there are many unique problems faced by illegal residents that would justify separate consideration; however, this paper is not the forum for that discussion. The distinction made between citizen and permanent resident for the purpose of constitutional recognition is a dubious and formalistic one. Similarly, procedural differences in the treatment of permanent residents and long-term illegals under the *Immigration Act* should also be treated as suspect.

The seriousness of the impact of deportation on a deportee and his or her family must be recognized. And immigration law, in both procedure and substance, must accord with those principles that are enshrined in our constitution. The Supreme Court should abandon principles drawn from what Peter Schuck labels "classical immigration law"—"the realm in which government authority is at the zenith and individual entitlement is at the nadir"¹⁷—and recognize fully, as does

¹⁷ P. Schuck, "The Transformation of Immigration Law" (1984) 84 Col. L. Rev. 1 at 1.

Schuck, that “[i]mmigration is gradually rejoining the mainstream of our public law.”¹⁸

II. DEPORTATION UNDER THE IMMIGRATION ACT

A. *Who is Deported and How?*

Under the *Immigration Act*, a permanent resident may be removed if they fall under one of four general categories:¹⁹

- a) Those persons who pose a danger to the Canadian public because of their criminal activity.
- b) Those persons who engage in unacceptable political activity or are considered a threat to national security.
- c) Those persons who pose a danger to Canadian social services.
- d) Those persons who have failed to comply with requirements of the *Immigration Act*.²⁰

If it is believed that a permanent resident falls under one of the above categories, “[a]n immigration officer or a peace officer shall forward a written report to the Deputy Minister setting out the details of any information”²¹ indicating that a permanent resident is described under one of the heads of section 27(1). Those heads generally correspond to the list set out above. Pursuant to section 27(3), the Deputy Minister then determines whether a report will be forwarded to an inquiry.

If an inquiry is commenced, a member of the Adjudication Division of the Immigration and Refugee Board will determine, first, if the permanent resident is a “person described” under section 27(1). If it is found that the permanent resident falls under any of the paragraphs of section 27(1), then, pursuant to section 32(2), “the adjudicator *shall*, subject to subsections (2.1) and 32.1(2), make a deportation order against that person” [emphasis added]. The only exception is with respect to permanent residents who have breached a condition of their landing; they may be subject only to a departure order. Other persons who have violated the *Act*, but who are not permanent residents, face a similar proceeding before an adjudicator.

¹⁸ *Ibid.* at 90.

¹⁹ See, generally, s. 27(1).

²⁰ L. Waldman, *Immigration Law and Practice* (Toronto: Butterworths, 1992) (looseleaf) at § 6.19.

²¹ s. 27(1).

Only permanent residents who are ordered deported are entitled to an appeal before the IAD on factual, legal, and equitable grounds.²² With respect to equitable grounds, the IAD has a very broad discretion, taking into account "all the circumstances of the case."²³ Accordingly, the IAD will consider a broad range of factors, which are usefully set out in the decision of the former Immigration Appeal Board in *Ribic v. Canada (Minister of Employment and Immigration)*.²⁴

These circumstances include the seriousness of the offence or offences leading to the deportation and the possibility of rehabilitation or in the alternative, the circumstances surrounding the failure to meet the conditions of admission which led to the deportation order. The Board looks to the length of time spent in Canada and the degree to which the appellant is established; family in Canada and the dislocation to that family that deportation of the appellant would cause; the support available for the appellant not only within the family but also within the community and the degree of hardship that would be caused to the appellant by his return to his country of nationality. While the general areas of review are similar in each case the facts are rarely, if ever, identical.²⁵

The factors to be considered by the IAD are comprehensive; however, their decisions are largely discretionary. As such, reviewing courts have repeatedly stated that they will not scrutinize too closely the exercise of the IAD's equitable jurisdiction.²⁶ I will return to the *Ribic* criteria, below.²⁷

Given the vast scope of the immigration programme in Canada, it is difficult to determine precisely how many residents are deported each year. According to the Ministry of Citizenship and Immigration,

²² Section 70(1). Pursuant to s. 70(4), however, where a deportation order is made against a person with respect to whom a security certificate referred to in ss. 40(1) or 40.1(1) has been issued, or a person who has been determined to be a member of an inadmissible class described in ss. 19(1)(c.2) (d), (e), (f), (g), (j) (k), or (l), an appeal may only be brought on a question of law, or fact, or mixed law and fact. See, for example, *Chiarelli*, *supra* note 15.

²³ Section 70(1)(b).

²⁴ (1985), (I.A.B. T84-9623) [hereinafter *Ribic*].

²⁵ *Ibid.*

²⁶ See *Boulis v. Canada (Minister of Manpower and Immigration)* (1972), [1974] S.C.R. 875 at 885, where Laskin J. (as he then was) stated that the Board's "reasons are not to be read microscopically; it is enough if they show a grasp of the issues that are raised by s. 15(1)(b) and of the evidence addressed to them, without detailed reference." He was referring to s. 15(1)(b), the former source of the Board's equitable jurisdiction under the *Immigration Appeal Board Act*, R.S.C. 1970, c. I-3.

Whether the courts should be interfering with the decisions reached by a specialized tribunal raises many difficult policy issues. This rich debate, however, will not be considered here.

²⁷ See Part IV, below.

approximately 4,500 removal orders issue each year.²⁸ These would include deportation orders, as well as exclusion and departure orders issued against residents, refugees, visitors, and those in Canada without status. Annual reports of the Immigration and Refugee Board (IRB) give a better sense of the number of deportations, specifically, occurring each year.²⁹ In 1992, for example, the IAD heard 335 appeals of removal orders issued by adjudicators. Of those cases appealed, 140 were dismissed and 52 were abandoned or discontinued. Thus, up to 192 permanent residents could have been deported in that year.³⁰ (Though a permanent resident has an appeal by right, it is presumed that not all deportees pursue an appeal.) The numbers, considering the size of the immigration scheme, are not great. However, any number of those persons deported might be forced to sever family, community, employment, and other significant ties to Canada and to Canadian citizens.

B. *Sovereignty: The Source and Role of the Deportation Power*

Historically, deportation has been used against those persons deemed unfit to live within a country. The long-standing persuasiveness and unquestioned authority of this position was illustrated by the Supreme Court of Canada in *Kindler*, where La Forest J. stated:

The government has the right and duty to keep out and to expel aliens from this country if it considers it advisable to do so. This right, of course, exists independently of extradition. If an alien known to have a serious criminal record attempted to enter into Canada, he could be refused admission. And by the same token, he could be deported once he entered Canada. This basic state power was described by Lord Atkinson in *Canada (A.G.) v. Cain*, [1906] A.C. 542 (P.C.) at p. 546:

²⁸ Conversation with Kevin Sack, Ministry of Citizenship and Immigration, Public Affairs (6 April 1994). The total number of annual removals are as follows: 1991-92—3,423; 1992-93—4,682; 1993-94 (to April 1994)—4,401; 1994-95 (projected)—5,100.

²⁹ Immigration and Refugee Board, Annual Report 1992 (Ottawa: IRB, 1992) at 24. For 1989-91, see the Annual Report for 1989-91 (Ottawa: IRB, 1989-1991). The numbers for previous years are as follows: 1991—116 dismissed, abandoned, or discontinued; 1990—100 dismissed, abandoned, or discontinued; 1989—120 dismissed, abandoned, or discontinued. Note that these numbers would also include appeals, pursuant to s. 70(2), by convention refugees, persons with valid immigrant visas seeking landing, and persons with valid visitors' visas seeking entry.

³⁰ The issuance of a deportation order does not necessarily mean that the order will be executed. There are certain countries to which the Minister will not return deportees unless there is evidence of criminality or concerns regarding national security.

One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State ... and to expel or deport from the State, at pleasure, even a friendly alien. ...

If it were otherwise, Canada could become a haven for criminals and others whom we legitimately do not wish to have among us.³¹

This statement was adopted by Sopinka J., writing for the Court in *Chiarelli*. He added that “[t]he most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country. At common law an alien has no right to enter or remain in the country.”³² This all-powerful notion of sovereignty that took hold in the nineteenth century has held an iron grip on immigration; its dubious sources have, for the most part, gone unquestioned.

James Nafziger thoughtfully revisits this issue and concludes that “[t]he proposition that states have an absolute right to deny territorial access to all aliens has unusual resilience and resonance, but little historical or jurisprudential foundation.”³³ While I do not intend to engage in a critique of the questionable origins of a state’s right to exclude and remove, suffice to say that it is rooted in imprecise legal doctrine, fears of threatened state security, and, in some cases, overt racism.³⁴ Immigration control also served as a means of managing the labour supply and maximizing profit. As Barbara Roberts writes in her study of deportation from Canada, deportation “maintained a balance between the need for cheap labour in times of economic expansion, and the desire to cut welfare costs in times of economic contraction.” It also served to control political dissent when it was exercised by the state upon those who “upset or threatened the system.”³⁵

As I shall argue, for deportation to pass constitutional muster it must be in accordance with the principles of fundamental justice.

³¹ *Kindler*, *supra* note 7 at 202-03.

³² *Chiarelli*, *supra* note 15 at 733.

³³ “The General Admission of Aliens Under International Law” (1983) 77 *Am. J. Int’l L.* 804 at 841.

³⁴ See, for example, the early American cases interpreting the overtly racist “Chinese Exclusion Law.” In *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581 (1889), exclusion was held to be acceptable if it protected the United States from any threat. The threat in this case involved “an Oriental invasion” (595), “vast hordes,” and “the presence of foreigners of a different race in this country, who will not assimilate with us” (606).

³⁵ *Whence They Came: Deportation from Canada 1900-1935* (Ottawa: University of Ottawa Press, 1988) at 8-9. Roberts also explores the role of deportation in controlling political dissent through the removal of Communists, and others.

However, one such principle, sovereignty, has too often led to fundamentally unjust results in immigration cases. In light of this troubling history, sovereignty must be critically re-examined. Sovereignty, and its interpretation at common law,³⁶ ought only to be understood as one of the principles of fundamental justice among a wide variety of sources that ought to be considered.

C. Administrative Sanction not Punishment

The state's prerogative power to exclude and remove aliens, as exercised by the executive, has largely been immune from vigorous judicial scrutiny. Recognized by the courts as a mere administrative sanction, intuitively, it seems difficult not to see deportation as a punishment of the highest order. The effect of this suspect classification of deportation is profound: it maintains and enforces the proposition that immigration is an administrative state benefit and that, therefore, immigrants possess no rights. While the language of administrative/judicial and benefit/right may seem antiquated in the post-*Nicholson*³⁷ era, it still lingers with great resilience in immigration law. In *Hurd v. Canada (Minister of Employment and Immigration)*,³⁸ for example, the Federal Court of Appeal in discussing deportation stated that "[i]t may, in particular circumstances, amount to a grave, personal disadvantage, but not to the kind of larger-than-merely-personal disadvantage. ... Deportation is analogous, rather, to a loss of a licence."³⁹

The characterization of deportation as analogous to the loss of a licence fails to capture the significance of the *Nicholson* holding: the Federal Court does not consider the seriousness of the impact on the deportee in more than a cursory way. Moreover, in *Singh* Justice Wilson explicitly rejected the distinction between rights and privileges for the purpose of a *Charter* analysis.⁴⁰ Deportation cannot be equated with

³⁶ For a discussion of Blackstone's commentary on the status of aliens at common law see *Canepa*, *infra* note 65 at 275-76.

³⁷ *Nicholson v. Haldimand-Norfolk Reg. Board of Police Commrs.*, [1979] 1 S.C.R. 311 [hereinafter *Nicholson*]. Citing *Bates v. Lord Hailsham*, [1972] W.L.R. 1373, Laskin C.J.C. quoted Megarry J., at 324: "in the sphere of the so-called quasi-judicial the rules of natural justice run, and ... in the administrative or executive field there is a general duty of fairness."

³⁸ (1989), 90 N.R. 31 [hereinafter *Hurd*].

³⁹ *Ibid.* at 38.

⁴⁰ For a more detailed discussion of this point, see text accompanying note 79.

losing a job, a licence, or government benefit; it does, however, encompass all of those interests, with a concomitant loss of family, community, and, in a word, liberty.

In practical terms, deportation lies much closer to traditional notions of punishment than to administrative sanction. It is a punishment, though directed at immigrants, that often results in significant hardship and suffering for family members and friends, who may in fact be citizens. In a study of deportation and the immigration power in Australia, David Wood writes that, in some cases, losing the right to live in what has become one's homeland can be a deprivation even more serious than imprisonment. But despite the severity of its impact, deportation is generally overlooked as a serious form of punishment.⁴¹ The reason for the courts' persistent characterization of deportation as less than serious stems from a number of sources. It is in part rooted in the reluctance of the judiciary to scrutinize executive decisions intimately related to state sovereignty or security. Secondly, deportation has been effectively removed from the realm of criminal punishment where considerably more common law and constitutional protections are engaged. Finally, deportation is often justified on the basis of cost and administrative expediency.

The courts' focus upon classification—visitor, immigrant, citizen—while ignoring the substance of a person's relationship with the country, perpetuates the notion that for certain persons deportation is acceptable treatment. It also lifts from the courts the burden of having to examine precisely what is at issue in deportation cases, and what effects deportation has on individuals. As Schuck writes:

In view of what is inevitably and personally at stake, then, it is undeniable that deportation punishes the alien and punishes her severely. To maintain, as classical immigration law consistently has done, that deportation resembles a sanction like being ejected from a national park rather than that of being banished or sentenced to jail, suggests that something deeply symbolic, not dryly logical, has been at work in the shaping of the doctrine. ... The government's obligations to the alien are viewed as resting upon her formal status rather than upon her actual relationship to the society.⁴²

It must be acknowledged that the Federal Court is slowly moving away from its view of deportation as a mere civil sanction. The *Charter* is to a large degree responsible for this change. However, as cases as recent as *Hurd* suggest, there is still a significant distance to travel until the courts scrutinize deportation with the same exactitude with which

⁴¹ D. Wood, "Deportation, the Immigration Power, and Absorption into the Australian Community" (1986) 16 F. L. Rev. 288 at 288.

⁴² *Supra* note 17 at 27.

they have begun to view other interests.⁴³ While it is clear that the duty of fairness applies to immigration proceedings, the recognition of deportation as giving rise to constitutional rights has been slow in coming. This, I would suggest, is in part a residual effect of administrative law's slow embrace of interests beyond those that were recognized at common law. Immigration law, as a consequence of many factors, but, in particular, of a powerful notion of sovereignty, only gradually has moved into a realm where greater legal protections are being afforded. Similarly, constitutional interests have just begun to be recognized. This is in part the result of a similar approach taken to legal analysis under administrative law and section 7 of the *Charter*. The two stage structure of section 7 parallels, in many ways, the approach taken by administrative law to determine, first, whether the duty of fairness applies, and second, what is required by that duty. Under the *Charter*, the threshold requirement of engaging a right to life, liberty and security of the person must first be met; and, second, the content—encompassing both procedure and substance—of the principles of fundamental justice must be determined. The often understated significance that deportation was given under administrative law continues, in part, to inform its judicial treatment under section 7. The slow maturation of immigration as a branch of administrative law continues to limit its growth under the *Charter*.

D. *Deportation Under the Charter: Case Law*

There has been a considerable number of cases that have considered deportation under the *Charter*, focussing on sections 7, 12, and 15 in particular. The purpose of this discussion, however, will be to assess only the development of section 7. Given this focus, it would at times be unnecessary to distinguish between immigration and refugee cases. Nevertheless, it is important to realize that immigration and refugee cases raise distinctly different concerns, in particular with respect to the threshold question of whether there is a deprivation of life, liberty and security of the person.

⁴³ See, for example, *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, where L'Heureux-Dubé J., at 669, held that dismissal from a public office would engage the duty of fairness. "The existence of a general duty to act fairly will depend on the consideration of three factors: (i) the nature of the decision to be made by the administrative body; (ii) the relationship existing between that body and the individual; and (iii) the effect of that decision on the individual's rights."

The following discussion of the case law is centred around the Supreme Court of Canada's decision in *Chiarelli*. Following an assessment of *Chiarelli*, I will canvas the earlier case law in order to provide the larger backdrop against which it must be viewed. Subsequent case law will then be examined in order to assess the impact of this decision.

In *Chiarelli*,⁴⁴ the Supreme Court of Canada considered a number of issues respecting the deportation of a long-term resident convicted of serious criminal offences, and to whom a security certificate had been issued. Writing for a unanimous Court, Justice Sopinka held that deportation for the commission of a serious criminal offence does not violate the *Charter*.

The first question answered by the Court was whether there had been a deprivation of liberty or security of the person. Referring only to the Federal Court judgment in *Hoang v. Canada (Minister of Employment and Immigration)*,⁴⁵ where it was held that deportation was not to be conceptualized as a deprivation of liberty, Sopinka J. stated that it was unnecessary to answer this question as there was no breach of fundamental justice. I would argue that the matter was squarely before the Court and it ought to have been answered. Moreover, in order to properly contextualize the principles of fundamental justice, it is critical to the analysis that the Court accurately identify the interests at stake. Mr. Chiarelli's relationship with his family, his community, and the country to which he would have been returned were all factors that ought to have been considered when characterizing the deprivation resulting from deportation. Without understanding precisely what is at issue for a deportee and balancing his or her interests against those of the state—a necessary step when determining if state action accords with the principles of fundamental justice—the Court is left to make blind assessments, and not the highly contextualized determinations called for by Justice Lamer, as he then was, in *Re B.C. Motor Vehicle Act*.⁴⁶

In determining the principles of fundamental justice as they apply to this case, Sopinka J. stated that

the court must look to the principles and policies underlying immigration law. The most fundamental principle of immigration law is that non-citizens do not have an unqualified

⁴⁴ *Chiarelli*, *supra* note 15.

⁴⁵ (1990), 13 Imm. L. R. (2d) 35 [hereinafter *Hoang*].

⁴⁶ [1985] 2 S.C.R. 486 [hereinafter *B.C. Motor Vehicles*]. Lamer J. stated, at 513, that the principles of fundamental justice "cannot be given any exhaustive content or simple enumerative definition, but will take on concrete meaning as the courts address alleged violations of s. 7."

right to enter or remain in the country. At common law an alien has no right to enter or remain in the country.⁴⁷

Sopinka J., moreover, turned to the *Charter* itself to further justify the qualification of the rights of permanent residents:

The distinction between citizens and non-citizens is recognized in the *Charter*. While permanent residents are given the right to move to, take up residence in, and pursue the gaining of a livelihood in any province in s. 6(2), only citizens are accorded the right "to enter, remain in and leave Canada" in s. 6(1).

Thus Parliament has the right to adopt an immigration policy and to enact legislation prescribing the conditions under which non-citizens will be permitted to enter and remain in Canada.⁴⁸

He then considered the state's interest in removing those who violate conditions of permanent residency set down in the *Immigration Act*:

One of the conditions Parliament has imposed on a permanent resident's right to remain in Canada is that he or she not be convicted of an offence for which a term of imprisonment of five years or more may be imposed. This condition represents a legitimate, non-arbitrary choice by Parliament of a situation in which it is not in the public interest to allow a non-citizen to remain in the country.⁴⁹

Thus, for Sopinka J., when viewed in the context of immigration law, deportation for a criminal offence does not violate the *Charter*. I suggest that to hold forth the basic tenets of immigration law as the sole source of fundamental justice in this case is wholly inadequate. Not only does looking broadly at an entire branch of law de-contextualize the principles of fundamental justice, it also precludes any consideration of the individual's interests *vis a vis* the state. Secondly, "the basic tenets of our legal system,"⁵⁰ as one of the varied sources of the principles of fundamental justice, are certainly broader and can be woven from a richer fabric than the common law as it applies to aliens. In considering the sources and content of the principles of fundamental justice, John Evans writes:

[The courts] should also acknowledge that the common law is not the only source of the "basic tenets" of our legal system. Sometimes, the growth of the common law may have been stunted by historical circumstances so that it no longer represents contemporary

⁴⁷ *Chiarelli*, *supra* note 15 at 733.

⁴⁸ *Ibid.* at 733-34.

⁴⁹ *Ibid.* at 734.

⁵⁰ *B.C. Motor Vehicles*, *supra* note 46 at 503.

notions of administrative justice, at least when the interests protected by section 7 are in jeopardy.⁵¹

Finally, in concluding that removing a resident for serious criminality is "a legitimate and non-arbitrary choice of Parliament," Sopinka J. failed to appreciate that, in the case of long-term residents, the distinction between citizenship and residency is, in fact, highly arbitrary and formalistic. As is discussed below,⁵² citizenship is no longer the basis for the distribution of many societal rights. In many cases it is residency, and the substantive relations that flow from it, that serve to ground an individual in his or her community and, more generally, in his or her country.

It must be acknowledged that the Court in *Chiarelli* also considered the issuance of a security certificate and its effects upon the deportation process. While Sopinka J. did expressly consider whether deportation offends the *Charter*, it may be that when the Court has an opportunity to reconsider the issue, this case will be distinguished on the grounds that the very serious security and criminality allegations informed the proceeding. Moreover, it is evident from the judgment that many issues remain open. In particular, the Court must decide whether deportation engages liberty or security interests, thereby giving rise to a consideration of the principles of fundamental justice.

To assess the decision in *Chiarelli* and to determine whether other courts have subsequently moved beyond the arguably limited holding in that case, it is useful to turn to the jurisprudence of the Federal Court. This is particularly helpful in regard to the deportation of permanent residents and, more generally, with respect to the application of section 7 of the *Charter* in Immigration and Refugee Board adjudication inquiries.

In *R. v. Gittens*,⁵³ the first reported immigration decision to consider *Charter* arguments, the Federal Court held that deportation to Guyana of a person convicted of a number of criminal offences did not violate the *Charter*. The applicant had lived in Canada since early childhood and had no known relatives in Guyana and could not speak the language. The Court rejected the argument that deportation would deprive the applicant of the right to life, liberty and security of the person, as well as other *Charter* arguments. In doing so, the Court

⁵¹ "The Principles of Fundamental Justice: The Constitution and the Common Law" (1991) 29 Osgoode Hall L.J. 51 at 85-86.

⁵² See Part III.C.2.d), below.

⁵³ (1982), 137 D.L.R. (3d) 687 (F.C.T.D.).

regarded as “entirely irrelevant the effect deportation may have on other members of his family.”⁵⁴ Fortunately, the Court’s position in *Gittens*—that deportation does not engage section 7 rights—is likely no longer correct, as Waldman suggests,⁵⁵ in light of more recent pronouncements from the Court.

In 1985 the Supreme Court stated unequivocally in *Singh*⁵⁶ that a refugee is entitled to an oral hearing. More recently, however, this right has been qualified in cases where there are allegations of criminality. As the Federal Court of Appeal stated in the refugee case of *Hoang*,⁵⁷ “on the authority of *Hurd* and *Chiarelli*,⁵⁸ deportation [of a refugee claimant] for serious offences affects neither s. 7 nor s. 12 rights, since it is not to be conceptualized as either a deprivation of liberty or a punishment.”⁵⁹ The correctness of this conclusion is, however, questionable. The Court failed to realize that, first, it was the return of a refugee claimant who faced the threat of persecution that engaged the section 7 analysis in *Singh*. And second, that the denial of a hearing was not in accordance with the principles of fundamental justice. In *Hoang* there was no doubt that the claimant would have faced a threat to his liberty and security of the person were he returned. The issue the Court should have addressed, then, is whether the deportation of a person who has been convicted of serious criminal offences is in accordance with the second aspect of section 7: the principles of fundamental justice.

The Federal Court is slowly moving away from the position set down in *Gittens* and *Hoang*. The case of *Grewal v. Canada (Minister of Employment and Immigration)*⁶⁰ involved a permanent resident convicted of attempted murder who sought to re-open his adjudication hearing in order to make a refugee claim. After reviewing the adjudicator’s decision not to re-open, the Court dismissed the appeal. However, the importance of the decision lies in the Court’s recognition that “immigration inquiries and hearings engage *Charter* s. 7 rights.”⁶¹

⁵⁴ *Ibid.* at 692.

⁵⁵ Waldman, *supra* note 20 at §2.8.

⁵⁶ *Supra* note 14.

⁵⁷ *Supra* note 45.

⁵⁸ *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1990] 2 F.C. 299 (C.A.).

⁵⁹ *Supra* note 57 at 41 [footnote added].

⁶⁰ [1992] 1 F.C. 581 (C.A.) [hereinafter *Grewal*].

⁶¹ Waldman, *supra* note 20 at § 2.9. Waldman argues that this is the “most clear statement by the Federal Court of the role that the Charter and fundamental justice will play in the immigration process and is a clear statement by the court that the [sic] immigration law and procedure must be

Moreover, as Waldman correctly suggests, this acknowledgement is significant as it “means that all such procedures must be in accordance with the principles of fundamental justice.”⁶²

Justice Linden, for the Court, stated that “[i]t has already been determined that the deportation of refugees infringes their right to security of the person” as held in *Singh*. He continued, however, to state that “[t]his, of course, does not mean that people cannot be deported for good reason, that is, as long as there is no violation of the principles of fundamental justice. Thus, for example, a person may be deported if he commits a serious crime.”⁶³ He continued:

Hence, it is permissible to deport a permanent resident for the commission of a serious offence without violating the Charter, as long as fundamental justice has been accorded to that person before doing so. The question, therefore, is whether there has been a violation of the principles of fundamental justice in this case. The legislation and the earlier jurisprudence of this Court must yield to the dictates of section 7.⁶⁴

The acknowledgement by the Federal Court that immigration inquiries and hearings engage the *Charter* is significant and overdue.

The Federal Court has considered the Supreme Court’s ruling in *Chiarelli* on a number of occasions, two of which deserve mention here. In *Canepa v. Canada (Minister of Employment and Immigration)*,⁶⁵ the Court considered the deportation of a long-term resident who had come to Canada at age 5. He became a drug addict and to support his addiction committed crimes. He was convicted of 37 offences, mostly for breaking and entering and theft. The appellant was ordered deported.

Counsel for the appellant argued that deportation violated the *Charter*, but also grounded her argument in the common law. Submissions were made as follows:

[S]ections 7 and 12 of the *Canadian Charter of Rights and Freedoms* confer the intermediate status of “non-expellable aliens” or “*de facto* citizens” on immigrants who have established a “sufficiently substantial connection” with Canada. Such persons were said to be those who have been admitted as permanent residents at a very early age, who have developed a deep-rooted connection with Canada by taking their schooling here, and who have no continuing ties with their native lands.

subservient to the dictates of the Charter.”

⁶² *Ibid.*

⁶³ *Grewal*, *supra* note 60 at 588.

⁶⁴ *Ibid.*

⁶⁵ [1992] 3 F.C. 270 (C.A.) [hereinafter *Canepa*].

It was contended that there was even a common law basis for such a category in the “denizens” distinguished by Blackstone from “aliens” and “natives”: Blackstone, *Commentaries on the Laws of England*, [abridgement] 3rd. ed. by W.C. Sprague, 1895, at page 65, defines a denizen as “an alien born, but who has obtained ex donatione regis letters patent to make him an English subject: a high and incommunicable branch of the royal prerogative.”⁶⁶ [citations omitted]

Justice MacGuigan rejected the common law argument, holding that what it outlined was *de jure* and not *de facto* status, and that the appellant could not rely on the distinction. This novel argument, I would suggest, does however have relevance. It serves to qualify the near absolute lack of recognition extended to aliens at common law. Questions that cast doubt upon historical legal assumptions about the rights of aliens must, therefore, moderate accordingly the persuasiveness of the common law as a source of the principles of fundamental justice. MacGuigan J. then turned to the *Charter* argument.

Charter arguments, however, were precluded by the Supreme Court of Canada decision in *Chiarelli*. Accordingly, the Federal Court of Appeal held that the qualified right to remain enjoyed by permanent residents did not violate principles of fundamental justice.⁶⁷ With respect to the threshold question of whether deportation is a violation of liberty, the Court relied on its decisions in *Hoang* and *Hurd* to foreclose that discussion, despite the *dicta* of Sopinka J. in *Chiarelli*, where he explicitly left the issue open.⁶⁸

When examining the appellant’s claim that deportation, for him, was cruel and unusual treatment or punishment and a violation of section 12 of the *Charter*, MacGuigan J. engaged in a balancing of interests that, I would argue, is equally relevant under, and required by, section 7. He quoted from the unanimous decision of the Immigration Appeal Board (Appeal Division):

In these cases the Board is required to carefully weigh the interests of Canadian society against the interests of the individual. ... In summary therefore: the appellant’s lengthy drug-related criminal record and the particular circumstances surrounding it, his commission of a serious drug offence even after the deportation order, the absence of dependants, the less than convincing evidence that he has completely overcome his drug dependency and that he would not revert to criminal activity, and the lack of any redeeming features of his twenty years in Canada, far outweigh the distress and dislocation which removal would undoubtedly cause to the appellant and his family.⁶⁹

⁶⁶ *Ibid.* at 275.

⁶⁷ *Ibid.* at 276.

⁶⁸ *Ibid.* at 277-78.

⁶⁹ *Ibid.* at 283-84.

Though upholding the deportation, the analysis that MacGuigan J. approved of is precisely that which should be conducted under section 7. In determining whether state action is in accordance with principles of fundamental justice it is necessary to balance individual and state interests. Moreover, this balancing demands a narrow focus on the interests at stake, which I would argue, ultimately enhances the accuracy of the decisions being made.

In *Nguyen v. Canada (Minister of Employment and Immigration)*,⁷⁰ the Federal Court of Appeal considered the application of a permanent resident, ordered deported, who had made a refugee claim at his inquiry. The applicant argued that both the eligibility determination under section 46 of the *Immigration Act*, and deportation under sections 27 and 32 were unconstitutional.

Justice Marceau, writing for the Court, rejected both attacks. While this holding does not venture beyond those cases previously mentioned, Marceau J. added a statement of some importance in footnote 5 of his judgment:

While Sopinka J., in writing the judgment of the Supreme Court in *Chiarelli*, has not considered it necessary to take a firm position on whether the issuance of a deportation order would affect the liberty of the individual within the meaning of section 7 of the *Charter*, it seems to me, with respect, that forcibly deporting an individual against his will has the necessary effect of interfering with his liberty, in any meaning that the word can bear, in the same manner as extradition was found to interfere in *Kindler*.

The Court concluded, however, that eligibility determinations made under the *Immigration Act*, and deportation, and the effect of both provisions when operating together, did not violate the principles of fundamental justice.

Marceau J. added the following comment at the end of his judgment, which also deserves notice:

We have been dealing here: first, with the issuance of a deportation order, *not* its actual execution to a precise country. ... It would be my opinion, however, that the Minister would act in direct violation of the Charter if he purported to execute a deportation order by forcing the individual concerned back to a country where, on the evidence, torture and possibly death will be inflicted. It would be, it seems to me, participation in a cruel and unusual treatment within the meaning of section 12 of the Charter, or, at the very least, an outrage to public standards of decency, in violation of the principles of fundamental justice under section 7 of the Charter. There are means to enjoin the Minister not to commit an act in violation of the Charter.⁷¹

⁷⁰ [1993] 1 F.C. 696 (C.A.) [hereinafter *Nguyen*].

⁷¹ *Ibid.* at 708-09.

Though the basis upon which the Court distinguished between the issuance of a deportation order and its execution is less than clear (it is possible that the Court was awaiting an appeal to the IAD), the decision is still significant. For Marceau J., deportation becomes “an outrage to public standards of decency” under certain conditions. And when these conditions are met, there is, seemingly, an absolute constitutional barrier to deportation. Thus, these *dicta* go further than *Singh*, which required only an oral hearing.

In summary, the Federal Court has ostensibly used *Chiarelli* to foreclose the question of whether deportation violates the principles of fundamental justice, but it has also recognized that immigration inquiries do engage the *Charter* and do affect constitutionally protected interests. Finally, in *obiter*, the Court held in *Nguyen* that deportation under certain circumstances would be an “outrage to public standards of decency” and a violation of fundamental justice.⁷² The Court’s use of such language to lay the foundation for future section 7 deportation challenges is, I suggest, a reaction to what Luc Tremblay characterizes as “an unreasonable law.” In outlining what he believes may be the content of the principles of fundamental justice, he writes:

Perhaps the most controversial presumption at common law which could be included in section 7 is the presumption against an unreasonable law. It brings to mind the concept of reasonable law developed in the United States under the doctrine of substantive due process.

However, it should be noted that the word “reasonable” as far as it is now entrenched in section 7 of the *Charter*, must receive *prima facie* an interpretation in accordance with the common law.⁷³

Citing a line of English cases, Tremblay points to Justice Spence’s adoption of the word “reasonable” into Canadian law. In *Bell v. R.*,⁷⁴ Spence J. stated:

[T]he by-law in its device ... comes exactly within Lord Russell’s words as to be found to be “such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men.”⁷⁵

Marceau J.’s holding, then, acknowledged that under particularly extreme circumstances the courts will look beyond the procedural rights

⁷² *Ibid.* at 709.

⁷³ “Section 7 of the *Charter*: Substantive Due Process?” (1984) 18 U.B.C. L. Rev. 201 at 249 [footnotes omitted].

⁷⁴ [1979] 2 S.C.R. 212.

⁷⁵ *Ibid.* at 223.

afforded to persons subject to deportation proceedings, and to the substantive effects of that action.

III. DEPORTATION AND THE CHARTER: TOWARD A RECONSIDERATION OF RIGHTS

A. *Comparative Interests: What is at Stake?*

Immigration's slow movement into the mainstream of public law is taking place on a number of fronts, as has been noted by many commentators.⁷⁶ In Canada, it was first within refugee law that the courts began to recognize the profound individual interests at issue. *Singh*⁷⁷ signalled an important first step. In that case, three Justices of the Supreme Court held that section 7 of the *Charter* was engaged by the "potential threat" to the security of the person faced by a refugee if returned to the country whence he or she came.⁷⁸ As Justice Wilson stated:

It seems to me that even if one adopts the narrow approach advocated by counsel for the Minister, "security of the person" must encompass freedom from the threat of physical punishment or suffering as well as freedom from such punishment itself.⁷⁹

Moreover, Wilson J. held that the principles of fundamental justice included, at a minimum, the notion of procedural fairness. Considering the seriousness of the interests at issue in the *Singh* case, this would include an oral hearing.

In establishing the right to a hearing for a refugee claimant, Wilson J., in unequivocal language rejected the deeply ingrained presumption that "immigration is a privilege and not a right."⁸⁰ She stated:

I do not think this kind of analysis is acceptable in relation to the *Charter*. It seems to me rather that the recent adoption of the *Charter* by Parliament and nine of the ten provinces

⁷⁶ See, for example, Schuck, *supra* note 17, and "Immigration Policy and the Rights of Aliens" (1983) 96 Harv. L. Rev. 1286 [hereinafter "Immigration Policy"], for an exhaustive enumeration of many of the constitutional issues implicated by immigration law.

⁷⁷ *Supra* note 14.

⁷⁸ *Ibid.* at 223ff. Beetz J., writing for two others, relied instead upon the *Canadian Bill of Rights*, S.C. 1960, c. 44, s. 2(e), reprinted in R.S.C. 1985, App. III, to reach the same result.

⁷⁹ *Ibid.* at 207.

⁸⁰ *Ibid.* at 209. Wilson J. quoting W. Tarnopolsky, *The Canadian Bill of Rights*, 2d ed. (Toronto: McClelland & Stewart, 1975) at 273.

as part of the Canadian constitutional framework has sent a clear message to the courts that the restrictive attitude which at times characterized their approach to the *Canadian Bill of Rights* ought to be re-examined.⁸¹

The interests at stake for refugees, including the potential consequences if they are returned, easily bring them under the *Charter's* protection.

This interest-based analysis, in part a product of the post-*Nicholson*⁸² era, has been slower to spread into the field of non-refugee deportation where persecution is not necessarily an issue. The Federal Court, however, has slowly acknowledged that deportation can of itself be a deprivation of liberty and security of the person. While the Federal Court has accepted that the deportation of a permanent resident might violate his or her right to life, liberty and security of the person, it has not engaged in an expansive analysis of this issue. Waldman suggests that the Supreme Court of Canada's decision in *B.C. Motor Vehicles*, which holds that imprisonment amounts to a deprivation of liberty, is determinative of the issue. As he states, "given that a person can be subject to detention and forcible removal from Canada as a result of an immigration inquiry it is difficult to imagine how such a proceeding will not engage a person's s. 7 rights."⁸³

The critical question becomes, then, what are the principles of fundamental justice as they are engaged by immigration law? What are the procedural protections that must be extended? And, substantively, what forms of treatment are simply unacceptable? It is my contention that under particular circumstances deportation of long-term residents is not in accordance with the principles of fundamental justice. In order to arrive at that point, however, I shall first examine the *Charter*-protected rights of liberty and security of the person.

Due to space constraints, I shall devote only limited attention to the protected rights enumerated in section 7. While the moral weight of this section may be found in its first stage, the more difficult legal analysis occurs in the second stage. Furthermore, there seems to be little intuitive difficulty in concluding that deporting an individual, and thereby separating him or her from family and community, constitutes a deprivation of the deportee's right to liberty, and certainly, of his or her

⁸¹ *Ibid.*

⁸² *Supra* note 37.

⁸³ Waldman, *supra* note 20 at § 2.8.

security of the person.⁸⁴ Nevertheless, the protected rights do create a threshold that must be overcome in order to advance to the second stage of analysis.

In *Singh*, Wilson J. addressed this important threshold issue and sought to give meaning to each of the constituent elements of section 7: life, liberty and security of the person. She held that like liberty, security of the person is “capable of a broad range of meaning,”⁸⁵ and referred both to the Law Reform Commission of Canada’s definition of security of the person and to Article 25 of the *Universal Declaration of Human Rights* (1948).⁸⁶ She then suggested the following approach: “‘security of the person’ must encompass freedom from the threat of physical punishment or suffering as well as freedom from such punishment itself.”⁸⁷ Admittedly, when considering the deportation of a permanent resident as opposed to the *refoulement* of a refugee claimant, the threshold is clearly different and may not involve the threat of, or actual, physical punishment. However, as stated above, the deportation of a permanent resident *does* often involve the detention and forcible removal of that person from Canada, thus arguably engaging the right to liberty, if not the right to security of the person, as well.

Though undecided by the Supreme Court in *Chiarelli*, it is settled law at the Federal Court that immigration inquiries do engage the *Charter* rights to life, liberty and security of the person. While the courts are frequently imprecise when discussing rights violations, it has been held on several occasions that deportation engages the rights to liberty

⁸⁴ See P. Bryden, “Fundamental Justice and Family Class Immigration: The Example of *Pangli v. Minister of Employment and Immigration*” (1991) 41 U.T.L.J. 484. Bryden observes, at 515-16, “a judicial willingness to move our notion of constitutionally protected liberty and security interests beyond the scope of common law or statutory entitlements, and into a realm in which judges discover, based on some philosophical or social consensus, that what is at stake is worthy of special protection.”

Contra, P. Garant, “Fundamental Rights and Fundamental Justice” in G. Beaudoin & E. Ratushny, eds., *The Canadian Charter of Rights and Freedoms*, 2d ed. (Toronto: Carswell, 1989) at 331. Garant takes a narrower view of security of the person. Referring to *R. v. Morgentaler*, [1988] 1 S.C.R. 30, she states, at 351, that “this extension of the concept of security to all forms of psychological trauma caused by state action is extremely dangerous, in our view, unless strictly confined to the field of criminal law.”

⁸⁵ *Supra* note 14 at 206.

⁸⁶ *Ibid.* at 206-07. Wilson J. quoting the Law Reform Commission of Canada, *Medical Treatment and Criminal Law* (Ottawa: Canada (Minister of Supply and Services), 1980) [Working Paper 26], which, at 6, states: “The right to security of the person means not only protection of one’s physical integrity, but the provision of necessities for its support.” See, *ibid.* at endnote 9 for the text of Art. 25(1) of the *Universal Declaration of Human Rights* (1948).

⁸⁷ *Ibid.* at 207.

and security of the person.⁸⁸ The more difficult task is to establish, by re-evaluating the principles of fundamental justice as they apply to the deportation of immigrants from Canada, a right to remain under section 7 of the *Charter* in cases where the individual's interests outweigh those of the state.

B. *Section 6(1) of the Charter: Citizen or Not*

Section 6(1) of the *Charter* grants only citizens the right "to enter, remain in and leave Canada." The implicit exclusion of permanent residents, according to Sopinka J. in *Chiarelli*, provides Parliament the basis on which to enact "conditions under which non-citizens will be permitted to enter and remain in Canada."⁸⁹ It is a disputable presumption, however, that s. 6(1), by virtue of its exclusion of non-citizens, creates an all or nothing constitutional protection regime. This would give to citizenship a constitutional significance that does not correspond to the factual reality. Moreover, it would perpetuate and constitutionalize the formalistic classification to which aliens have been subject at common law.

In regard to this classification, Wood argues that after a certain period of time an alien becomes absorbed into the state-community and is no longer subject to the immigration power. He then criticizes citizenship as a determinant of significant rights:

[F]or persons other than immigrants, [citizenship] is obtained very easily, simply by being born in Australia. It is not asked of native-born Australians, what family, social, or economic ties, for instance, they have with Australia. Despite the fact that it is scarcely treated as controversial, it seems quite arbitrary to take birth as the relevant criterion. What seems to make this choice plausible is the general (but certainly not universal) truth that most persons spend some period of time in the country in which they are born. It is the latter which gives rise to any genuine moral right to reside permanently in the country rather than the former. It is through living in a country that one develops any real connection with it.⁹⁰

⁸⁸ In *Singh*, *supra* note 14 at 206-07, deportation was held to engage the security of the person. In *Hoang*, *supra* note 45 at 41, the Court held that deportation was not to be conceptualized as a deprivation of liberty. In *Grewal*, *supra* note 60 at 587, the Court held that deportation engaged the right to life, liberty and security of the person. Finally, in *Nguyen*, *supra* note 70 at footnote 5, the Court ruled that "forcibly deporting an individual against his will has the necessary effect of interfering with his liberty."

⁸⁹ *Chiarelli*, *supra* note 15 at 733-34.

⁹⁰ Wood, *supra* note 41 at 299.

There are good reasons why those born in a country shall be citizens. Namely, there would be no other country to which those persons would belong. Moreover, what would happen with children of illegal immigrants? Wood makes a valid point, however, in questioning the legitimacy of the distinction between citizen and immigrant.

The fact that in Canada section 6(1) of the *Charter* does not include permanent residents, refugees, or other non-citizens, does not mean that they have no rights under the Constitution. Just as section 7 has functioned as a residual with respect to a number of the legal rights contained in sections 8 to 14,⁹¹ so, I would suggest, should it serve the same purpose with respect to a non-citizen's right to remain. While it was acknowledged by Sopinka J. in *Chiarelli* that immigrants enjoy a limited right to remain, the nature of this statutory right seems contractual rather than constitutional. "[P]ermanent residents described in section 27(1)(d)(ii)" and thereby subject to deportation, Sopinka J. stated, "have all deliberately violated an essential condition under which they were permitted to remain in Canada."⁹² In approaching the *Charter*, however, courts must employ a more *purposive* interpretation. Given "the diminishing relevance of the status of formal citizenship to the allocation of extrapolitical rights,"⁹³ a formalistic interpretation that would exclude from the *Charter* the right to remain for non-citizens seems untenable. The disassociation of citizenship from the distribution of societal rights, moreover, mirrors, or is perhaps a symptom of, a conceptual change toward notions of sovereignty. Judith Lichtenberg suggests that "[n]ational boundaries are increasingly less relevant, and are already much less relevant than is ordinarily supposed, to determining whose interests must be considered."⁹⁴ Similarly, under the *Charter*, dubious conceptions should not form the basis for the distribution of constitutional rights.

⁹¹ See the discussion of Lamer J. (as he then was) in *B.C. Motor Vehicles*, *supra* note 46.

⁹² *Chiarelli*, *supra* note 15.

⁹³ "Immigration Policy," *supra* note 76 at 734. This statement is made in the broader context of a discussion of *Plyer v. Doe* 102 U.S. 2382 (1982), where the United States Supreme Court held that the state of Texas had an obligation to extend the benefit of education to undocumented alien children in the community.

⁹⁴ "National Boundaries and Moral Boundaries: A Cosmopolitan View" in P. Brown & H. Shue, eds., *Boundaries: National Autonomy and its Limits* (Totowa, N.J.: Rowman & Littlefield, 1981) at 92; see also H. Shue, "Exporting Hazards," in the same collection at 107.

C. *Section 7 of the Charter: The Right to Life, Liberty and Security of the Person*

If section 7 of the *Charter* encompasses a residual protection of the right to remain for non-citizens, what is the nature of that protection, and what is its breadth? To argue that section 7 is merely a repository for that which cannot be accommodated in other *Charter* sections would be to underestimate its significance, particularly in relation to deportation. That which is protected by section 7 certainly includes the liberty and security interests that are engaged by deportation proceedings. So while section 7 might contain certain protections that are found elsewhere in the *Charter*, it is unnecessary to stretch it to include rights that are squarely within its boundaries. The role of other *Charter* provisions in interpreting the principles of fundamental justice, as a related issue, will be discussed below.⁹⁵

The determination of whether there has been a deprivation of life, liberty and security of the person is the necessary first step to determining if there has been a violation of section 7 of the *Charter*. Only if there is such a deprivation is it necessary to determine whether that deprivation is in accordance with the principles of fundamental justice. The two stages of the analysis, however, are intertwined. As La Forest J., writing for the majority in *R. v. Lyons*,⁹⁶ stated:

It is ... clear that the requirements of fundamental justice are not immutable; rather, they vary according to the context in which they are invoked. Thus certain procedural protections might be constitutionally mandated in one context but not in another.⁹⁷

It is presumed that La Forest J.'s statement is equally suited to considerations of substantive justice under section 7. Lamer J. also stated in *B.C. Motor Vehicles* that the principles of fundamental justice "cannot be given any exhaustive content or simple enumerative definition, but will take on concrete meaning as the courts address alleged violations of s. 7."⁹⁸ Evans, too, notes the relationship between the broadened scope of interests protected under section 7 and the concomitant protections that must follow from it—protections rooted in the duty of fairness, and as such, included within fundamental justice. He states:

⁹⁵ See Part III.C.2.a), below.

⁹⁶ [1987] 2 S.C.R. 309.

⁹⁷ *Ibid.* at 361 (as cited by Sopinka J. in *Chiarelli*, *supra* note 15 at 743).

⁹⁸ *Supra* note 46 at 513.

While the courts may have been slow in the past to protect the interests in personal liberty of such typically powerless groups as inmates of prisons and psychiatric facilities, parolees, and those subject to immigration control and deportation, they ought to see in section 7 evidence of the high societal value placed on the individual interests there described, and give them their due weight when determining the procedural protections appropriate as a matter of common law.⁹⁹ [footnotes omitted]

In *Chiarelli* Sopinka J. did not engage in the first step of the analysis, and I would argue, in not doing so failed to establish the context in which the principles of fundamental justice ought to have been determined. The first stage is, to some extent, determinative of the analysis that follows. In an article that persuasively argues for the protection of the continued receipt of welfare benefits under section 7 of the *Charter*, Ian Johnstone makes a similar point. He states that “[s]ince the two branches of s. 7 are inter-related, the values implicit in the principles of fundamental justice are concretized when attached to substantive interests.”¹⁰⁰ Finally, it may be useful to draw an analogy to the analysis that takes place under other *Charter* sections. When considering the scope of freedom of expression under section 2(b), the Supreme Court has indicated that expression directed toward (a) seeking and attaining the truth; (b) fostering participation in social and political decision making; and (c) cultivating diversity in forms of individual self-fulfilment, lies at the core of this *Charter* freedom.¹⁰¹ Thus, limitations that impinge upon expression promoting any of those values will be subject to more vigorous scrutiny.¹⁰² Similarly, it may be argued that under section 7 a clear definition of the interests at stake is critical to determining the requirements of fundamental justice in each case. Presumably, where the interest engaged lies closer to the “core” values of section 7, the principles of fundamental justice that limit that interest will be scrutinized with greater zealously. In determining what lies at the core of section 7, guidance may be taken from the words of the section itself: life, liberty and security of the person.

⁹⁹ *Supra* note 51 at 80.

¹⁰⁰ I. Johnstone, “Section 7 of the Charter and Constitutionally Protected Welfare” (1988) U.T. Fac. L. Rev. 1 at 7 [footnote omitted].

¹⁰¹ See *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927 at 976.

¹⁰² See *R. v. Keegstra*, [1990] 3 S.C.R. 697.

1. Principles of fundamental justice

In order to contextualize the principles of fundamental justice, one must first examine precisely what interests are at stake. In the case of a refugee, the interests of security of the person and freedom from physical or threatened violence are clear, as stated in *Singh*. In the case of a permanent resident or long-term illegal resident who faces deportation to a country where he or she has never lived, is, perhaps, unable to speak the language, and would be separated from family and community, the threat to liberty and security of the person is also quite acute. Finally, the threatened deportation of a visitor with no communal ties to Canada engages decidedly different interests. Simply put, it is critical not to overlook the first stage of a section 7 analysis if the second stage is to be adequately contextualized for a well informed and thoughtful consideration of the principles of fundamental justice.

Once the interests are contextualized it is necessary to, first, determine what the principles of fundamental justice are in that situation; and second, to balance the competing interests of the individual and the state to determine whether a given procedure accords with those principles. Justice La Forest addressed this in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*,¹⁰³ where he stated:

What these practices have sought to achieve is a just accommodation between the interests of the individual and those of the state, both of which factors play a part in assessing whether a particular law violates the principles of fundamental justice. The interests in the area with which we are here concerned involve particularly delicate balancing.¹⁰⁴[citations omitted]

And as was stated by Justice Cory in *R. v. Wholesale Travel Group Inc.*,¹⁰⁵ when assessing this balance, context remains crucial:

It is now clear that the *Charter* is to be interpreted in light of the context in which the claim arises. Context is relevant both with respect to the delineation of the meaning and scope of *Charter* rights, as well as to the determination of the balance to be struck between individual rights and the interests of society.¹⁰⁶ [emphasis added]

The Court again returns to the importance of focusing narrowly on the interests at stake in each case—a step that was not taken in *Chiarelli*.

¹⁰³ [1990] 1 S.C.R. 425 (cited in *Chiarelli*, *supra* note 15 at 744).

¹⁰⁴ *Ibid.* at 539.

¹⁰⁵ [1991] 3 S.C.R. 154 (cited in *Chiarelli*, *supra* note 15 at 732).

¹⁰⁶ *Ibid.* at 226.

The principles of fundamental justice can be drawn from a variety of sources. In determining which strands should be accorded interpretive weight, and which should be discarded, it is necessary that a court take an expansive view of, and assess critically, all the information before it. But determining where to find the principles of fundamental justice may prove difficult at times. The Supreme Court, however, has provided some guidance on where courts should be looking to find these principles.

The sources to which the courts may turn in a given case include those principles that are "found in the basic tenets of our legal system," that lie "in the inherent domain of the judiciary as guardian of the justice system" and not in the realm of "general public policy." They include those principles that are recognized as "essential elements of [any] system for the administration of justice [that] is founded upon a belief in the dignity and worth of the human person and the rule of law."¹⁰⁷ The ambiguity of these phrases suggest that the principles of fundamental justice can be ascertained from any number of sources: these would include other *Charter* provisions, the jurisprudence of other free and democratic societies, customary and conventional international law, and the common law, among others.¹⁰⁸

a) *International sources of fundamental justice*

The Supreme Court has recognized that Canada's international obligations serve as one particularly rich interpretive source.¹⁰⁹ Chief Justice Dickson, writing in dissent in *Reference Re Public Service Employee Relations Act (Alta.)*,¹¹⁰ stated:

A body of treaties ... and customary norms now constitute an international law of human rights under which the nations of the world have undertaken to adhere to the standards and principles necessary for ensuring freedom, dignity and social justice for their citizens. The *Charter* conforms to the spirit of this contemporary international human rights movement, and it incorporates many of the policies and prescriptions of the various

¹⁰⁷ E. Colvin, "Section Seven of the Canadian Charter of Rights and Freedoms" (1989) 68 *Can. Bar Rev.* 560 at 568. Colvin arrives at this definition of fundamental justice by consolidating passages from the judgment of Lamer J. (as he then was) in *B.C. Motor Vehicles*, *supra* note 46 at 503, 512.

¹⁰⁸ See, generally, Hogg, *supra* note 13 at s. 33.8.

¹⁰⁹ See A. Bayefsky, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation* (Toronto: Butterworths, 1992); see also W. Schabas, *International Human Rights Law and the Canadian Charter: A Manual for the Practitioner* (Toronto: Carswell, 1991).

¹¹⁰ [1987] 1 S.C.R. 313.

international documents pertaining to human rights. *The various sources of international human rights law—declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms—must, in my opinion, be relevant and persuasive sources for interpretation of the Charter's provisions.*

The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of the "full benefit of the *Charter's* protection." I believe that the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.¹¹¹ [emphasis added]

Beyond looking to treaties to which Canada is a signatory, Canadian courts may find instruction from other international sources. Though Canada is not a party to the *European Convention*,¹¹² Anne Bayefsky, in her text on the use of international human rights law in interpreting the *Charter*, states:

Canadian courts have traditionally made some mention of non-binding sources of law from other jurisdictions ... for the purpose of formulating informed responses to domestic legal questions. ... Furthermore, for the European Convention on Human Rights and associated jurisprudence (to which 85 percent of the [Supreme Court of Canada references to international human rights law] refer), additional justification can be found. Much of Canadian legal tradition is inherited from the United Kingdom. That state itself is a party to the European Convention, and the Convention has been used in British courts to interpret British law. As well, the drafting history and actual provisions of the European Convention are closely related to the Covenant on Civil and Political Rights. The sophisticated quasi-judicial and judicial system associated with the European Convention (unlike that of the Covenant on Civil and Political Rights) makes the jurisprudence of the European Convention helpful in understanding Canada's obligations under the Covenant.¹¹³

Thus, the *Convention* serves to both provide guidance in interpreting the *Charter* and to clarify Canada's international obligations under the *ICCPR* (which in turn, serves as a significant interpretive source for the *Charter*).

Other free and democratic societies provide another source of jurisprudence useful for interpreting the *Charter*. The case law of the European Community may be of particular benefit in defining the principles of fundamental justice under section 7. While Community law begins with the presumption of free movement under Article 48 of the

¹¹¹ *Ibid.* at 348-49. The latter part of this statement was adopted by Dickson C.J.C., speaking for the majority, in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at 1056.

¹¹² See Schabas, *supra* note 109 at 255, for the text of the *European Convention*; and Bayefsky, *supra* note 109 at 619, for the text of the *ICCPR*.

¹¹³ *Supra* note 109 at 111. Schabas, *supra* note 109 at 57, makes a similar argument for the use of the *European Convention*, comparing its interpretive value to that of the American *Bill of Rights*, U.S. Const. amends. I - X.

European Economic Community Treaty,¹¹⁴ movement may be curtailed where it interferes with a sovereign state's interests, which include the right of a state to take measures to maintain public policy, public security, and public order. What Community member states consider to be public policy, public security, and public order concerns, and for which interests they will exercise their sovereignty, provide further insight into what are considered to be fundamental interests by European nations. Also informative is the extent to which the European Court of Justice permits these concerns of nation-states to derogate from the right of free movement, which is subject only to the European Union's concept of *ordre public*. Most importantly, these judgments exhibit the kind of balancing of individual and state interests that should take place under the *Charter*.

Two basic principles can be found from the case law: Free movement may only be curtailed when there is a serious threat to public interests; and, secondly, a state may not justify, in the name of public policy, the differential treatment of nationals of other member states and its own citizens for the purposes of law enforcement. Though premised on free movement, both of these principles would, nevertheless, support an interpretation of section 7 that precludes the deportation of long-term residents save when they pose a serious and continuing risk to the safety and order of Canada.

In *R. v. Bouchereau*,¹¹⁵ the Court of Justice of the European Communities interpreted the scope of the public policy proviso that limits the guarantee of free movement under Article 48 of the Treaty. It held that deportation could only be ordered in limited circumstances, and not against a person convicted of minor drug offences. The Court interpreted the clause as follows:

In so far as it may justify certain restrictions on the free movement of persons subject to Community law, recourse by a national authority to the concept of public policy presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society.¹¹⁶

¹¹⁴ See Office for Official Publications of the European Communities, *Treaties Establishing the European Communities*, abridged ed. (Luxembourg: Office for Official Publications of the European Communities, 1987) at 167-68.

¹¹⁵ (No. 30/77), [1977] C.J.E.C., 2 C.M.L.R. 800.

¹¹⁶ *Ibid.* at 825.

Thus, it is clear that states may only rely upon their residual discretion under the Treaty where there is a serious, continuing, and profound threat to a fundamental interest.

In *Adoui v. Belgium*¹¹⁷ the Court reviewed the actions of Belgium, which expelled non-national female prostitutes on the basis of public policy considerations. It was argued that Belgium was violating the Treaty by taking measures against prostitution engaged in by nationals of other member states while not prosecuting, and effectively disregarding, similar activities of its own nationals to the extent that those activities were criminal. The Court held that a member state could not treat non-national criminals differently from local criminals in order to protect the public. In fact, prostitution, which was not criminally punishable in Belgium, could hardly be said to violate the *ordre public*.

How can this aid in interpreting the *Charter* as it applies to immigrants subject to deportation? The Treaty establishes a right to remain subject to certain extreme exceptions, and it may be argued that our *Charter* imposes similar requirements with respect to long-term residents. Jurisdictions that face similar challenges of balancing individual and state interests have established that persons should only be deported where there is a clear and present danger to society. And so should our *Charter* be read. The state's sovereign power remains; however, the principles of fundamental justice require that those individuals who are established in Canada, and who do not pose a significant risk, have a right to remain and cannot be deported.

b) *The common law*

The common law, as many commentators suggest, remains a particularly important—if not the most important—source of the principles of fundamental justice. But fundamental justice certainly includes more than the common law duty of fairness. And one of the issues that courts and commentators have been struggling with is precisely *how much* more fundamental justice requires. Though advocating a cautious approach to the development of section 7, Evans suggests that there are circumstances in which the courts should move beyond the common law. He states:

It should only be necessary to resort directly to the *Charter* when a ground of judicial review that would otherwise have been available at common law has clearly been

¹¹⁷ (No. 115/81 & 116/81), [1982] C.J.E.C., 3 C.M.L.R. 631.

abrogated by statute, or when the existing common law of judicial review does not give to a *Charter* right the degree of protection that the applicant is seeking.¹¹⁸

The principles of fundamental justice move beyond the common law in so far as they cannot be limited by statute. Moreover, the *Charter* has placed a "high societal value" on particular interests delineated therein, and can be "invoked as a source of a new legal right."¹¹⁹

And while certain interests will enjoy an enhanced constitutional recognition, what is the concomitant degree of enhanced *protection* to be had under the *Charter*? Is fundamental justice concerned merely with procedure or does it include substantive protection as well? Although the Supreme Court has attempted to avoid the difficulties raised by this question,¹²⁰ I suggest that fundamental justice is concerned with both procedural and substantive protection.¹²¹ Where a particular interest triggers the operation of section 7, fundamental justice requires that interest to be given sufficient protection, whether that is done procedurally¹²² or through substantive intervention by the courts.¹²³ As Wilson J. stated in her concurring opinion in *B.C. Motor Vehicles*, "it is hard to see why one's life and liberty should be protected against procedural injustice and not against substantive injustice."¹²⁴

Sufficient protection can only be given to the liberty and security interests of permanent residents who have breached a condition of their status in Canada, or to long-term illegals if deportation is found to be

¹¹⁸ Evans, *supra* note 51 at 57.

¹¹⁹ *Ibid.* at 73, 80.

¹²⁰ See Hogg, *supra* note 13 at s. 44.10(a), where he states that "the distinction has never been clear. ... The Court's decision in the *B.C. Motor Vehicle Reference* does spare us that order of argument."

¹²¹ See Tremblay, *supra* note 73 at 252, where he states: "The principles [of fundamental justice] can deal with the procedural content of the law, such as a fair hearing, or with the substantive content of the law, such as the requirement of *mens rea* as a constituent part of a crime."

¹²² See Singh, *supra* note 14, where the principles of fundamental justice required that a refugee claimant be granted an oral hearing.

¹²³ See *B.C. Motor Vehicles*, *supra* note 46: an absolute liability offence where there is the possibility of imprisonment violated fundamental justice; and see *R. v. Morgentaler*, *supra* note 84, where it was held that the requirement that an abortion be approved by a therapeutic abortion committee violated the principles of fundamental justice both in terms of procedure and, per Wilson J., substantively in its interference with a woman's right to choose. See Colvin, *supra* note 107 at 571, where he states that "[i]n both cases, the Supreme Court reviewed features of legislative schemes which could be viewed as means to the achievement of social ends. Neither case, however, offers much support for a power to review the justice of the social ends which are pursued through legal means."

¹²⁴ *Supra* note 46 at 531.

unjust. To focus upon deportation as either a substantive or procedural concern is to unnecessarily complicate the argument.¹²⁵ An attack upon deportation procedures under the *Immigration Act* would be unlikely to succeed given that the *Act* provides two levels of impartial decision makers, broad grounds of appeal, and the possibility of judicial review (though decidedly less procedural protections are engaged by the deportation of an illegal). Similarly, to label deportation as a substantive violation of the principles of fundamental justice is, perhaps, to overshoot the mark. What is required is a more delicately textured approach that sufficiently contextualizes the state's action *vis a vis* the individual. Simply put, the courts must identify the individual interests at stake and, when balanced against the state's interests, determine whether deportation is constitutional under those circumstances.

Such an approach is supported by the decision of the Supreme Court of Canada in *B.C. Motor Vehicles*. As Lamer J., as he then was, stated, citing Dickson J. in *Big M Drug Mart*,¹²⁶ "[t]he task of the Court is not to choose between substantive or procedural content *per se* but to secure for persons 'the full benefit of the *Charter's* protection.' " ¹²⁷ The enactment of the *Charter* requires the courts to interpret legislation in a manner consistent with the *Charter's* provisions.¹²⁸ Attributing a narrow and strictly procedural interpretation to "principles of fundamental justice" will, as Lamer J. stated, increase the "possibility that individuals may be deprived of these most basic rights. This latter result is to be

¹²⁵ For a different view see B. Jackman, "Advocacy, Immigration and the Charter" (1990) 9 Imm. L. R. (2d) 286 at 297, where she states: "The Charter has been restricted to date essentially to the recognition of procedural protections. There has not been a decision which recognises any purely substantive rights of aliens under the Charter."

See also E. Morgan, "Aliens and Process Rights: An Open and Shut Case of Legal Sovereignty" (1988) 7 Wisc. Int'l L.J. 107, for a more theoretical analysis of the interaction between procedure and substance within the context of international law. Constitutional law, he argues, at 125, has become co-opted by principles of international sovereignty:

The irony ... is that the benevolent discourse of constitutional rights has become the primary medium in which to express the traditional attitude of national insulation, the increasing openness of process thereby deflecting attention from continuing closure of substance. ... The historical pattern of Canadian immigration law, therefore, may be said to be one of movement in terms of process and stagnation in terms of substance.

¹²⁶ [1985] 1 S.C.R. 295.

¹²⁷ *Supra* note 46 at 499.

¹²⁸ The issue of whether courts should be intervening in deportation issues and introducing their value judgments in place of an elected Parliament, particularly at present in light of the public's seeming dissatisfaction with immigration policy, is outside the scope of this paper.

avoided given that the rights involved are as fundamental as those which pertain to life, liberty and security of the person."¹²⁹

c) *Other Charter provisions*

It is incumbent upon the courts not only to look at "the character and the larger objects of the *Charter*,"¹³⁰ but also to look at other *Charter* provisions when interpreting section 7. Deportation operates at the intersection of a number of *Charter* guarantees. These include the "right not to be tried ... and punished for an offence" more than once (section 11(h)); the "right not to be subjected to cruel and unusual treatment or punishment" (section 12); and "the right to equal protection and benefit of the law" (section 15). When considering the principles of fundamental justice under section 7, the courts should find instruction in sections 11(h), 12, and 15. Under particular circumstances, can deportation be conceived as a punishment that is being imposed after a person has already been convicted under another act of Parliament?¹³¹ Can deportation be perceived as cruel and unusual treatment?¹³² Does deportation subject immigrants who have been convicted of criminal acts to a more severe punishment than citizens convicted of those same acts?¹³³ While deportation may not violate any of these sections standing alone, the larger objects that they seek to protect may nevertheless be engaged. Other sections of the *Charter* should guide the courts in identifying the principles of fundamental justice. Therefore, even if the above-mentioned sections are only tangentially engaged by deportation they should still be considered under section 7.

d) *European Convention materials*

The *European Convention*¹³⁴ provides a particularly fruitful source of interpretation for the *Charter*. The European Court of Human

¹²⁹ *Supra* note 46 at 501.

¹³⁰ *Big M Drug Mart, supra* note 126 at 344.

¹³¹ In *Hurd, supra* note 38, it was held that the answer is no: Deportation is not punishment and therefore not double jeopardy.

¹³² See *Chiarelli, supra* note 15, where it was held that deportation does not violate s. 12. But also see *Nguyen, supra* note 70, per Marceau J.

¹³³ See *Chiarelli, supra* note 15, where deportation was held not to violate s. 15 of the *Charter*.

¹³⁴ *Supra* note 3.

Rights has heard a number of cases involving the deportation of long-term residents, and it is instructive to examine the approach taken by that Court. Article 8.1 of the *European Convention* states:

Everyone has the right to respect for his private and family life, his home and his correspondence.

This section alone, and in conjunction with other *Convention* sections, has been held to preclude the deportation of an individual where there would be a significant interference with his or her family life.¹³⁵ Violations of Article 8.1 may be justified under Article 8.2, however, where it is shown that the interference is (a) in accordance with the law, (b) in pursuit of a legitimate aim, and (c) necessary in a democratic society. The following decisions outline the Court's developing interpretation of the right to family life, and show under what circumstances such a violation can be justified. The cases decided under this Article of the *European Convention* illustrate the appropriate balance to be struck, or at a minimum, the factors that ought to be considered, when courts scrutinize oppressive government action *vis a vis* an individual and, as a consequence, his or her family.

In the earlier case of *Abdulaziz, Cabales and Balkandali v. United Kingdom*,¹³⁶ the European Court of Human Rights gave a restrictive interpretation to Article 8 of the *Convention* when balanced against state sovereignty. It was stated that

[t]he Court cannot ignore that the present case is concerned not only with family life but also with immigration, and that, as a matter of well-established international law and subject to its treaty obligations, a State has a right to control the entry of non-nationals into its territory. ...

The duty imposed by Article 8 cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country.¹³⁷

The case was brought by immigrant women in the United Kingdom who were not permitted to sponsor their spouses. The law stated that only women who were citizens could sponsor their husbands. This differed from the situation as it applied to non-citizen men, who were entitled to sponsor their wives. Though the Court did not find a

¹³⁵ See *infra* note 150.

¹³⁶ (1985), 7 E.H.R.R. 471 (European Court of Human Rights) [hereinafter *Abdulaziz*].

¹³⁷ *Ibid.* at §§ 67-68.

violation of Article 8, the immigration rules were held to have constituted discrimination on the basis of sex.

*Moustaquim v. Belgium*¹³⁸ signalled a fundamental shift in Article 8 jurisprudence. A Moroccan national who had lived in Belgium since the age of two was deported after being convicted of a number of offences, both as a juvenile and as an adult. The Court had little difficulty in finding a violation of Paragraph 1 of Article 8. It was stated:

The measure complained of resulted in his being separated from [his family] for more than five years, although he tried to remain in touch by correspondence. There was accordingly interference by a public authority with the right to respect for family life guaranteed in Paragraph 1 of Article 8.¹³⁹

Under Paragraph 2 of Article 8, the Court found the deportation to be in accordance with the law and that it served a legitimate aim. However, it was found not to be necessary in a democratic society; that is, not "justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued."¹⁴⁰ The Court balanced the interests of the state against those of the applicant as follows. The offences were

spread over a fairly short period. ... There was ... a relatively long interval between [them] and the deportation order. ... All the applicant's close relatives ... had been living in Liège for a long while. ... Mr. Moustaquim himself was less than two years old when he arrived in Belgium.¹⁴¹

The Court concluded:

Having regard to these various circumstances, it appears that, as far as respect for the applicant's family life is concerned, a proper balance was not achieved between the interests involved, and the means employed was [*sic*] therefore disproportionate to the legitimate aim pursued. Accordingly, there was a violation of Article 8.¹⁴²

This balancing analysis is familiar to us under section 1 of the *Charter*. The scope of Paragraph 2 of Article 8 was given an even narrower interpretation in the following case, where the criminality at issue was more serious.

¹³⁸ (1991), Series A. No. 193 (European Court of Human Rights) [hereinafter *Moustaquim*].

¹³⁹ *Ibid.* at 18.

¹⁴⁰ *Ibid.* at 19.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.* at 20.

In the case of *Beldjoudi v. France*,¹⁴³ a lifetime resident of France was convicted of a number of serious offences and was ordered deported. He argued that the deportation order violated his right to respect for his private and family life¹⁴⁴ pursuant to Paragraph 1 of Article 8, and that the deportation could not be justified under Paragraph 2 of Article 8.

The Court held that deportation violated Paragraph 1 of Article 8 of the Convention. Concerning Paragraph 2, the government asserted its interests as follows. They argued that Mr. Beldjoudi had committed a large number of serious offences over a period of fifteen years, all of them during his adult life. The sentences totalled over ten years in prison; the crimes continued even after the deportation order was served; and, “[i]n short, the dangerous character of Mr. Beldjoudi meant that his presence on French territory could not be tolerated by the community.”¹⁴⁵ These very serious state concerns were balanced against the applicant’s interests. This case, it was stated, differed from *Moustaquim*, as the criminality was far more serious. However, weighing against this was the fact that the applicant, an Algerian, had lost his French nationality when he was a minor; his wife was a French citizen; and he had lived in France for 40 years. The Court concluded that “[h]aving regard to these various circumstances, it appears, from the point of view of respect for the applicant’s family life, that the decision to deport Mr. Beldjoudi, if put into effect, would not be proportionate to the legitimate aim pursued and would therefore violate Article 8.”¹⁴⁶

The separate concurring opinion of de Meyer J. is also instructive. He concluded that “[w]hile it is true, as the documents in the case show, that Mr. Beldjoudi has already been convicted of numerous offences, mostly comparatively serious ones, and is now once more under suspicion of having committed others, he can be sufficiently punished for these by the criminal law.”¹⁴⁷ De Meyer J. acknowledged that Mr. Beljoudi had become a *de facto* citizen of France, which precluded treating him differently from French nationals for his criminal activity.

¹⁴³ (1992), Series A. No. 234-A (European Court of Human Rights) [hereinafter *Beldjoudi*].

¹⁴⁴ *Ibid.* at 25.

¹⁴⁵ *Ibid.* at 27.

¹⁴⁶ *Ibid.* at 28.

¹⁴⁷ *Ibid.* at 35 [footnote omitted].

In a further concurring opinion, Martens J. stated in very unequivocal terms that deportation is unacceptable treatment for long-term residents. A portion of his judgment is excerpted below.

Paragraph 1 of Article 3 of Protocol No. 4 to the [European] Convention forbids the expulsion of nationals. In a Europe where a second generation of immigrants is already raising children (and where violent xenophobia is increasing to an alarming extent) it is high time to ask ourselves whether this ban should not apply equally to aliens who were born and bred in a member State or who have otherwise, by virtue of long residence, become fully integrated there (and, conversely, become completely segregated from their country of origin).

In my opinion, mere nationality does not constitute an objective and reasonable justification for the existence of a difference as regards the admissibility of expelling someone from what, in both cases, may be called his "own country."... I believe that an increasing number of member States of the Council of Europe accept the principle that such "integrated aliens" should be no more liable to expulsion than nationals, an exception being justified, if at all, only in very exceptional circumstances. ...

I would have preferred the Court's decision in the present case to have been based on the aforesaid principle, coupled with a finding that there were no very exceptional circumstances justifying a departure therefrom. A judgment along those lines would have achieved what the *Moustaquim v. Belgium* and the present judgment have failed to do, namely introduce a measure of legal certainty; this seems highly desirable, especially in this field.¹⁴⁸

Martens J. also would have found a violation of the right to private life under Article 8 of the *Convention*. The interests considered with respect to privacy are similar to those advanced concerning family life.

To sum up: I think that expulsion, especially (as in the present case) to a country where living conditions are markedly different from those in the expelling country and where the deportee, as a stranger to the land, its culture and its inhabitants, runs the risk of having to live in almost total social isolation, constitutes interference with his right to respect for his private life.¹⁴⁹ [footnotes omitted]

In both *Moustaquim* and *Beldjoudi*, the interests considered by the Court do not differ greatly from those that are considered by the IAD on appeals in equity from deportation orders. The significance of these decisions, however, is that they create a supra-national obligation upon states and they are subject to adjudication by a Court in the fullest sense. Extending this to our Canadian context, I would argue that it is not for the IAD to conclude that under particular circumstances a person should benefit from equitable considerations and not be deported; it should not be open to the IAD to make that determination at all. Certain persons,

¹⁴⁸ *Ibid.* at 37.

¹⁴⁹ *Ibid.* at 38.

by virtue of their long-term residence, their family, their community ties, and other factors, ought to have a supra-legislative, or constitutional, right to remain. What is suggested is a constitutional restraint on the power to deport, pursuant to section 7 of the *Charter*, that would involve a kind of equitable balancing similar to that currently engaged in by the IAD. Such balancing, moreover, would be sufficiently broad to encompass a respect for, and a protection of, family life similar to that which is outlined in Article 8 of the *European Convention*. This would be acknowledged, first, in the recognition that deportation affects the personal liberty and security of a deportee who is being separated from his or her family and community. Second, it would be acknowledged that the principles of fundamental justice recognize the family as the basic social unit, and would therefore protect against such interference. Using Article 8 to animate section 7 of the *Charter* differs little, in principle, from using other *Charter* sections to similar effect. Moreover, in *European Convention* jurisprudence, violations are often grounded upon the combined operation of two or more Articles.¹⁵⁰

e) *The International Covenant on Civil and Political Rights*

Canada's obligations under the *ICCPR*¹⁵¹ give rise to another source from where the principles of fundamental justice may be drawn. Article 23.1 of the *ICCPR* states:

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

The language of Article 23.1 is stronger than that of the *European Convention*, which accords only "the right to respect for ... private and family life"—something less than protection. Thus, given the more forceful language, it would seem that Canada's international obligations as a signatory to the *ICCPR* are at least as demanding as the protection required under Article 8 of the *European Convention*.

The Human Rights Commission of Australia, in a report entitled *Human Rights and the Deportation of Convicted Aliens and Immigrants*,¹⁵²

¹⁵⁰ See *Abdulaziz*, *supra* note 136, where a violation of respect for family life (Art. 8) was found in concert with a violation of freedom from discrimination (Art. 14).

¹⁵¹ *Supra* note 3.

¹⁵² Report No. 4 (Canberra: Australian Government Publishing Service, 1983). The report states:

The [Australian Human Rights] Commission notes that the European Commission has

considered whether Article 23.1 was engaged in deportation cases. The commission stated:

The very fact that a family is in existence, and that its interests must be protected and promoted, places on those making deportation decisions an obligation to deport only when there is a greater interest at stake than that of protecting the family, and, in particular, the children, irrespective of whether they were born in Australia.¹⁵³

Drawing on conventional international law, there are a number of reasons for including under section 7 the protection of the family. First, the *ICCPR* calls for this protection in unequivocal terms. Second, the European Court of Human Rights has, in interpreting the *European Convention* (a document that shares many similarities with the *ICCPR*),¹⁵⁴ extended significant protection to the family against the deportation of one of its members. Finally, beyond the *ICCPR*, Canada is enjoined by other international treaties that it has signed, including the *Convention on the Rights of the Child*,¹⁵⁵ which recognize and protect similar rights and interests. While some of these conventions have neither been widely applied nor received much analytical attention, I would suggest that they add strength to the argument against deportation where it would result in the separation of the family unit.

f) *Community as a source of rights*

The movement away from classical immigration law and “theories of obligation derived ... from the forms of consent by a

considered the nature of the obligation towards the family in exclusion cases pursuant to complaints under Article 8 of the *European Convention*. The language of Article 8 is somewhat different from that of Article 23.1 ... but if anything it might be considered that the *ICCPR* language imposes stronger protections. ... The Commission considers that, in certain circumstances, e.g. where an alien of long-standing residence in Australia has established a family in Australia and, in particular, where children of the family have grown up in Australia, deportation could amount to an infringement of ... Article 23.1 of the *ICCPR*.

The Report also suggests that deportation could amount to an infringement of Article 17 (arbitrary interference with one's family); Article 24 (protection of the rights of a child); and the *Declaration of the Rights of the Child*, Principle 6 (a child shall grow up in the care of his or her family and not be separated therefrom).

¹⁵³ *Ibid.*

¹⁵⁴ See Bayefsky, *supra* note 109 at 111, where she states that the “actual provisions of the European Convention are closely related to the Covenant on Civil and Political Rights.”

¹⁵⁵ U.N. Doc. A/RES/44/25. The *Convention* was concluded on 20 November 1989 and entered into force on 2 September 1990. It was signed by Canada on 28 May 1990 but was not yet ratified as of 1 January 1991.

sovereign government” leads toward a “new communitarian ethos that grounds obligation in social relationships and notions of substantive justice.”¹⁵⁶ It is from the community, then, and the relationships that bind persons to their families and their society, that the courts should look to find yet another source of rights to aid in the interpretation of section 7 of the *Charter*. It is outside the scope of this paper to analyze in detail the distinction between formal citizenship in a sovereign state and membership in a sub-state community. However, it is clear enough that the two represent different types of associations that give rise to different webs of rights and obligations.

Citizenship is no longer the basis for the distribution of many government benefits and social rights. While there are a few privileges that remain within the exclusive domain of citizenship, their numbers and significance are declining. Instead, it is being increasingly recognized, that “community” gives rise to certain rights for those who do not enjoy the status of citizenship. Community, in its broadest sense, may include simply a sustained presence in a country. And for some commentators it is nothing more than time that ought to give rise to an individual’s constitutionally protected status, free from the exercise of the immigration power. Wood’s radical suggestion is that citizenship itself should be dismantled and replaced with something earned. “Persons born in Australia, then, should not be regarded as having permanent resident rights until they have resided in the country for the requisite period of time.”¹⁵⁷ Placing fewer requirements on those who through the fortuity of birth enjoy citizenship is to create a two-tiered system of protected interests without adequate justification.¹⁵⁸ As Wood continues, “[i]t is inequitable to place greater demands on immigrants than on native-born Australians concerning the issue of being a ‘good Australian.’”¹⁵⁹

In the early 1980s American courts began to extend to illegal aliens a greater bundle of rights than they had previously enjoyed. The rationale for this movement is what has been called “contacts” theory: constitutional protection rooted not in formal status but, rather, in an alien’s “contacts” with or “ties” to the United States. These contacts,

¹⁵⁶ Schuck, *supra* note 17 at 75.

¹⁵⁷ Wood, *supra* note 41 at 300-01.

¹⁵⁸ See also “Immigration Policy,” *supra* note 76 at 1464.

¹⁵⁹ *Supra* note 41 at 301.

then, create a "constitutionally cognizable liberty interest."¹⁶⁰ What is being argued, and perhaps accepted by some courts, is a conception of freedom rooted in an individual's *engagement* in a community, rather than in a more negative conception of *freedom from* some action.¹⁶¹

Within the framework of the Canadian constitution, with its profoundly different sense of freedom and community rooted in the "inherent dignity of the human person,"¹⁶² such an analysis is equally persuasive. If, as Johnstone writes, "a purpose of the Charter is to ensure that dignity and self-respect are preserved in interactions with the state,"¹⁶³ then, by recognizing community ties as a basis of membership, the courts must conclude that under certain circumstances non-citizens do enjoy a right to remain: It is only through a constitutional recognition of the substantive relationships that individuals form with their communities that dignity and respect will be ensured. In summary, as one commentator has concluded, "[t]he participation model, as well as various other strands of modern doctrine regarding immigration, aims to replace the category of citizenship with a more acceptable index by which individual liberty rights are to be determined."¹⁶⁴

IV. CONCLUSION: A CONSTITUTIONAL RIGHT TO REMAIN

The deportation from Canada of long-term residents is a deprivation of liberty and security of the person that is not in accordance with the principles of fundamental justice. This proposition is supported by the wealth of sources that ought to be considered when interpreting section 7 of the *Charter*. The *Charter* as a whole, jurisprudence on the *European Convention*, Canada's international obligations under the *ICCPR*, and principles of freedom of movement drawn from the European Community, all point to a right to remain for long-term residents. Furthermore, the substantive connections that an individual forges with his or her community provide a more compelling basis for constitutional recognition than does formalistic categorization. And

¹⁶⁰ "Immigration Policy," *supra* note 76 at 1325. Particular reference is made to the case of *Landon v. Plescia* 103 U.S. 321 (1982), which recognized that a resident alien could not be excluded at the border when returning after being out of the country.

¹⁶¹ *Ibid.* at 1324.

¹⁶² See, for example, *B.C. Motor Vehicles*, *supra* note 46; and *R. v. Morgentaler*, *supra* note 84.

¹⁶³ Johnstone, *supra* note 100 at 22.

¹⁶⁴ "Immigration Policy," *supra* note 76 at 1464.

while the common law is also a valuable source of interpretation, it need not be determinative.

Many of the principles drawn from the various sources set out above are presently considered by the IAD when determining whether equitable relief should be granted to a person ordered deported. (Of course, long-term illegals not entitled to an appeal do not benefit from this consideration.) The *Immigration Act* states that decisions in equity should be made "having regard to all the circumstances," and this has been interpreted in *Ribic* to include considerations of the seriousness of the offence, the possibility of rehabilitation, the length of time spent in Canada, the ties to family and community, and, generally, the hardship that would be caused by deportation.¹⁶⁵ I would argue that each of these criteria is valid and ought to be considered whenever a long-term resident faces deportation, regardless of their status in Canada. I would add, however, that equitable considerations under the *Immigration Act* provide an inadequate recognition of, and insufficient protection for, the interests at stake. These interests engage the constitution, and it is only through constitutional recognition of a right to remain for long-term residents that adequate protection can be extended.

The recognition of the *Ribic* criteria under section 7 of the *Charter* leaves to the courts the determination of whether deportation in a particular situation is constitutional. The IAD "can expect no curial deference with respect to constitutional decisions."¹⁶⁶ Moreover, basing a right to remain not on equity but on the *Charter*, expands the scope of this guarantee. Under the *Immigration Act* only permanent residents have a right of appeal on grounds of equity; under the *Charter*, "every human being who is physically present in Canada"¹⁶⁷ would enjoy this protection. Constitutional recognition ought to be based upon substantive considerations and not upon suspect classifications. The right to remain for long-term residents must be recognized under the *Charter* where, after meaningful balancing, the individual's interests outweigh those of the state. And, finally, the formalistic distinction between citizens and non-citizens must be rejected where it is found to be without substance.

¹⁶⁵ *Ribic*, *supra* note 24.

¹⁶⁶ *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5 at 17.

¹⁶⁷ *Singh*, *supra* note 14 at 202.

