1998

Use of Discretion in Independent Migrant Selection: A Study of Canadian Immigration Law, Policy and Practice

Philip Lupul

USE OF DISCRETION IN INDEPENDENT MIGRANT SELECTION:

A STUDY OF CANADIAN IMMIGRATION LAW, POLICY AND PRACTICE

by

Philip Lupul

A thesis submitted in partial fulfillment of the
requirements for the degree of

Master of Laws

at

Dalhousie University
Halifax, Nova Scotia

September, 1998

This thesis is dedicated to my parents, Eugene and Erna Lupul, whose own immigrant experience doubtless provided inspiration and a touchstone for this work. But more than that, it is their sacrifice, faith and determination which made it possible for me to realize my ambitions. This work is as much their achievement as mine.

I also dedicate this thesis to my wife Mary and sons, Roman and Nicholas. Their unstinting support and patience through a year of residence in Halifax and another year of part time effort while on assignment in New Delhi sustained me through many long days of effort. Particularly in the last year, much of the time devoted to this project was taken from them. The completion of this thesis is a tribute to their willingness to give of themselves for me.

I can only hope that my gratitude and love provide some measure of recompense.

Philip Lupul
New Delhi, India
August 31, 1998

TABLE OF CONTENTS

ABSTRACT

Canadian immigration law has traditionally relied upon broad grants of discretionary authority as a tool for immigrant application processing. Such authority has had two facets – a procedural aspect allowing for flexibility in methods and processes for handling applications, and a substantive aspect relating to actual decision making. This thesis examines such discretion in the particular context of the Independent category of migration that is provided for under the current *Immigration Act* and *Regulations*.

Chapter One begins with a discussion of the concept of discretion generally. An overview of the extremes of jurisprudential opinions which affect this topic is provided, together with an examination of the rationale for existence of discretionary authority and a review of the various forms that it may take. Chapter Two highlights use of discretionary power in overseas processing, where most Independent selection occurs, and traces recent developments in the immigration bureaucracy that appear to impact upon its availability and usage. Chapter Three scrutinizes the current limits on usage of discretion that have derived from the process of judicial review and the courts' treatment of this topic. Additionally, certain extra-judicial influences and the functional limits they impose upon discretionary power are identified.

This thesis argues that discretionary power has recently been significantly affected by two evolving trends. Hampered by fiscal constraints, the bureaucracy has sought to reduce usage of positive substantive discretion which, by its very nature, is a resource intensive processing tool. Conversely, since negative substantive discretion retains some functional benefits, not much official disdain has been focused upon it. Meanwhile, procedural discretion has been enhanced because of the resource savings it has delivered up. The courts, on the other hand, have worked to restrict negative substantive discretion while simultaneously guarding the fullness of its positive variant. These dual purposes are rooted in a traditional mistrust of discretionary authority and a modern trend to favour rights. While the courts have been proactive in constraining negative discretion, their protection of positive substantive discretion has followed a more passive and traditional course, focusing only on whether it has been unduly fettered. They have not gone so far as to find any vested rights in applicants to draw upon policies allowing for inclusion outside of normal requirements. Concurrently, procedural discretion has only been of interest to the judiciary with respect to any adverse impact upon applicant rights.

The conclusion drawn in Chapter Four is that the developments described all push ultimately in the same direction. Though the bureaucracy and the judiciary each have their own reasons and interests in the matter, yet they are united in desiring a more rules based selection system, that is less reliant upon substantive discretion. Recognizing that such a move is in harmony with the spirit of the current post-*Charter of Rights and Freedoms* era, a consideration of how reform may be undertaken and some specific initiatives in that regard are recommended. In particular, I note that the complete elimination of all discretionary authority may be neither possible nor desirable and offer some suggestions for its containment and structuring that may serve to enhance its beneficial qualities and limit its offensive aspects.

ACKNOWLEDGEMENTS

It is difficult to know where to begin, especially since a work of this nature is more a product of evolution, brought about by many contributions, than a single magic spark.

It is appropriate to acknowledge first the contribution of those closest to this work - my supervisor, Professor Audrey Macklin, my readers, Professor Teresa Scassa and Professor Richard Devlin, and the Chair of the Graduate Studies Program, Professor Bruce Archibald. Their encouragement and guidance was the essential platform upon which this thesis was built and served to ensure that the LL.M. program generally was a rich learning experience.

I wish also to acknowledge my indebtedness to the Graduate Program Secretary, Sheila Wile. Her tireless patience and warm good humour endeared her to all of the students and helped to make the experience of life at Dal a pleasant one indeed.

I would be remiss as well if I did not recognize my fellow classmates whose company, advice and commiseration throughout a year of toil in the graduate carrels made the year so memorable and enjoyable. And who can forget those potluck suppers?! My thanks and best wishes to all of you – Diane Babor, Richard Fader, Evelyn Hartley, Mimi LePage, Stephania Luciuk, Jeffrey Ludlow, Lynn Marshall, Watis Sotthibandhu, Aaron Tetteh-Ahinakwa and Yin Xiang

A special thank you also to my colleague, Ram Anand Shankar. Over the last

year, when I was no longer on campus, he graciously attended to a host of thesis related details for me that required personal attention. That support and his constant encouragement dispelled much of the sense of isolation that went with an off-campus research effort and kept me focused throughout many distractions and interruptions.

As I stated at the outset, I believe this thesis is a product of evolution. A stint as Adult Programming Coordinator at the Legal Resource Centre, in the Faculty of Extension at the University of Alberta, provided me with an opportunity to work in an academic legal setting. It was there that my interest in legal research and writing first flowered and the idea of undertaking graduate studies was galvanized. I am grateful to Professor Lois Gander, Ms. San San Sy and the staff of the Legal Resource Centre for the experience and inspiration.

My thanks also to Professor Frank Jones of the Faculty of Law at the University of Alberta, Doctor E.G. Ted Wilson, formerly of the University of British Columbia, and Bernard Gagosz, (former) Consul-General of Canada at Seattle, Washington, for their assistance and support with respect to the application process for the LL.M. program.

Similarly, thanks to a great friend, Professor Charmaine Gorrie of the Department of Classics, University of British Columbia, for her advice on matters of Latin usage.

Finally, I wish to acknowledge my employer, the Department of Citizenship and Immigration Canada, for providing a study leave which enabled me to pursue this personal goal. It must be mentioned, however, that the views and opinions expressed herein are my own and do not necessarily reflect those of the Department of Citizenship and Immigration Canada. Similarly, though I am indebted to many persons for their contributions to this study, the responsibility for errors and omissions is mine alone.

INTRODUCTION

1. *Purpose*

This is a study of the use of discretionary powers in contemporary Canadian immigration law and practice. It is, most centrally, a story of change and transformation. Unremitting change, occurring with almost lightening speed, appears to be one of the few constants of life today in Canada. It is a pace of change that stems from developments and innovations that seem to feed one upon the other to fuel ever more evolution. The phenomenon of globalization and advances in information and other technologies have, in many ways, made the world a smaller place. Closer to home, the social and legal landscape has similarly been subjected to powerful forces that have reshaped many aspects of our society. The advent of the *Charter of Rights and Freedoms* in the early 1980's, for example, has had profound and far-reaching consequences that have left few areas of law and social policy unaffected. More recently, the restricted economic means of governments in Canada, both provincial and federal, has harbingered service reductions and bureaucratic restructuring whose full effects remain to be seen.

As I attempt to demonstrate in this work, these same forces, as well as others, have worked in recent years to reshape our understanding and acceptance of discretionary authority within the particular field of immigration law. Immigration law and policy, of course, are simply one small part of a larger whole that is our legal system. And, since the legal system exists to serve the needs of society, it cannot be immune to the

influences and events that rework society as a whole. I have endeavoured in this thesis to examine and explain some of the theories, jurisprudence, and practical considerations about discretion that affects its place and usage in our law. However, in order to tell the complete story of discretion, I have also found it important to do so with reference, not just to the law and jurisprudence, but also to the wider political and social context. The use of discretionary power has as much to do with attitudes and opinions that can be shaped by a wide variety of factors and influences beyond the law itself.

The current *Immigration Act* and *Regulations* have been in place for some twenty years and reflect thinking of an earlier, perhaps less complicated, or at least more stable, period. At that time, legislators saw fit to incorporate express grants of broad substantive discretion in the Independent selection rules as a sort of panacea for curing any defects in the way the rules actually operated. Writing just after the current immigration regime was put in place, J.H. Grey, in a study of discretionary power in Canadian law, noted that:

> If administrative law is seen as the study of the use of power, one of its most important interests is discretion, since the limits on discretion are at the same time the limits on the power that anyone can have in our type of democracy. The massive expansion of the powers of the state, and the growth of immensely powerful committees, commissions and other bodies, against which may be juxtaposed a new and fervent interest in civil liberties and human rights, renders a re-examination of discretion and discretionary powers both essential and inevitable.[1]

Much has changed in society and in the law since Grey wrote these words and there is now even more cogency and urgency to the need for a re-examination of discretion. Indeed, as one of the more controversial parts of immigration law, it is surprising that so little attention has been accorded it in the academic literature. That may

---

[1] J.H. Grey, "Discretion in Administrative Law" (1979) 17 *Osgoode Hall L.J.* 107 at 107.

be changing, however. A recent legislative review commissioned by the Minister of Immigration, for example, thorough cursory in its treatment of the topic, has served to focus some attention on discretionary authority. That report has suggested vast changes to the availability and handling of discretionary power in immigration matters. These changes involve not just restructuring of discretion, but also its reduction. The proposals offered by the Review Committee reflect the realities of a "new-think" which has taken hold of immigration law in Canada.

However, broad substantive discretion has increasingly fallen into disfavour, not just with the courts and the bar, but also with the bureaucracy that administers immigration law. Though the two sides have approached the issue from different perspectives and for different reasons, their views have converged to place broad substantive discretion in something of a tightening vise. Discretion is a labour intensive selection tool, requiring a substantial commitment of time and energy from decision-makers to render individualized decisions. In an era of cutbacks and reductions, administrators have found it increasingly difficult to reconcile such a commitment with a diminishing resource base. Meantime, the courts and the bar have also worked against broad substantive discretion, preferring instead that immigration decisions should proceed from the strict application of explicit rules. Because of their peculiar interests, the two sides have chosen to focus on different aspects of substantive discretion. The bureaucracy's desire to resile from discretionary decision making is concentrated on positive discretion, used to grant exemptions from the ordinary rules, while the judiciary and bar have sought to limit its negative use, as a tool for denying qualification. A combination of bureaucratic expediency and judicial formalism has combined to restrict

the ambit and scope of substantive discretion. Procedural discretion, used to reduce processing steps, however, has simultaneously enjoyed something of a renaissance. Offering advantages for administrative convenience, it has been only of passing interest to the courts and the bar, who have acted primarily just to ensure that it is not used in a way that negatively impacts upon applicant rights.

Though this paper examines the handling of both procedural and substantive discretion, it is obviously the uncertain situation of substantive discretion that is the story of the hour. It is compelling reading precisely because it is a story of paradox, with two sides working for different reasons to hem it in from opposite directions. It is curious, perhaps, but not unusual. Discretion, by its very nature, seems to be dominated by paradox and inconsistency. It is a subject involving strong opinions which, while largely polarized, are yet also inconsistent. Those who decry use of negative discretion in one breath, for example, are also often heard to call for more ample positive discretion in the next.[2] Discretion is about exceptions to the ordinary rules for qualification as an immigrant. In the past, the human condition worldwide seemed to be simply too diverse to be readily and adequately captured by a set of rules, no matter how ample and all encompassing they purported to be. Though the "new-think" involves an emerging consensus favouring a more complete, comprehensive set of rules as the basis for immigrant selection, no one seems to have quite figured out how to dispense with discretion altogether. The Legislative Review Committee, for example, while highlighting that discretion remains an uneasy and troubling component of our

---

[2] For a discussion of this apparent double standard, see for example, J.M. Evans, H.N. Janisch & David J. Mullan, *Administrative Law: Cases, Text and Materials*, 4th ed., (Toronto: Emond Montgomery, 1995), at

immigration law and practice, still recommends retention of some residual discretion to protect against the possibility of rule failure. And therein lies the irony of discretion – widely conceded to be essential and ubiquitous yet not much loved.

The problem, of course, is that immigration involves tough choices. Though we prefer rules, we don't always seem to like the effects that their application can have upon the lives of individuals. Rules seem fair because they suggest everyone will be treated the same. The choices become tough, however, when the application of rules moves from the abstract to the particular. There is no shortage of candidates seeking entry as immigrants to Canada who are able to cite some personal circumstances involving disadvantage, misery or hardship. It matters not whether the problem is seen to arise from application of the rules themselves or from the peculiar situation of the applicant. Either way, compassionate people must inevitably be moved by any example of distress. But what to do? The reality of hard choices is in fact the *raison d'etre* for the existence of substantive discretionary power in our immigration law. Existing alongside, between and around the black and white rules, its ability to relieve against any hardship arising out of application of the rules is that which renders it indispensable. It is important to note, though, that because of the restrictions placed upon its negative use, the tough choices today seem to be mostly of one variety – when to allow an exemption from the strict rules for qualification.

The grant of an exemption from the rules involves larger issues which make the choices even tougher. Relief is not simply a matter between the applicant and the decision-maker. Rather, it also strikes at certain fundamentals of our legal system, such

---

1021 (hereinafter referred to as "Evans").

as notions about the rule of law and the supremacy of Parliament. This is evident in the decision of Muldoon J. in the *Orantes* case[3], where the applicant argued that the *Act's* prohibition on entry of persons unable to support themselves constituted impermissible age discrimination, contrary to the *Charter of Rights and Freedoms*. In dismissing the application, the Court stated:

> This nation is a parliamentary democracy, which means that the elected tribunes of the people are those who must lawfully enact the legislation. It means that Parliament, by legislation under the rule of law, may choose which foreigners, if any, may be legally admitted for permanent residence in Canada. It means that if parliamentary democracy is to survive in Canada, Parliament must make those choices and not become helpless in the face of assertions by aliens, no matter how sympathetic their cases....
>
> It takes a certain degree of intellectual toughness to support the principles of parliamentary democracy in face of various individuals who seek migration into Canada against the will of the democratically elected representatives of the people (not to disparage the Senate of Canada). If the Charter be interpreted in such a manner as to obviate the will of Parliament in a matter such as this, it is the sort of frustration which would ultimately destroy national government by amputating the lawful means of governance.[4]

Notwithstanding any commitment to the will of Parliament, however, the evolution of discretion in recent years appears to have involved a downplaying of the public interest in immigration matters. Again, it seems to be an issue where the three major players in immigration have been in agreement, albeit for different reasons. The bureaucracy, for example, has encouraged a paradigm shift amongst its decision-makers where the only "client" to be considered in immigration matters is the individual visa applicant.[5] The bar, on the other hand, has encouraged a devotion to rules, at least on the negative side of the discretion equation, without regard for consequences that may flow

---

[3] *Orantes* v. *Canada (Minister of Employment & Immigration)* (1990), 34 F.T.R. 184.
[4] *Ibid.* at 188.
[5] See *infra* note 740 and accompanying text for a discussion of this phenomenon.

from the result. It has been an effective strategy in the courts, since the oversight mechanism available to Independent immigrants, judicial review, is ostensibly only concerned with procedure. The devotion of all sides, therefore, has turned predominantly to procedure. Discretion, though, is more about substantive justice than procedure. Thus, it is not surprising that it has been something of a victim to be sacrificed at the altar of procedure.

Thus, in describing the current trend to move away from discretionary power and to have more particularization in the rules, I have attempted to sound a note caution. Though critics may be vocal in their disdain for discretionary power, the case, as I attempt to show is not all one way against discretion. Should we move too far towards a rules based system, we need to recognize that it may well be gained at the expense of the responsiveness and humanity that has been a hallmark of our immigration processes. We may be able to devise rules that exclude sufficiently well, but it is also clear that we will never devise inclusionary rules sufficiently clever to capture all those who are seen to be deserving. It is important, therefore to ask whether the potential downsides are consistent with the public interest and whether we, as a people, are prepared to make any trade-offs in our immigration program that may be necessary. Certainly, before we have the more rules based system that seems to be favoured, it is important to understand more fully what discretion is, how it is used in our system and what implications are likely from current developments. My hope is that this study will contribute in some measure to that end.

2. *Scope*

"Is it true that immigration policy is often in conflict with the rule of law? ... The answer is only too often "Yes.""[6] So begins an article by Toronto immigration lawyers Cecil Rotenberg and Mary Lam, detailing their views of a conflict between the immigration law promulgated by Parliament and the immigration policy devised by the Department of Citizenship and Immigration Canada (CIC). Their assertion demonstrates vividly the philosophical gulf that often separates the bar and the bureaucracy. It is also a clear indication of the hold that the "rule of law" principle maintains over the hearts, minds and imaginations of Canada's immigration lawyers.[7] Particularly in this post-*Charter* era, that principle is the shibboleth for our time that marks the front line of the struggle between philistine discretion and the righteousness of rules. But what exactly is

---

[6] C.L. Rotenberg & Mary Lam, "Business Immigration and Policy – A Review of Some Aspects of the Entrepreneur Program", (1995) 26 Imm.L.R.(2d) 100 at 100.

[7] The importance of the rule of law principle is one that stretches across all areas of law. One of the more prominent current Canadian issues in which it is implicated concerns the matter of Quebec secession. In particular, the rule of law is a central theme of various intervenors' arguments before the Supreme Court of Canada in *Reference Concerning Certain Questions Relating to the Secession of Quebec from Canada*, Supreme Court File No. 25506, initiated by Order-in-Council P.C. 1996-1497, dated September 30, 1996. For a pair of recent articles, published under a joint title of "The Rule of Law", discussing the role of the rule of law in this reference, see H. W. MacLauchlan, "Accounting For Democracy and the Rule of Law in the Quebec Secession Reference" (1997) 76 Can. Bar Rev. 155; and Robert Howse & Alissa Malkin, "Canadians Are a Sovereign People: How the Supreme Court Should Approach the Reference on Quebec Secession" (1997) 76 Can. Bar Rev. 186.

The ubiquity and fundamental nature of the concept of the rule of law is such that it has even crept into the lexicon of the international lawyer. For example, James Crawford, Whewell Professor of International Law at the University of Cambridge, in describing human rights law and practice at the international level, uses the term to typify a middle ground position between three potential theories. In his model, the first, and most traditional, position is what he terms the "conventional" model. There, human rights are derived from the content of treaties and have no special significance beyond that. At the other extreme is the "constitutional" position, where human rights become the central organizing idea of the international system, with states' rights subordinated to it. In between, there is what he calls the "rule of law" model. Under this model, when states enter into treaties or other promises concerning human rights, the situation is changed, with the result that those rights become vested in individuals. Thus, a set of state-individual rights is added to the traditional conception of international law as simply a collection of states' rights. In this way, human rights can affect states' freedom of action, as seen in the conventional model. J. Crawford, "Human Rights and the State" (Lecture of 8 January, 1997, from "The Bertha Wilson Course in Human Rights", Special Visiting Lecturer series held at Dalhousie University, Halifax, N.S., 6 – 17

this "rule of law" and what is its relationship to Canadian immigration law and policy? Is it truly the fundamental cornerstone that underpins our legal system? Moreover, is the paradox that is discretionary power, being both undesirable and indispensable, fundamentally incompatible with it? What concessions have been necessary to allow the two to coexist within one system? What adjustments might still be necessary to effect a better balance between the rule of law and discretionary power? And what of the courts who act as arbiters between the opposing views? Are they really in the middle between the positions of the bar and the bureaucracy? Why does discretionary power have such a bad reputation? What are the influences that truly affect its exercise? These are just some of the questions that are examined in this study.

As may be apparent, discretion is an enormous topic. Accordingly, I have felt compelled to impose limits, wherever possible, so as to contain the ambit of this work within what was realistically possible, given the various constraints and limitations I faced. The major limiting device employed, of course, is that I have chosen to focus only on so-called Independent immigrants. The *Immigration Act* and *Regulations* provide for three broad classes of immigration – Refugees, Family Class and Independents. Though discretionary power affects all three to some extent, neither of the other two classes is so overtly subject to it as are Independents. Independent immigrants are selected largely as a matter of unabashed national self-interest and it is this which provides much of the rationale for leaving their selection process most directly subject to discretionary power. CIC's Immigration Manuals define "Independents" as "...persons who intend to enter the labour market and have the intention and ability to be self-supporting upon their arrival in

---

January, 1997) [unpublished].

Canada."[8] The point of the exercise is to select in only those who will not be a drain on the public purse and are capable of contributing to the economy. Likewise, since this category is dealt with, for the most part, outside of Canada, it is overseas processes that are particularly considered in this study, though I have drawn upon examples developed in the context of the other immigrant classes, wherever they seemed to have broader application or illustrated particular points well.

Further, I have limited this study to identifying and describing only those factors and forces, presently affecting discretionary power, which I believed to be particularly significant. In my estimation, those forces are not yet fully played out and the complexities of their inter-relationships are such that their final outcome remains largely to be determined. Further, the influences that might potentially affect any given exercise of discretion are simply too many to be practically dealt with in a study of this nature. Accordingly, this work does not purport to be either all encompassing or the last word on the subject.

Additionally, this study proceeds out of my seven years experience as a visa officer and daily exposure to the application of discretion in practice. This experience obviously imposes certain biases about this topic which I have attempted to recognize and reconcile. Nonetheless, it is also an experience which, I believe, has equipped me well to venture some opinions as to the practical realities of discretion. Thus, while I have attempted an academic treatment of the topic, yet I have also striven to ground it in the ways and methods of actual usage by using real examples whenever possible.

---

[8] CIC Immigration Manual (hereinafter IM), Chap. OP-5, para. 2.2 "Who is eligible to apply?".

3. *Layout*

This work begins in Chapter 1 with a review of some of the fundamental characteristics and attributes of discretionary power and its treatment in Canadian jurisprudence. In particular, the two schools of jurisprudence, positivism and functionalism, which have had the greatest impact upon its perception in our law are considered. The discussion then moves on to examine why discretion is thought to be necessary and what it is exactly. In Chapter 2, I examine how the overseas selection process for Independent immigrant works and the ways in which discretionary power is imported into that process. Attention is then paid to the restructuring exercise that CIC has undergone in recent years and the particular initiatives that have come out of it. Particular emphasis is placed upon the manner in which such initiatives may have impacted upon discretionary decision-making. Chapter 2 concludes with consideration of sociological theories and the insights they may offer as to how discretion is affected by the institutional setting in which it is employed. Chapter 3 opens with a consideration of the role of the courts and judicial review in Independent immigrant matters. The courts' handling of discretionary power within the selection process, and the impact that judicial decisions have had on its availability and usage, are considered in the middle part of this chapter. In particular, attention is given to the limitations that have proceeded from judicial interventions. The remaining portion of the chapter finishes with a discussion of the role and influence of other actors, outside of the courts, in setting limits upon the use of discretionary power. Chapter 4 then offers my conclusions as to the current availability and usage of discretionary power, both substantive and procedural. I also

consider the proposals for reform that have recently been suggested by the Legislative Review Committee. Finally, I conclude by providing some thoughts and recommendations as to possible directions for future reform.

CHAPTER 1 – FOUNDATIONS OF DISCRETION

"Discretion is the means by which law - the most consequential normative system in society - is translated into action."[9]

1.1 How is discretion understood?

In the British legal tradition, jurisprudence and philosophy have tended historically to portray discretionary authority as a sort of ill-defined law, comprised of plenary power usually subject to few restrictions or controls. This image of discretion as an unstructured and largely unrestrained power has left an indelible image in legal circles of the character of discretion that is bleak and unsettling. Certainly, as a sort of semi-despotic power, the necessity for abiding wariness and constant vigilance over discretionary power has been a predominant theme of academic literature.

Though recent scholarly literature has begun to pierce the veil of doubt surrounding discretionary power, the roots of mistrust run deep and are difficult to shuck off. Generations of lawyers have been inculcated with a pejorative view of discretion that remains widespread[10] and which has far reaching consequences. As Evans observes, "[n]o aspect of the administrative state has attracted a worse press from lawyers than the discretionary powers regularly conferred on, and exercised by, agencies and officials in

---

[9] Keith Hawkins, ed., *The Uses of Discretion* (Oxford: Clarendon Press, 1992) at 11 (hereinafter referred to as "Hawkins").

[10] See for example, J.M. Evans, "Controlling Administrative Discretion: A Role for Rules?" in *The Cambridge Lectures 1991*, edited by F.E. McArdle (Cowansville, Que.: Yvon Blais, 1993) 209 at 209, where the author observes "Lawyers are by instinct deeply suspicious of broad discretionary power exercisable by public officials and institutions.... If one were to ask lawyers what words they associate

the course of carrying out statutory schemes."[11] In fairness, it must be conceded that it is a suspicion that has been proven well-founded in too many instances, over too many years. In the particular field of immigration law, historical examples of broad misuse and abuse of discretionary power are not hard to find.[12]

However, it is possible also to discern a sort of "spill-over" effect from those examples of misdeeds, that readily ascribes blame to discretion for any illicit activity by governmental authorities. It is a process of popular demonization, whereby every injustice is credited to discretion, regardless of whether such wrongs truly involved application of a lawfully granted statutory authority. An example of this is found in a postscript by R. Sampat-Mehta to his book, *International Barriers*.[13] In it, he describes an abrupt change in Canadian immigration policy in late 1972, whereby visitors to Canada were no longer permitted to apply for permanent residence from within Canada.[14]

---

with "discretion", most would be negative: "arbitrary", "capricious" and "abuse" would, I expect, figure prominently in their replies."

[11] Evans, *supra* note 2 at 1019.

[12] An obvious example would, of course, be those policies and procedures which were used in the past to exclude persons on the basis of racial and ethnic origins. For a brief description of such policies, see Carol Turner-Trusca, "A Short History of Immigration to Canada 1869-1995" (1995) 12:3 Bout de Papier 11. See also R. Sampat-Mehta, *International Barriers* (Ottawa: Harpell's Press, 1973), at 131-136, where a number of instances of the use of discretionary power to discriminate against Asian peoples during the first part of this century are cited. For example, prospective immigrants were required to demonstrate that they possessed a certain stipulated minimum amount of unencumbered funds available to aid their settlement. Likewise, a requirement of "continuous journey" was interpreted so that only those arriving directly from their country of origin could be landed. The lack of direct commercial transportation from Asia to Canada made it impossible for Asians to satisfy this requirement. The regulations containing these provisions were ostensibly applicable to all immigrants. However, they contained a grant of discretionary power to immigration officials allowing their waiver. Sampat-Mehta notes ample evidence that such provisions were regularly waived for European and American immigrants, but never for Asians.

[13] *Id.*

[14] *Id.* at 319-325. A general prohibition against applying from within Canada for permanent residence has been in place, as Sampat-Mehta describes, since November 3, 1972. It is enshrined in s. 9(1) of the current *Immigration Act*, R.S.C. 1985, c. I-2, which reads: "Except in such cases as are prescribed,...every immigrant and visitor shall make an application for and obtain a visa before that person appears at a port of entry."

Apparently reacting to an unanticipated tide of would-be arriving immigrants[15], the government suspended regulations that permitted visitors to change their status to immigrants, from within the country.[16] This had the effect of shifting significant discretionary power to port of entry immigration officers to determine the bona fides of visitors. In particular, the officers were empowered to refuse entry, and summarily return to their point of origin, any arriving traveler determined to be an intending immigrant.

In Sampat-Mehta's view, "[b]y executive action, the government has again placed unrestricted discretionary powers in the hands of Immigration Officers in deciding who are and are not to be admitted to the country."[17] He describes the consequences of this as "many faceted abuses"[18], and goes on to relate an account of two port of entry immigration officers convicted of extortion and dereliction of duty for importuning an arriving visitor for sex, in return for a grant of entry. While this certainly describes a despicable event, it serves also to illustrate how opponents of discretionary power are able to find abuse where they wish. An alternative view of this episode is to recognize that while it involves abuse, it is not one involving the exercise of a statutorily accorded power. The convictions that were registered clearly demonstrate that the duo was not acting within any sort of lawful authority. Rather, the malefactors obviously relied upon the aura of authority attached to their positions to achieve their illegitimate aim.

Unfortunately, this is the type of abuse of authority which can and does occur even in the presence of the clearest rules. But why is it then that such incidents are so

---

[15] Sampat-Mehta, *id.*, ascribes a racial motive to the policy change. In his view, it was not just a case of overwhelming numbers, but rather the predominantly Asian characteristic of the movement, which caused most concern.

[16] *Id.* at 320.

readily seized upon as illustrative of the dangers of discretionary power? The answer lies in the jurisprudential thought that has shaped our administrative law. Certainly, it is in jurisprudence that the roots of current law and practice regarding exercise and control of discretionary power are found, and it is there that its usefulness and utility as an administrative tool has been molded. Since "[n]othing is more practical than theory"[19], it is appropriate therefore to begin a study of the use of discretion in Canadian immigration law by considering briefly the jurisprudential footing upon which it rests.

Accordingly, this chapter commences with a consideration of the role and influence of legal positivism, the philosophical foundation from which the concept of the "rule of law" springs. In particular, I explore development of the concept of the rule of law, with its favouritism for codification and the seeming certitude of rules, and the effect that this has had upon acceptance of discretionary authority. I then go on to consider the functionalist line of jurisprudence which has encouraged a more pragmatic understanding of the administrative world generally, and of discretionary power in particular.[20] This chapter then concludes with a discussion of the "why" and the "what" of discretion – why it is seen as necessary in our law and what it is exactly.

---

[17] *Id.* at 323.
[18] *Id.*
[19] Evans, *supra* note 2 at 33.
[20] Though there are other schools of thought that offer insights upon discretionary power, I have deliberately chosen to limit consideration of jurisprudence to these two alone. Quite simply, they have had the greatest impact in shaping current attitudes and thinking about discretion and provide sufficiently contrasting viewpoints to illustrate something of the range of opinions that obtain on this subject. Moreover, my purpose for considering jurisprudence is simply to provide essential context for the real focus of this paper – consideration of the current usage and practice respecting discretionary power in overseas selection of Independent immigrants.

1.2 Dicey and the Rule of Law

In any system of law, there are really only two options for the expression and enforcement of law. The first involves discretion, which invests legal authorities with latitude to determine the ambit and scope of activities that are under the legal purview. The other entails resort to rules, usually collected and codified in statutes, that typically specify with some precision what is to be regulated, the extent to which it is regulated, and the consequences of any breach of the rule. Though they seem to be opposites, the two are actually just reverse sides of the same coin. This is so since even the clearest rule often requires some judgment in its exercise. As a result, the fundamental question is one concerning which of them is to enjoy primacy. In modern Canadian practice, it is obvious even to the casual observer that rules are pre-eminent.

This pre-eminence is seen clearly in the following paragraph from a judgment of the Supreme Court of Canada:

> The rule of law, a fundamental principle of our Constitution must mean at least two things. First, that the law is supreme over officials of the government and thereby preclusive of the influence of arbitrary power...Second, the rule of law requires the creation and maintenance of an actual order of positive law which preserves and embodies the more general principle of normative order. Law and order are indispensable elements of civilized life.[21]

This passage contains two important ideas bearing upon discretionary power, both of which are grounded in the concept of the "rule of law". These are that the law is composed of explicit rules and that such rules act as a check on the authority of governmental officials. By implication, that which is not part of the express law is included in the potential for arbitrary power. Discretionary authority, of course, exists

largely outside of or on the edges of express rules. It is apparent from this passage that mistrust of discretionary authority is an inherent and integral component of our conception of the ideal of the rule of law.

According to John Willis, the origin of suspicions toward discretion can be traced back at least to the civil war period in English history.[22] The victory of the middle class in 1688, which vested ultimate authority in Parliament and the courts, also bred a dislike for discretion, which was so inextricably a feature of royal prerogative.[23] Willis writes that this distrust, which came with the passage of time to be invested with the aura of doctrine, was largely coming unglued by the time Albert Venn Dicey, a turn of the century Oxford law professor, "...canonized it with a name: the "rule of law" [footnote omitted]".[24] Dicey picked up on the traditional prejudice though, and incorporated it under his conception of the rule of law with a broad assertion that rights in England were subject not to discretion, but rather to law alone.[25] This critical view of discretion was a central theme in his seminal work, *Introduction to the Study of the Law of the Constitution*[26], first published in the 1880's. The wide reception that this volume received

---

[21] *Re: Manitoba Language Rights*, [1985] 1 S.C.R. 721 at 748-749.
[22] John Willis, "Three Approaches to Administrative Law: the Juridical, the Conceptual, and the Functional" (1935) 1 U.T.L.J. 53 at 54 - 55.
[23] In "Separation of Powers: A Study in Administrative Law" (1936) 1 U.T.L.J. 313, Jacob Finkelman discusses the historical mistrust of delegation of authority that has marked English common law and its relationship to development of the doctrine of separation of powers, which dictates that courts should oversee any grants of discretion. And yet, as Willis also points out, *id.* at 53 –59, courts, the legislature and the executive have all wielded each of the others powers in particular situations over time. Hence, the doctrine is more rigid in theory than it has been in practice. According to Finkelman, *id.* at 341, "...though the doctrine has survived in the thought and rhetoric of the profession, it [actually] has no place as a principle of law."
[24] Willis, "Three Approaches to Administrative Law", *id.* at 54.
[25] Evans, *supra* note 2 at 29.
[26] A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: MacMillan, 1960).

ensured that it was to have long and lasting influence.[27] Dicey's own distaste for official discretion was nowhere more evident than in his classic statement expounding upon the rule of law, where he explained it as meaning that:

> ...no man is punishable or can be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.[28]

Certainly, by use of the word "discretionary" in the same breath as "wide" and "arbitrary", Dicey left little doubt as to his pejorative sentiments.[29] More importantly, the continuing influence of the several principles expressed in this paragraph is difficult to overestimate. Through his formulation of the rule of law and its restatement of the historical bias toward discretion, Professor Dicey was able to reinvigorate the prejudice.[30] And indeed, he remained ever vocal in his suspicion of discretionary power, though in later writings he softened somewhat by allowing that state provision of social welfare programs required some freedom for action by administrative officials. Nonetheless, even this concession was accompanied by the warning that such powers were always subject to abuse, if not closely constrained by law.[31] Similarly, the bias against discretion in his statement of the "rule of law" was reinforced by the requirement that only a

---

[27] The tenth edition of that book, consulted for this treatise, is surely evidence of longevity, and circumstantially at least, of continued influence.

[28] *Supra* note 26 at 188.

[29] Evans, *supra* note 2 at 1019, observes for example that "...Dicey seemed to regard the presence of discretion as inimical to a system of government that was subject to the rule of law."

[30] See H.W. Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17 Osgoode Hall L.J. 1 at 22, where the author identifies 3 themes in Dicey's work: (1) that discretion is the antithesis of law; (2) that generality of legal rules is identified as an important safeguard of individual rights; and (3) that resolution of disputes by the ordinary courts, rather than officials or a Conseil d'Etat, is said to be a hallmark of legality. Ironically, he notes that courts have always had a good deal of discretion, for example in determining what is their inherent jurisdiction (ie. fact finding, sentencing and review of

"distinct breach of law" could provide a legitimate basis for official action. It ensured that fuzziness in legal language and standards, regardless of whether they were regulatory or penal in nature, was to be eschewed. Clarity and certitude were rendered synonymous with justice and fair play in the English legal mind.

Although in many ways Dicey got it wrong, with many of his ideas and theories discredited or discarded over the years, his views on the illegitimacy of discretionary power were not so easily forgotten.[32] The influence of those views was such that they were taken up with some fervour by others. In 1929, Lord Hewart, then Chief Justice of England, wrote in his book, *The New Despotism,*[33] about the need to bring administrative tribunals under the sway of the courts in order to check what he called "collectivist tendencies".[34] A similar rebuke to administrative freedom was delivered a couple of years later by Oxford scholar, Sir Carleton Kemp Allen, in his work, *Bureaucracy Triumphant.*[35]

The practical outlet for all of this mistrust was the development of an overarching theme in academic literature on how best to control administrative discretion that remains

---

inferior tribunals).

[31] Evans, *supra* note 2 at 1019.

[32] See for example, Eric Barendt, "Dicey and Civil Liberties" [1985] Public Law 596, where the author observes that Dicey's real contribution was not that he gave an accurate account of the common law. In his view, Dicey's description was, in fact, wrong in many respects. Thus, at 596, he states that what Dicey "...wrote about individual rights and freedoms remains important, not so much because it is still a tolerably accurate account of the basic constitutional position of these liberties, but rather because his outlook – a paean of praise to the wisdom of the common law – continues to influence modern thinking on these matters."

[33] (reprint 1929 ed., London: Ernst Benn, 1945).

[34] The influence of this work apparently reached also to the Canadian side of the Atlantic. See for example, F.R. Scott, Comment [1936] Can. Bar Rev. 62, where the author uses a reference to this work as the lead-in to an article decrying both arbitrary use of deportation powers by Canadian immigration officials and unwillingness by the courts to check exercise of such power.

[35] (Oxford: Oxford Univ. Press, 1931).

evident today. For example, in his authoritative tome, *Administrative Law*,[36] Sir William Wade begins by describing administrative law "...as the law relating to the control of governmental power".[37] Like most traditional legal texts dealing with this area of law, Wade's emphasis is on control and circumscription of delegated discretionary power, with little concession to any positive or beneficial aspects that may follow from the delegation. As such, he describes two inherent characteristics that attach to administrative agencies. "First, they are all subject to legal limitations; there is no such thing as absolute or unfettered administrative power. Secondly, and consequentially, it is always possible for any power to be abused".[38] Thus, in Wade's view, it follows that "[t]he primary purpose of administrative law... is to keep the powers of government within their legal bounds, so as to protect the citizen[39] against their abuse"[40]. This statement is now so commonplace as to be something of a mantra for administrative lawyers.[41]

---

[36] Sir William Wade & Christopher Forsyth, *Administrative Law*, 7th ed. (Oxford: Clarendon Press, 1994) (hereinafter referred to as "Wade").

[37] *Id.* at 4.

[38] *Id.* at 5.

[39] Or, very relevantly in the immigration law context, even the non-citizen.

[40] Wade, *supra* note 36 at 5. The use of the word "abuse" to describe misuse of administrative powers is perhaps an unfortunate one, since every misuse of power is thus imbued with an aura of deviousness or malicious intent. It is, however, simply a term of art that has come to describe any use of power not strictly permitted within the terms of the delegation that delivered it. Wade does note that government is only human and so makes mistakes like any citizen might. Thus, he notes that while "abuse" is bound to occur, that term does not *ipso facto* require the existence of any moral turpitude.

[41] See for example, the 1968 Report of the Royal Commission, *An Inquiry into Civil Rights: Report No. 1* (Toronto: Queen's Printer, Ontario, 1968), chaired by the Honourable J.C. McRuer who, while accepting the need for discretion in the modern state, also warned that it needed to be strictly limited. Writing at page 95, Vol. 1, No. 1, he urged that such power be delegated only to the extent that is "...necessary and unavoidable in order to achieve the social objective or policy of the statute. It ought not to be conferred where rules or standards for judicial application can be stated. Where an administrative power is necessary and unavoidable, the power should be no wider in scope than is demanded to meet the necessity." For similar views, see also generally, Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge, La.: Louisiana State University Press, 1969)and Denis J. Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford: Clarendon Press, 1986).

Dicey's influence on the attitude of our legal system toward discretion was important, but it was not his only achievement.[42] Perhaps even more significant was that his ideas were able to influence the very structure of that system. This was so, since he would make no concession to the uniqueness of administrative law and the nature of the issues and problems that are its province. Dicey asserted that English common law would not countenance any such bifurcation as was present in the French legal system, where the *droit administratif* existed as a unique branch of law, complete with a separate judicial structure concerned only with the activities of administrative agencies. Consequently, he brooked no "special treatment" for this branch of law, holding that its subject matter and issues were on the same plane as any other dealt with in the regular courts. For him, the rule of law was simple and neat. One law and one system of justice for all, so "...that government and citizens alike...[were] subject to the general law of the land administered in the ordinary courts".[43] Regardless of whether the parties to a dispute consisted of government and governed, or just two private citizens, the rule of law meant, in theory at least, that all were free to come before the same courts, as equals, to receive the same measure of justice. This homogenous conception of the oneness of our legal system has ensured the supremacy of the "ordinary" courts as the pinnacle of our legal system. Irrespective of whether the subject matter involves an issue of broad social policy, or a bit of legal minutia concerning statutory interpretation, the ultimate venue for

---

[42] For an interesting discourse generally on the influence of "Diceyan values", see the judgment of Wilson J. in *National Corn Growers Assn.* v. *Canada* [1990] 2 S.C.R. 1324.

[43] Evans, *supra* note 2 at 28, where the authors also note that this conception of government under law has been the basis for objections to broad discretionary power granted to the Minister of Citizenship and Immigration to expel non-citizens or permit or refuse entry to persons, irrespective of whether or not they have met general admission criteria. Evans describes the often open ended nature of such power as unsettling for those whose preferences lie with a fixed set of universally applicable rules.

resolution is the same.

Since at least the Great Depression of the 1930's, the administrative legal system has grown explosively and now regulates and manages ever more aspects of daily life. Throughout this growth, however, the possibilities for and limitations on administrative action have been dominated by ideals and principles laid down in Dicey's formulation of the rule of law. In particular, it has provided the jurisprudential basis for courts to maintain a supervisory role over administrative agencies, even where it has been expressly denied by legislation.[44] A uniquely legalistic worldview, with the litigation model as its primary paradigm, has, therefore, served to shape much of the form, function, processes and structures that make up current administrative law. Of course, as with any matter of public policy, there are a number of opinions regarding whether society has been well served by Dicey's model of the rule of law and the uniformity it wrought.[45] It is just such questioning which prompted development of the functionalist critique.

1.3 Dicey Undone - The Functionalist Approach

Although Dicey attempted to flesh out the bones of the ideal of the rule of law, yet it remained something of an inchoate concept, more significant in form than substance.[46]

---

[44] *Id.*

[45] See for example, Evans, *id.* at 29, who note that the courts' patterns of thought and understanding of law and legal processes have been superimposed upon the administrative machinery for delivery of public services. To their mind, however, the effort has not been entirely smooth, particularly with respect to interests created by the administrative state, such as licenses and welfare benefits. They suggest that legal notions of procedural propriety in decision making, favouring litigation and more formal judicial process, have often left the courts myopic to other models for administrative action.

[46] Evans, *id.* at 27, for example, offers the following observations:

> The rule of law is an ideal to which appeals are regularly made by proponents, and their critics, of measures relating to the design and delivery of public programs. Like the concepts of liberty and

This seeming defect has perhaps been its greatest strength. Because it was not one thing, it could thereby be all things to everyone. In 1979, H.W. Arthurs noted that while a lot of the stuffing had been knocked out of Dicey's theories over the years, yet the "rule of law" remained a rallying cry for any who view delegated authority and discretion suspiciously, as the first and worst breach in the defense of individual liberty.[47] It is precisely because of its wispy definition that it continues to be a popular catch-all rubric for disparaging any displeasing governmental action implicating discretionary authority. And it is precisely this sort of attitude which Dicey intended to stir up, since his prejudices against administrative law prevented him from viewing it as other than an illegitimate branch of law. Certainly, this flavour is captured, as Arthurs points out, in Dicey's characterization of administrative tribunals as somehow "inferior" and regular courts "superior".[48] Even in the face of criticisms that the concept of the "rule of law" is more theory than substance, it continues to be a very influential force in shaping lawyers' and judges' opinions of the proper role, ambit and structure of administrative law[49]. And it is, of course, a critical view of discretion which lies at the core of those opinions.

However, the case against discretion is not all one sided and it was this realization which spawned the functionalist movement. Functionalism proceeds from the assumption that administrative law should be viewed as facilitative and legitimizing,

---

> democracy, the rule of law has no generally agreed meaning as applied to law and administration. The rule of law is also like liberty and democracy in that it is rejected by few, although particular versions of it are keenly contested. ... However, the root idea, namely that government should be subject to law, is one that, like democracy and liberty, will not go away.

[47] See Arthurs, "Rethinking Administrative Law", *supra* note 30 at 4-5.

[48] *Id.*

[49] *Id.* at 5.

rather than limiting and restrictive, and that government action can be a source of good.[50] Developed during the 1930's as a reaction to what was seen as the misguided premise upon which Dicey's positivist formulation was based, its leading early proponent was Professor John Willis of Dalhousie University Law School. Willis observed that the Diceyan approach was fixated on the fact that a power was granted, and that it was this point alone which garnered lawyers' attention most, playing to their fears of big government and apprehension of any curtailment of individual liberty. He saw this as a shallow, knee jerk reaction that missed the truly salient point. Instead of concentrating on the fact that a power has been granted, Willis felt the real focus should be on the uses power is actually put to. In this way, its most humane and efficacious application might be ensured. To further this goal, he took issue with the central pillar that held Dicey's unitary model of the rule of law together - namely, that "ordinary law" and "ordinary courts" were the only legitimate components of the English legal system.

Willis began by noting that the need for delegation of authority was a necessary and established practice, since it was practically impossible for Parliament or the legislatures to directly legislate, adjudicate and regulate the minutiae of the myriad activities within their jurisdictions.[51] Contrary to Dicey's assertions that Parliament was the ultimate and only source of law, Willis cited a long tradition of other bodies

---

[50] Functionalists concede that mistakes and errors can and are made by tribunals. However, they emphasize that such mistakes are natural in any human activity and need not necessarily be the result of ill will or malice. Such mistakes, therefore, are not cause for viewing suspiciously all government activity. It is simply a case of providing the best possible procedure, including appropriate scrutiny mechanisms, to ensure fair and reasonable outcomes in accordance with the mandate for which the power was granted.

[51] See for example, Willis "Three Approaches to Administrative Law", *supra* note 22 at 55, where he observes that "[t]he delegation of power to a government department, a practice of very respectable antiquity, is now universally recognized by responsible persons as a practical necessity if the work of government is to be carried on at all. Why waste the time of parliament on details or on technical matters

"...laying down general rules for future action...."[52] Arthurs, a later proponent of the functionalist approach, picked up on this train of thought and put it even more forcefully, stating:

> ...Dicey's assumption that recourse to "ordinary law" and "ordinary courts" was a constitutional right sanctified by actual practice in "pre-collectivist" England is insupportable. On the contrary, history and modern practice coalesce around the proposition that what is "ordinary" is a situation in which law emanates from many sources, including judges who do not sit in, and are not part of the hierarchy of, the superior courts; statutes which perversely and persistently fail to conform to Dicey's constitutional strictures; and customs and private arrangments which similarly sink below Dicey's plimsoll line. In short, Dicey's view of the legal system...was both partial and partisan: partial, because it ignored so much; partisan, because it emphasized the legitimacy of the common law over all other parts of the system.[53]

Although functionalists obviously disagreed with the picture that Dicey painted of the structure and sources of law, they maintained that this did not necessarily place them at odds with the fundamental principles upon which the rule of law was based. In Arthurs' words, "[t]he rule of law does assume a different vision of the legal system than does administrative law...[but] [w]hat divides these visions of law is not a fundamental disagreement over the relevance of such basic values as procedural fairness, adherence to appropriate normative rules, or accountability; rather, the source, meaning and practical

---

which it cannot understand? [footnote omitted]"

[52] *Id.* See also for example, Evans, *supra* note 2 at 30, where the authors cite the example of tribunals, active already in Dicey's time, which were dedicated to worker safety in factories, mines and the like.

[53] Arthurs "Rethinking Administrative Law", *supra* note 30 at13-14. Notwithstanding such criticisms, it is not difficult to find examples of the sway which Dicey's rule of "ordinary law and ordinary courts" continues to hold over common law minds. For example the most recent edition of Wade's text on *Administrative Law*, *supra* note 36 at 12, still describes the fact that ordinary courts, rather than special administrative tribunals, determine cases involving the validity of government action as the "...outstanding characteristic of the Anglo-American system.... The ordinary law of the land, as modified by Acts of Parliament, applies to ministers, local authorities, and other agencies of government, and the ordinary courts dispense it."

implementation of these values are the focus for debate."[54] Accepting then that power must be delegated, shared or otherwise distributed for reasons of practicality and efficacy, the focus instead is to ask the question - to whom has a particular statutory power been granted? Such a line of questioning, they postulate, promotes maximum efficiency in administration by matching power to the body or tribunal best suited to exercise it.

Having settled the initial line of inquiry, functionalism goes on to propose a subsidiary branch of questioning concerning the oversight process to which exercise of any discretionary power might be subjected. The quest is to determine to what extent and by what sort of agency such review should be conducted.[55] It is, of course, a first order tenet of the rule of law that "ordinary" courts have exclusive jurisdiction to oversee and review all legal processes. For functionalists, however, it is hardly a foregone conclusion that the courts should, by default, be favoured for the work of administrative review. Arguing that courts are, in fact, ill equipped and ill-suited to the work of reviewing statutory discretions, Willis and others have been especially critical of the judicial straitjacket that has been imposed upon the administrative field by Dicey's parochial prescription.[56] Functionalism stresses the importance of recognizing that administrative tribunals are delegates of powers granted by elective assemblies. Because those bodies, unlike the courts, derive their authority directly from the people, they have a more immediate connection to democratic legitimacy. While the courts clearly have a constitutional and moral position as supervisors, neither should they be empowered to thwart legitimate policy objectives enunciated by the legislature. Instead, law should be

---

[54] Arthurs, *id.* at 42.
[55] Willis "Three Approaches to Administrative Law", *supra* note 22 at 59.

the means for facilitating the achievement of public policy ends and courts should give the widest deference in this regard.[57] Functionalists assert, however, that courts have not shown such deference in fact.

The reasons cited for this are many, and include the mistrust that Dicey laboured to nurture against discretionary power. However, the problem goes beyond this, touching upon areas involving court structures and processes that do not necessarily implicate a deliberate judicial effort to confound and disrupt the administrative machinery. It is simply that courts are by nature ill-suited and ill-equipped for the task of administrative review. According to Willis, "[l]egal rights are normally decided by a court for the reason, and no other, that they are best fitted for the work of finding facts and absorbing new interests into the existing social structure. But the legal mind is not trained to interpret legislation on subjects of which its possessor is entirely ignorant."[58] The complex and far reaching policy issues present in many tribunal decisions, he argues, are matters typically beyond the ken and experience of the classically trained judicial mind. In particular, the formative process that lawyers and judges undergo fosters a preference for facts and strict determination of rights in an individualized decision-making setting that induces a sort of judicial tunnel vision. Because of it, courts tend to ignore the larger social purposes and full panoply of equities that should properly be part of the equation.[59]

---

[56] Evans, *supra* note 2 at 30.

[57] *Id.* at 31.

[58] Willis "Three Approaches to Administrative Law", *supra* note 22 at 76.

[59] Or, as Evans, *supra* note 2 at 30, notes the functionalist argument:

> Dicey's disapproval of broad administrative discretion and his support for giving the "ordinary" courts a key position in the resolution of disputes between the individual and the administrative state thwarts the effective implementation of legislatively enacted public interest programs of regulation and redistribution. The litigation process reduces to a "question of law" or an issue of procedural "fairness" complex policy choices that are more helpfully considered in the context of

Though often guided by a sense of justice and fair play, the fixation of courts in this regard leads to confusion and uncertainty in many areas of administrative law and exacerbates the difficulties for agencies to develop comprehensive, effective strategies for carrying out their overall mandates.[60]

As Arthurs observes, the obsession with individual justice can and does produce the opposite effect of what may actually have been intended by the legislation concerned. In his words:

> At...[the] root [of incoherence in the judicial review system] is the inevitable tendency of good judges to want to do the right thing, to shield citizens against perceived injustices, to vindicate legal values. These tendencies are so strong that they lead judges to reach results by whatever means come to hand: strict or purposive interpretations of the governing legislation, technical or liberal attitudes towards the tribunal's procedural and evidentiary requirements, conservative or creative use of the courts' remedial powers, and most importantly, selection of a restrained or interventionist attitude towards the judges' own role. What happens on the surface of the judgment is, in the end, determined not so much by text-book maxims as by the judges' conviction that the interest of justice will or will not be served by a particular result.[61] ...But this conviction gives rise to a serious

---

the program that the agency is administering, than of general legal principles and the inevitable distortions of litigation.

[60] Evans, *id.*, notes that the functionalist camp:

> ...has...argued that the positivist legal tradition, of which Dicey's thought is part, has failed to appreciate that law is inextricably intertwined with policy. Given the limitations of legislative foresight and the inherent ambiguities of language, it is normally not possible to determine, when contested, the meaning of a provision in an agency's enabling legislation without also considering the consequences that one interpretation, rather than another, would have for the program that the legislation had been created by the legislature to deliver. The specialist agency is more likely than any reviewing court to be in a position to make an informed assessment of the interpretation that will enable the program to be most effective. It follows, therefore, that if judicial intervention on the ground of illegality means that a reviewing court is encouraged to substitute its interpretation of legislation for that of the agency, the agency's ability to develop a coherent strategy for discharging its policy mandate is liable to be undermined.

[61] A statement which suggests the rule of law's prescription for one law and equal justice for all is stronger in theory than practice. The quite understandable sentiment described in this passage by Arthurs is doubtless common in practice. At a luncheon address to the 1996 C.B.A. Immigration Law Conference, for example, I recall a Federal Court Justice recounting his experience in reviewing a particular case decision. As he explained it, he felt compelled by the law to confirm the removal of an immigrant applicant from Canada, though the equities of the case apparently troubled him thereafter. He frankly admitted that should the same scenario present itself again, he would have no hesitation to decide the case otherwise. The implication was clear that "justice" would be made to prevail over law.

> problem: a court's view of "justice" will not necessarily conform to that of the legislature or of the administrative tribunal it is reviewing.[62]

Functionalists are quick also to point out a number of other significant problems associated with the practice of judicial review, as it has developed. For example, although review is said ordinarily not to be concerned with questions of fact, it is generally a facile matter to convert issues of fact or policy to questions of law.[63] Moreover, the reality of having courts supervise administrative practices has the practical effect of forcing subordinate tribunals to adhere more closely to formal court-like processes, than may have been intended. In particular, the commitment to the adversarial process, resting as it does upon the notion of individualized processing, robs the administrative sphere of flexibility in striking "...an appropriate balance between efficiency and effective rights of participation."[64] Similarly, the judicial preference for published reasons, rooted in the common law principle of *stare decisis*, has the effect of restricting delegated discretion, since its exercise is thereby subjected to more rigorous scrutiny.[65]

Willis, "Three Approaches to Administrative Law", *supra* note 22 at 74, echoes the views of Arthurs when he observes that common law and equity developed largely from judges doing what they thought "best" under the circumstances. It is for this reason that he derides the rule of law as being stronger in form, than in substance. Were it otherwise, he posits that the rule of law's abhorrence of broad powers vested in public authorities might have stymied the development of the ample social policies for which Canada is renowned.

[62] H.W. Arthurs, "Protection against Judicial Review" (1983) 43 Revue du Barreau 277 at 284-285.

[63] Willis, "Three Approaches to Administrative Law", *supra* note 22 at 74.

[64] Arthurs, "Protection against Judicial review", *supra* note 62 at 289. See also, for example, the Supreme Court of Canada's decision in *Singh* v. *Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, 17 D.L.R. (4th) 422 (S.C.C.), where arguments concerning administrative efficiency and cost were dealt with summarily.

[65] Willis, "Three Approaches to Administrative Law", *supra* note 22 at 74. Willis' views obviously hark back to a different era and it is doubtful that many today would argue that such scrutiny is necessarily a bad thing. Rather, the argument may have shifted focus to suggest that published reasons may allow intervention for the wrong reasons – that because courts have so elevated individual rights, scrutiny of published reasons may tend to focus only on minor faults and be oblivious to assessment of overall justice.

Functionalists maintain that the use of procedural fairness as the primary tool for defending individual liberty and rights actually misses the point altogether and causes as much harm, as good. The demands of "natural justice" and "fairness", they argue, are more suited to the adversarial processes of the court than of some administrative bodies.[66] Rather than enhancing liberty, the procedural fairness imposed by courts may actually have a dampening effect, inhibiting effective delivery of public programs.[67] They point out that the tendency of bureaucracy is to follow the path of least resistance. Thus, the true problem is not that individual rights are in jeopardy, but rather that the agency concerned will do as little as is needed to meet the thresholds set by the court.[68] The greater threat, therefore, is that public programs will be under-delivered, with too much time and energy expended on form and not enough devoted to substance. The problem is exacerbated by a narrow judicial focus on procedures and immediate parties only, which effectively forecloses serious consideration of the real purposes for which the legislation was promulgated. It is a viewpoint that often leads to good individual decisions, but overall bad law, since both the wider body of intended beneficiaries and the public interest are minor considerations, if considered at all.[69] The absence of a broader outlook, involving consideration of the context and totality of the particular program, means that procedural fairness becomes a substitute for substantive justice. In such a game, there may be individual winners, but the real goals and purposes of the program are left to rest

---

[66] Arthurs, "Protection against Judicial Review", *supra* note 62 at 288-289.
[67] Evans, *supra* note 2 at 30.
[68] Arthurs, "Rethinking Administrative Law", *supra* note 30 at 24, notes a developing body of literature that suggests that administrative decision-makers are not only theoretically committed to obeying law, but in fact may tend to allow discretion to crystallize so completely into rules that they sometimes cease to function effectively, or at least as originally mandated.
[69] Evans, *supra* note 2 at 30.

on a house of cards, more substantial in appearance than in reality.

The matter of limited understanding is compounded also by judicial procedures and practices which, though of great antiquity and impeccable pedigree, hobble the court's ability to expand its horizons and, by extension, those of the administrative world. In reviewing for legal error, the courts apply canons of statutory interpretation that assume a word or phrase can have a universal legal meaning. It is an assumption that proceeds from a certain chauvinism that while policy may be the province of administrative agencies, yet it remains for courts alone to interpret legislation and its application and effect upon individual rights. The result is that if the agency adopts a different interpretation to that preferred by the court, then a reviewable error has occurred.[70] However, the courts have traditionally operated under a canon of construction that prevented them from seeking interpretive guidance outside of the statute itself.[71] Discretion created under statute must be exercised in accordance with the statute that creates it. In determining whether a body has strayed from the limits of what Parliament intended a power to be exercised for, the canon holds that Parliament's intent is to be gleaned only from the statute, and not from any *travaux preparatoires* or other secondary source. This results in the so-called "black box" problem of statutory interpretation, which can often create a yawning gap between policy intent and actual practice, as permitted by the courts.

The peculiarities of judicial interpretation have another deleterious side effect. Statutes are created to tell laypersons how to conduct themselves. However, the arcane

---

[70] Evans, *id.* at 29

[71] Arthurs, "Rethinking Administrative Law", *supra* note 30 at 18.

processes of judicial interpretation actually serve to obfuscate, since what is apparent on the face of the statute may not always accord with actual court sanctioned practice. Judicial pronouncements, therefore, may serve to render the law even more incomprehensible and inaccessible to the very persons it is meant to serve. Arthurs suggests a number of reasons for the traditional reluctance of courts to go outside the four corners of a statute in their efforts at interpretation. These include a preference for symmetry and consistency over actual objectives, a sense of devotion to ancient common law dictates that eschew resort to extrinsic evidence and the possibility of a low yield in results insufficient to justify the effort needed to pick through extraneous evidence.[72] His own inclination, however, is for a theory which suggests that the bias against outside evidence actually springs from a desire to remain true to the Diceyan ideal of one law for all, which does not countenance development of separate rules for specialized groups or interests.[73]

Whatever the reason, Arthurs argues that the courts' attitude to interpretation should vary, depending upon whether it is exercising primary jurisdiction or a review function. He notes that if reviewing a tribunal, then the court should be sensitive to the fact that parliament chose to repose its trust in the interpretation of the tribunal, which may be expert in the matter. Though there is now a developing trend in this direction, at least in the case of tribunals considered expert by the courts, it does not enjoy wide application since only a very few specialized tribunals have actually been accorded

---

[72] *Ibid.* at 19.

[73] *Ibid.* See also *ibid.* at 26, for example, where he notes that one component of the rule of law is that the same legal rules be applicable to all equally. He dismisses this as "nonsense", citing the example of Crown immunities, and asserting that it is in fact a common practice to find laws that are meant to be applied

"expert" status.[74] Interpretation of legislation is the business of the courts and so they continue to prefer their own judgment to that of "inferior" tribunals. Coincidentally, this preference for court-like interpretations arrived at through court-like methods has a homogenizing effect that may serve to stifle innovation and creativity in bureaucratic procedures and processes.[75] According to Arthurs:

> Having judges review administrative processes may have resulted in a tendency to tell administrators "do as we do" as well as "do as we say". The legacy of Dicey's rule of law clearly has developed a culture that produced predictable results. The structure and staffing of tribunals, the specification of their functions and procedures, and the provision of broad rights of appeal are molding tribunals which tend to be more court-like. Life is coming to resemble art.[76]

In particular, the courts' litigation model focuses attention primarily on the individual parties to a suit. The result is an emphasis on processes for protection of individual rights which tends to downplay the public interest component of public programs. Certainly, in the immigration sphere, the courts in recent years have been vigorous in circumscribing discretionary power, both substantive and procedural, usually citing the right of applicants to fairness as the justification.[77] One telling result of this

---

selectively to particular individuals or groups.

[74] The question of curial deference to tribunal expertise, and the related issue of privative clauses, are matters of some controversy. However, they are not ones which directly affect the subject matter of this study and so are not be canvassed in any depth. Suffice to say that there are no privative clauses affecting immigration. See, for example, *Connor et al.* v. *Canada (Min. of Citizenship & Immigration)* (1995), 95 F.T.R. 66 at 68 where the Court noted that "...the statutory provisions of the *Immigration Act* indicate that privative-clause type deference is not intended." Speaking of the I.R.B. in particular, the Court added that it did not accord a high degree of deference to decisions of that tribunal, since it did not consider the I.R.B. to be expert in the same way that a securities commission might be expert in a technical area. Similarly, the courts have not been inclined to regard visa officers as any sort of expert decision-makers and so have no hesitancy in reviewing overseas immigration decisions. For more information on the subject of preclusive clauses and judicial deference to tribunal expertise generally, see Evans, *supra* note 2 at 813 - 965.

[75] Arthurs, "Rethinking Administrative Law", *supra* note 30 at 28, notes that there is little dispute that giving supervisory jurisdiction to courts has affected the development of administrative law.

[76] *Id.* at 38.

[77] For a more detailed discussion and specific examples of this phenomenon, see generally Chapter 3 below.

attitude is perhaps seen in frequent amendments to the *Act* and *Regulations* that have been undertaken to preserve administrative flexibility and efficiency. Where the loss of discretion has had serious resource or other implications for CIC, legislative amendments invoking new rules to replace the discretion have been necessary. Administrators have thus been forced into a situation of creating an ever more detailed, court-like regime of intricate rules and obscure procedures to meet judicial objections concerning discretion.

Fortunately for administrators, however, rules can be fashioned not just to safeguard applicant rights, but also to preserve administrative convenience. Though statutory and regulatory changes have been necessary in some instances, these are more of a nuisance than an obstacle. On the other hand, however, there must be some doubt as to whether the court driven move to a greater mass of more explicit rules has been a victory for applicants and the protection of their interests. A more complex administrative regime appears to do little to facilitate greater access to the immigration system or to enhance overall substantive justice in that system. This is particularly so when one considers the clientele involved and the barriers many of them face in terms of their geographic location, language ability, access to competent legal advice on Canadian law and the like. An ever more detailed regime of intricate rules and obscure procedures, spelling out in more particularity what may or may not be done, simply adds additional complexity difficult for many applicants to overcome. It is ironic to consider that the singular focus on individual rights, rather than making immigration processes fairer and more user friendly, may have had the opposite result. It is not surprising, therefore, that the use of private immigration advisers has spiraled as applicants find themselves increasingly unable to comprehend the myriad rules now applicable even to a "routine"

application. At the same time, a spirit of increasing litigiousness[78] has focused ever more judicial attention on immigration law with the result that opportunities for judicial intervention have also expanded. And so it is that the circle becomes complete, with more attention and intervention begetting more detailed rule making.

Functionalists, however, would prefer less emphasis on individual rights and more on the purposes of the legislation and the public policy it is meant to further. In their view, the methods and processes of the administrative agency should be shaped mostly by the needs of its mandate and public. If this means a large amount of autonomy and divergence in the practices of administrative agencies, then so be it.[79] All of this would simply be a reflection of the realities of the mandate and more likely to carry forward the mission of providing greater good to more persons.[80]

---

[78] See for example, External Affairs and International Trade Canada - All Immigration Mission Message ORD-0074 (18 October 1991) "Federal Court Challenges". That message describes a realization by departmental officials of a change in the ways of overseas immigration processing, marked chiefly by an atmosphere of increased litigation. The document describes a number of departmental strategies for dealing with same, including creation of a "Litigation Advisor" position at Headquarters to liaise between Department of Justice counsel (who conduct immigration litigation on behalf of CIC) and visa officers in the field. Other initiatives meant to help officers cope with the workload flowing from increased litigation include more training on litigation, human rights and privacy matters, provision of more detailed guidelines and better reporting on and analysis of court decisions impacting field operations.

[79] See for example, John Willis, "The McRuer Report: Lawyers' Values and Civil Servants' Values" (1968) 18 U.T.L.J. 351. In his reply to the McRuer report, *supra* note 41, Willis states that its recommendation to have a mandatory code of statutory procedures governing administrative matters is simply wrong. In his view, one of the essential features of administrative tribunals is a less complicated process. At 358-359, he notes:

> If you set up mandatory statutory codes of minimum procedural decencies, however devised, you will, in my view, inevitably reintroduce into 'non-court' deciding authorities the 'court' atmosphere that they were created to avoid – where following the prescribed ritual is more important than getting at the merits, and strings of procedural objections are regularly made for no other purpose than to give the lawyer who loses on the merits a second string to his bow in the court of review."

Instead, he argues for what he calls the principle of "uniqueness". "That the question of who, if anyone, should have the right to overturn the decisions of what authorities on what issues is one that can be answered only in consideration of all of the circumstances of the situation at hand. The factors are many and varied and include commonsense considerations such as speed, expense, expertise, 'public opinion' and many other factors too numerous to mention."

[80] Arthurs, "Rethinking Administrative Law", *supra* note 30 at 29.

Thus, while functionalists have serious misgivings about the appropriateness of courts as a review forum for administrative action, they do not question the need for a review mechanism. It is simply that the courts' inadequate understanding of the particular subject matter leaves them best suited to deciding questions of law or jurisdiction, but nothing more.[81] Particularly in the case of exercise of a discretion, they feel that what is needed is broader training and experience than just that of pure law and legal practice. In short, the position is that review panels supervising discretions require members whose background and experience encompass the totality of administrative law and the special purposes for which the particular legislation was enacted. Only with proper appreciation of the entire context in which the decision-making was rendered, is a reviewing body in a proper position to pass upon the propriety of a specific decision.[82]

And indeed, there is some realization on the part of courts that they are effectively outsiders, asked to peer into the inner workings of a clock whose operation they do not fully comprehend. It is for this reason, for example, that they claim no overt interest in the substance of a reviewed decision and limit their supervision to matters of procedure alone.[83] This is not to suggest that the administrative realm is entirely free of its own

---

[81] There are, of course, other opinions as to the fitness of courts as review panels for administrative decisions. Wade, *supra* note 36 at 12, notes some advantages in favour of courts, including that:

- The citizen can turn to courts of high standing in the public esteem, whose independence is beyond question;
- Highly efficient remedies are available;
- There are none of the demarcation problems of division of jurisdictions; and
- Government is seen to be subject to the law of the land.

[82] Willis, "Three Approaches to Administrative Law", *supra* note 22 at 80.

[83] Willis, *id.* at 61-62, who also notes an increase in the classes of discretions that courts were prepared to control, expansion in the grounds of error for which review would lie and the courts evasion of privative clauses that purported to deprive them of jurisdiction to conduct review. In his opinion, such developments are indicative of "judicial hostility" toward discretionary power. Of course, things have moved on since Willis wrote this more than 60 years ago, and the range and breadth of areas now covered by administrative tribunals has increased as complexity in society has increased. Simultaneously, however, the court's

problems. One of the dangers cited against administrative tribunals by Dicey, for example is acknowledged by functionalists as a serious concern. It is the problem of such tribunals being too subject to political influence by the legislatures which establish them.[84] However, for them, it is simply a case of ensuring that proper precautions, such as sufficient autonomy, are enshrined in any enabling statute. The danger is not sufficient to justify the courts being the only suitable oversight mechanism.

Although criticizing courts on the one hand as ill-suited to review of administrative tribunals, functionalists have not shrunk from offering suggestions on the other as to how review by courts might be improved. Presumably, their advocacy for an alternative review mechanism has been tempered by a certain pragmatism as to the actual likelihood of courts being completely separated from this activity. This may in fact be the strength of functionalism and the reason for its continuing relevance. Though advocating an alternative vision, yet it has also offered insights for improving the existing regime.[85] Nonetheless, it is clear that a more positivistic, rule of law approach continues to prevail as the dominant approach of the courts in their consideration of discretions in immigration law and the results are manifested in the emphasis on individual rights that presently obtains.

1.4 Why have discretion?

In the Canadian constitutional tradition, Parliament and the provincial legislatures

---

jurisdiction to supervise procedural error has not slackened. It is particularly interesting to note principles and attitudes developed years ago may continue even today to show vigor and vitality in the modern practice of administrative law.

[84] Arthurs, "Rethinking Administrative Law", *supra* note 30 at 34.

[85] See for example, Evans, *supra* note 2 at 31, who observes that functionalism has become a significant

are sovereign within their own defined areas of legislative competence. A consequence of this sovereignty is that they are free to delegate some or all of their authority to a subordinate agency or body, as they deem appropriate.[86] Thus, legislation is often drafted in a "bare bones" fashion, with authority for creation and implementation of compendious regulations setting out the procedures and rules by which an Act is to be carried out passed on to a subordinate body.[87] And indeed, it is delegation of authority that is the very heart and soul of administrative law. As Wade notes, the reality is that very few legal objectives are actually achieved by the mere enactment and promulgation of statutes, regulations and orders.[88] Rather, the real work of implementing legislative intent and delivering public programs is generally carried on outside of the legislature.[89] The creation of boards, tribunals and other authorities, to whom power is delegated, is the ordinary means by which that end is accomplished. So it is, in particular, that the Department of Citizenship and Immigration Canada (CIC) and the Immigration and Refugee Board (IRB) have been created and empowered to carry out goals and objectives set out in the *Immigration Act*[90] (hereinafter the *"Act"*) and *Immigration Regulations*[91]

---

influence in Canadian administrative law in recent years, ameliorating some of the shortcomings of Dicey's positivist approach.

[86] David P. Jones & Anne S. deVillars, *Principles of Administrative Law*, 2d ed. (Scarborough: Carswell, 1994) at 27.

[87] Peter W. Hogg, *Constitutional Law of Canada*, 3d ed. (Scarborough, Ont.: Carswell, 1992) at 339-340, notes a practical justification as to why delegation occurs:

> It is impossible for the federal Parliament or any provincial Legislature to enact all of the laws that are needed in its jurisdiction for the purpose of government in any given year. When a legislative scheme is established, the Parliament or the Legislature will usually enact the scheme in outline only, and will delegate to a subordinate body the power to make laws on matters of detail. The subordinate body (or delegate) to which this law-making power is delegated is most commonly the Governor in Council or the Lieutenant Governor in Council; each of these bodies is in practice the cabinet of the government concerned [footnote omitted].

[88] Wade, *supra* note 36 at 4.

[89] See generally Evans, *supra* note 2 at 4-20.

[90] *Supra* note 14.

(hereinafter the *"Regulations"*). Although the former is an actual department of government and the latter a semi-autonomous board[92], both are subordinates of and must take instruction from Parliament, in order to carry forward the aims and objectives of Parliament in respect of immigration matters.[93]

In the words of the current Minister of Immigration, Lucienne Robillard, "[i]mmigration issues are rarely cut and dry."[94] Because of this, while black and white rules provide the foundation of the immigration program, their imprecision is recognized and provided against by the device of discretionary authority. Without question, the central justification for grants of broad administrative discretion has been the impracticality of devising legislation sufficiently ample to deal with every possible contingency and permutation of circumstances which can and do occur in the course of administering of legislation. As Evans notes:

> When they enact a regulatory statute, legislatures cannot foresee or answer many of the policy questions that will inevitably arise in the course of delivering the

---

[91] *Immigration Regulations, 1978,* SOR/78-172, as am.

[92] See s. 66 of the *Act* which provides that the IRB shall report to Parliament through the Minister for Citizenship & Immigration. See also CIC, *Canada's Immigration Law* (Ottawa: Minister of Supply and Services Canada, 1992), at 23, footnote 2, where it is stated: "The Immigration and Refugee Board (IRB) is an independent decision-making body. It is empowered under the Immigration Act to hear appeals in one division and determine refugee status in the other. ... All board members are appointed through the Governor In Council."

[93] There are, of course, significant differences between government departments and independent or semi-autonomous administrative tribunals.

> "Civil servants ...are normally subject to the instructions of their superiors in the hierarchy and to departmental policy, for which the minister is ultimately responsible. In contrast, members of independent administrative agencies are in law immune from directions from colleagues, including the agency chair, on how they should decide a given case...A well publicized example was the resignation in 1995 of the deputy chair of the IRB following allegations by members that he had tried to "pressure" them over decisions that he regarded as out of line with Board policy. The problem is that it is very difficult to reconcile the notion that members should enjoy the same degree of autonomy as judges, with the need to ensure that agency decisions made in the implementation of a public program are both consistent and informed by the collective wisdom and experience of the agency as an institution." Per Evans, *supra* note 2 at 13.

[94] CIC, News Release # 98-20, "1997 Report Shows the Number of Minister's Permits Issued Holding at the 1996 Level" (2 April 1998) at 3.

> programs that they have established. Hence, the broad grants of discretion given to many independent administrative agencies that they may exercise to make additional rules or formulate policies, or case by case.[95]

Thus, while the *Immigration Act* and *Regulations* paint a reasonably detailed picture of who may immigrate to Canada, and under what circumstances, they still are insufficient to provide complete and specific guidance as to the appropriate disposition in every case. Proper fulfillment of the goals and aims of the *Act* and *Regulations* would be impossible without a delegation of at least some discretionary authority over the subject matter of immigration law to the bodies that administer it. Such authority provides essential latitude for tailoring extant rules to suit irregular situations, for extrapolating beyond the rules to deal with cases not directly envisioned or encompassed by the statutory regime or to permit a determination whether the rules are at all applicable in any given instance.

The problem of formulating laws and rules that can anticipate and respond appropriately to every potential scenario is particularly acute in the case of immigration law, which must be capable of implementation both domestically and abroad. Regulations that seem to make sense in a domestic setting often can prove difficult of application and interpretation in a foreign context. The matter is further complicated by a sometimes parochial view possessed by legislators. Members of Parliament come from many walks of life and often possess a wide variety of professional backgrounds. But few have significant experience working or living outside Canada and, more particularly, little practical understanding of the diversity of environments within which our immigration legislation operates abroad. Likewise, the legislative agenda is sometimes manipulated in favour of domestic political concerns that pay scant attention to the

---

[95] Evans, *supra* note 2 at 17.

problems of global application. All of this leaves Parliament somewhat myopic to the problems of implementing and administering externally law created in Canada, largely pursuant to a domestic worldview.

Two examples serve to illustrate the problem. Under a former version of the *Regulations*[96], permanent residents or citizens of Canada were entitled to sponsor for immigration to Canada all of their "dependents", which group included children, parents and grandparents of the sponsor. The sponsored immigrants were entitled to have all of their dependents accompany them, as well. The term "dependents" was defined to encompass all of the immigrant's children of any age, so long as those children had never been married. Those children were entitled, in turn, to bring with them all of their never married children, of any age, and so on down the line. The policy objective sought to be furthered by this rule was (and still is) "...to facilitate the reunion in Canada of Canadian citizens and permanent residents with their *close relatives* from abroad....[emphasis added]"[97] Given this, it is unlikely that legislators had in mind groups of fifty or sixty people[98], spanning several generations of a family, being sponsored for immigration to Canada by a single sponsor. Yet, this was the not uncommon result when the rule was put into practice abroad. This led to two concerns about constitution of the family class. The first centered on who should rightfully be a member of it and the second related to just how large a sponsored group of family members should be. In choosing the phrase

---

[96] SOR/88-286, 19 May, 1988 (often referred to as "J88"). In particular, see paragraph 1 of the Schedule which amended the definition of "dependant" so that a sponsor in Canada could sponsor all of their never married children of any age, as well as any unmarried children of such a child.

[97] The *Act*, *supra* note 14, s.3(c).

[98] I recall being told that the unofficial record for a single group migration under this rule was over 70 persons, though I have not been able to verify this number. Suffice to say, in my experience, I have seen single groups of up to 20 persons.

"never married children" to describe those who might be sponsored, it is doubtful that parliamentarians intended that one sponsor should assume the burden for settling so many people, at one time, into Canadian society.[99] Likewise, parliamentarians came to realize that some persons intended to be in the family class were being excluded and other persons, not meant for inclusion, were in fact being found eligible.[100] It seems evident that the traditional Canadian norm[101], where marriage in the third or fourth decade of life is common, was the conceptual foundation for the rule. Legislators likely failed to

---

[99] The problem of sponsorship breakdowns doubtless contributed in part to the later reformulation of the "dependent" definition to limit it to persons who, in addition to being unmarried, are under 19 years of age. See s. 2(1) of the current *Regulations*. Because selection in this category took no account of an immigrant's skills, resources, language abilities and other factors relating to settlement potential, even someone without any hope of self-sufficiency in the domestic economy could be granted entry. Even for a prosperous sponsor, the reality of providing for a large number of unemployable persons posed significant burdens that could sometimes overwhelm both inclination and ability to provide support. In such instances, the failure of sponsorship support was disastrous for both the immigrants and the public purse. The problem of sponsorship breakdowns remains an ongoing one, with an estimated 14% of sponsored immigrants continuing to seek social assistance after arrival in Canada. See for example, CIC *Daily Wrap – Sommaire Quotidien (hereinafter Daily Wrap)*, "Departmental Issues/Questions Propres au Ministre" (15 December 1997) 1 at 3, detailing a plan by the Peel Region in Ontario to bring action in court against sponsors who default on their obligations to cover the expenses of persons they have sponsored for permanent residence in Canada. Citing stories carried on 13 December 1997 in the *Ottawa Citizen, London [Ontario] Free Press* and *Winnipeg Free Press*, the report notes that sponsorships are generally entered into for a ten year period, during which the sponsor is liable for the settlement of the immigrant. Peel Region intends to set up a pilot to sue sponsors to recover welfare payments made to any immigrant covered by a sponsorship agreement that is still in effect.

[100] The incongruous results possible under the J88 *Regulations* were illustrated by an example given in a press release by the (then) Minister of Employment and Immigration, Bernard Valcourt, announcing changes to the Family Class definition in 1992. See Employment and Immigration Canada (EIC), News Release 92-11, "Changes to the Immigration Regulations on the definition of dependency" (20 March 1992). In that release, the Minister is quoted as saying that changes were to the Family Class definition were undertaken in order to more accurately "...reflect the Canadian concept of family dependency." An example of the type of situation that often occurred under J88 is given, at 2, where it is stated:

> The new regulations replace existing rules which state that children of any age could be sponsored or included in Family Class applications as long as they had never married. The current rules [ie. J88 rules] have created situations where, for example, parents could bring in a self-sufficient, 50-year-old bachelor son but not a dependent, 18-year-old daughter who had been widowed.

[101] It is beyond the scope of this paper to analyze Canadian marriage trends. The phrase "traditional Canadian norm" is used in recognition of the fact that, like so many other aspects of society, marriage patterns and conceptions of what constitutes a family unit are not static. I am reinforced in my view, however, that a more traditional view of marriage was involved in the formulation of the family class definition by the fact that no account was taken of so-called "common law" and "same-sex" marriages. For more on this, see *infra* note 120 and accompanying text.

account, however, for the fact that in some countries[102], formal marriage ties of the type common in Canada (and hence recognized under the *Immigration Act*), may be uncommon.[103]

Another illustration concerns the method by which Independent category immigrants are selected.[104] Such applicants are chosen precisely for their potential to become quickly established in Canada and immediately participate in and contribute to the economy. To qualify, each applicant is assessed according to a number of factors that cover such items as level of education, language ability and vocational training and experience.[105] Under the assessment process, each factor is gauged according to a regime that allocates a certain number of points for every level of attainment or achievement. A score of 70 points is seen as indicative of likely success in the Canadian economy and so is the minimum ordinary threshold for an application to be approved.

Educational assessment provides one example of the difficulties of interpretation and application of our immigration law abroad. Since a reasonable level of educational

---

[102] For example, my first foreign assignment as a visa officer was to Jamaica. After only a short time living and working there, it became apparent that a paradigm of marriage and family different from the Canadian norm, was widespread. Only in a minority of cases were formal marriage ties of the type common in Canada, involving elaborate wedding rituals and the necessity of a license, seen. Instead, the "common-law" scenario was much more common. Of course, this is simply anecdotal evidence from my own observations and there is an obvious question as to how much influence Canadian immigration rules may have had upon marriage patterns amongst intending immigrants. Again, such a question is beyond the focus of this study.

[103] It should be noted that the regulation was absolute, permitting of no discretion. Once the family relationship was proven, the entitlement to the immigrant visa was subject only to universal statutory requirements relating to public health and safety concerns.

[104] Three broad categories for qualification as an immigrant are established under Canadian immigration law. These include the family class (persons within a prescribed degree of consanguinity who have been sponsored by their Canadian resident relative), refugees (persons fleeing persecution) and independents (persons applying on their own initiative). See generally s. 6 of the *Act* and *Canada's Immigration Law*, *supra* note 92 at 6-10. Also see Lorne Waldman, *Immigration Law and Practice*, vol. 2 (Markham, Ont.: Butterworths, 1992) at 13.1-13.2.

[105] Schedule I, *Immigration Regulations*. See also below, Appendix A to this study, which sets out the selection factors.

attainment is generally recognized to provide a greater likelihood for successful establishment in the current economy, the points awarded under this factor increase in proportion to the level of education. However, educational systems can vary considerably even within a single country and so it is no surprise that there may be even more variation between countries and regions of the world. What might seem at first glance a simple matter of specifying, say a high school diploma, as the minimum acceptable level of attainment, may become an unusually complex matter to determine in practice. Since the Canadian norm is twelve years of education for a high school diploma, one might think that specifying twelve years of education would be the end of the matter. In *Yang* v. *Canada (Minister of Employment & Immigration)*[106], however, the applicant presented evidence to show that, in Taiwan, normal secondary schooling ends after a total of nine years, with many applicants often proceeding to a college thereafter for up to five more years. In this case, the court had to determine whether the equivalent of a Canadian high school diploma was gained after the nine year period of secondary formation, or whether it was dependent upon a further five years of college.[107] This example illustrates, in a minor way, the difficulties often encountered when a system of rules seeks to measure foreign equivalents against domestic standards.[108] If there is to be

---

[106] 17 Imm.L.R. (2d) 229.

[107] In this case, the court found, sensibly, that the college was also to be considered part of the secondary education for which units of assessment were to be awarded under the educational assessment system then in place under the *Act*. That system allowed a maximum of 12 points for education, being 1 unit for each year leading to completion of secondary schooling. The system did not award points for any years of education beyond high school and so it was important for the applicant to have the college considered, in order to obtain full assessment units.

[108] Even greater difficulties are encountered in the area of vocational experience and qualification, which are assessed pursuant to Factors 2 and 3 in Schedule I of the *Regulations*. The system for qualification in a particular occupation in one country may bear little resemblance to that of another country. Likewise, an occupation called one thing in one locale may be entirely different from a similarly titled occupation in another country.

a fit, inevitably some flexibility and common sense is needed to square the two. A more facile course of action, of course, might be to simply disregard personal and professional qualities and merits, and simply select on the basis of a quota or some other objectively and readily identifiable criterion. However, such a method does not facilitate selection for those qualities and attributes which, over time, have been determined to show the best results, vis-à-vis selecting immigrants possessing the skills and talents to contribute readily and meaningfully to the Canadian economic and social milieu.[109] It is unlikely therefore, that the basic scheme of individual selection will soon be abandoned for independents, notwithstanding the difficulties inherent in such selection process.[110]

The *Immigration Act* and *Regulations* are filled to overflowing with laws and rules and regulations.[111] Still, they are inadequate to deal with the multitude of potential situations and permutations that must inevitably arise in the course of dealing with an extremely diverse cross-section of humanity, hailing from every corner of the world. A combination of personal circumstances and individual characteristics, affected by indigenous conditions, cultures and traditions, and acted upon by local laws, standards

---

[109] See for example, CIC, *Into the 21st Century: A Strategy for Immigration and Citizenship* (Ottawa: Min. of Supply and Services, 1994) at 28. One justification for selection on the basis of skills and abilities is that "[r]esearch shows that immigrants selected for their skills and abilities are more likely to earn higher incomes than other immigrants, and more likely to contribute to the economy without resorting to welfare or making use of publicly-funded settlement programs". The independent category thus is seen as something of a counterbalance to the more humanitarian oriented programs found under the refugee and family classes. The independent class is a deliberate attempt to focus on and bolster the economy, which is not a relevant consideration in the other two categories.

[110] Indeed, the government's plan is to actually increase the proportion of independent immigrants in the overall immigration plan. See CIC, *Into The 21st Century, ibid.*, at ix, in the Executive Summary where, amongst other initiatives, it is noted that, in future, CIC intends that "...a greater share of immigrants will be selected on the basis of their ability to contribute to Canada's economic and social development, reducing demand on integration services...."

[111] Certainly, the wealth of rules that now governs immigration law appears to be borne out by the sheer size of the current *Immigration Act*. See for example Margaret Young, Background Paper, "Immigration: Constitutional Issues" (October, 1991) (Lib. Of Parliament - Research Branch) at 3, where the author

and qualifications, all conspire to ensure that every applicant is unique. Under such circumstances, application of any immigration law or rule, no matter how cleverly and clearly devised, will inevitably be faced with tough cases - classic problems of "square pegs and round holes". It is for this reason that legislative drafting, particularly in immigration law, tends to be more of an exercise in the law of averages, rather than one of microscopic precision. The situation was succinctly captured by Dickson C.J.C. (as he then was) who, though speaking more generally, once noted that, "[a]bsolute precision in the law exists rarely, if at all."[112]

Related to the impracticality of devising sufficiently comprehensive rules to cover every contingency is the problem of legislative intent. A slippery concept at best, legislative intent is a perennial source of frustration to courts and administrative tribunals alike. Even the best example of legislative craftsmanship will frequently be found wanting in clarity and specificity as to the intent of its framers. Yet, it remains a *sine qua non* of our legal system that intent is to be given effect to, no matter how obtuse or obscure it may be. Perhaps hoping to avoid such obfuscation, Canada's *Immigration Act* incorporates a somewhat unique section, at least for Canadian law, detailing the objectives that Parliament hoped to further. The *Act* provides as follows:

> ...Canadian immigration policy and the rules and regulations made under this Act shall be designed and administered in such a manner as to promote the domestic and international interests of Canada recognizing the need
> (a) to support the attainment of such demographic goals as may be established by the Government of Canada in respect of the size, rate of growth, structure and geographic distribution of the Canadian population;

---

observes that the Canada's first immigration statue in 1869 had 14 pages, while the 1952 *Act* had 34 pages and the present *Act* possesses 122.

[112] *Attorney General of Quebec* v. *Irwin Toy Ltd.; Moreau et al., Interveners* (1989) 58 D.L.R. (4th) 577 at 617.

(b) to enrich and strengthen the cultural and social fabric of Canada, taking into account the federal and bilingual character of Canada;
(c) to facilitate the reunion in Canada of Canadian citizens and permanent resident with their close relatives from abroad;
(d) to encourage and facilitate the adaptation of persons who have been granted admission as permanent residents to Canadian society by promoting cooperation between the Government of Canada and other levels of government and non-governmental agencies in Canada with respect thereto;
(e) to facilitate the entry of visitors into Canada for the purpose of fostering trade and commerce, tourism, cultural and scientific activities and international understanding;
(f) to ensure that any person who seeks admission to Canada on either a permanent or temporary basis is subject to standards of admission that do not discriminate in a manner inconsistent with the *Canadian Charter of Rights and Freedoms*;
(g) to fulfil Canada's international legal obligations with respect to refugees and to uphold its humanitarian tradition with respect to the displaced and the persecuted;
(h) to foster the development of a strong and viable economy and the prosperity of all regions in Canada;
(i) to maintain and protect the health, safety and good order of Canadian society; and
(j) to promote international order and justice by denying the use of Canadian territory to persons who are likely to engage in criminal activity.[113]

Each of these ten objectives is laudable and sensible. Taken together, however, they actually exacerbate the challenge of discerning legislative intent and may even hinder the possibilities for precise subordinate rule formulation. Some of the objectives are meant to be facilitative, some are control oriented, and still others contain elements of both approaches. There is no stipulation, however, as to whether they are all to be considered of the same urgency or priority. Likewise, they are also not mutually exclusive, with the result that any two or more may potentially be applicable in any given case. It is in this flurry of fuzzy objectives that CIC goes about its work of interpreting and applying rules of general application on a global basis. Can a system that is founded

[113] Section 3.

upon a desire to be "all things to all people" work without some discretionary authority in its interpretation and application? Not likely.

The only workable solution, therefore, is a relativistic approach, with objectives shifting up and down a scale of priority, depending upon the particular facts at hand. Whether the family reunification objective is to be favoured over the public safety objective, for example, may depend upon the seriousness of the threat to public safety that a particular applicant poses. A serial killer poses a more serious risk than does a habitual thief. In the latter case, the deleterious consequences of enforced family separation may be seen to outweigh the risk of future criminal activity in Canada. With the example of the serial killer, however, it is difficult to imagine the existence of sufficient equities to tip the balance away from the public protection objective.[114] It is apparent from these examples that discretion is axiomatic to a sensible, defensible and sustainable application of the diverse objectives of the *Act*. A rote system, listing objectives in descending priority, might provide greater certainty but, in practice, would be likely to result in much hardship and dissatisfaction. It would also be less likely to accord with fundamental societal notions of how justice and fairness are to be achieved. Similarly, the *Act's* objectives reflect the broad base of understanding and popular support upon which our immigration program is founded. Eliminating any of the objectives, or blindly favouring one over another, might well imperil that support.

---

[114] For a recent example of the public safety objective being favoured over family reunification, see Estanislao Oziewicz, "Family ties trip up would-be immigrant" *The (Toronto) Globe and Mail* (30 June 1997) A1. The article details the case of Gerlando Sciascia who was sponsored in the family class for immigration to Canada by his son. Mr. Sciascia is alleged to be a Mafia member, connected to the Cosa Nostra Bonnano organized crime family in New York. Although he withdrew his application for immigration after the allegations surfaced, the Canadian Consul in New York is noted as stating that "no humanitarian or compassionate grounds would overcome Mr. Sciascia's inadmissibility to Canada."

The consequences of inadequate balancing of objectives are not to be understated. Almost invariably, a poor weighing of objectives results in significant and sustained media notoriety that leaves public confidence in immigration policy shaken. Even where the favouring of one objective is inadvertent or perhaps even unavoidable (say, for example, an applicant has skilfully misled immigration authorities), the nature of the media is such that only the most sensational aspects of a case will be reported. Although such instances are comparatively few, they always garner much attention and generally make front-page news headlines.[115] From a practical standpoint, therefore, discretion is essential to achieving a delicate, and yet fluid, balancing and weighing of priorities that must occur in each and every case.

Words are the building blocks used to construct rules. Yet words are notorious will o' the wisps, drawing as much from context and background, as from inherent meaning. Quite commonly, words which have a particular and specific meaning in ordinary parlance may suddenly be found, by judicial interpretation, to mean something entirely different, or even opposite, to that ordinary meaning.[116] Likewise, the meaning of words has a tendency to change and shift with time, usage and context. It is impossible,

---

[115] See for example, Miro Cernetig, "Drug suspect let into Canada" *The (Toronto) Globe and Mail* (22 December 1993) A1. In that case, Lee Chau Ping, the so-called "Ice Queen of Southeast Asia", obtained an immigrant visa as a business immigrant in the Independent category. Ms. Ping is alleged to have been the kingpin behind an organization that manufactured and distributed worldwide an illicit drug known as "ice". She apparently has gone underground since "landing" in Canada and has yet to turn up. Nonetheless, the sustained media notoriety that this case has engendered well illustrates the need for careful balancing of objectives in every instance. This case is an example where, whether advertently or not, the economic development objective that guides the business immigration program was given precedence over the public protection objective. The resultant furor leaves little doubt that few would agree with the "balance" that was struck.

[116] See for example, the word "shall", which is ordinarily understood to be mandatory. However, in certain contexts, courts will find it, instead, to be merely permissive. The same is true also for the word "may" which is ordinarily understood to be permissive. "In the interpretation of statutes, it has often been ruled that may is to be understood as equivalent to shall or must". *R. v. S. (S.)* (1990), 57 C.C.C. (3d) 115 at 128,

therefore, for legislative drafters to conceive of every possible twist of circumstance, interpretation and usage in advance. In the end, they are often forced to settle for doing what can feasibly be done; create laws premised upon and dealing with the "average" case.

At the same time, however, the inadequacy of rules remains troubling. Inevitably, it seems, not all deserving cases are included by the rules, nor all unworthy ones excluded. These are the situations it is presumed that the legislature intended, or should have intended, to capture, but which the vagaries of language and paucity of drafter's imagination conspired to prevent being reduced to paper. Our sense of justice and propriety do not permit a complete abandonment of responsibility for equity and fairness to the shortcomings of statutory drafting and interpretation.[117] The result is that legislative intent is fixed upon as a way to make up for the deficiencies of words. If parliamentary intent is to be favoured, and there is little doubt that we do favour intent over black and white words, then some means of "supplementing" the rules must be incorporated into the system. It is here that the "equity" of discretion meets and commingles with the "common law" of formal, rigid rules. Discretion is the modern "chancellor's foot" and comes in a size suited to fit every shoe. It is just the item to infuse some common sense into the rules, ensuring that justice and fair play are not heedlessly overlooked, nor unduly taken advantage of.[118] Flexibility, then, is the inherent, dominant characteristic of

---

129, 77 C.R. (3d) 273, 110 N.R. 321, [1990] 2 S.C.R. 254, 49 C.R.R. 79, 41 O.A.C. 81, per Dickson C.J.C.

[117] This sort of thinking is even part of CIC's own corporate culture and is captured in the following statement: "Canadians' belief that every human being should be treated with fairness and dignity must be reflected in the policies and practices of their government." CIC, *Into The 21st Century, supra* note 109, at xiv.

[118] See for example Carl Schneider, "Discretion and Rules: A Lawyer's View" in Keith Hawkins, ed., *The Uses of Discretion, supra* note 9, 47 at 56, where the author makes the ironic point that our common law

discretionary power, allowing the blunt edges of the law to be softened to suit our own notions of what may be just in any given situation.

But discretion is more than just flexibility. It is also innovation. Once cast in the stone of statute law, rules are sometimes difficult to manipulate or rescind, even after the rationale for their formulation is no longer apparent.[119] In our parliamentary system, it is commonly the case that broad consensus and agreement is needed before an outdated rule can be varied or replaced. And yet, particularly on thorny issues of social policy, legislative consensus can be difficult to assemble and sustain. Formal laws excel in following societal developments, but only rarely do they lead. In those instances when political leadership is absent, broad consensus elusive, or legislative time unavailable, discretion sometimes is applied in the breach to provide a workable solution.

A case in point is to be found in CIC policy on processing of same sex partners for permanent residence in Canada. The *Act* and *Regulations* do not formally recognize homosexual marriages for purposes of Family Class sponsorship.[120] Likewise, in the current climate of polarized debate generally on the topic of acceptance of gay rights, legislative reworking of the definition of marriage in the *Regulations* has not been a political priority. Nonetheless, the government has not been altogether insensitive to the

---

system, while viewing discretion with suspicion, nonetheless seems "...almost designed to promote the exercise of discretion." He notes that discretion is founded in a concern to preserve doctrinal flexibility, which is evidenced in a preference by judges "...for making fine distinctions so that justice can be done in each case."

[119] See for example, Glanville Williams, "Discretion in Prosecution", [1956] *Crim. L.R.* 222 at 224 - 231, where he discusses this problem in the criminal law context. He notes that discretion is sometimes used by police, prosecutors and even courts to decline enforcement of obsolete or controversial legislation. Although exercise of this power sometimes generates criticism, he observes, at 226, that most often what is criticized is actually insufficient use of discretion, rather than overuse.

[120] Neither, for that matter, does the legislation recognize the so-called "common law marriage" which is widely prevalent in Canadian society today. See the definitions of "member of the family class", "marriage" and "spouse" at s. 2(1) of the *Regulations* and the policy guidance on processing of same sex

hardship that can follow from enforced separation of partners in committed relationships. Responding to sustained lobbying and an increased propensity to litigation by individuals and gay rights groups[121], the government has given its tacit approval to a creative deployment of discretion by the immigration bureaucracy that has relieved some of the pressure for a formal legislative solution[122].

Section 2.1 of the *Regulations* permits the Minister to exempt any person from any immigration regulation, where she is satisfied that an exemption should be granted because of the existence of humanitarian or compassionate grounds. In June 1994, a message[123] was sent to all immigration processing missions advising them that homosexual partners of Canadian citizens or permanent residents might be processed for landing under s. 2.1, where "...undue hardship could result from separation....".[124] The result was that what could not be accomplished directly through Parliament by a bold

---

and "common law" partners contained in CIC IM, "Overseas Processing", Chap. OP-1, para. 4.2.2, at 6-7.

[121] Most noticeably, by LEGIT (The Lesbian and Gay Immigration Task Force), located in Vancouver B.C. See generally "LEGIT lobbying gets the word out" LEGIT News (The Newsletter of LEGIT), Fall 1995 at 1.

[122] And thus resolving, at least for the time being, the government's conundrum of being forced to alienate one segment of the population in order to appease another. For a brief overview of the question of sexual orientation and its treatment under Canadian immigration law, see John A. Yogis, *Sexual Orientation and Canadian Law: An Assessment of the Law Affecting Lesbian and Gay Persons* (Toronto: Emond Montgomery, 1996) c. 8.

[123] CIC All Mission Message ORD0150 regarding processing of same sex partners; also see generally CIC All Mission Message ORD0149 on use of humanitarian and compassionate discretion.

[124] CIC IM, Chap. OP-1, Section 4, "Principal Applicants and Dependants" Paragraph 4.2.2, (ver. 12-95) at 6. In reality, use of R2.1 authority is directed by this manual to be used only as a last option. Instead, officers are directed first to consider whether the applicant might qualify as an ordinary independent applicant. Failing this, positive discretion under R. 11(3) is mandated. This is generally used where an independent applicant falls a few points short of the pass mark needed, but otherwise appears to have good settlement potential. Failing either of these two options, then R. 2.1 may be invoked in recognition of "undue hardship" which might result from enforced separation of the partners. See also CIC IM, Chap. OP-5, Section 2, para. 2.3.1 (ver. 05-97) "Common law and same-sex partners".

legislative stroke, instead was done by judicious application of discretionary authority, with little fanfare or notoriety.[125]

The problem of volume provides yet another aspect to the flexibility and innovation justifications for discretionary power. Handling large numbers of applications is a feature common to many administrative tribunals. In the case of immigration, the government has implemented a five year plan to "land"[126] up to two hundred and fifty thousand immigrants yearly.[127] As mentioned, these immigrants are selected based upon their ability to qualify in three broad categories; Refugees, Family Class and Independents. Though the specific requirements vary from category to category, most immigrant cases are likely to entail at least some assessment of educational, language, employment and other criteria relating to potential for resettlement in Canada.[128] In addition, the *Act* and *Regulations* stipulate other exigencies, such as those relating to the protection of public health and safety, which must be undertaken for every applicant[129].

---

[125] This raises the issue of political accountability of the discretion holder, an issue which those opposed to discretionary power are most sensitive to. The obvious answer is that R. 2.1 discretion resides ultimately with the Minister. Since she is directly accountable in parliament, the power must inevitably be exercised in a manner she is prepared to defend.

[126] Defined at s. 2(1) of the *Act* as being "lawful permission to establish permanent residence in Canada".

[127] The figure of 250,000 is simply a "target", with the actual number of immigrants landed varying from year to year, according to a number of factors such as number of applications received, resources available to process them and the like. In 1996, for example, there were actually 225,313 immigrants landed although the official target had not changed. See CIC, *You asked about...immigration and citizenship* (Ottawa: Min. of Public Works and Government Services, 1997) at 5. Likewise, the target is adjusted from year to year to reflect what is considered feasible in any given year. Pursuant to s. 7(1) of the *Act*, the Minister is required to lay before Parliament yearly an immigration plan detailing the projected immigration levels for the coming year. Thus, for 1997, the total number of immigrant and refugee landings is expected to be between 195,000 and 220,000 persons. CIC, *Staying the Course: 1997 Annual Immigration Plan (Tabled on October 29, 1996)* (Ottawa: Min. of Supply and Services Canada, 1996) at 3.

[128] Strictly speaking, family class immigrants and refugees selected within Canada by the IRB are not "assessed" on these criteria for purposes of determining their ability to qualify for immigration, as is the case with independents and refugees selected abroad. However, some assessment of them is conducted pursuant to these criteria for statistical reasons and for purposes of determining their need for any public settlement assistance, language training, etc.

[129] For example, medical examinations and criminal and security screening.

These are fixed statutory requirements, set down by Parliament, which CIC cannot ignore. In the meantime, CIC has not been sheltered from the effects of the debt crisis facing the Government of Canada. Like most other departments, it has been called upon to share in the burden, with $75 million cut from its budget in recent years.[130] The result has been the need for "restructuring" and the inevitable "downsizing". With a fixed legislative mandate, a static caseload volume and reduced fiscal and human resources, the department has been placed between the rock of reduction and the hard place of unabated service expectations. After years of cutbacks, the euphemism of "doing more with less" is simply no longer tenable. The chosen way out of the dilemma has been resort to the twin options of "re-engineering" and "restructuring".[131] Reducing overall workload, automating processes, and concentrating resources to achieve economies of scale and cost savings have all been implemented under this regime. Though application volumes and legislated requirements have remained largely unchanged, discretion vested in the department as to how best to meet those needs has proven to be the essential grease for keeping the wheels of immigration processing turning. On a more fundamental level, the availability of discretion to individual officers as to how best to implement the reductions and new procedures on an individual case basis has resulted in significant savings. For example, in some types of routine cases, officers may waive interviews[132] that are

---

[130] For a more detailed discussion of the cutbacks and the effects they have wrought, see generally below, Chapter 2, and also CIC Internet home page at http://cicnet.ci.gc.ca.

[131] For more particulars, see CIC *You asked about...*, *supra* note 127 at 7-9, where initiatives such as standardization, the role of Case Processing Centres and Call Centres, and self-assessment are discussed. See also below, Chapter 2, for more detailed discussion of the effect of the reductions on use of discretion.

[132] For example, the Immigration Regional Processing Centre in Buffalo, N.Y., which receives all applications for immigration to be processed by Canadian visa offices located in the United States, advises that interviews are waived in more than half of all such cases. See "Applying for Permanent Residence in Canada: Changes to Immigrant Processing in the USA", insert dated April 1, 1996 placed in immigration

determined unnecessary, saving time, money and frustration for both the client and the department.[133] Without such discretion, both on a department wide and an individual officer basis, it is doubtful that even "doing the same with less" would have been possible. Quite simply, flexibility in determining its own procedures has enabled CIC to prevent a massive caseload from overwhelming the system and choking off altogether the flow of completed cases.

A further rationale for discretionary power concerns the problem of interpretation for enforcement purposes. It is here that the notion of discretion as equity, described earlier, is most apparent. As Evans states:

> Because many situations are not foreseen at the time of enactment, statutory provisions require interpretation by officials. The process of filling in the silences and resolving the ambiguities in statutory language that interpretation so often involves can be described as the exercise of an *implicit* discretion to elaborate unclear or incomplete legislative instructions. Second, even the most detailed and precise regulatory codes are not self-enforcing; typically, officials are left with ample, and unstated discretion about the circumstances in which they will actually be enforced against individuals.[134]

It is discretion, wielded as an implement of interpretation and enforcement, which takes the rough edges off of the law and fills in the crevices and cracks between the legislators

---

application kits provided by the Processing Centre, at 3.

[133] This is just one aspect of an overall strategy of reducing intensive case processing requirement that was, at one point, captured in the slogan "we serve you better by seeing you less." CIC's response to fiscal and other imperatives is dealt with more fully in Chapter 2, below.

[134] Evans, *supra* note 2 at 1021-22. Discretion in enforcement is a particularly relevant issue in the criminal law field. See for example, Kenneth Culp Davis, *Discretionary Justice, supra* 41. Davis notes the considerable discretionary power generally wielded by police officers with respect to enforcement of the law and was concerned about its abuse. For a more recent example of discretionary law enforcement, see Sherri Aikenhead, "Daring to bare: How long before women go topless in Halifax?" *The (Halifax) Daily News* (22 June 1997) at 21. The article discusses a recent court ruling in Ontario which is cited as permitting women to legally doff their tops in that province. Nova Scotia police, however, do not appear to appreciate the logic of the judgment in question and are quoted as being ready to continue to force women to cover up. Their strategy for enforcement, however, evidences a certain amount of enforcement discretion. According to a Halifax regional police spokeswoman, "If somebody is walking down Spring Garden Road [in Halifax] topless, they'll first be asked for identification and then asked to cover up.... If

broad brush strokes of meaning. It remains, therefore, for officials in the field to provide interpretations and applications that best meet the intended objective or purpose of any given provision. While the *Act* and *Regulations* often provide blanket rules that seem mandatory in nature, yet it is understood that legislative intention rarely wishes to have such provisions rigorously applied to even the most trivial infraction. A case in point concerns medical inadmissibility. Section 19 of the *Act* baldly provides that no one suffering from diseases or disorders which might endanger public health or safety, or which might lead to excessive demands on health or social services, may be granted admission to Canada.[135] However, policy guidance provided by CIC makes clear that this rule is not absolute.[136] Thus, visa officers are directed in all such cases to consider whether any extenuating circumstances exist to justify admission, prior to issuing a refusal.[137] Selective application and enforcement in such cases ensures that particular decisions are made in the context of overall intent and objectives, rather than the vacuum of a specific rule.

Differing levels of entitlement to rights or privileges is another reason for extensive use of discretion under immigration law. This is perhaps most clearly illustrated in the example of criminal inadmissibility. Under Canadian immigration law,

---

the person refuses to cover up and says no, they'll be arrested."

[135] Section 19(1)(a)(i) and (ii).

[136] Likewise, the courts have held that medical inadmissibility must be assessed in each case against the purposes for which entry is sought. Thus, greater latitude is to be shown in sponsored dependent cases, since applicants in that category will benefit from close family support. A less discretionary approach, however, may be appropriate in independent category cases, since they will tend not to have such support available. *Deol* v. *Canada (Min. of Employment & Immigration)* (1992), 18 Imm. L.R. (2d) 1 (Fed. C.A.).

[137] See CIC IM Chap. OP-5, para. 3.3.1 (ver. 05-97), "What to do in medically inadmissible cases", which advises visa officers that "[w]hen the applicant or dependent is found to be inadmissible for medical reasons..., you *may* consider whether there are humanitarian, compassionate or economic grounds for issuing a Minster's permit to allow the person to enter and remain in Canada notwithstanding the medical inadmissibility." See also CIC IM Chap. OP-19 for factors to be considered in recommending issuance of

persons with criminal records, or who are guilty of committing acts or omissions which would be crimes punishable domestically, are prohibited to enter Canada.[138] Exception is made for those who have satisfied the Minister that they are rehabilitated or that their entry would not be detrimental to public safety or other national interest concerns. The *Act* prescribes a yardstick for gauging the gravity of the crime, which is somewhat reminiscent of the summary/indictable split used under the *Criminal Code.*[139] Offences considered "less serious" are dealt with more leniently, while more stern treatment is reserved for those considered "most serious". But even within these two categories, there is a vast array of offences evidenced. Thus, in the less serious category, we might find a destitute student convicted of shoplifting a sausage for his supper, a college professor guilty of an assault on his spouse, and an incorrigible, unemployed alcoholic with a lengthy record for drunk driving offences. Each raises unique concerns and equities and it would clearly be inappropriate to treat them all with the same level of vigorous bureaucracy. A single, minor act done *in extremis* is manifestly less deserving of short shrift at a border entry point than is behaviour which forms part of an identifiable, prolonged pattern and which poses significant risks to public safety. Likewise, a minor offence against property is vastly different than an offence involving violence against the person. But here again the problem of formulating a rule that is sensitive to all of the nuances and subtleties of each specific case arises. And, the problem is intensified by the

---

a Minister's permit.

[138] See generally subsections 19(1)(c) to (l) and 19(2)(a) to (b) of the *Act*.

[139] R.S.C. 1985, Chap. C-46. Admittedly, the *Immigration Act* yardstick is only roughly equivalent to the summary/indictable split used in the *Criminal Code*. While a range of punishments are available with respect to both summary and indictable offences, the *Immigration Act* relies upon a potential penalty under or over 10 years as the set point for distinguishing between "less serious" and "more serious" cases. See the *Act*, s. 19(1)(c) & (c.1) (max. term of 10 years or more) and 19(2)(a) & (a.1) (max. term of less than 10

difficulty of identifying all of the factors to be applied to a particular case, and of assessing the weight to be attached to any particular factor. Fairness dictates that each case should be considered individually and carefully, with due regard for all relevant circumstances of the offence and the offender.

The problem of devising a sufficiently precise rule to cover every situation is further exacerbated by what Jones and deVillars call the "short leash" principle[140], which is simply a desire not to confer vested rights on a particular party. Discretionary policies and programmes do not create legal rights enforceable by way of *madamus*.[141] The rationale is obvious. It is undesirable, for example, to give criminals a general right to enter Canada as they please. On the other hand, though, we do recognize that rehabilitation does occur and that humanitarian aspects may arise which are deserving of some compassion. A Family Class immigrant, for example, may have a more compelling need for entry to Canada than might a criminal who seeks to enter for a short period of time as a mere tourist. Because of the nature of Family Class migration, such an applicant would have an entitlement to entry that more closely approximates a right (even if, strictly speaking, a "right" has not been directly conferred under the *Act*), while the entitlement of the tourist would be more in the nature of a privilege. Given the complexities of criminal cases, the existence of mitigating and aggravating factors, the likelihood of recidivism and the existence of humanitarian concerns, it is difficult to formulate a general rule for properly weighing all such factors, while simultaneously providing for a sliding scale of entitlement. Accordingly, discretionary power enables the

---

years).

[140] Jones & deVillars, *Principles of Administrative Law*, *supra* note 86 at 74.

decision-maker to sort out equities and to prioritize entitlements, without the necessity of conferring fixed entitlements that might prove unpopular or embarrassing.[142]

The example of a criminally inadmissible visitor and an ordinary Family Class immigrant provides a vivid contrast for illustrating the notion of differing entitlement, but the notion of a sliding scale also works on a more subtle level. Differing levels of entitlement are present even within and across immigrant categories. Refugee claimants who are in Canada[143], for example, are accorded an assessment process that is less discretionary in nature than that provided for Independent applicants. The rationale is found in the basis for selection in each of the categories. Refugees are persons in flight from persecution.[144] Canada has assumed an international obligation to protect any such persons who enter its territory.[145] Because of the urgency of their circumstances, and the potential dire consequences of a refusal of sanctuary, a formal, court-like determination process has been implemented for assessment of these cases. It incorporates safeguards, like the right to be assisted by counsel at hearings, which are similar to those found in ordinary courts of law.[146] Likewise, once a determination of Refugee status is made, there

---

[141] *Young* v. *Canada (Min. of Employment & Immigration)* (1987), 1 Imm. L.R. (2d) 77 (F.C.T.D.).
[142] For more on the use of discretion as a means for sorting out entitlement and the differences between visitor and immigrant categories in that regard, see *infra* note 176 and accompanying text.
[143] Even within the general category of "refugee claimant", Canadian law makes a distinction between those claiming status in Canada and those claiming abroad. Those claiming abroad are subject to a more discretionary process. See *infra* note 153 and accompanying text.
[144] See the definition of "Convention Refugee" contained at s. 2(1) of the *Immigration Act*.
[145] *Convention on the Status of Refugees*, (1951), 189 U.N.T.S. 138; 1969 Can. T.S. No. 6 as am. by *Protocol Relating to the Status of Refugees* (1967), 606 U.N.T.S. 267; 1969 T.S. No. 29.
[146] See for example, *Gargano* v. *Canada (Min. of Citizenship & Immigration)* (1994), 25 Imm. L.R.(2d) 292, 85 F.T.R. 49. There, the court observed that while the right to counsel was not absolute, yet unfair denial of the opportunity to be represented could result in a denial of natural justice. Failure in this case to provide an adjournment in order to retain counsel prevented the applicant from receiving a fair hearing. By contrast, an immigrant applying for a visa abroad has no general right to be represented by counsel in any interview.

is no discretion in the decision-maker to withhold the grant of status for reasons such as lack of ability to settle successfully or fraud in obtaining entry to Canada.[147]

A similar proposition holds true for Family Class applicants. These are close family members sponsored by relatives in Canada who have agreed to assume responsibility for their settlement. Once the requisite family link has been established, the immigration official is, in effect, *functus officio.* She has no discretion to withhold the immigrant visa despite concerns, perhaps, as to settlement prospects for the particular individual, or the depth of the sponsor's personal commitment to the settlement obligation.[148] The case is otherwise with Independent immigrants. Selected precisely for their personal abilities to establish in Canada, their acceptance or rejection remains subject to discretion in the visa officer. Processed on the basis of a points assessment scheme, the decision-maker retains authority to ignore the points tally, where she believes that it does not accurately reflect settlement potential.[149] Because selection as an

---

[147] There is, of course, an exception in any case where criminal or security concerns are present. However, this is largely a matter of statutory requirements, rather than exercise of discretionary power, though there is admittedly some discretion as to whether the statutory provision should be applied in any given case. For the present discussion, I am focusing on the example of discretion relating to assessment of settlement potential and fraudulent entry, for purposes of contrasting its use in relation to levels of entitlement and rights. Once refugee status is granted in Canada, it is subject only to the statutory exceptions for serious criminality and the like. This is to be contrasted with the U.S. position where the grant of asylum (U.S. terminology distinguishes between a "person seeking asylum", being someone that applies from within the country, and a "refugee", who applies from abroad) is much more discretionary. In the U.S., since the grant of asylum is entirely discretionary, any pre or post entry misconduct may be used to justify withholding of status. See *Immigration and Nationality Act*, 8 U.S.C. § 1158(a) which provides that an "alien may be granted asylum in the discretion of the Attorney General". See also A. T. Fragomen, Jr. and S. C. Bell, *Immigration Fundamentals: A Guide to Law and Practice*, 1992 ed. (New York: Practising Law Institute, 1992) at 6-33; and S.H. Legomsky, *Immigration Law and Policy* (Westbury, N.Y.: Foundation Press, 1992) at 840-841.

[148] Assuming the sponsor has given an undertaking, pursuant to section 6 of the *Regulations*, that she will assist the immigrant. In assessing such undertakings, immigration officers consider a schedule that sets out a suggested minimum income that a sponsor should have to give such an undertaking. There is no guarantee, of course, that even with such a minimum income, the sponsor will honour the undertaking or that it will be sufficient to provide for the particular needs of both the sponsor and the immigrant.

[149] *Regulations*, s. 11(3).

Independent immigrant is merit based, these applicants simply have less entitlement to landing than do Refugee or Family Class applicants, and this is reflected in the discretionary power accorded the decision-makers.

Although the privilege - right dichotomy is somewhat out of favour today[150], yet it continues to animate the use of discretion in immigration law.[151] At common law, immigration was conceived of purely as a privilege. No one had a right to enter, except at the sufferance of the sovereign and even then, only on terms imposed by the sovereign.[152] Doubtless, this notion of privilege fostered the tremendous reliance upon

---

[150] See for example, the judgment of Wilson J. in *Singh*, *supra* note 64, 17 D.L.R. (4th) 422 at 461, who declined to apply a "rights-privilege" mentality to interpretation of the *Charter*. She states, "[t]he creation of a dichotomy between privileges and rights played a significant role in narrowing the scope of the application of the *Canadian Bill of Rights*.... I do not think this kind of analysis is acceptable in relation to the Charter." Generally, the distinction is no longer seen as a justification for withholding a minimum level of fairness to all applicants. Regardless of whether a "right" or a "privilege" is implicated, our law will require that any determination should be arrived at only in accordance with requisite procedural fairness. The specifics of such procedural fairness, of course, vary in accordance with the level of entitlement, considerations of justice, etc. So it is that refugees are entitled to a more court-like process, with substantial safeguards, while an independent applicant is entitled only to a more informal process, possibly even without benefit of an oral hearing. Everything depends upon the interests at stake and the possible repercussions that may flow from the decision.

[151] See for example, D. Bagambiire, *Canadian Immigration and Refugee Law* (Aurora: Canada Law Book, 1996) at 365, footnote 2, who notes that the tendency to create a rights and privileges dichotomy continues even today, notwithstanding the admonition of Wilson J. This attitude is evident even in the practicing bar. In "Medical Inadmissibility: Selection Without Standard?", Paper presented to The 1996 Immigration Law Conference (Vancouver: Canadian Bar Association, 1996) at 2, Cecil L. Rotenberg, a senior Canadian immigration lawyer, states the following: "The writer does not make the laws but only want (sic) a universally fair and legal application of the laws to all prospective immigrants. *While immigration is a privilege*, proposed immigrants are entitled to legal and fair processing. It is up to us as their lawyers to see that this happens. [emphasis added]"

[152] In the Canadian context, *Attorney General of Canada* v. *Cain* [1906] A.C. 542 (J.C.P.C.) remains a classic statement of the comprehensive and wide ranging nature of state power to regulate entry by non-nationals. The court said there, 542 at 546, that '[o]ne of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or its social or material interests." See also *Prata* v. *Minister of Manpower and Immigration* (1975), 52 D.L.R. (3d) 383, [1976] 1 S.C.R. 376, 3 N.R. 384 where the court observed that at common law, an alien had no right to enter or remain in Canada except with leave of the Crown. The common law has been essentially codified in s. 5(1) of the *Act*, which states: "No person, other than a person described in section 4 [ie. citizens, permanent residents, convention refugees and Indians registered under the *Indian Act*], has a right to come into or remain in Canada."

discretion in immigration matters which continues to be evident in current law and practice. The common law concept of the complete sovereignty of the Canadian Nation State to resist incursions by foreigners has slowly been chipped away at on several fronts. An obvious example concerns the case of Refugees. The *United Nations Refugee Convention*[153] resulted in recognition of rights of asylum and sanctuary for displaced persons. Having acceded to the convention, Canada has a duty to provide refuge to persons within its ambit. The duty thus translates into a right belonging to Refugees to claim and obtain sanctuary. Interestingly, though, the right is one belonging only to those Refugees who are able to make their own way to Canada. For those not so fortunate as to possess the ability or resources to get to Canada, there is no right to refugee status and asylum. Canada's convention obligations extend only to persons physically present on our soil. While we do select Refugees from abroad for resettlement on our own initiative, this is done as a voluntary act of compassion only. It is not the fulfillment of any legal duty. Consequently, there is an element of discretion pervading the foreign selection of Refugees that is not present in the domestic context. Like Independent Class immigrants, foreign selected Refugees are assessed as to their ability to successfully settle in Canada.[154]

More recently, the advent of the *Canadian Charter of Rights and Freedoms*[155] (hereinafter the *Charter*) has led to a further erosion of the common law primacy of the

---

[153] *Supra* note 145.

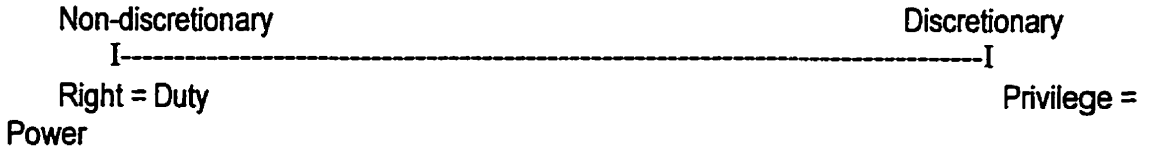
[154] See "Convention Refugees Seeking Resettlement", s. 7, *Immigration Regulations*, which requires visa officers to consider various economic and educational factors in arriving at an opinion as to whether a convention refugee is capable of becoming successfully established.

[155] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

State to deal with foreigners as a matter within its complete discretion.[156] In *Re Singh and M.E.I.*[157], the Supreme Court of Canada found that the *Charter's* guarantee under section 7 to "life, liberty and security of the person" was applicable to any person physically present in the country. Although that case dealt with the situation of Refugee claimants, it ensured that anyone, including a non-citizen, would be entitled to a reasonable measure of procedural fairness in any processes leading to their removal.

In summary then, discretion is used as a tool to permit a finer level of sifting, according to entitlement, both within and across categories. In cases where entitlement is deemed to be low, then the presence of discretionary power is generally greater. Where entitlement is high, a duty exists which tends to displace discretionary authority. Thus, depending upon notional entitlement, the existence of discretion will fluctuate across a spectrum that spans the rights and privilege dichotomy. Figure 1 provides a graphic representation of this situation, which might be termed a rights/privilege continuum.

Figure 1 - Rights/Privilege Continuum



1.5 What is discretion?

Examination of the "why" of discretion highlights the fact that it is both ubiquitous and, arguably at least, indispensable. But what exactly is it? Defining

---

[156] For a discussion of the effects of the *Charter* on immigration law generally, see Bagambiire, *supra* note 151 at 365–391.

discretion is a difficult task at best, largely due to the fact that it is a multi-dimensional concept, with shades of meaning that depend upon the circumstances in which it is used. Unlike rules, which are hard and fast (or at least relatively more so than discretion) and easily collected, analyzed and quantified in volumes of legal texts, discretionary power suffers from an amorphous nature. This is so since discretion begins where laws and rules leave off.[158] Since primacy of rules is favoured in our liberal democratic legal tradition, it is inevitable that discretion should reside only in the space not taken up by rules. Existing, therefore, only in relation to rules, discretion necessarily dwells in a penumbra of fluid uncertainty on the edges of those rules. More cogently, it is also an inescapable fact that where there are rules, there will be discretion.[159]

There is something of a presumption in our legal tradition that rules are "safer" than discretion, since their meaning and scope of application appear to be more precise and focused. This, in turn, suggests that rules are less arbitrary, more predictable and, ultimately, fairer. Such a conclusion, however, may not be quite as certain or reliable as it seems.[160] In reality, our legal tradition, with its preference for certainty and fixed boundaries, actually demands that rules and discretion should inform one another. Moreover, though dissimilar on a superficial level, both draw their guidance from one common pool of fundamental legal principles. Accordingly, there tends to be a surprisingly uniform, common scope for legitimate action, regardless of whether rules or

---

[157] *Supra* note 64.

[158] Kenneth Culp Davis, *Discretionary Justice, supra* note 41 at 3.

[159] See for example Hawkins, *supra* note 9 at 35, where the author notes that rules and discretion are not discrete, opposing entities. Rather, in his view, discretion suffuses the interpretation of rules and their application.

[160] A point which I attempt to make throughout this work. In particular, however, sociological work in recent years has attempted to debunk the notion that discretion is as arbitrary as traditionally presumed.

discretion are implicated. The limits for one tend to foreshadow the limits of the other and so the discrepancies between the two may be more apparent than real. Likewise, though the virtues of written laws are often extolled as the ideal model for regulation of our society, the reality is that discretion is still an essential part of that model. The difficulties of ever devising a complete set of rules of absolute clarity and precision are such that discretion must always be present, to some degree or other, in any system of rules. Thus, it exists as both a procedural device, assisting interpretation and application of rules, and as a substantive tool, supplementing shortcomings in the rules themselves.[161] Typically, both types of discretion are present in some measure in any regime of rules or laws. In practice, therefore, rules and discretion, occur in tandem and may be as much identical as fraternal in their exercise.

Like rules, discretionary power is a ubiquitous substance, pervading every area of law and every field of legal endeavour.[162] At a fundamental level, law is an exercise in rationalization of facts, values and influences and it is these three ingredients which Davis

---

This point is examined in greater depth below, at section 2.3 Discretion and Sociology.

[161] This distinction is dealt with more fully below, at Chapter 2, section 2.1 The Selection Process.

[162] Indeed, a 1975 study by the Law Reform Commission of Canada, upon a review of the revised statutes of Canada, reckoned that those statutes contained 14,885 grants of discretionary power. See Philip Anisman, *A Catalogue of Discretionary Powers* (Law Reform Commission of Canada, 1975) at 23. The powers bestowed by such grants were classified as "judicial" (5938), "rule making" (3467), "administrative" (2933) and "investigative" (1298). Within the *Immigration Act*, Anisman calculated there were a total of 173 grants of discretionary power, broken down as follows: "judicial" (101), "administrative" (20), "investigative" (19) and "rule making" (33). Although the *Act* contained in the 1970 revision of statutes was replaced in its entirety by the current *Act* (ie. *Immigration Act, 1976*), there is no reason to believe that the situation in respect of discretionary powers is any different now, as then. In considering these statistics, it is prudent as well to bear in mind Anisman's caution, given at page 23. "Nevertheless, it should be stressed that powers enumerated show only the tip of the iceberg. Many express powers are not included in the tables, none of the discretionary powers granted in the regulations themselves were considered, and, most important, no attempt was made to discover the number of implicit powers capable of exercise or actually exercised [footnote omitted]."

ascribes to the make up of discretion.[163] The facts include actions (or even inaction) and rules which must be applied to those actions. Values are the grease along which the interpretive exercise slides, buffeted all the while by influences such as the characteristics of the litigants, the manner in which the suit has arrived in court or even, one supposes, by the state of the judge's digestion. Given the diverse factors which can influence the make up and exercise of discretionary power, it is inevitable that the end result is a multi-faceted creature existing on various planes cutting across our legal system.

There is, nonetheless, a single thread running through every attempt at definition which leads inevitably and inexorably to one notion alone - power. Thus, Evans offers that discretion is "...an express legal power to choose a course of action from a range of permissible options, including the option of inaction".[164] Grey takes this a step further by asserting a sort of complete independence in the decision-maker. He postulates that "[d]iscretion may best be defined as the power to make a decision that cannot be determined to be right or wrong in any objective way."[165] Similarly, in the view of Kenneth Culp Davis, discretion occurs "whenever the effective limits on the power of a public official leave freedom to choose between possible courses of action or inaction".[166] Regardless of how the precise statement is formulated or expressed, it is apparent that the idea of power lies at the root of every attempt to define the concept of discretion.

1.5.1 "Of Doughnuts and Discretion" – The Relationship to Rules

While power may be something of a given, the more intricate and subtle question

---

[163] Davis, *supra* note 41 at 5.
[164] Evans, *supra* note 2 at 1021.
[165] J.H. Grey, "Discretion in Administrative Law", *supra* note 1 at 107.

about discretion concerns its relationship to rules. Although it entails power, yet it is not an absolute or unbridled power. The traditions of our legal and political systems have engendered a lively and enduring suspicion of unregulated power, which is thought to be anathema to democratic society and the "rule of law". Accordingly, discretion does not exist freely in our society without reference to standards and principles.[167] It is for this reason that much jurisprudential time and energy have been expended in defining and describing the proper relationship between rules and discretion.[168]

For John Austin, a 19th century proponent of the positivist school of thought, discretion existed at the 'furry edges'[169] of rules, where decision-makers are empowered to make new rules or to rework old rules to deal with unique or unanticipated difficult cases.[170] Here, discretion obtains as power to devise or refashion rules. H.L.A. Hart, though developing an even more elaborate description than Austin of rules as a system, still clung to the basic tenet of Austin that rules were everything. Hart's version of the rule-based system was comprised of primary and secondary rules.[171] The primary rules are the laws, orders and ordinances themselves, which confer rights or impose obligations. The secondary rules are rules of recognition, dealing with how and by whom

---

[166] As cited in Hawkins, *supra* note 9 at 16.
[167] The exact nature of those standards and principles is discussed below, Chapter 3 "The Limits of Discretion".
[168] See for example Hawkins, *supra* note 9 at 14, who observes that obsession with rules is the major difference in approach that law and social science bring to the study of discretion. Legal philosophers think in terms of the relationship between rules and discretion while social scientists prefer to focus on decision making.
[169] As described in Ronald M. Dworkin, "The Model of Rules," (1967) 35 *U. Chicago L.R.*, 14 at 18, citing J. Austin, *The Province of Jurisprudence Determined*, 1832.
[170] This is, of course, simply an older version of Kenneth Culp Davis' assertion, see *supra* note 41 at 3, that "where law ends, discretion begins." This is the optimist's view. Davis also quotes a more pessimistic version, ascribed to William Pitt and engraved on a stone in front of the Justice Building in Washington, D.C., that states: "Where law ends tyranny begins."
[171] H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) at 77-96.

primary rules may be created and terminated. Recognizing, like Austin, that no system of rules could ever completely anticipate all of the difficult cases that might crop up, Hart too conceded that discretion would exist as a tool for tweaking the rules in such instances. Thus, his essential description of discretion, though still relating it to power, refined the notion by stipulating that it involved power to make rules, to reform rules and to extinguish rules. Accordingly, in his bifurcated system, Hart consigned discretionary power to dwell in the realm of secondary rules.

Working further on the relationship between rules and discretion, Ronald Dworkin was prompted to draw a famous analogy wherein he likened discretion to the hole in a doughnut.[172] In his view, it had no existence except as a void defined by a surrounding belt of restriction. Discretion is a very specialized term, which "...is at home in only one sort of context: when someone is in general charged with making decisions subject to standards set by a particular authority."[173] Further, since it is context sensitive, its meaning and use is shaped and controlled by the particular circumstances in which it arises. Dworkin identified just three situations that give rise to discretionary power in the western legal tradition. He classified them as two "weak" senses and one "strong". His description is as follows:

> Sometimes we use "discretion" in a weak sense, simply to say that for some reason the standards an official must apply cannot be applied mechanically but demand the use of judgment. ...
> Sometimes we use the term in a different weak sense, to say only that some official has final authority to make a decision and cannot be reviewed and reversed by any other official. ...

---

[172] "The Model of Rules", *supra* note 169 at 32; also see R.M. Dworkin, *Taking Rights Seriously* (London: Gerald Duckworth & Co., 1977) at 31.
[173] "The Model of Rules", *ibid.*

> I call both of these senses weak to distinguish them from a stronger sense. We use "discretion" sometimes not merely to say that an official must use judgment in applying the standards set him by authority, or that no one will review that exercise of judgment, but to say that on some issue he is simply not bound by standards set by the authority in question.[174]

Applying these senses to Canadian immigration law, we find that the first weak sense, a decision demanding the exercise of judgment, is one that is found throughout the immigration program. Virtually every application for a visa, regardless of whether it is in an immigrant or a non-immigrant category, involves some level of discretionary judgment. The only variable concerns the level of discretionary power that may be present in any given instance. In some cases, it may be more open-ended, while in others it will be greatly restricted. For example, in the Family Class, an applicant's right to an immigrant visa crystallizes upon proof of the requisite family link. Discretionary judgment in such an application is limited to the adequacy of the proof offered. It does not extend so far as to permit any judgment regarding the motivation of the applicant in seeking entry to Canada.[175]

In contrast, a visitor visa applicant[176] is also required to provide proof as to certain substantive requirements, such as possession of a valid passport or travel document[177] or sufficient funds to facilitate the travel.[178] However, it is not enough for such an applicant

---

[174] *Ibid.* at 32-33.

[175] This is not to make light of the difficulties that can sometimes be present in proving relationships in family class cases. For an example of such difficulties, see *Secretary of State for External Affairs & Minister of Employment & Immigration* v. *Menghani and Canadian Human Rights Commission* (1993) 21 C.H.R.R. D/427 (F.C.T.D.), rev'g in part (1992) 17 C.H.R.R. D/236 (Cdn. H. Rts. Trib.). As this case illustrates, when the applicant is from a country or region where record keeping and documents are not reliable, proving family ties can be almost as difficult as proving intent in visitor cases.

[176] The term "visitor" is defined at s. 2(1) of the *Act* as "a person who is lawfully in Canada, or seeks to come into Canada, for a temporary purpose."

[177] *Regulations*, s. 14(3).

[178] See for example, *Toor* v. *Canada (Min. of Employment & Immigration)* (1987), 1 Imm. L.R. (2d) 104, 9 F.T.R. 292 (Fed. T.D.), where the applicant's inability to afford the travel in question was found to be a

just to prove these prerequisites. They must also satisfy an officer of the temporary nature of their proposed visit.[179] This is an additional element, which involves judgment and assessment of intent. Intention is very obviously a more difficult criterion to assess than is a claimed relationship to another person. There is often no single best piece of evidence that an applicant can present to verify that she intends only to travel to Canada for a finite period and purpose. Since intent is only a state of mind, the adequacy of the proof will be dependent upon all of the circumstances. Moreover, in practice, the result may well be that what satisfies one officer may prove insufficient to another. The absence of a fixed standard to be mechanically applied in every case invariably vests considerable latitude in the examining official. The nature of what is to be proved in visitor cases creates a greater scope for discretionary decision-making in those cases, than is apparent in Family Class immigrant applications. In the end, however, both examples concern the measure of discretionary power available with respect to the sufficiency of proof, and so the only real difference between them is simply the size of the hole in the doughnut.

The second weak sense, where an official is not subject to review, is also present in the operation of Canadian immigration processes, as it is in most areas of administrative laws.[180] In our legal tradition, decisions of administrative officials are not

---

legitimate ground for denial of a visitor visa.

[179] The discretionary nature of the grant of a visitor visa and the minimum indicia of a temporary purpose are set out in section 13(2) of the *Regulations* which states:

> A visa officer may issue a visitor's visa to any person who meets the requirements of the Act and these Regulations if that person establishes to the satisfaction of visa officer that he will be able
> (a) to return to the country from which he seeks to come to Canada; or
> (b) to go from Canada to some other country.

[180] "Weak" is perhaps a poor choice of terms for a sense of discretion which imports the sort of power that unreviewabilty speaks to. Dworkin might have been better advised to draw a clearer distinction of this

generally reviewable on the merits, only on the matter of jurisdiction, which includes the process by which a decision was reached.[181] While an error in process will allow the courts to intervene (most often ordering that the matter be reheard), they will not ordinarily examine the equities or substantive features of the case. These are for consideration and assessment by the hearing officer alone. In this sense, then, an immigration official is not subject to review. Their decision as to the merits and demerits of a case is beyond dispute, both by the courts and by higher level officials.[182]

Finally, Dworkin's third strong sense, discretion unbounded by any standards, though rarer in practice than the first two, is still evident in immigration practice.[183] For example, section 2.1 of the *Regulations* empowers the Minister to "...exempt any person from any regulation made under subsection 114(1) of the Act [pursuant to which the *Immigration Regulations* have been promulgated] or otherwise facilitate the admission to

---

sense by referring to it as a mid-level or medium type.

[181] Grey, "Discretion in Administrative Law", *supra* note 1 at 112; see also J.H. Grey, *Immigration Law in Canada* (Toronto: Butterworths, 1984) at 1-5. There is some inconsistency in the literature regarding the grounds for judicial review. Some authors, such as Bagambiire, *supra* note 151 at 346 –349, refer to many grounds for review, such as abuse of discretion, breach of natural justice or procedural fairness, acting beyond jurisdiction, without jurisdiction, failing to exercise jurisdiction, error of law and so on. Others, like Grey, simply lump all such distinctions under the broad notion of jurisdiction. For reasons of economy and practicality, I am here adopting the latter approach.

[182] This is, of course, the theory. In reality, however, it is not unusual for higher level officials to intervene, at least where a negative decision is concerned. If that decision is thought to be indefensible, senior officials may direct that a positive decision be substituted, or if the case has been appealed to the courts, CIC will often consent to a judgment in the applicant's favour. The contrary, however, is not true. Because the rules of fairness dictate that "she who hears must decide", higher level officials are not able to dictate negative results, since this would be an unwarranted fettering of the decision-maker's discretion. Such cases are ripe for review in the courts, who will not hesitate to find a breach of the principles of fairness. Thus, while discretion may apparently be fettered in a manner that benefits an applicant, the converse results in misconduct that will not be tolerated. In theory, one supposes that a lower level official who is overturned by superior level officials might have justifiable cause to appeal such actions, particularly where those overturning the decision have not otherwise been directly involved in the assessment process. In practice, however, it is unheard of for lower level officials to appeal such occurrences.

[183] Although some argue that is extremely rare. See for example, David Feldman, Book Review of *The Uses of Discretion*, by Keith Hawkins, ed., [1994] Public Law 279 at 289 who notes that "...it is central to Dworkin's thesis that strong discretion in law is extremely rare, if it exists at all."

Canada of any person where the Minister is satisfied that the person should be exempted from that regulation...."[184] Clearly, while the Minister possesses the authority, or discretion, to waive a requirement of the *Regulations*, she may not be compelled to do so.[185] This is so because the legislation provides no standard to guide the exemption power. The lack of any standards for the exercise of this extraordinary discretion effectively renders it immune to any sort of review. A dispensation from the *Regulations* is an exceptional matter that remains entirely within the judgment of the Minister and her delegates.[186] Neither the courts, nor any other official, are in a position to substitute their own opinion for that of the Minister in these decisions.[187] It is this type of authority

---

[184] *Supra* note 91.

[185] This is very clearly evidenced in the case of *Khalon et al.* v. *Canada (Minister of Citizenship & Immigration)* (1995), 101 F.T.R. 297 (F.C.T.D.). That case dealt with a request for exemption from the application of the rules for immigration contained in the *Act* and Regulations, pursuant to a humanitarian and compassionate review under s. 114(2) of the *Act*. The applicants had been denied a favourable review and so applied for judicial review. In dismissing the application, Muldoon J. noted the extraordinary nature of the exemption to be granted under s. 114(2) and was critical of attempts to bring its operation under the purview of the courts. In his judgment, at 301, he states that:

> Applicant's counsel keep attempting to expand and over-judicialize the application of the H&C [humanitarian and compassionate] review. It is well to remember what was stated by Strayer, J. (as he was), in *Vidal* [*Vidal and Dadwah* v. *Minister of Employment and Immigration* (1991), 41 F.T.R. 118, 13 Imm. L.R. (2d) 123 (T.D.)], ...on the nature of subsection 114(2) of the *Act*. Three of the six propositions stated by him are:
>
> (1) In subs. 114(2) Parliament has authorized the Governor-in-Council to make exceptions to the rules found in the *Act* and in the *Regulations*. There is therefore nothing inconsistent with the *Act* in the Governor-in-Council creating such exceptions by regulation.
>
> (2) The exceptions so made are for the benefit of those in whose favour they are made and do not detract from the normal application of the general rules to all others. *Those who are complaining that they have not been made a beneficiary of a regulation adopted under subs. 114(2) are in effect complaining that they have not received a special benefit.* ...
>
> The H & C review is a sort of last resort after having failed the legal criteria: it is a privilege. One wonders if some newly devised last, last discretionary resort were to be invented, if the bar would attempt to judicialize it, too.

[186] See also Christopher Vicenzi, "Extra-Statutory Ministerial Discretion in Immigration Law" [1992] *Public Law* 300, where he discusses existence of a prerogative in the Minister to "under-enforce" the immigration rules. While the Minister may choose to waive a rule for reasons for compassion or justice or any other reason deemed sufficient, the determination is entirely within the Minister's purview and may not be compelled.

[187] See for example, *Young* v. *M.E.I et al.*, *supra* note 141, where the applicant sought a Minister's Permit on the basis of a departmental policy. The court found such policies do not create legal rights enforceable by way of mandamus.

which undoubtedly most rankles opponents of discretionary power. But even this apparently unbridled authority does not lead automatically to despotism. As Dworkin states, this type of discretion does not mean that an official "...is free to decide without recourse to standards of sense and fairness, but only that his [or her, as in the case of the current Minister of Immigration] decision is not controlled by a standard furnished by the particular authority...."[188] More precisely, while there is no legal standard to guide the exercise of discretion in this instance, yet there may well be other standards in play.[189] The salient feature is that while this type of decision may be subject to criticism as unfair, stupid, ill-conceived and so on, yet it cannot be said to have deprived an applicant of either a substantive decision or a procedural commitment to which he or she had an entitlement under law.

1.5.2. Explicit and Implicit Discretion

Discretionary power is bestowed in two manners; as an explicit delegation of authority and as an implicit, but necessary, adjunct to any rule-based decision-making.[190] An example of this duality is to be found in section 11(3) of the *Immigration Regulations, 1978*, which states:

---

[188] "The Model of Rules", *supra* note 169 at 34.

[189] The Immigration Manuals do provide policy guidance as to when and how this authority should be invoked. Though this is mere departmental policy, and not law, it is still significant that some guidance is thought necessary. Likewise, there may be other controls of a more practical nature, such as public opinion and political oversight by Parliament. For more on this generally, see below, section 3.4 Extra-Judicial Influences on Discretion.

[190] The implicit form of discretion is often seen to be a component of the notion of "jurisdiction" that is used in administrative law. See generally Evans, *supra* note 2 at 1021-1022, who notes that rules often contain implicit discretion regarding how they are to be interpreted and enforced. See also Stanley de Smith, The Right Honourable The Lord Woolf & Jeffrey Jowell, *Judicial Review of Administrative Action*, 5th ed. (London: Sweet & Maxwell, 1995) at 300 – 302 (hereinafter referred to as "de Smith"). The authors specifically note, at 302, that because of the necessity for interpretation, statutory discretions "...may be conferred implicitly as well as expressly."

> A visa officer may
> (a) issue an immigrant visa to an immigrant who is not awarded the number of units of assessment required by section 9 or 10 or who does not meet the requirements of subsection (1) or (2) [all of which relate to the immigrant having received sufficient units of assessment on the independent immigrant point selection system], or
> (b) refuse to issue an immigrant visa to an immigrant who is awarded the number of units of assessment required by section 9 or 10,
> if, in his opinion, there are good reasons why the number of units of assessment awarded do not reflect the chances of the particular immigrant and his dependents of becoming successfully established in Canada and those reasons have been submitted in writing to, and approved by, a senior immigration officer.[191]

Here, discretionary authority is expressly delegated to the visa officer to make determinations as to whether an assessment under the Independent category selection system accurately reflects settlement potential. While the visa officer is ordinarily required to apply the rules in order to arrive at a determination, there is an express discretion hanging over the process which can be employed to overcome any perceived defect in the rules. The visa officer may take, or may refuse to take, action to relieve against the rules, where she is of the opinion that there are *good reasons* for doing so. The opposite proposition also holds true. The visa officer has authority to deny the benefit of the rules, if there is sufficient justification to believe they have inordinately favoured an applicant. Either way, this delegation involves a classic grant of express discretion and could hardly be any clearer. The visa officer *may* take a certain course of action, but is not necessarily compelled to do so. She has a choice to exercise that depends upon all of the circumstances. If she is not properly satisfied of the propriety of the case for action, she may refuse relief.

---

[191] *Supra* note 91.

Implicit discretion, on the other hand, though more subtle, is equally extant in this example. The entire grant of explicit discretion is premised upon the conduct of a points assessment.[192] Assessing the applicant on the points selection system requires that the visa officer take stock of the personal and professional background of the applicant, with a view to determining how many points are appropriate. Every applicant will, of course, present a unique combination of personal qualities and qualifications. The object of the exercise in Independent migrant processing is simple – to find and select those persons who are likely to "become successfully established in Canada".[193] Formulating a set of universal rules that will consistently achieve that object is, however, decidedly less simple. In many cases, it may never be possible to devise rules of general application that are absolutely certain and clear in their meaning and application, in every situation. Such generality often gives rise to vagueness that necessarily leaves interpretation of the meaning of rules somewhat unpredictable. As a consequence, some discretion in interpretation and application of the rules in each individual instance is indispensable. But even procedural discretion to interpret the meaning of the rules, according to the facts, may not be enough. Vague rules also encourage grants of substantive discretion, such as that seen in section 11(3) of the *Regulations*, as a means of reconciling idiosyncrasies or failings in the rules that prevent them from achieving the object of the statute.

Thus, section 11(3) allows that the visa officer may ignore the rules, where *good reasons* exist. In this instance, 'good reasons' are stipulated as those relating to the

---

[192] The workings of the points selection system is described in greater detail below, section 2.1 The Selection Process.

likelihood of the immigrant and her family of *becoming successfully established in Canada*. Although this prescription is meant to provide guidance in the exercise of the explicit discretion, it is not entirely obvious what successful establishment entails. Likewise, there is no exhaustive list of factors under the *Immigration Act,* which enumerate when successful establishment is conclusively proven. Since some interpretation of the phrase "successful establishment" is necessary, it is not surprising that the rule requiring it cannot be self-executing. Some interpretation of its meaning is necessary. Such interpretation inevitably involves a range of possibilities within which choice may be exercised. Likewise, facts and other evidence must be assembled and categorized, and their individual weight and collective relevance assessed. The power to conduct an assessment of evidence and apply rules to that evidence entails an implicit grant of discretion, inherent *ab initio* in the decision-maker's jurisdiction to perform the task. This is Dworkin's first weak sense in action. Wherever a diversity of potential fact scenarios is combined with a requirement for assessment of sufficiency and cogency of proof, the rules will be incapable of mechanical application. Choice, or discretion, will need to be exercised in sorting out the relevant and the probative from the superfluous and the irrelevant. The choices made in this process are very much subject to review and, if indefensible, then they will be overturned. However, this does not deny that the decision-maker has an implicit freedom to interpret and apply the rules. It is simply that this type of implicit discretion is more closely controlled than is substantive discretion, which may also be granted implicitly or explicitly.[194]

---

[193] See section 8 of the *Regulations*.

[194] Indeed, discretion in interpretation and application of rules is one of the more rigorously scrutinized

Returning once more to Dworkin, it is interesting to note the place that discretion in interpretation and enforcement occupy in his analogy. Suggesting that they fit neatly into a hole surrounded by a ring of rules, does not adequately capture their true nature as sinewy entities that act upon the rules themselves. It is for this reason that some criticize the doughnut as deceptively imprecise, conveying an image of distinction and definition that does not obtain in all cases.[195] Given that interpretative and enforcement discretion is perhaps better analogized as commingling with the fibers of the ring of rules, the doughnut may actually look like a sponge cake,[196] with a large hole in the middle and a lot of little holes shot all through it.

Applying this to immigration law, the hole in the middle of the doughnut can be likened to the explicit discretion wielded by immigration bureaucrats. Within that middle void, they are free to choose from among any assembled options. Their power of choice is relatively ample here, being immune to review, at least on the merits. This is Dworkin's second weak sense. Within the surrounding band of rules, there are also often choices to be made among and between the rules. This type of discretion is most often granted as an implicit matter, though it may also occur as an overt matter. The necessity

---

forms of discretion, primarily because courts see themselves as expert in this field. Interestingly, section 11(3) represents an unusual example of an explicit version of substantive enforcement discretion, which more often exists an implicit power. Implicit enforcement discretion is most often associated with criminal law, where police, prosecutors and courts have authority to determine whether or not charges should be laid or, if laid, whether they should be withdrawn. See for example, Glanville Williams, "Discretion in Prosecuting", *supra* note 119 at 222, where the author states that "[i]t is completely wrong to suppose (as is sometimes done) that the institution of prosecutions is an automatic or mechanical matter."

[195] See Galligan, *Discretionary Powers supra* note 41 at 32 where he notes that the doughnut analogy "...can be misleading in suggesting ...a clear division between the surrounding standards and discretion; in the clearest cases of discretion that division may be clear, but more typically the two are interwoven, with discretion occurring where there are gaps in the standards, or where the standards are vague, abstract, or in conflict."

[196] For another interpretation of the doughnut, see Lorne Sossin, "Redistributing Democracy: An Inquiry into Authority, Discretion and the Possibility of Engagement in the Welfare State", (1994) 26 Ottawa L.R.

for choice in the interpretation and application of rules allows discretion to insinuate itself into the band of rules, filling in space not otherwise taken up by the rules. This mostly implicit discretion implicates the first weak sense enumerated by Dworkin. The courts rigorously monitor it, at least in part, because of a norm that it should be exercised in a judicial and judicious fashion. Surrounding all of this, however, there exists a "super discretion", which may be exercised independently of the concerns imposed by the band of legal rules and the usual considerations that affect implicit and explicit forms of ordinary discretion. It is a prerogative power, subject to no legal standards or rules, which Dworkin appropriately calls strong discretion. Although he posits that such discretion occurs but rarely in law, this is not so in the case of immigration law where its occurrence is fairly common. Admittedly, however, it is available only as a positive matter, allowing for relief from the strict application of the rules.[197] It might be called the "last, last chance" discretion, commonly seen in relation to humanitarian and compassionate applications for relief against the rules. It arises in both inland and overseas processes and entails what has been called a "special privilege".[198] As Muldoon J. has described it, the humanitarian and compassionate "...review is a sort of last resort after having failed the legal criteria: it is a privilege".[199] Because of this, courts are more hesitant to interfere in its exercise.[200]

---

1 at 12, where the author prefers the analogy of a sponge.

[197] Presumably, such discretion is not available as a negative matter because the fundamental principles of our legal tradition do not permit "penalization", except on clear and well-defined grounds. Depriving a party of the benefit of some rule of general application through the use of a broad discretionary power, not subject to effective review, would contravene elementary notions of justice and fair play.

[198] See *Khalon, supra* note 185.

[199] *Ibid.*

[200] But not altogether unwilling. However, such interventions are usually limited to ensuring that the discretion accorded remains large and is exercised for the purposes granted. See for example, *Yhap* v.

A final aspect of implicit discretion that bears mention concerns power to set procedures, methods, forms, timing, degrees of emphasis and a host of other subsidiary factors. Although these appear at first glance to be relatively trivial procedural matters, yet their manipulation can have a significant impact on how substantive choices are effected.[201] Again, the ability to exercise discretionary control over these items arises either by implicit or explicit conferral of authority. Under s. 114 of the *Act*, for example, express authority is delegated to the Governor in Council to create regulations dealing with a wide range of matters affecting who may qualify for immigration and in what manner. On the other hand, the local manager of a visa office abroad, or a CIC in Canada, will also have significant latitude to set processes and procedures that can impact upon delivery of services. Matters such as office hours, preferences as to documentary evidence that should accompany an application and the like[202], all have an affect on immigration processes. If unreasonable, such stipulations can result in delay[203], or even denial, of service. It is apparent then that this implicit bureaucratic discretion can be as powerful, in its own way, as an explicit grant of discretion.

Canada (Minister of Employment and Immgration), [1990] F.C. 722, 9 Imm. L.R. (2d) 243, 34 F.T.R. 26 (F.C.T.D.). There, the Court found departmental guidelines to be unduly restrictive as to the sorts of matters which might be considered upon a humanitarian and compassionate review.

[201] Davis, *supra* note 41 at 4.

[202] See for example, Buffalo APC application kit insert, *supra* note 132, where stipulations of this sort are enumerated.

[203] An example of this can be seen in the recent experience of a Nova Scotia man who sponsored his American spouse for permanent residence in Canada. The matter is detailed in Parker Barss Donham, "For better, for worse" *The [Halifax] Sunday Daily News* (22 June 1997) at 4-5. The story purports to recount what happened "...when a happy bride's bid for landed-immigrant status became a 14-month ordeal when the red tape ran amok." In particular, this couple was dealing with two different CIC offices at one point, one in Canada and another located abroad. One bit of delay in the case is ascribed to the fact that while the Canadian office would accept payment by charge card, the foreign office would not. The Canadian office was apparently unaware of this difference in procedure and had counseled that credit card payment was indeed an option at the visa office.

1.5.3 Ministerial and Delegated Discretion

At the federal level, legislative authority for creation of regulations to flesh out the procedures and rules by which a statute is to be carried out is most often delegated to the Governor in Council.[204] The Governor in Council is, in reality, simply the executive arm of government, commonly known as cabinet.[205] It is composed of the Prime Minister and other ministers, including the Minister of Immigration.[206] In the case of immigration law, some of Parliament's legislative authority has in fact been delegated to the Governor in Council.[207] It is pursuant to this authority that the Governor in Council has created the *Immigration Regulations*, which provide a mass of fine detail supplementing the more general overall scheme set out by the *Act*.

It is salient to note also that the Minister of Immigration is herself a delegatee of power. Though she is a cabinet member, and hence "part" of the Governor in Council, she has no direct authority of her own, save that which has been accorded to her under the

---

[204] Evans, *supra* note 2 at 9-10.

[205] *Per* Hughes J. in *South-West Oxford (Township)* v. *Ontario (Attorney General)* (1985), 18 O.M.B.R. 21 at 24, 50 O.R. (2d) 297, 3 C.P.C. (2d) 92, 15 Admin. L.R. 1 (H.C.), where in speaking of the Lieutenant Governor in Council (the provincial counterpart), he observed that "...the Lieutenant-Governor in Council is the expression of a function and not of any group of individual ministers...." See also section 35(1) of the *Interpretation Act*, R.S.C. 1985, c. I-21 which provides this definition:

> "Governor General in Council" or "Governor in Council" means the Governor General of Canada acting by and with the advice of, or by and with the advice and consent of, or in conjunction with the Queen's Privy Council for Canada.

Hogg, *supra* note 87 at 26, terms it a "strange practice" in Canadian law that statutes never refer to the Prime Minister or cabinet, preferring instead to donate power to the Governor in Council. No matter what the delegatee is called, however, he notes that the conventions of responsible government ensure that effective power is always shifted "into the hands of the elected ministry where it belongs".

[206] See Hogg, *id.* at 343-345, where the author states that because of retention of the British model of government in Canada, there is a close link between the executive and legislative branches, which contrasts sharply with the United States or Australia, where the separation of powers is more complete. Thus, he observes that there is no general doctrine regarding separation of powers in Canada and so no requirement that legislative and executive powers be exercised by different bodies.

[207] Section 114(1) of the *Act* sets out a list matters over which the Governor in Council is empowered to make regulations.

legislation.[208] Nonetheless, as a functional matter, it is she, rather than the Governor in Council, who heads up the immigration bureaucracy. Accordingly, it is to her that immediate responsibility and authority for the day to day workings of the Immigration Department falls. This authority necessitates delegation to the Minister of a broad range of powers to enable her to administer and enforce the *Act,* and ensure that government policy on immigration is carried forward.[209]

While many powers are nominally accorded to the Minister in her role as functional head of the immigration bureaucracy, few of them are actually exercised by her directly. Instead they are usually delegated in turn to subordinates.[210] The reality of the size and complexity of the immigration program is such that it is inconceivable that the Minister herself could deal personally with every case that might implicate her discretionary power. As a matter of practicality, therefore, she is permitted to delegate some of her authority, either as an express or implied matter.[211]

---

[208] Thus, for example, s. 114(2) of the *Act* contains an express provision permitting the Governor in Council to authorize the Minister to exempt anyone from any regulation.

[209] For a discussion of the potential checks on the authority delegated to the Minister of Immigration, see below, section 3.4.1 The Minister.

[210] Section 121 of the *Act* provides:

> (1) Subject to subsection (1.1), the Minister or the Deputy Minister, as the case may be, may authorize such persons employed in the public service of Canada as the Minister or Deputy Minister deems proper to exercise any of the powers and perform any of the duties and functions that may be or are required to be exercised or performed by the Minister or Deputy Minister, as the case may be, under this Act or regulations. ...
>
> (2) Any power exercised or duty or function performed under subsection (1) by any person authorized to exercise or perform it shall be deemed to have been exercised or performed by the Minister or Deputy Minister, as the case may be.

[211] Courts will imply an authority to delegate because of practical concerns. See for example, *Vidal* v. *Canada (Minister of Employment and Immigration)* (1991), 41 F.T.R. 118, 13 Imm. L.R. (2d) 123 (F.C.T.D.). There. the applicant contended that a lack of explicit wording permitting delegation obligated the Governor in Council to personally pass upon applications for exemption from the *Regulations* under s. 114(2) of the *Act.* The Court dismissed this contention summarily, however, noting the practical impossibility of the Governor in Council personally dealing with thousands of such applications. Because of this, it found that an extensive delegation system must be implied. This system allows review of individual cases by immigration officers who, in turn, provide recommendations to the Minister. After

Express delegation arises in those instances where the *Immigration Act* and *Regulations* distinguish between discretionary powers wielded by the Minister of Immigration and those exercised on her behalf by other officials, such as visa officers.[212] It is accomplished by way of delegation instruments, which are made public. In order for the Minister's delegate to be lawfully constituted, they must come within the class or category of officials who have been approved to exercise the particular power on the Minister's behalf.[213] On the other hand, there also exist certain powers which the *Act* prohibits the Minister from re-delegating.[214] As a delegatee herself, she is not entitled to re-delegate her authority unless there is a specific provision to permit her to do so, or the circumstances of the *Act* suggest that this is permissible.[215]

Thus, in some instances, where no explicit characterization is made as to who may

---

receiving those recommendations, the Minister, usually acting through other officials within her office, is free to decide cases as she deems appropriate in the circumstances. See also *Minister of Employment & Immigration* v. *Jiminez-Perez* (1984), [1984] 2 S.C.R. 565, [1985] 1 W.W.R. 577, 9 Admin. L.R. 280, 14 D.L.R. (4th) 609, 56 N.R. 215 (S.C.C.).

[212] See for example, s. 2.1 of the *Immigration Regulations* which allows the "...Minister to exempt any person from any regulation made under subsection 114(1) of the Act or otherwise to facilitate the admission to Canada of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations." On the other hand, see text of s. 11(3) of the *Regulations* accompanying note 191, *supra*, which accords a discretion exercised directly by visa officers.

[213] See below, section 3.3.3.1 Protecting Discretion, discussing the concept of "*Delegatus Non Potest Delegare*" and the importance of a properly constituted delegation of power.

[214] These are prescribed in the *Act*, at subsection (1.1) of section 121, which reads:

> (1.1) The Minister or Deputy Minister, as the case may be, may not authorize the exercising of the powers or the performing of the duties and functions referred to in [this Act under]subsection 9(5), paragraphs 19(1)(c.2), (f), (k) and (l), subsections 39(2), 40(1) and 40.1(1), subparagraph 46.01(1)(e)(ii), paragraph 53(1)(b) and subsections 81(2) and 82(1).

Essentially, all of these provisions relate to persons who pose security or serious criminal risks. Apparently, because of the sensitive nature of these cases, the Minister (in cooperation with the Solicitor General, in some cases) must personally determine whether to deny admittance or, if the person is already in Canada, to allow deportation.

[215] See John Willis, "*Delegatus Non Potest Delegare*", (1943) 21 Can. Bar Rev. 257 at 259. "A discretion conferred by statute is *prima facie* intended to be exercised by the authority on which the statute has conferred it and by no other authority, but this intention may be negatived by any contrary indications found in the language, scope or object of the statute...."

exercise a power, it may still be understood that the Minister has authority to delegate her powers to lower level officials. This implied delegation will be surmised from all of the circumstances attendant upon the grant. If delegation is not expressly prohibited, then even considerations of practicality and necessity may be cited by the courts as justification for implying a right in the Minister to pass on her authority.[216] The reality, therefore, is that many of the powers and duties granted to the Minister are actually exercised by officials acting on her behalf. In such cases, "[t]he official is not usually spoken of as a delegate, but rather as the *alter ego* of the Minister or the department; power is devolved rather than delegated.[footnotes omitted]"[217]

Regardless of who actually exercises a power, the propriety of a discretionary decision may be challenged by way of an application for judicial review. The central question in any judicial review concerns the nature of the power in question, whether it was exercised in a fit and proper fashion and whether it is amenable to review by the courts. Certainly, there exist some discretionary powers that the courts will decline to supervise too closely. In particular, those characterized by the courts as purely discretionary are often found not to be amenable to judicial interference. This is even truer where exercise of the power implicates broader political questions or considerations

---

[216] See for example, *Vidal* v. *Canada, supra* 211 where the court readily implied an extensive delegation system. In doing so, it rejected an argument by counsel for the applicant that applications for "humanitarian and compassionate" consideration pursuant to s. 114(2) of the *Act* required personal consideration by the Governor in Council. For practical reasons stemming from the volume of such applications, the Court found it "inconceivable" that Parliament should have intended to prohibit delegation of authority and responsibility over such matters to the Minister.

[217] De Smith, *supra* note 190 at 369, where the authors note also:

> In general, therefore, a Minister is not obliged to bring his own mind to bear upon a matter entrusted to him by statute but may act through a duly authorised officer of his department. The officer's authority need not be conferred upon him by the Minister personally; it may be conveyed generally and informally by the officer's hierarchical superiors in accordance with departmental practice.

that exceed the scope of the particular case at hand.

In *Winn* v. *Canada (Attorney General)*[218], for example, the applicant applied for *mandamus* to compel the Attorney General to provide consent to institute a prosecution. The court noted that a decision to prosecute was entirely discretionary on the part of the Minister and that there were no statutory or other guidelines as to when, how and under what circumstances that discretion should be exercised. In the face of such a broad discretion, the court declined to make an order. In its view, judicial restraint was warranted where a purely discretionary power, ill suited to judicial review, was in issue.[219] Such powers generally implicate a special privilege not ordinarily available. In the absence of a duty on the discretion holder to act, or a right in the applicant to compel the exercise of a discretion, the courts will not act. This is especially so where the matter involves questions of politics or public policy, which are more suited to the political arena than the courtroom.[220]

The hesitancy of the courts to act in the face of a so-called "pure discretionary power" is reinforced by the nature of the remedies available. Judicial review in the Trial Division of the Federal Court is the primary vehicle by which overseas immigration

---

[218] (1994), 28 Admin, L.R. (2d) 254, 84 F.T.R. 115.

[219] For a similar result on similar facts, see also *Ballantyne* v. *Duplessis* (1938), 76 Que. S.C. 448 (Que. S.C.). There, the Attorney General failed to notify an applicant as to whether consent to commence an action, which was needed pursuant to a statute governing employment, would be given. The court noted that the giving of consent was discretionary. Under the circumstances, it was found that the Attorney General's lack of response indicated that discretion had been exercised with a negative result.

[220] See for example, *Williams* v. *Canada (Minister of Citizenship & Immigration)* (1997), 35 Imm. L.R. (2d) 286 (F.C.A.). In that case, the respondent had been declared a "danger to the public" pursuant to s. 70(5) of the *Act*. The court reviewed the process by which the "Minister" might form an opinion that an individual poses risks to the public generally. Strayer J.A. observed that such an exercise involves a prognostication of potential future activity, which cannot be proven definitively. As such, the Minister is required to engage in a weighing of the factors, both for and against the applicant. In his view, however, this is an activity perfectly suited to the Minister, since "...there is always a risk [in such cases] and the extent to which society should be prepared to accept that risk can involve political considerations not

decisions may be challenged.[221] The usual remedies in such cases include writs of *certiorari, mandamus* and prohibition, which may be sought all together, or in any combination.[222] *Certiorari* is used to quash a decision of a tribunal, while prohibition issues to prevent an anticipatory breach of the law. *Mandamus*, on the other hand, issues to compel performance of a duty owed to an applicant.[223] Though it may be used to compel the exercise of a discretion, it cannot be used to dictate a particular outcome.[224]

All of these writs are prerogative remedies whose issuance is discretionary in the court.[225] Thus, a court is under no obligation to afford them, even where a *prima facie* case has been made out by the applicant.[226] Indeed, they may be refused despite that the public authority in question has been found to have acted in contravention of the law.[227] Likewise, the "...scope of the prerogative orders reflects the general principle that it is not the role of the...Court on judicial review to substitute its own decision for that of the

---

inappropriate for a minister".

[221] There are, of course, exceptions to this proposition. One of the most obvious is the right of appeal, in sponsored immigration cases, to the Immigration Appeal Division (IAD)of the Immigration and Refugee Board (IRB) under s. 77(3) of the *Act*. However, any challenges of IAD decisions are also dealt with by judicial review in the Trial Division of the Federal Court, pursuant to s. 18.1 of the *Federal Court Act*.

[222] Bagambiire, *supra* note 151 at 356.

[223] For more on the nature of these remedies and the circumstances under which they may issue, see generally Bagambiire, *ibid.*at 335-363; and de Smith, *supra* note 190 at 693-704.

[224] *Poizer* v. *Ward,* [1947] 2 W.W.R. 193, 55 Man. R. 214, [1947] 4 D.L.R. 316 (Man. C.A.), reversing [1947] 1 W.W.R. 807 (*sub nom.* Pozier, Re) (Man. K.B.).

[225] De Smith, *supra* note 190 at 695; J.H. Grey, "Discretion in Administrative Law", *supra* note 1 at 113, footnote 40. For a discussion generally of discretion in the court upon judicial review, see de Smith, *id.* at 805-820.

[226] See, for example, *Sashi* v. *Canada (Min. of Employment & Immigration)* (1987), 3 Imm. L.R. (2d) 288 (Fed. T.D.). In that case, the applicant sought to sponsor his adopted daughter. However, the application was denied on the basis that the strict requirements of the foreign adoption had not been complied with. The court noted that the conclusion of the visa officer, though not unreasonable, involved some interpretation of foreign law. Accordingly, procedural fairness required that the applicant should have been given some opportunity to respond to the interpretation. This was not done. Under the circumstances, however, the court saw no substantial injustice and, since the relief sought was discretionary, dismissed the action.

[227] De Smith, *supra* note 190 at 695. The remedies may also be denied because the conduct of the applicant is such as to warrant a denial of relief. See Bagambiire, *supra* note 151 at 355.

original decision-maker[footnote omitted]."[228] Accordingly, in order to meet with success on an application for review, it is incumbent upon the applicant to demonstrate some duty owed to her. If the decision in question entails a purely discretionary power, then such duty is absent. *Mandamus*, in particular, will not issue except where the applicant possesses a legal interest in the duty whose compulsion is sought. This fact was evident in *Robinson* v. *Canada (Minister of Citizenship)*[229], where the court set out the elements to be demonstrated for a successful application. "[T]he applicant must show that: 1) it has a clear legal right to have the thing sought by it done; 2) the duty whose performance it is sought to coerce is actually due and incumbent upon the officer at the time of seeking the relief; 3) the duty is purely ministerial[230] in nature; and 4) there has been a demand and a refusal to perform the duty".[231] Frankly, therefore, if the matter involves a "purely discretionary" decision, the Minister or her delegate will be free to act in a highly subjective fashion.

As an elected official responsible for shaping, implementing and administering government immigration policy, it is inevitable that political considerations will be present, to a greater or lesser extent, in almost every decision that the Minister of Immigration is called upon to make. Accordingly, courts are more likely to show greater deference to discretionary decision making engaged in by the Minister, than that of a lower level official acting pursuant to a delegation.[232] In this light, it is pertinent to note

---

[228] De Smith, *ibid.* at 698.
[229] [1990] 1 F.C. 362, 10 Imm. L.R. (2d) 224 (F.C.T.D.).
[230] The Court is not using the term "ministerial" here to connote a power wielded by the Minister of Immigration. Rather, its meaning in this context relates to a mandatory act or duty that admits of no personal discretion or judgment in its performance.
[231] *Supra* note 229, 10 Imm. L.R. (2d) 224 at 227.
[232] This is made abundantly apparent in the decision of *Nguyen* v. *Canada* (1993), 18 Imm.L.R. (2d) 165,

that, by virtue of s. 114(2) of the *Act* and s. 2.1 of the *Regulations*, the entirety of the selection criteria established by the *Regulations* have been left subject to a broad, overriding discretion in the Minister. She is authorized to relieve against the regulations whenever she is satisfied that an exemption should be granted or that humanitarian and compassionate reasons for doing so exist. It is a sort of statutory "escape valve" which empowers the Minister to "under-enforce" the law as she deems expedient.[233] The plenitude of this discretion cannot be overemphasized. There are simply no criteria fixed

---

100 D.L.R. (4th) 151, 151 N.R. 69, 14 C.R.R. (2d) 146 (Fed. C.A.). In that case, a permanent resident was summoned to an inquiry under section 27(3) of the *Act* to determine whether he should be deported for having been convicted of a serious criminal offence, contrary to section 27(1)(d). The inquiry was adjourned when the applicant indicated that he wished to seek refugee status. Subsequently, the Minister of Immigration issued a certificate pursuant to section 46.01(1)(e)(ii)(B) [now section 46.01(1)(e)(iii)] declaring the applicant to be ineligible for refugee status because he constituted a danger to the public in Canada. Upon resumption of the inquiry, the certificate was tendered in evidence and the applicant was ordered deported. Upon judicial review of that deportation order, the applicant's counsel argued, in part, that the legislative provisions which permitted the Minister to issue such a certificate violated the applicant's rights under section 7 of the *Charter* not to be deprived of his liberty, except in accordance with the principles of fundamental justice. In counsel's view, the lack of any specific criteria in the legislation to guide the Minister in her decision to issue a danger certificate was contrary to fundamental justice. In the Court of Appeal, this argument was quickly disposed in a manner that made clear that the court had no qualms about a wide and unstructured discretion being granted to the Minister. Speaking for the court, 151 N.R. 69 at 74, Marceau J.A. stated:

> With respect to the legislation itself, it is argued that the absence of legislative safeguards to protect against the issuance of an ill-advised certificate, such as a requirement that dangerous conduct be likely to continue and that the dangerousness be intractable, coupled with the fact that there is no provision for a court review of the Minister's opinion, renders the whole legislative scheme disrespectful to the principles of fundamental justice. I disagree. *I do not believe that the Minister needs to be compelled to follow formal guidelines as to the factors he should take into account in forming his opinion, and I consider the Minister's opinion in respect of public danger as reliable as that of a court.* [emphasis added]

[233] This is to be contrasted with the situation in Britain where, arguably, the Minister has not been accorded statutory authority to "under-enforce" immigration law. See Vicenzi, "Extra-Statutory Ministerial Discretion in Immigration Law", *supra* note 186, who notes that the Secretary of State (who has responsibility for immigration in England) exercises a discretion to under-enforce the immigration rules. In his view, however, English law does not actually accord power to the Secretary of State to grant dispensation in the thousands of cases that he actually does every year. However, he does also note some case law, at 317, which seems to suggest that a broad construction of one statutory section may provide the necessary authority. Whether or not such statutory authority exists, the Secretary of State assumes he has this power and, of course, those who benefit from it do not challenge it. On the other hand, since it is a pure discretion, there is no basis to appeal refusal to exercise the discretion. In practice, therefore, this discretion is immune from judicial supervision, since successful parties do not appeal and unsuccessful ones have no basis for appeal.

by statute or regulation that the Minister must follow.[234]

Moreover, in reviewing exercises of discretion, it is clear that the courts show greater deference to Ministers than to rank and file civil servants. This can be seen, for example, in cases involving criminal inadmissibility. Where the prospective entrant to Canada has a criminal record of any sort, they must seek a grant of "rehabilitation". The authority for granting such rehabilitation, at least with respect to more serious offences, has not been delegated by the Minister and so she retains direct responsibility for each determination. The usual procedure is for the applicant to be interviewed by a visa officer who, if satisfied genuine rehabilitation has occurred, makes a positive recommendation to the Minister for exercise of her discretion to grant relief. In the *Leung* case[235], the applicant had been convicted in 1989 in Hong Kong of theft, forgery of a document and uttering a forged document and sentenced to four months imprisonment on each count. Upon his later application for permanent residence under the Independent category, Leung was able to satisfy the visa officer of his genuine rehabilitation, with the result that the visa officer forwarded an enthusiastic positive recommendation to the Minister.[236] The Minister, however, without giving reasons, declined to exercise her

---

[234] Though admittedly, this discretion may not be completely devoid of criteria guiding its exercise. However, the criteria applicable usually are those set by the Minister herself, in the form of policy statements contained in the Immigration Manuals, Operations Memoranda and the like. The Minister is under no obligation to formulate such policies to guide exercise of her discretion. However, once adopted, the courts will act in the interests of fairness to ensure that they are applied evenly and consistently. For a fuller discussion of the legal position of policy statements, see text accompanying note 556, *infra.*

[235] *Chi Wah Anthony Leung* (14 April 1998), Federal Court File No. IMM-1061-97 (F.C.T.D.) [unreported], as cited in *Lexbase - The National Information Network for Immigration Practitioners* (hereinafter referred to as "*Lexbase*") 9:5 (May, 1998 Sending) at 14.

[236] The enthusiasm of the officer is evident in an extract from the rehabilitation recommendation forwarded to the Minister. It reads: "It is rare in the course of an Immigration Officer's career that an applicant for permanent residence in Canada exudes so fundamentally the features of rehabilitation, remorsefulness, and contriteness as portrayed to myself as the interviewing officer and writer of this rehabilitation submission." *Id.*, 14 at 15.

power in favour of the applicant. After apparently failing to obtain leave to directly challenge the Minister's determination[237], the applicant applied for judicial review by questioning the visa officer's role in the matter. The central issue concerned the duty of a visa officer to question the reasonableness of the Minister's decision. Though the Minister's apparent disregard for the ringing endorsement provided by one of her own officials seems on its face somewhat perverse, the completely discretionary nature of her authority and the deference courts will pay to it is seen in this statement by Gibson J.:

> It is worthy of note that the responsibility for rehabilitation decisions has been vested in the Minister, not in officials such as visa officers. It was for the Minister to determine whether or not she was satisfied and the fact that the visa officer who prepared the submission to her was himself satisfied is of no consequence.[238]

Accordingly, the Court found no obligation on a visa officer to inquire after the propriety of a Ministerial decision. Indeed, the Court went so far as to distinguish a Ministerial decision from those rendered by officials employed in her department, by using the example of a medical officer's opinion. Medical officers provide opinions to visa officers as to whether applicants meet statutory requirements respecting health. Such opinions often involve a significant element of discretion in their formation. Though visa officers have no medical training, the courts nonetheless have found a duty in them to assess the reasonableness of Medical Officer opinions.

The result is somewhat incongruous. The very expertise of visa officers lies in assessing the personal qualities, achievements and general character of visa applicants. The selection factor of personal suitability, for example, applicable to all Independent

---

[237] *Id.*
[238] *Id.*

migrants, requires officers to form opinions regarding the adaptability, motivation, initiative, and resourcefulness of individual applicants.[239] These are very closely related to the sorts of qualities that might be assessed in determining whether genuine rehabilitation has actually taken place. Assessing the fitness of medical opinions, however, draws upon a whole different skill set and knowledge base than visa officers are likely to possess. The only explanation for the differing roles of visa officers in these two scenarios is the *laissez faire* attitude of the courts toward Minister's discretion.

The point is further illustrated by the case of *Bhatnager*[240], which showed that courts are willing to be pragmatic in the context of Federal Court practice, at least where senior government officials are involved as litigants. Faced with the question of whether or not to hold government ministers personally responsible for the actions of their departments, the majority of judges in the several levels of court traversed by the *Bhatnager* case relied upon their own judicial discretion to avoid a result that the rule of law seemed to dictate.

In *Bhatnager*, the applicant had been sponsored for permanent residence by his wife, a Canadian citizen. Though the application was submitted in 1981, it was still under consideration in the Immigration Section of the Canadian High Commission in New Delhi, India in 1985. Understandably frustrated with the pace of matters, the sponsor filed a Notice of Motion in the Trial Division of the Federal Court for a writ of *mandamus* to compel the Minister of Employment and Immigration to process Mr.

---

[239] Schedule I, Factor 9, *Regulations*.

[240] *Canada (Min. of Employment & Immigration)* v. *Bhatnager*, [1986] 2 F.C. 3 (Fed T.D.), rev'd [1988] 1 F.C. 171 (Fed. C.A.), aff'd [1990] 2 S.C.R. 217, 44 Admin. L.R. 1, 111 N.R. 185, 71 D.L.R. (4th) 84, 43 C.P.C. (2d) 213, 12 Imm. L.R. (2d) 81.

Bhatnager's application. In the course of the *mandamus* proceedings, an order for production of the visa office file was made by the Trial Division to facilitate cross-examination upon affidavit.[241] The order, addressed to the respondent Minister of Employment and Immigration and the Secretary of State for External Affairs, stipulated that they should give direction to their officials for production of the file. In the result, however, the file was not produced with sufficient alacrity to meet the deadline set by the Court. As a result, Bhatnager sought to have the respondent Minister and Secretary of State held in contempt of court for failing to heed the order. Although the order for production had not been personally served upon the respondents, formal service of it had been accepted on their behalf by counsel, in accordance with procedures set out in the Federal Court Rules governing such matters.[242]

The contempt proceedings placed squarely before the court a cornerstone proposition of the rule of law – that no one, not even a government minister, is above the law. As was observed by the Trial Division of the Federal Court, "[t]here has never been any doubt in this case as to whether ministers and other government officials are subject to the law, and therefore subject to duly issued orders of this Court. This is a principle which has been recognized for centuries in the system of public law we inherited in

---

[241] At that point in the proceedings, the Secretary of State for External Affairs was also added as a party to the proceedings, since foreign service visa officers were then employees of the Department of External Affairs and International Trade Canada (now the Department of Foreign Affairs and International Trade). *Bhatnager* v. *Canada (Minister of Employment & Immigration and Secretary of State for External Affairs)*, [1988] 1 F.C. 171 at 176 (Fed. C.A.).

[242] There does not seem to have been any dispute concerning whether the Ministers ever had personal knowledge at any time material to the question of contempt of court. As Strayer J. noted, *supra* note 240, [1986] 2 F.C. 3 at 19: "In the present case there was no suggestion that the order of the Associate Chief Justice of August 15 [requiring production of the file] had ever been served personally on the respondents or otherwise brought to their attention prior to [the deadline of] September 3."

Canada. It is an aspect of the rule of law. [footnote omitted]"[243] Though the theory of that principle was beyond doubt, its actual application in practice was decidedly less certain, as evidenced by differences of opinion in the Courts. In the Trial Division, Strayer J. relied upon the common law to reject the argument that the Federal Court Rules, permitting service of an order upon a party's solicitor of record, were sufficient to fix a party with knowledge of an order in contempt proceedings. Betraying a pragmatic frame of mind, he stated the following:

> It is true that paragraph 311(1)(a) of the rules of court of the Federal Court provides that service of a document, not being a document that is required to be served personally, may be effected by leaving a copy of it at the address for service of the person to be served. By virtue of the definition of "address for service" in Rule 2(1), this term in the case of a party who has an attorney or solicitor on the record means the business address of that solicitor. While the rule says nothing specific as to personal service of an order subsequently relied on as a basis for a proceeding in contempt of court, I believe that from the common law principles it must be deduced that in such cases the order must be served personally on the party if service is later to be relied on as the basis for knowledge by that party of the order which he is alleged to have violated. ...I do not accept that mere knowledge by the solicitor alone of the order is sufficient to affix his client with such knowledge of the order as to render that client guilty of the quasi-criminal offence of contempt of court.[244]

The Court of Appeal, on the other hand, took a more positive view of the deference to be accorded to the rule of law principle, reversing Strayer J. to find the respondent ministers in contempt. Discounting any role for common law principles, Urie J. held that the Federal Court Rules were complete on the matter and entirely determinative of the issue. In his opinion:

> ...the Federal Court Rules...provide a comprehensive code for the manner in which notice of court orders is to be effected. On the evidence there can be no

---

[243] Per Strayer J., [1988] 3 F.C. 383 at 384, in the assessment of penalty hearing following from the Court of Appeal's decision, *supra* note 240, reversing his earlier judgment that contempt was not made out.
[244] *Supra* note 240, [1986] 2 F.C. 3 at 20.

> doubt that those Rules were fully complied with in this case so that both the pronouncement of the order in open court in the presence of the duly authorized representative of the respondents, and its subsequent service on him, constituted notice to them as surely as if they had been personally present and served herewith.[245]

In short, the Court found the rules to be the rules, and equally applicable to all. Further, since the rules mentioned no distinction concerning the nature of the proceedings, it made no difference whether they were quasi-criminal or civil in substance.

The last word, of course, remained for the Supreme Court of Canada. Speaking for the Court, Sopinka J. preferred the more functional methodology adopted by the Trial Division. Adverting to a long tradition in the common law requiring "...personal service or actual personal knowledge of a court order as a precondition to liability in contempt..."[246], he noted that in the absence of express provision to the contrary, the Federal Court Rules could not be taken to have altered that position. This was particularly true where a serious offence like contempt of court was implicated.[247] He went on to add that a such approach was particularly appropriate where, as here, the party to be cited was no ordinary litigant.

> In the case of Ministers of the Crown who administer large departments and are involved in a multiplicity of proceedings, it would be extraordinary if orders were brought, routinely, to their attention. In order to infer knowledge in such a case, there must be circumstances which reveal a special reason for bringing the order to the attention of the Minister.[248]

The Court noted that there was no evidence from which to infer actual knowledge by the Minister and Secretary of State of the court order and that vicarious liability did not exist

---

[245] *Supra* note 240, [1988] 1 F.C. 171 at 185.
[246] *Supra* note 240, (1990) 12 Imm.L.R. (2d) 81 at 88.
[247] *Id.* at 90.
[248] *Id.* at 89.

in criminal law to impute knowledge and responsibility to a party. In the result, the Minister and Secretary of State were exonerated of the contempt charge.

Perhaps the most interesting question concerning the existence of a wide discretion in the Minister of Immigration is why it was felt necessary to accord her such power. The obvious answer is one reviewed earlier in this paper, concerning the difficulty of devising rules that provide for substantive justice in every case. However, consideration must also be given to the question as to what extent this provision may have been influenced by political considerations. Anyone who has worked for any period of time in the field of immigration law and policy will appreciate the fact that they are perennial "hot" topics in the public agenda. Major newspapers carry almost daily accounts of individual immigration cases that present some sort of crisis. Generally, these stories tend to portray the "system" as having failed in one of two ways – either by negligently omitting to keep out an undesirable or by obstinately and unreasonably keeping out a desirable. While the first case can only be made up by often protracted and notorious remedial enforcement action through the courts, the second is amenable to a deft exercise of discretion under section 114(2) of the *Act*. Thus, should the coverage on a refusal case become critical of departmental action, with significant public support mobilized in favour of the wronged applicant, expedience may dictate defusing the situation by judicious and timely discretion.

Whether or not this is appropriate is likely a matter best left to the legislators. For in the end, it is in the House of Commons and the forum of public opinion that such actions are ultimately accountable. Fortunately for the Minister, the demand for discretionary action is usually more vocal and strident than any call against its use. Thus,

there is often less political "damage" to saying "yes" than "no". This is especially so since there tend to be few effective limits on positive discretion used to accord special benefits, outside of the operation of the ordinary rules of general application. Certainly, those benefiting from it are unlikely to complain. The other immediate party, the Minister, also is unlikely to appeal the use of positive decision by any of her delegates. Moreover, because of privacy concerns, decisions in individual immigration cases are not ordinarily made publicly available.[249] As a result, the public is unlikely even to be aware of when positive discretion has been exercised.

1.6 Chapter Summation

Evans asserts that "[i]t is obvious to all that discretion is the very life blood of the administrative state.[250] Be this as it may, it does not mean that discretion as an administrative tool enjoys universal acceptance. In fact, it remains a subject of some controversy with a wide diversity of opinions and jurisprudential philosophies evident on questions concerning its propriety and the circumstances of its usage. What is more certain, however, is that discretion occurs in many forms and on many levels; ministerial and delegated, positive and negative, and implicit and explicit. Additionally, wherever it occurs and however it is employed, discretion must be conceded to be power. But it is more than that, and leaving the description there is, as one reviewer has noted, to paint it

---

[249] The *Privacy Act*, R.S.C. 1985, c. P-21, generally prohibits disclosure to third parties of information collected by the federal government, except upon the consent of the individual concerned. See also Government of Canada, *Access to Information Act and Privacy Act* (Ottawa: Treasury Board of Canada, undated information pamphlet). For a fuller discussion of the role of the *Privacy Act* in immigration matters, see below section 3.4.4 Human Rights, Privacy and Access to Information.

[250] Evans, *supra* note 2 at 28.

as a caricature of itself.[251] Choice is really what discretion is most about. It is the freedom that power imports to choose between alternatives. But they are not just arbitrary choices. Rather, the choices required by our law are between procedural compliance and substantive justice. Discretion is that which can put autocracy into bureaucracy or forge compassion and empathy into administration. It is an animating essence that permits a choice between blind adherence to rules or blindness to the sometimes otherwise inflexible dictates of rules. It is also a double-edged sword, allowing for both facilitation beyond the strict constraints of rules and for control within the letter of the law. And in the end, it is this dichotomy which has ensured that discretion should remain a subject of enduring interest and controversy.

[251] *Ibid.* at 1022.

CHAPTER 2 – THE OVERSEAS CONTEXT

2.1 The Selection Process

As noted in Chapter 1, immigration to Canada is carried out pursuant to three broad categories, comprised of the Family Class, the Refugee Class and the Independent category.[252] The Family and Refugee Classes are intended to further goals centered on family reunification and protection of persons from persecution.[253] The Independent category, on the other hand, is primarily concerned with the economic and cultural development of Canada.[254] While the first two proceed from a sense of compassion and humanity, the Independent category is unabashedly concerned with the best interests of the country. In a very real sense, Independent immigrant selection is what Canada does for itself and this is reflected in the manner in which such immigrants are chosen. Family

---

[252] The Independent category itself contains several sub-categories. These include the Business Class, Assisted Relatives and "regular" Independents. Business Class immigrants are persons whose intention it is to start a business or invest a specified minimum amount of capital into designated immigrant investor funds. This class is, in turn, comprised of three sub-categories; Entrepreneurs, Investors and Self-Employed persons (See definitions for each contained at s. 2(1) of the *Regulations*). Assisted Relatives are persons who, though having a relative in Canada, do not qualify for processing in the Family Class. As a result, they are made to qualify according to the criteria for regular Independent immigrants. However, in recognition of the fact that they have a relative in Canada who is presumably willing to support their application, the overall total that they need for qualification is reduced by five points, as compared to other Independents (See section 10(1)(b) of the *Regulations*). True Independents, on the other hand, are those who have no close relatives in Canada and whose intention it is to enter the labour market. They must qualify solely on their own merits, according to a selection grid (See Section 8(1) and Schedule I of the *Regulations* and the Selection Grid at Appendix A, below). In order to contain the ambit of this paper, I have deliberately chosen "true" Independents as the principle focus for this paper. Accordingly, considerations relating specifically to Business immigrants and Assisted Relatives will not be discussed, other than as an incidental matter.

[253] See objectives set out in section 3(c) & (g) of the *Act*.

[254] See objectives set out in section 3(b) & (h) of the *Act*. To this, one might also add the attainment of demographic goals, as per section 3(a) of the *Act*. This is particularly true in the case of Independents since their numbers are, at least at present, the most closely controlled of any category. Such control is exercised primarily in the form of a demographic factor (See factor 6 of Schedule I to the *Regulations*, below, at

Class applicants need to show a close relative in Canada, willing to sponsor their migration, while Refugees must establish a "well-founded fear of persecution"[255]. Once either of these propositions is satisfactorily demonstrated, the applicant will qualify for admission, regardless of their personal attributes, education, language ability, job skills or other similar qualifications.[256]

The case is otherwise with Independent immigrants. They are selected precisely for those qualities and skills which are thought to ensure their swift and easy resettlement into Canadian society. In the words of the Immigration Manual, "[s]uccessful applicants in the independent class will be selected primarily due to their ability to make a significant contribution to the economic, cultural and social fabric of Canada."[257] The fact that Independent selection is largely a matter of national self-interest is further confirmed by the *locus* of selection. Unlike the other two categories, Independent selection is an activity carried out exclusively overseas. This facilitates a greater degree of control over who may enter and avoids the lengthy involvement and expense that deportation or removal of unqualified candidates can entail. And, quite simply, there are few equities that militate in favour of Independent migrants being granted entry in advance of satisfying entry requirements. It is the national interest, rather than the interests of applicants which is favoured and the requirement for application outside of Canada

---

Appendix A), which is applicable to Independent migrants alone. See text accompanying note 259, *infra*.

[255] I am just referring here to Refugee claimants selected from within Canada pursuant to a decision of the Convention Refugee Determination Division of the Immigration and Refugee Board. Refugees selected abroad for resettlement in Canada are subject to requirements not applicable to those who have been selected domestically. See subsections 7(1)(b) and (c) of the *Regulations* which stipulate, for example, that overseas refugee applicants must demonstrate some financial resources available to aid their settlement and skills which suggest potential for becoming successfully settled in Canada.

[256] Subject, of course, to any statutory requirements under s. 19 of the *Act*, relating to health and public safety, that may be applicable.

simply reinforces that only those with the qualities sought will be granted entry. Thus, pursuant to section 9(1) of the *Immigration Act*, every immigrant or visitor to Canada must apply for and obtain the appropriate visa, before presenting themselves at a port of entry. Although exemption is granted for those cases which are "prescribed", no such prescription exists for Independents as a class.[258]

Moreover, this self-interest ensures that overall management of the flow of Independents to Canada is conducted on a more discretionary basis than is the case with other categories. This is done through the device of the "demographic factor".[259] Sometimes called the "levels control", it is one of nine factors contained in Schedule I to the *Immigration Regulations*[260], which provides the basic assessment scheme under which Independents are selected. The "levels control" exists to facilitate rapid policy changes to suit the political climate and the policy whims of the government of the day. So long as the flow of such immigrants is seen to be an asset and beneficial to the country, the tap will be allowed to remain more open. If the traffic is, however, suspected to be causing deleterious consequences in the economy, social life or other aspects of society, then it can be quickly reduced. Only the Independent class is subject to the use of the device of demographic factor.[261] This control device is easily manipulated and is effective by its

---

[257] CIC IM, Chap. OP-5, para. 1.1.

[258] Though there is the possibility for Independents to be selected from within Canada pursuant to a "humanitarian and compassionate" review under s. 114(2) of the *Act*. However, the emphasis in such cases is on exigent personal circumstances that justify extraordinary processing, rather than the normal selection criteria employed when selection occurs abroad. On the other hand, while Family Class applicants are subject also to the general rule that they should apply from abroad for their visas, spouses and children of Canadian citizens or permanent residents are routinely granted exemption from this requirement. The family connection is ordinarily deemed to provide sufficient evidence of compelling circumstances.

[259] *Regulations*, Schedule I, item 6.

[260] For a table setting out the selection factors, see below, "Appendix A - Independent Immigrant Selection Grid".

[261] The number of units awarded under the demographic factor is a matter entirely within the discretion of

sheer simplicity. All Independent immigrants must obtain a score of 70 points or greater, according to the selection grid, for a successful application. By raising the demographic factor, the number of applicants who might qualify is increased. The reverse situation holds where the demographic factor is reduced.[262]

While the demographic factor allows for control over the gross number of applicants that will qualify for immigration to Canada, a further selection criteria, known as the "occupational factor"[263], is used to exercise control in both a quantitative and a qualitative way.[264] Pursuant to s. 11(2) of the *Regulations*, every applicant must score at least one unit of assessment for the occupational factor in order to be successful. In this regard, a "General Occupations List" of occupations open to potential immigrants is maintained, which accords an occupational demand factor, from 1 to 10, for every listed occupation. If an occupation is not listed, then it is considered a "zero demand" occupation and so will not facilitate immigration. By reducing either the number of "open" occupations, or the occupational demand factor assigned to particular occupations, the flow of immigrants can be increased, reduced or cut off altogether.

Within the selection process itself, discretionary power occurs in many places, either overtly, as express statutory grants, or implicitly, as a matter of procedural practices and interpretation. Numerous examples are found throughout the *Act* and *Regulations*, the policy manuals and in the daily practices of visa offices. Without

---

the Minister, notwithstanding that factor 6 states that such "[u]nits of assessment shall be awarded as determined by the Minister *after* consultation with the provinces and such other persons, organizations and institutions as he deems appropriate...." [emphasis added]

[262] See CIC IM, Chap. OP-5, para. 4.1.6 discussing the demographic factor.

[263] *Regulations*, Schedule I, Item 4.

[264] Of course, the selection system as a whole operates so as to effect qualitative selection, according to the stipulated criteria.

attempting an exhaustive list, this section will provide an overview of the selection process and the presence of discretion, as it occurs in the light of statutory grant and in the shadows of procedure and interpretation.[265]

2.1.1 Procedural Discretion

Discretion enters the selection process as a factor of procedural practices and as a consequence of delegated authority for administering substantive requirements and stipulations. When employed as a procedural device, it affects the manner in which an application will be handled and the steps that it may be required to undergo, in order to satisfy the substantive requirements for qualification. Substantive discretion, going to the merits of an application, determines whether it is ultimately successful.

Unfortunately, the distinction between the two is not always obvious in practice. Procedural discretion may be implicated in the exercise of a substantive discretionary power and vice versa. For example, a decision to waive a selection interview implicates both a procedural and a substantive step. By waiving the interview, the officer has opted to make a substantive decision that the applicant is qualified and that points awarded upon paper-screening are an accurate portrayal of settlement potential. This decision necessarily imports some substantive discretion concerning sufficiency of the evidence offered, weight to be attached to the individual pieces of evidence, and so on. But it also involves procedural discretion – interview, a significant procedural step, has been waived to allow the applicant to move further along the process. As is apparent, there may only

---

[265] See Appendix A "Independent Immigrant Selection Grid" for a list of the qualifying factors against which Independents measured. See also Appendix B "Independent Immigrant Selection Process Chart" for a schematic overview of the selection process.

be shades of meaning separating procedural and substantive discretion in any particular situation. Despite the difficulties of providing definitive characterizations in every situation, the distinction between procedural and substantive discretion is perhaps most useful to an understanding of discretion in everyday immigration practice, and so it is one I use for the balance of this study.

The burden of proof in all immigration cases rests squarely upon the shoulders of the applicant.[266] This is so since section 9(4) of the *Act* makes clear the discretionary nature of the power of a visa officer to issue any type of visa. It mandates that an officer must be satisfied that issuance of a visa is not contrary to the *Act* or *Regulations*. Applicants attending overseas selection interviews are not entitled to be represented at such hearings, as the attendance of counsel is an entirely discretionary matter in the visa officer.[267] In the view of CIC, since it is the applicant's own qualifications and personal qualities that are under review, it is for her to put her own best case forward. The presence of an advocate, acting as an intermediary between the client and the interviewer, would be likely to distract the focus of the inquiry and perhaps add unnecessary formality.[268] Thus, notwithstanding that she may have retained counsel to assist her, it is the applicant's responsibility to present cogent and clear evidence at interview of her ability to qualify.

---

[266] See *Act*, s.8(1), which provides: "Where a person seeks to come into Canada, the burden of proving that that person has a right to come into Canada or that his admission would not be contrary to this Act or the regulations rests on that person."

[267] On the discretion of a tribunal to permit or deny the presence of counsel at a "hearing", see generally de Smith, *supra* note 190 at 450-454.

[268] There is an analogous problem associated with interviews requiring interpreters. In such cases, the officer may end up, in effect, interviewing the interpreter rather than the applicant, if sufficient care is not taken to ensure genuine communication.

This was evident in the *Hajariwala* case[269], for example, where the court highlighted the need for provision by the applicant of all justification and documentation relevant to a determination of admissibility. The Court observed that the *Act* and *Regulations* impose no positive obligation on a visa officer to provide information, counseling or other assistance to an applicant, though these may be offered as a matter of departmental policy or individual officer initiative.[270] Thus, there resides a discretion within each officer to follow the dictates of her conscience and the demands of her workload, as to how far she may be willing to go to assist any applicant to meet the requirements of the legislation. Obviously, in an environment where officers carry heavy caseloads and feel harried and pressed, they will likely possess less time and inclination to go beyond the minimal requirements for assistance placed upon them by law. Practical matters, therefore, such as institutional pressures and constraints, caseload and personal initiative may legitimately, at least according to law, influence accessibility to the immigration system.

To put an application into process, an applicant must provide sufficient information and documentation to meet a procedural threshold that varies somewhat from

---

[269] *Hajariwala* v. *Canada (Min. of Employment & Immigration)* (1988), 6 Imm. L.R. (2d) 222, 34 Admin. L.R. 206, 23 F.T.R. 241, [1989] 2 F.C. 79 (Fed. T.D.).

[270] It is amusing to note that there is no obligation in law to be "helpful". Could *Hajariwala* be said to stand for the proposition that it is lawful to be bureaucratic? Contrast the *Hajariwala* decision, however, with that of *Choi* v. *Canada (Min. of Employment & Immigration)* (1991), 15 Imm. L.R. (2d) 265, [1992] 1 F.C. 763 (C.A.) where the court was drawn to the "irresistible" conclusion that CIC policy was to withhold information from applicants about the possibility of making a full application forthwith, without the need for a preliminary assessment via a Pre-Application Questionnaire (PAQ). Although the court viewed the PAQ pejoratively, seeing it as a means by which the department avoided the work burden associated with a full application, this does not tell the whole story. While there can be no dispute that the PAQ was intended to alleviate some burden on the department, it also was meant to save time, money and frustration for those applicants who were unlikely to qualify. Unfortunately, *Choi* and *Hajariwala* suggest that the department is better off to be unhelpful, than to attempt something that may later be construed as mischievous. For a fuller discussion of the *Choi* decision and its implications, see text accompanying note

office to office. The level of that threshold is adjusted by each office according to a number of factors, including administrative convenience, the type of documentation common in the office's jurisdiction, the reliability of same, and so on.[271] If that threshold has not been met, the application may be returned by the office concerned without the case having been acknowledged and "locked-in".[272] Once the lock-in hurdle has been cleared, the application is launched on a processing track that concludes only when a final disposition is rendered. There are just three possible dispositions – granting of a visa, refusal, or withdrawal of the application by the applicant herself.

The handling of applications for immigration by Independent category applicants has been described as a "...two-stage assessment process during which it is the visa officer's duty to apply criteria set forth in the legislation and award points based on the ability of the applicant to become successfully established in Canada."[273] The first of the two stages is a file review, or "paper-screening" as it is often called. This entails an

---

660 *infra*.

[271] CIC IM, Chap. OP-5, Para. 2.1.1 (Ver. 09-97), "What is a completed application?" provides the following guidance to visa offices with respect to Independent cases:

> A completed application consists of:
> - a signed IMM 0008 for the principal applicant, his/her spouse and all dependents 18 years of age and older;
> - supporting documentation to allow you to render a decision on the selection criteria;
> - the correct cost recovery fees.

As a technical, legal matter, it is a dubious proposition that a visa office requires more than just the correct cost recovery fees and IMM 0008 application forms at the outset, at least for purposes of locking in the file. While some visa offices may require more documentation to accompany the initial application, this is a matter of preference that an insistent applicant may choose to ignore. However, providing only the minimum will not aid the exercise of procedural discretion, such as a decision on whether or not interview should be waived, for example.

[272] For more on lock-in and its importance, see *infra* note 371 and accompanying text. Again, while individual visa offices may stipulate particular items that they expect to be included with an initial application, there is no statutory authority for this. As a result, an applicant may submit only his completed IMM8 application form and the correct processing fees. Failure by the visa office to accept these, at least for lock-in purposes, would result in a reviewable error.

[273] *Zeng* v. *Minister of Employment and Immigration* (1989), 27 F.T.R. 56 at 57 (F.C.T.D.) per Jerome, A.C.J.

examination of the application for completeness of the submission[274], categorization as to class of application and, most importantly, substantive assessment as to ability to meet selection criteria.

An Independent applicant who fails to obtain at least 60 points at paper-screening, may be refused without interview.[275] The matter is not quite so cut and dried, however, as simply securing the requisite number of points. The paper-screening officer may exercise a discretion that is both procedural and substantive in character to put an otherwise failed application into process. Of her own initiative, or at the request of the applicant, the officer may determine that there is some aspect to the case which militates against strict adherence to the cut off suggested by the points regime. There may be any number of reasons that will impel an officer to exercise her authority in this regard. Typically, however, the decision proceeds from a conclusion that the points tally has somehow failed to adequately reflect true settlement potential.

The second stage of the assessment process involves an interview of the applicant by a visa officer. In reality, this stage is most often skipped by those who have obtained the outright pass mark of 70 points at paper-screening. Waiver of interviews is now commonplace[276] and so an important hurdle for most applicants is simply the question of whether an interview will even be convoked. This decision is entirely discretionary

---

[274] Although CIC attempted at one point to introduce the concept of "one-step application" as a matter of uniform worldwide procedure, it has now largely been abandoned, in part because of the difficulties of providing a single set of instructions that account for all of the local conditions that each overseas visa office must wrestle with. For more on the one-step application, see *infra* note 370 and accompanying text.

[275] *Regulations*, section 11.1.

[276] See for example, Buffalo APC application kit insert, *supra* note 132, mentioning a waiver rate in excess of 50%.

though, as a policy matter, the Department endorses waiver whenever possible.[277] The advantages of a waiver of interview are many for both CIC and applicants. Waiver saves workload for CIC and improves processing times since the matter of case processing is rendered an entirely paper exercise. For the applicant, it means that time, effort and expense associated with attending an interview are avoided.

Waiver is generally granted when it is clear that the applicant obtains sufficient points to qualify and is not obviously affected by any statutory bar. Recognizing the imprecision of the selection grid, however, departmental policy does permit waiver of interviews, even where the applicant has not obtained the 70 points needed for a clear pass.[278] For example, where the applicant indicates experience in an occupation for which there is apparent demand in Canada[279], significant work or study experience in a North American context[280], and sufficient financial resources for establishment, or at least reliable support from a family member in Canada, waiver of interview may still be granted. In such circumstances, CIC recognizes that there is little "value added" to

---

[277] See CIC IM Chap. OP-5, Para. 3.7 (Ver. 06-97) "Interviews", where the following guidance is offered:

> R22.1 provides officers with the right to call any applicant and/or any of the applicant's dependents (whether they plan to accompany or not) for an interview provided the interview is for the purpose of assessing the application.
>
> Applicants who meet one of the following criteria would not normally be interviewed:
>
> a) if the information provided on the application form and accompanying documents clearly shows that an applicant will accumulate sufficient units of assessment to meet the pass mark for their particular occupational group;
> b) if applicants fail to accumulate sufficient units of assessment and have no chance of accumulating sufficient additional units during an interview.
>
> All other cases should be **considered** for interview.

[278] This is particularly true for cases where the applicant obtains between 64 and 69 points on paper-screening, since 5 to 6 points is the average tally for personal suitability awarded at interview. Thus, if there is nothing on the file to suggest that an applicant would obtain less than the average number of points for personal suitability at interview, holding an interview adds little value to the selection process.

[279] Either pursuant to the General Occupations List or an offer of employment that has been confirmed by way of validation through a Canada Employment Centre (CEC) in Canada.

[280] Which tends to confirm language ability, adaptability and other factors pointing to potential for successful settlement in Canada.

processing in routine cases by holding an interview.

Waiver of interview confirms that the selection criteria have been met. Though an application may still be refused thereafter for failure to clear statutory requirements relating to health and public security, it would be unusual for a negative decision on selection criteria to follow a waiver decision. That said, however, such a circumstance might arise, for example, where it appeared that the assessment underlying the waiver decision had been somehow erroneous and that the selection criteria had not been properly satisfied. Because it is entirely discretionary, the decision to waive interview can be revoked at any time so as to require an applicant to appear at an interview. Thus, if the waiver decision was thought somehow to be faulty, the likeliest result is that the applicant would be called to interview since, most often, they would have gained at least enough units of assessment to clear the paper-screening threshold of 60 points.

The importance of providing full and complete information with an initial application is obvious then for several reasons. First, it prevents delay due to the application being returned for more information or documentation and facilitates lock-in at the earliest possible opportunity. Second, it assures that a fully informed paper-screening is conducted, thereby maximizing the potential points an applicant might receive. Third, since the legal burden rests upon the applicant to prove her case, a well-supported application reduces the risk of outright refusal at paper-screening.[281] Finally, a wealth of information facilitates the possibility that positive procedural discretion will be exercised to waive the necessity for a personal interview.

---

[281] This, of course, raises an issue about the importance of good counseling materials being provided by CIC to potential applicants so that they are fully informed as to what ought to go into the application.

Although interview can be waived at any stage of the process, the best chance for obtaining same occurs at the outset, at paper-screening. Once a file has been set for interview, responsibility for it usually shifts from the officer who has conducted paper-screening to another who will conduct the interview. At this point, a sort of institutional inertia can take hold to make waiver decisions difficult to obtain. Between the time of paper-screening and interview, there may be no one individual who has responsibility for it. Even where the file has been assigned to a particular officer, that officer may have little time for case review outside of their interview schedule and may not have familiarity with the file much in advance of the interview. As well, since time has been set aside in the interview roster for dealing with the matter, it may appear just as easy to resolve any outstanding issues at that time.

Interview itself imports a significant degree of discretion, both as to the range of issues that might be canvassed and the depth to which they will be explored. To a large extent, the parameters of the interview can be influenced by the care taken in paper-screening. A meticulous paper-screening usually guides the interviewing officer to examine just one or two, often very focused, issues of concern. A cursory paper-screening, however, provides no such guidance and often leaves the interviewing officer to conduct an open ended examination that only becomes more focused as the interview progresses. In either case, it remains to the discretion of the interviewer to determine the issues and the extent to which they will be examined. Since paper-screening may not be used to fetter the interviewing officer's discretion, they are free to pursue even those matters that only become apparent at interview. Likewise, while paper-screening is used to point out areas of concern, it may not be used to suggest an outcome from any

interview. As such, insofar as interview is concerned, paper-screening serves just two purposes – determining whether interview may be waived and, if not, then identifying relevant issues of concerns so as to reduce the amount of time that may be needed at interview.

2.1.1 Substantive Discretion

Selection

In the case of Independents, the assessment process involves comparison against the selection grid found at Schedule I of the *Regulations*.[282] There are nine factors contained in the grid for which Independents earn points. Some of the factors are purely objective in nature, while others contain a blend of subjective and objective elements. Of course, any activity importing an element of subjectivity inherently gives rise to some scope for discretionary power.

Education and occupation are examples of two selection factors that implicate both subjective and objective elements in their assessment. Under the education factor, applicants are awarded points according to the highest level of schooling they have completed. As noted earlier in this work[283], assessment of educational attainment is not nearly as clear cut as it might seem at first glance. What passes for a high school diploma in one country may not be the same as in another country. Inevitably, therefore, some assessment and interpretation of local scholastic standards and levels of achievement may be needed if the proper points are to be awarded. The same is true of assessment of

---

[282] See Appendix A below.

[283] For a discussion of the difficulties of educational assessment on a global basis, see text accompanying note 106, *supra*.

occupational experience and training. An occupation described as an engineer in one country might only be equivalent to an engineering technician or technologist in another. Indeed, the generic nature of the term "engineer" is such that it is often used in some countries to describe occupations that would not ordinarily be associated in Canada with any type of engineering. In assessing occupational formation and experience, form is not nearly so important as substance. Everything depends upon the circumstances of the training and experience and what they actually entailed. Regardless of what the educational or occupational attainment is called, it is the formative program and process by which the designation or title was attained that is most important. Cogent and clear proof that qualifications are equivalent to a particular level of attainment in Canada can sometimes be difficult to obtain. In the absence of such proof, the assessing officer will have a greater scope for exercising subjective judgement, or discretion. Not surprisingly, therefore, the greatest scope for adjudicative discretion lies in evaluation of the sufficiency of the proof that will cause the points to be awarded.

A number of factors on the selection grid, such as the demographic factor or age, are entirely objective and so admit of no substantive discretion. The former is awarded as a matter of course, while the latter involves a simple calculation of points according to age. Perhaps the most discretionary of the selection factors are language ability and personal suitability. In both instances, the latitude for discretion is a result of the lack of statutory or regulatory guidance given for their assessment. For example, though the selection grid in Schedule I of the *Regulations* mandates that language ability in French and English should be assessed against the standards of "fluently", "well" and "with difficulty", no instructions are provided in the Schedule as to the differences between

these three levels of proficiency. In addition, there is no standard test for language ability recognized under the *Act* or the *Regulations*. The only guidance on this matter is found in the policy statement contained at Appendix A to Chapter OP-5 of the departmental Immigration Manual. However, even the instructions there leave a wide scope for discretion. For example, the Appendix distinguishes between the three levels of ability in the context of spoken language by offering the following:

> *Fluently* – The applicant speaks and understands oral communication with approximately the same ease as that of an articulate native speaker.
> *Well* – The applicant is able to comprehend and to communicate effectively on a range of topics.
> *With Difficulty* – The applicant is able to communicate only in a very limited way.[284]

Quite obviously, the imprecision of these gauges for language ability ensures there are many applicants who fall somewhere between any of two of them. And, in the absence of a standard test, there is significant scope for debate as to whether such an applicant is closer to one level than another.

The assessment of personal suitability is likewise more subjective and hence more discretionary because of a paucity of guidance in the legislation. And again, the Immigration Manual provides little more policy guidance as to assessing personal suitability than is apparent in Schedule I of the *Regulations*. The entire Manual passage dealing with this factor is as follows:

> Determination of the number of units of assessment to be awarded an applicant, to a maximum of 10, rests on the judgement of the interviewing officer. The qualities of adaptability, motivation, initiative, resourcefulness, and such other attributes, admirable or otherwise, as the applicant may display, are characteristics on which the officer may base his determination.[285]

---

[284] CIC IM Chap. OP-5, Appendix A at 37 (Ver. 06-97).
[285] CIC IM, Chap. OP-5, para. 4.1.9. See also the guidance provided there for assessment of reading and

As is evident, where the *Act*, *Regulations* or policy have specified more criteria, the scope for discretion is reduced. Where the criteria are comparatively few, however, then discretionary authority is inevitably greater.[286] Against this, however, it must be recognized that the scope for discretionary action in the selection grid is subject to some limits. The two elements of language ability and personal suitability are still guided by some criteria, no matter how loose they may be. Thus, even with the factor of personal suitability, for example, which is undoubtedly the most discretionary factor on the grid, the scope for discretion is not unlimited.[287]

2.1.3 R. 11(3) Discretion

Officially, discretionary decision-making in overseas immigrant selection by CIC runs at two percent annually.[288] However, this does not disclose the true story. This figure only represents actual selection decisions which can be tracked in the Computer Assisted Immigration Processing System (CAIPS) used by visa offices abroad.[289] In that system, immigrant selection decisions, whether positive or negative, are assigned a numerical value which can be monitored, collected and analyzed. Such tracking is effective only for decisions entered into the system as selection decisions. Thus, what is

---

writing skills, which is similarly imprecise.

[286] By way of contrast, see Waldman, *supra* note 104, at 14.9 in § 14.25, for an assessment as to the discretionary nature of a visitor visa. In his view, the visitor visa is highly discretionary because of the minimal criteria applicable to its issuance. As he states: "Clearly the Act provides the visa officer with a discretion. The only requirement on the visa officer is that he or she consider the application, act fairly in his or her decision and not unduly fetter his or her discretion."

[287] The limits on the selection factor of personal suitability have been the subject of much attention by the courts and so is discussed in greater depth, below, at section 3.3.5 Personal Suitability.

[288] E-mail discussion with R. Kurland, Barrister & Solicitor, April 1997, citing informal discussions with CIC officials. This is evidently comparable to similar figures for U.S. immigration processing.

[289] CIC offices in Canada use a different computer system, called the Field Operational Support System (FOSS), than that used in visa offices.

captured are simply those cases involving a discretionary substantive discretion pursuant to sections 2.1[290] or 11(3) of the *Regulations*. None of the discretionary procedural steps upon which a selection decision may ultimately be founded are recorded. They are simply beyond the capability of CAIPS, and possibly beyond the desire of the bureaucracy, to record.

R. 11(3) provides the primary vehicle by which substantive discretion is injected into the selection process. It is a discretion directly tied to the selection factors and is intended to alleviate any perceived situations of rules failure, either because the selection factors have overestimated or underestimated settlement potential. Thus, it exists as both a positive tool for selection and a negative tool for exclusion. Positive discretion, pursuant to R. 11(3)(a), is used to waive the interview of an applicant who has obtained less than 70 units of assessment, but whose overall application indicates a high likelihood for successful establishment. It may even be used to put a case into process where insufficient units have been obtained to pass paper-screening.[291] Similarly, it may be used to select in those applicants who have attended an interview, but who have still been unable to obtain sufficient units for an outright pass, or who have failed to obtain at least one unit of assessment for occupational experience or occupational demand. Conversely,

---

[290] Discussed below commencing at page 115.

[291] See, for example, *Shum* v. *Canada (Minister of Citizenship & Immigration)* (1995), 30 Imm. L.R. (2d) 233 (F.C.T.D.) where the applicant sought judicial review of a decision to refuse his application without an interview, where he obtained less than the necessary 60 points to justify his case being put into process. The applicant had asked that discretion be exercised to grant him an interview, even though he had obtained insufficient units. The officer, citing insufficient units of assessment, declined to exercise discretion and grant the interview. Upon judicial review, the court noted that discretion under section 11(3) of the *Regulations* was not subject to the necessity of first obtaining sufficient units for the "pass" mark that justified further processing. Accordingly, the decision was overturned with a direction that the question of discretion be specifically addressed, even in the absence of sufficient units to justify an outright pass.

negative discretion under R. 11(3)(b) is available for similar reasons – namely, that although the required units of assessment have been achieved, they represent an overestimate of true potential for successful settlement.[292] Discretion under R. 11(3), whether positive or negative, is exercised in the local visa office. It is qualified by the requirement for "good reasons" founding its exercise and is subject to the necessity of those reasons being put in writing to and concurred in by a senior immigration officer.[293] By gloss of judicial interpretation, 11(3) discretion has also been found to be limited to consideration of potential for successful establishment in an economic sense only, and may not be used with respect to potential for social establishment.[294]

2.1.4 R. 2.1 Discretion

While 11(3) discretion is meant to allow visa officers to reconcile inadequacies in the selection criteria, there exists a further tool that allows consideration of factors not related to those criteria. Authority has been delegated to program managers at visa offices abroad to exercise power pursuant to section 2.1 of the *Regulations* to exempt any person from the requirements of any regulation, if humanitarian and compassionate ("H

---

[292] Obviously, the more contentious of the two branches of R. 11(3) concerns the negative discretion available to refuse an otherwise successful application. Examples of 11(3)(b) decisions are many and a few only provide a fair illustration of how the power is used in practice. See, for example, *Covrig* v. *Canada (Minister of Citizenship & Immigration)* (1997), 35 Imm. L.R. (2d) 128 (F.C.T.D.) where the applicant, a mechanical engineer by profession, was refused an immigrant visa despite having obtained 71 points. At interview, the visa officer found that the applicant "projected a distinct lack of energy and dynamism" which, combined with other factors, caused her grave concern as to his settlement prospects. Muldoon J. found, at 139, that the visa officer did not commit an error in considering "...that the applicant's hopelessness in the English language made him an economic and employment liability in Ontario, his intended destination."

[293] While an exercise of positive discretion under s. 11(3) requires that reasons justifying same be put in writing, so as to obtain the concurrence of a senior immigration officer, there is no requirement for written reasons with respect to a decision not to exercise positive discretion. *Channa* v. *Canada (Minister of Citizenship and Immigration)* (12 February 1997), Federal Court File No. IMM-1980-96 (F.C.T.D.) [unreported].

& C") considerations exist to justify same.[295] In essence, the humanitarian and compassionate review involves a request by the applicant for a dispensation from application of the ordinary rules for qualification. As such, it is described by Muldoon J. as a "special privilege" involving few countervailing rights or duties for compelling its exercise. This is evident from the following passage, where the Court stated:

> When seeking a special privilege, as distinct from a cast-iron legal right, the applicants must bring before the v.o. [visa officer] all the data which the applicants think will move the v.o. to recommend H & C [humanitarian and compassionate] relief. If their information be spotty, inconsistent, incomplete or unforthcoming, they cannot be heard to complain that they were not accorded a special privilege not generally accorded. The H & C review is a sort of last resort after having failed the legal criteria: it is a privilege.[296]

H & C power exists domestically as well overseas, but the two types of reviews are subject to different considerations and standards of fairness. This was made clear by Muldoon J. in the *Khalon* case[297], where he noted that, "...not only are there different H & C considerations in overseas reviews as distinct from inland reviews[298] but, ...the v.o. [visa officer] is not required to put before the applicant any tentative conclusions which the v.o. may be drawing from the material presented to him or her..., not even apparent contradictions which concern the visa officer."[299] Accordingly, an applicant contesting a negative H & C decision must show the visa officer erred in law, proceeded on a wrong

---

[294] See the *Chen* decision, cited *infra* at note 605, and the discussion accompanying same.
[295] "H & C" power was formerly centralized in the Governor-in-Council. However, the power was delegated to local program managers with the implementation of Phase I of C-86 regulations in February, 1993. See CIC All Mission Message ORD0149 "R 2.1 Humanitarian and Compassionate Discretion", *supra* note 123. For a description of the various changes wrought by Bill C-86, see *infra* notes 563 and 629 and accompanying text.
[296] *Khalon, supra* note 185 at 301.
[297] *Ibid.*
[298] For example, on an inland review, one might consider how well established in Canada a family has become, notwithstanding that they have no lawful status. Such a consideration is not as likely to arise in

or improper principle or acted in bad faith. However, as Muldoon J. correctly observes, the absence of a legal entitlement to demand exercise of this discretion places a "heavy burden" on the applicant upon a judicial review application.[300]

As is apparent, R. 2.1 discretion is entirely of a positive character and is used to relieve against hardship[301] that might be caused by requiring strict compliance with some requirement of the *Regulations*.[302] The rationale for this power, the circumstances expected to be attendant upon its use and the manner in which it differs from R. 11(3) discretion, are set out in a message from CIC headquarters to all visa offices. The relevant parts read as follows:

> ...[The] Act, Regulations and delegation instrument (I-32) are silent on which grounds warrant use of [R. 2.1] H and C authority. This is no accident!
>
> During review of Bill C-86 much thought was put into whether H and C exemption of individual cases was appropriate. Parliament reached the conclusion that not only should H and C exemption be maintained but that Act should be amended to permit delegation of authority below Governor In Council. Result was amended section 114(2) of Act and new section 2.1 of Regulations.
>
> Discussions within Department on drafting of R 2.1 revolved around view that one of strengths of CDN immigration regime has been its flexibility. Although Act and Regulations are always drafted so as to cover widest number of scenarios it is inevitable, given the diversity of our clients and their individual situations, that some worthwhile cases with compelling H and C circumstances will fall outside the system. With R 2.1, Ministers and Department have now

---

overseas consideration of H & C.

[299] *Khalon, supra* note 185 at 300.

[300] *Ibid.* at 300.

[301] For example, it is regularly used to overcome a lack of flexibility within the *Act* and *Regulations* regarding non-traditional family groupings. See CIC IM Chap. OP-1, Para. 4.2.2 (Ver. 06-96) "What about common-law spouses and same-sex partners?" at 6, and also text accompanying note 120, *supra*.

[302] More specifically, overseas it may only be used to overcome the requirements of sections 8 and 14(1) of the Regulations. See CIC All Mission Message ORD0149, *supra* note 123. Section 8 deals with the selection criteria imposed on independent immigrants, while section 14(1) imposes the requirement for a valid travel document on all immigrants. Overseas, R. 2.1 discretion is most often used to relieve refugee applicants from the need for a valid passport. Many of the refugees selected abroad find the requirements of section 14(1) difficult to comply with, since they will typically have fled their home country and no longer enjoy its protection. Accordingly, they may not possess a passport and may have no way to obtain one. For more on the use of R. 2.1 discretion in these circumstances, see IM Chap. OP-15, Para. 1.4 (Ver. 11-96) "Exceptions for immigrants" at 1.

> provided Program Managers with authority to exercise their judgements in facilitating issuance of visas in those cases where exemption of Regs 8 and 14(1) would be warranted. (To exempt from other requirements than R 8 and R 14(1) visa officers may request H and C exemption from Minister via case management).
>
> Although department did consider restricting use of H and C discretion to list of defined circumstances it was quickly realized that no such list could either be sufficiently comprehensive or flexible. In the end Department places trust in the good judgement and discretion of its officers to recognize when H and C conditions are sufficiently compelling to warrant exemption of regulations. Program Managers have been given wide H and C authority with the full expectation that it will be used to resolve these problems.
>
> In overseas context use of H and C exemption has been restricted to Regs 8 and 14(1) which means that Program Manager has authority to overcome failure on selection points if there are compelling H and C reasons to issue a visa. ... This is entirely different authority from that provided in R. 11(3) whereby senior immigration officer (I.E. Program managers abroad and their immediate assistants) may use positive or negative discretion if in her opinion the selection points do not reflect applicants ability to successfully establish. In effect, R 11(3) recognizes that selection points system does not/not identify all independent immigrants who can successfully establish. R 11(3) is not/not intended, nor should it be used, for passing for H and C reasons independent immigrants who fail to meet the selection system. On the other hand, R 2.1 recognizes that there may be compelling H and C reasons to issue visas to immigrants (of all classes) in spite of inadequate selection points. R 2.1 waiver of selection points is not/not necessarily restricted to only those who apply as independent applicants. ... [Paragraph numbering omitted][303]

2.1.5 Inadmissibility

Even with respect to the statutory bars to admission found under section 19 of the *Act,* there exists a healthy element of discretion. While the grounds for inadmissibility are written for the widest possible application, there is a recognition that it is not always appropriate to exclude, in every circumstance, everyone caught by them. The bars include inadmissibility for reasons of public security[304], poor health[305], inability to be self-

---

[303] CIC All Mission Message ORD0149, *supra* note 123.

[304] See generally subsections 19(1)(e), (f), (g), (k) and (l), which deal with a wide range of behaviour ranging from espionage and terrorism to participation in a government that engaged in gross human rights violations.

supporting[306], criminality[307] and non-compliance with the *Act*[308]. Subsections 19(1) and (2) of the *Act* contain mandatory[309] prohibitions on entry to Canada of any prospective immigrant or visitor who is described by any of the grounds for inadmissibility. Nonetheless, these grounds can be overcome by the exercise of discretionary power[310] emanating either from the local visa office or from a more central authority. Where the power is located seems to be guided by a combination of factors. Beyond reasons relating to functional practicality[311], these include consideration of the comparative seriousness of the ground for inadmissibility[312], whether there is more than one reason for inadmissibility[313], the possibility of inter-jurisdictional concerns[314] and the fact that some

---

[305] Giving rise to concerns about public safety or excessive demand on health care facilities. See section 19(1)(a) of the *Act*.

[306] Section 19(1)(b) of the *Act*.

[307] Subsections 19(1)(c), (c.1), (c.2), (d), (j) and 19(2)(a), (a.1) and (b).

[308] Subsections 19(1)(h) and (i), and 19(2)(c) and (d).

[309] Both 19(1) & (2) use the word "shall" in specifying that entry is to be denied to criminals.

[310] Note that the prohibition on admission contained in 19(2)(b) is the only barrier under section 19 that does not import an element of discretion, at least in so far as permanent relief is concerned. 19(2)(b) prohibits entry to persons who have been convicted, either in Canada or abroad, of two or more offences that would constitute summary conviction offences under any Act of Parliament. Presumably because such offences are seen to be more minor in nature, mere effluxion of time will serve to overcome their effect as a ground for inadmissibility. According to CIC IM Chap. OP-18, para. 3.2 (Ver. 09-97), at 3, "Persons described in A19(2)(b) do not need rehabilitation approval. Their inadmissibility is removed by the passing of the statutory five-year period." This differs, of course, from other grounds for criminal inadmissibility set out under section 19. In those cases, it is not enough that the five year period has passed. To obtain "rehabilitation" under the *Act*, the party will still have to satisfy the Minister, or her delegate, not only that the statutory period has passed, but also that true rehabilitation has, in fact, taken place.

[311] For example, since it is intent at time of admission that is relevant, the concerns set out in 19(1)(h) and 19(2)(c) are most commonly dealt with at a Port of Entry, at the time entry is sought. See CIC IM Chap. OP-17, Para. 1.1 (Ver. 06-96), at 1.

[312] Subsections 19(1) and (2), for example, prohibit the entry of anyone who has been convicted of criminal offences either abroad or in Canada, or even of persons who there are reasonable grounds to believe have committed acts or omissions abroad that would constitute offences if committed in Canada. Section 19(1) deals with more serious offences, while 19(2) proscribes entry for persons guilty of less serious offences. As a general matter, the more serious offences described in 19(1) may only be overcome by a direction from the Minister. However, for most criminal offences described in 19(2), authority has been delegated by the Minister to local program managers in visa offices to overcome the inadmissibility. For more on criminal inadmissibility, see generally IM Chaps. OP-17 (Evaluating Inadmissibility), OP-18 (Criminal Rehabilitation) and OP-19 (Minister's Permits).

[313] For example, authority has been delegated to program managers in visa offices to approve rehabilitation,

aspect of "national interest" or wider public policy may be involved.[315] In cases where functionality seems to demand it, or the ground of inadmissibility is viewed as relatively minor or routine, discretionary authority to provide relief has been delegated to local offices. Power over all other grounds of inadmissibility, however, remains centralized in the Minister's office directly or, in some cases, at a regional headquarters level. In such cases, though a visa office may recommend favourable consideration, approval must be granted by the relevant higher authority.[316]

As a general matter, discretionary relief under section 19 of the *Act* may be obtained in one of four ways, depending upon the type of inadmissibility involved. The

---

pursuant to section 19(2)(a), for persons affected by a single conviction that involved a potential penalty of less than 10 years imprisonment. Where two or more such convictions are extant, authority for granting rehabilitation may only be exercised by the Minister. See CIC Operations Memoranda (OM) EC 95-06e (2 August 1995) "Delegation of Authority to Grant Approval of Rehabilitation" describing the terms of the delegation of discretionary authority for rehabilitation approval to local program managers carried out pursuant to Bill C-44.

[314] The question of medical inadmissibility implicates provincial jurisdiction over health and social services. If a person with a serious health condition requiring expensive medical treatment is granted entry, medical costs may be incurred which will pose a drain on the provincial public purse. It is for this reason that authority to grant entry to such persons must be sought from a Director or Director General of the Immigration Regional Headquarters serving the intended province of destination. The process to be followed in such cases is set out in CIC IM Chap. OP-19, Para. 3.1 (Ver. 01-97), at 7-8 which states:

> The Director/Director General will seek concurrence or input from the responsible provincial health authorities, where they have indicated a desire for such involvement. The Director General/ Director will ensure all public safety, quarantine, health care access, eligibility for provincial public health insurance, financial and *provincial jurisdictional factors* are satisfactorily addressed before concurring with permit issuance. [emphasis added]

[315] This may be the rationale, for example, underlying the prohibition in section 19(1)(l) on entry of senior officials from regimes that have engaged gross human rights violations or crimes against humanity. In such instances, the Minister will need to be satisfied that entry "would not be detrimental to the national interest". Similarly, 19(1)(k) refers to persons, not otherwise described under 19(1), who constitute a danger to the security of Canada. The seriousness of this ground of inadmissibility is such that it is one of the few instances under the *Act* where the concurrence of both the Minister of Immigration and Solicitor General of Canada are needed, before entry may be granted. See CIC IM Chap. OP-17, Para. 5.3 (Ver. 09-97), at 15, which provides the following guidance to visa officers:

> A19(1)(k) is a residual class. It describes people who are a danger to national security, not covered by any other of these classes [ie. 19(1)(e),(f) and (g)].
>
> You should not refuse [such] an application ... without approval from Security Review (BCZ), Case Management, National Headquarters. You also require written approval of the Minister and the Solicitor General to use 19(1)(k).

[316] Which approval may be withheld, notwithstanding any favourable recommendation by the investigating

first, involving the so-called "discretionary entry", is set out under section 19(3). It provides as follows:

> A senior immigration officer or an adjudicator, as the case may be, may grant entry to any person who is a member of an inadmissible class described in subsection [19](2) subject to such terms and conditions as the officer or adjudicator deems appropriate and for a period not exceeding thirty days, where, in the opinion of the officer or adjudicator, the purpose for which entry is sought justifies admission.

This power is only available at a Port of Entry and is meant to allow for handling of emergent, usually unforeseen circumstances.[317] Typically, the ground of inadmissibility

---

officer. See the decision in the *Leung* case, *supra* note 235.

[317] See CIC IM, Chap. PE-10 "Senior Immigration Officer Functions at a Port of Entry", Para. 4.4.2 (Ver. 01-94), at 7-8, where the following direction is provided to Senior Immigration Officers regarding exercise of this power:

> **Factors to consider**
> When you are exercising discretion under A19(3), you should consider the following factors:
> a) try to balance the reasons for inadmissibility against the reasons for which a person seeks entry. The more serious the alleged inadmissibility, the better should be the reasons for justifying entry. For example, a recent conviction for which a person might be found described under A19(2)(a) or A19(2)(a.1) is likely more serious than the lack of a document.
> b) avoid using A19(3) to overcome a recurring inadmissibility. For example, an inadmissible truck driver may be required to travel to Canada in the course of his or her duties; you should not issue discretionary entry each time the person seeks entry, but instead counsel the person on the requirements for rehabilitation or consider issuing a Minister's permit.
> c) do not use A19(3) to refer persons inland. For example, if a person who appears to be inadmissible wishes to enter Canada for three months, it would not be appropriate to grant discretionary entry for 30 days and advise the person to go to an immigration office inland to seek a Minister's permit. The correct action in such a case would be to consider whether you should issue a Minister's permit at the POE.
> d) consider whether compassionate or other pressing considerations warrant use of your A19(3) authority to allow entry or whether, in the circumstances, an inquiry would serve a useful purpose.
> e) you must be satisfied that the person seeking entry poses no threat or danger to the public. For example a person with a recent conviction for impaired driving who arrives by air with some friends to spend [a] weekend in Montreal may be considered for 19(j) (sic) [ie. 19(3)] entry because the risk of committing an offence is minimized by the fact that the person will not be driving while in Canada. Due to economic benefits the public interest is served.
> You should also consider:
> a) whether the person seeking admission is described in A19(2).
> b) the person's motive for seeking admission.
> c) the urgency of admission: why did the person fail to comply with the requirements? In circumstances where a person is genuinely unaware of the visa requirement, if the reason for seeking entry is of such an urgent nature as to preclude obtaining a visa, or if the decision to enter Canada is spontaneous, it may be appropriate to use A19(3). For example, friends or relatives of a visitor to the U.S. decide to enter Canada from Niagara Falls, N.Y. to see the Canadian falls, and

relates to a procedural infraction, such as not possessing a visitor visa, or implicates a substantive ground not viewed too seriously, such as an old criminal conviction for a relatively minor offence.

A second method for obtaining relief, reserved exclusively for those inadmissible by reason of criminality, is known as "rehabilitation". This form of relief is permanent and may be used to overcome even the most serious criminal record. Effectively, it is the immigration law equivalent of a pardon.[318] Once granted, the applicant may no longer be denied entry because of the past misdeed. Since approval of rehabilitation is a discretionary matter, the applicant is required to affirmatively prove that any proclivities or tendencies which led to the offensive behaviour have, in all likelihood, been permanently overcome and that genuine rehabilitation has occurred. As noted, authority to grant rehabilitation in minor cases has been delegated to visa office program

---

the U.S. visitor meets all requirements for entry, including re-admissibility to the U.S., but is not in possession of a Canadian visa. If you were satisfied that the decision to enter Canada was spontaneous, you might wish to use A19(3) to allow entry. If you formed the opinion that the person seeking entry simply ignored visa requirements, or had plenty of time to obtain a visa, you might decide not to use A19(3) to authorize entry.
d) whether the purpose for which the person is seeking entry can be accomplished within the 30-day time limit allowed.
e) the extent to which the inadmissibility can be attributed to neglect or bad faith on the part of the person seeking admission. For instance, in a criminal case consider the date of conviction compared to the date on which the person is seeking entry. Is the conviction recent, or might the person be eligible for relief from the inadmissibility?
f) whether the person seeking entry is likely to leave Canada should discretionary entry be granted. Remember that removal costs become the liability of the department once entry is granted.
g) whether the person appears in the Enforcement Information Index in FOSS.
h) the recommendation of the examining officer.
Note that although A19(2)(d) is broadly worded, it refers only to those persons who do not fulfil or comply with any of the conditions or requirements of the Act or its regulations. It does not refer to persons who fall within the inadmissible classes described in A19(1).

[318] Indeed, under Bill C-44, the parallel to pardons was made more complete by shifting responsibility for granting of rehabilitation from CIC to the National Parole Board of Canada for any immigrant or visitor affected by a criminal conviction obtained in Canada. Formerly, even convictions registered in Canada were relieved against by the process of a grant of "rehabilitation" by the Minister of Immigration. Since C-44, however, a Pardon from the National Parole Board is the only permanent remedy available to foreign

managers.[319] In other cases, where authority for rehabilitation has been retained by the Minister, the usual procedure is for the applicant to convince a visa officer that a favourable report and recommendation should be made to the Minister.[320] The central determinant in such cases is whether the applicant is able to satisfy that further "...future unlawful activities are extremely unlikely...."[321] In determining whether or not rehabilitation has taken place, visa officers are given the following guidance:

> You must take a number of factors into account to assess whether a person is rehabilitated. You may measure rehabilitation by the passage of time and an examination of activities and lifestyle pre- and post-offence. Rehabilitation does not mean there is no risk of further criminal activity, only that the risk is minimal. The reason for coming to Canada is not a consideration for rehabilitation.
> *6.1 Type of offence*
> ... Applicants with a couple of minor offences may have little difficulty convincing you of their rehabilitation. Normally the offences are isolated, out of character and not indicative of criminal behaviour. ... In some of these cases an interview may not be required. ... Applicants with more serious or multiple offences require closer scrutiny. Normally, an interview will be required. ...
> *6.2 Rehabilitation considerations and evaluating risk*

---

nationals, under the *Immigration Act,* for Canadian convictions.

[319] Pursuant to Bill C-44, authority to grant rehabilitation under certain circumstances involving 19(2) type offences was delegated to program managers of CIC's in Canada and visa offices abroad. See CIC OM EC-95-06e, *supra* note 313. The general scheme for rehabilitation under the *Act* implicates three different authorities potentially involved in a grant of relief that will overcome a criminal record as a statutory bar. Where the convictions were registered in Canada, a pardon by the National Parole Board will suffice to remove the inadmissibility. See CIC IM Chap. OP-18, Para. 3.2 (Ver. 09-97) "Who cannot apply for approval of rehabilitation?" at 3. For convictions registered outside of Canada, authority for rehabilitation is split between the Minister and her delegates, according to the seriousness of the offence. CIC IM Chap. OP-18, Para. 1.2 (Ver. 06-96) "Legislative intent", at 1, illustrates this as follows:

> A121(1) allows the Minister to delegate his authority to public servants. Instrument I-53 in [Immigration Manual] IL 3 lists immigration officials (delegated authorities) who may grant rehabilitation to applicants described in A19(2)(a.1). The Minister reserves sole authority to grant rehabilitation to applicants described in A19(1)(c.1).

[320] Note that while this is the usual procedure, there is nothing to prevent an applicant from applying directly to the Minister for rehabilitation. Likewise, even where an applicant is unable to convince a visa officer to make a favourable recommendation, the applicant is still free to approach the Minister directly.

[321] CIC IM Chap. OP-18, Para. 1.3 (Ver. 06-96), at 1. See also CIC OM EC 95-06e, *supra* note 313. The discretionary nature of the relief is evident in the following guidance provided to program managers considering requests for rehabilitation:

> Applicants must demonstrate clearly that rehabilitation has taken place. Consider the likelihood they will commit further offences. *Do not hesitate to refuse to recommend or approve an application, if the applicant is unable or unwilling to demonstrate that there is a low risk of recidivism.* [emphasis added]

> You must assess rehabilitation considerations to determine the likelihood or risk of applicants' continued involvement in unlawful activities. These include:
> - Acceptance of responsibility for the offence.
> - Evidence of remorse for any harm done.
> - Evidence of restitution, where possible, to victims of their crimes.
> - Persons whose criminal involvement included, or was the result of, drug or alcohol abuse, sexual abuse, psychological disturbance, or a history of assaults, often require counselling (sic) or therapy in order to achieve rehabilitation.
> - Evidence of successful completion of a rehabilitation program as well as any evidence of a change in lifestyle.
> - Evidence of stability in employment and family life. Applicants who have been involved in a criminal lifestyle often exhibit instability in their lives. Participation in educational and skill training programs, steady employment and a positive family life may indicate a change in lifestyle.[322]

Since the question of what proof may satisfy an individual decision maker imports some latitude, albeit constrained by the bounds of good faith, relevant considerations and other elements of the notions of natural justice and fairness, a large element of discretion is inevitably present with respect to the granting of rehabilitation.

Another type of permanent relief from inadmissibility is the "Minister's Consent". This tool is used to overcome the inadmissibility described in section 19(1)(i), which denies entry to those who have been previously deported or excluded from Canada under section 55 of the *Act*.[323] The consent of the Minister is available equally to visitors and immigrants. Little guidance is provided to visa offices regarding the appropriate circumstances for exercise of this power. Chapter 1 of the *Overseas Processing* portion of the Immigration Manuals provides the following:

---

[322] CIC IM Chap. OP-18, Para. 6 (Ver. 06-96) "Determining Rehabilitation", at 9-10.

[323] Under subsection 55(1) of the *Act*, anyone previously deported must obtain the consent of the Minister before they may return to Canada. Those affected by an exclusion order, pursuant to subsection 55(2), only require the consent of the Minister during the twelve month period following their removal or departure from Canada. Once that period has elapsed, they do not require the Minister's consent. See CIC IM Chap. OP-1, Para. 17.1 (Ver. 06-96) "Who needs Minister's consent?" at 28.

> You must obtain all available information about the removal from the responsible office in Canada. You should ask the removing office's recommendation about approving or denying the request. ... Requests for Minister's consent are only appropriate when applicants are not inadmissible for any reason other than A19(1)(i).[324]

The absence of detailed guidance, both in the statutory sources and the policy manuals, obviously leaves much scope for the visa office in determining whether or not to grant consent.[325] Authority to grant the consent of the Minister has been delegated to program managers in visa offices abroad.[326]

More generally, a final, albeit temporary, type of relief from inadmissibility is available in the form of a "Minister's Permit".[327] Permits are a sort of catch-all remedy which cut across all the grounds of inadmissibility contained within section 19. They may be granted for periods of up to three years[328] and are designed to allow the Minister to "...balance the control and facilitation aims of the *Immigration Act*..."[329] that are set out at section 3. This is made clear in the policy manuals, which state:

> A3 states that policy, rules and regulations made under the *Immigration Act* need to serve a variety of aims. Minister's permits (IMM1263) exist to help balance competing aims in special circumstances. For this reason, they are the prerogative of the Minister.[330]
> Minister's delegates may issue permits when people who are a minimal risk to Canadian society have a compelling need to come into or remain in Canada. ... If our social and humanitarian commitments, economic and cultural interests, or international obligations to protect refugees and displaced persons...can be

---

[324] CIC IM Chap. OP-1, Para. 17.4 (Ver. 11-96) "Requests for Minister's consent", at 29.
[325] Further, there is no obligation on the Minister to provide reasons when refusing to grant consent. See *Singh* v. *Canada (Min. of Employment & Immigration)* (1986), 6 F.T.R. 15 (F.C.T.D.). See also *Leung*, *supra* note 235.
[326] CIC IM Chap. OP-1, Para. 17.3 (Ver. 11-96) "Who can grant or refuse Minister's consent?" at 29, states: "Instrument I-8 lists officials delegated by the Minister to grant or refuse consent. It includes officers in charge of visa offices."
[327] CIC IM Chap. OP-19, Para. 2.3 (Ver. 01-97) "Who is eligible?", at 2.
[328] *Immigration Act*, section 37(3).
[329] CIC Chap. OP-19, Para. 2.2 "When may a permit be issued?", Ver. 01-97, at 2.
[330] *Id.*, Para. 1.2 "Policy intent", at 1.

> advanced without unacceptable risk to the health, safety and good order of our society...or the risk that our territory will be used for criminal activity..., you may decide a Minister's permit is appropriate.[331]

It is clear then that issuance of a permit involves a process of weighing risk against need, in order to achieve a proper balance between control and facilitation. Where the risk of danger to the Canadian public is low and the need of the applicant is compelling, a permit is likely to issue. Conversely, high risk generally militates against issuance of a permit, even when demonstrated need is high. Similarly, while authority to grant Permits has been delegated to visa offices abroad in some circumstances, there remain other instances where concurrence must be obtained directly from the Minister or a regional headquarters. As noted earlier, the need for concurrence is related to the type of matter at hand and the various implications it may raise.[332] In any case, the issuance of Minister's Permits to allow admission outside of the ordinary requirements of the *Act* and *Regulations* is a sensitive matter, not undertaken lightly. This is particularly so, since the Minister is required to give an annual accounting to Parliament for all Permits issued.[333] Given the political nature of this forum, a seemingly cavalier attitude to issuance of permits may leave her subject to accusations that she is unmindful of public health and safety or that she is soft on criminals.[334] Accordingly, direction provided by the Minister

---

[331] *Id.*, Para. 2.2 "When may a permit be issued?", at 2.

[332] For a chart listing the level of concurrence that may be required for issuance of a Minister's Permit, see Appendix C, below.

[333] *Immigration Act*, s. 37(7), which specifies that a report shall be tabled annually before Parliament detailing how many permits were issued and what the categories of inadmissibility were.

[334] See for example, CIC News Release #98-20, *supra* note 94. The emphasis of the news release on the reduction of Permit issuance by 75% from 1992, and on the static nature of permit issuance from the previous year, is likely more than coincidental. Certainly, there is political mileage for any Minister to be seen as fair but firm. In particular, the news release highlights that permits issued to criminally inadmissible persons declined 4.8% over the previous year. Overall, a total of 3798 Minister's Permits were issued abroad in 1997 to persons seeking to enter Canada.

as to the circumstances under which Permits are to be issued may influence whether a broad and large interpretation or a more restrictive approach is employed in local issuing offices.

In reviewing the current usage of discretion with respect to the criteria for selection and the grounds for inadmissibility, the central feature is clearly a split between the *locus* of authority over it. Where the matter involves considerations that are largely confined to the individual case at hand, discretionary power has been delegated, for the most part, to the local level. Where, however, wider considerations of public policy, such as health and safety of the general populace, are implicated, power remains concentrated at the upper levels of the immigration bureaucracy. Further, because the *Act* attempts to carry forward the dual, antagonistic objectives of control and facilitation, a mass of complex considerations may be involved. Given the uniqueness of each case, obtaining a "proper" balance between these objectives is not a process that is readily reduced to a system of comprehensive rules capable of mechanical application in every case. While the factors to be considered can be easily enumerated, the process necessarily involves a weighting and prioritization that must shift from case to case. It is this which allows for individualized justice. However, it also ensures that discretion remains inherent in every case of an exception.

2.2 The Three "R's" and Discretion in the "New CIC"

2.2.1 Re-engineering, Reconfiguration and Renewal

Visa offices are staffed primarily, though not exclusively[335], by a cadre of

[335] It has long been the case that the number of regular foreign service officers is less than the actual

professional foreign service officers employed by the Department of Citizenship and Immigration Canada (CIC). CIC, in its current form, was created in 1993[336], when the social affairs officer cadre from the (then) Department of External Affairs and International Trade Canada[337] was reintegrated with the domestic immigration service. The social affairs complement was incorporated within CIC as a discrete unit under the organizational name of the "International Region". This reintegration occurred during a time of profound change for the Government of Canada and was just one part of a greater reorganization and rationalization then underway. Beset by economic woes, the Canadian government was struggling to regain control of its financial affairs and so, not surprisingly, cutbacks and efficiency measures were a central part of the design for putting the public trust back on a solid and sustainable fiscal footing.

CIC was not exempted from austerity measures invoked throughout the government.[338] Over the fiscal years from 1995/96 through 1997/98, it was required to cut more than 75 million dollars from its expenditures.[339] This necessitated massive cuts

---

number of overseas positions within CIC. As a result, a considerable number of "Canada based" visa officers serving abroad at any given time are actually personnel drawn from the inland service, generally serving on single assignments (ie. one tour abroad). In addition, the ranks of visa officers are supplemented by a group of locally hired program officers, called "Designated Immigration Officers", who exercise visa issuance authority equivalent to a regular foreign service visa officer (though it should be pointed out both groups typically work under the supervision of a senior visa officer).

[336] Introduction to *Departmental Outlook on Program Expenditures and Priorities for 1996-97 to 1997-98* as found on CIC home page (http:\\www.cicnet.ingenia.com) as at 2 February 1997.

[337] Now the Department of Foreign Affairs and International Trade Canada (DFAIT).

[338] The pervasive nature of the government wide expenditure reductions is too well known to require further elaboration here. As an example, however, see Erin Anderssen, "Canada to quit food, drug research – Scientists say decision puts Canadian lives in danger" *Ottawa Citizen* (11 July 1997) A1. That article details cuts in laboratory research in the food and drug division of Health Canada's protection branch. Citing soaring research costs, the government announced that 123 research positions would be eliminated.

[339] *Supra* note 336. See also CIC, *Departmental Outlook on Program Expenditures and Priorities – 1996-97 to 1998-99* (Ottawa: Minister of Supply and Services, 1996) at 17, where the following expenditure reductions, for International Region in particular and CIC as a whole, are forecast:

and restructuring on a sweeping scale. Right across the department, from headquarters and inland offices to foreign outposts, CIC undertook significant reductions in personnel and resources. International Region, in particular, was called upon to share in the austerity measures and did so by reducing its overseas positions by 20%.[340] But simply reducing overhead was not enough. At the same time that its budget was cut, CIC was still expected to maintain all of its core functions, including delivery of a rate of immigrant landings fixed at more than 200,000 per year.[341] Caught between the twin realities of declining resources and unrelenting demand, the Department was placed in a bind. Simply cutting was not enough. New efficiencies from remaining resources were necessary, if the shortfall between demand and necessary output was to be bridged. A major rethinking, therefore, of how CIC's service was delivered, and exactly what that

Expenditures (CAD $)	1996-97	1997-98	1998-99
International Region	60,629,000	52,826,000	48,333,000
Total CIC Expenditures	615,001,000	554,281,000	534,176,000

[340] Approximately 50 visa officers, or about 20-25% of the total foreign service immigration officer complement, were laid off as of April 30, 1996. For some apparent insight as to how the size of the cuts within International Region were arrived at, see "The 20% Decree" *Lexbase* (October 1997 Sending) at 3, citing *Access to Information Request* 97-125, where an extract of a memo, dated 12 April, 1996, from (then) CIC Assistant Deputy Minister Raphael Girard to Deputy Minister Janice Cochrane is given. Discussing the need for reduction of costs in inland operations, that memo makes reference to the fashion in which cuts to International region were settled upon. In particular:

> With International [Region], I simply decreed a 20% reduction in Canada based FTEs ["Full Time Equivalents", being permanent full time staff positions located abroad] in the field because productivity gains of that magnitude were easily obtainable. It isn't so easy with the Canadian regions because the residual work is either enforcement oriented or complex selection. What I am inclined to work toward is a results oriented resource base formula that will scan across regions. At the moment, we are getting fewer outputs and more spending – Does that sound familiar? There are still people out there who think that if you run up a backlog you will get more resources.

Also, for a longer view of foreign service immigration personnel reductions, see "New Immigration Approaches" (March 1997) 25 *Backspace* [Canadian Immigration Historical Society Newsletter] at 1, where it is noted that over the preceding five years, the "...number of Canada-based officers abroad fell from approximately 311 to approximately 211 in 1997, a reduction of 33%".

[341] The immigration plan for 1998, for example, will see a projected total number of immigrant and refugee landings that is between 200,000 and 225,000. See CIC, *A Stronger Canada – 1998 Annual Immigration Plan (Tabled 23 October 1997)* (Ottawa: Minister of Public Works and Government Services Canada, 1997).

service should be comprised of was initiated. The rationalizations that followed were to affect the entire spectrum of program delivery. From facilitation to enforcement, virtually no aspect of immigration processing was left untouched.

In 1994, proceeding from public consultations, CIC issued its plan for longer-term[342] strategic direction. Published under the name of *Into the 21st Century*, the theme of that document revolved around the mandate of CIC to meet government demands that the immigration program be "...accountable, affordable and sustainable".[343] "Business Process Re-engineering"[344] (BPR) was the name given to the initiative to find ways to solve the dilemma of meeting these disparate demands. Its mandate was not just to find strategies for maintaining service while digesting cuts. More ambitiously, it was tasked with finding new and innovative ways to improve service, even in the face of those cuts.[345]

Budget reductions meant that staff had to be let go and offices closed, for example, but BPR meant that this period of upheaval could be viewed as an opportunity, rather than just as a challenge, with a seeming situation of adversity turned to advantage. Under BPR, disruption from reductions was co-opted as a means for effecting

---

[342] CIC *"Into the 21st Century"*, *supra* note 109 at iii, where in an introductory "Statement by the Honourable Sergio Marchi -Minister of Ctizenship and Immigration" it is mentioned that the document represents a strategic framework meant to provide guidance for program and policy development over the next ten years.

[343] "Interview with a Minister: Talking to Sergio Marchi" (1995) 12:3 Bout de Papier 8 at 9. See also *ibid.*, CIC *"Into the 21st Century"*, "Executive Summary – Priorities for Action", at viii, where the following is given:

> [The] ...world [is] increasingly characterized by sweeping and rapid change. ... Part of this change is Canada's own fiscal reality. We must be mindful that resources once plentiful are now dear. In this context, our citizenship and immigration program must be more than fair and compassionate, it must be affordable and sustainable.

[344] CIC *"Into the 21st Century"*, *ibid.* at 66.

[345] *Ibid.*, where it is stated: "Significant productivity advances are expected through CIC's Business Process Re-engineering Project, now entering its system development phase. Notably, it will reduce costs at the

rationalization and maximization of remaining resources and to undertake a general "renewal" of CIC. So, for example, the need to close some offices to achieve savings was seized upon as a way to carry out a larger "re-configuration" of the network of CIC offices, both domestically and abroad, in ways that would also facilitate productivity gains.

Discretion was also a subject for BPR rethinking. It is, of course, a labour intensive selection tool that entails highly detailed and individualized case consideration. Obviously, such individualized processing is more "costly" than a comparable decision proceeding strictly from an application of rules. Beyond mere economics, a confluence of other trends, including globalization, fiscal realities, *Charter*-sensitivity and judicial notions of fairness, was also beginning to push the bureaucracy to conclude that broad adjudicative discretion was no longer appropriate in the selection process. Speaking about the challenges that these presented and the need for new thinking they created, the (then) Deputy Minister of Immigration, Peter Harder, had this to say:

> On the international side, if we are pursuing an Immigration and Refugee program in a world which has fundamentally changed in terms of globalization, we have to both deliver our program in that context and also provide a new context for public policy thinking.
>
> Let me just list a few of the implications. The 1976 Act, which is the fundamental Act of the Immigration Program, came into force at a time when we had 1200 refugee claimants in Canada a year. And they were all fleeing communism. It was pre-Charter [of Rights and Freedoms] so you didn't need a lot of rules to say yes or no. There was a lot of discretion in the system. Since then the world is people on the move. The collapse of communism means that the sorting out of good guys and bad guys in a refugee sense is complex and non-ideological. It is human rights based, not ideology based. The numbers are greater. With the Charter, it is a more litigious atmosphere in which we manage the program. It means we have to have more Charter-proof and Charter-sensitive procedures. You need legislation to say "no" and to pursue that in a meaningful

---

same time it improves client service."

> way. "No" has to have some finality and there has to be some ability for the program to manage the consequences of a negative decision both here [ie. in Canada] and abroad. We have had to adapt the law and our frame of reference significantly in the last number of years.[346]

Harder's comments highlighted a central difficulty facing CIC. Fiscal cutbacks required it to cut staff and reduce some services, but all of this had to be accomplished while maintaining a level of fairness sufficient to satisfy the courts. Certainly, as the *Singh* case earlier illustrated, courts are unimpressed by pleas of poverty as a justification for selection process inadequacies that compromise basic notions and standards of fairness.[347] Although citing the particular example of refugee selection, the generality of Harder's comments makes clear that he envisioned a wider application for them, to immigration as a whole. As the senior departmental civil servant, his views were those of the bureaucracy and so provided ample evidence of the profound sea-change in thinking regarding use of discretion that was under way. Conceiving a more rules based, less discretionary, selection system was thus added as another goal of the BPR agenda.

The sweep of BPR did not end with simply reducing processing burdens and increasing efficiencies, however. That was still not enough to solve the fiscal side of the

---

[346] "Immigration from the Top, the Inside and Abroad: Views from a Newcomer and a Veteran (Excerpt from an interview with Peter Harder)" (1995) 12:3 Bout de Papier 30 at 30.

[347] *Singh*, *supra* note 64, 17 D.L.R., 422 at 469. In the words of Wilson J., "...I have considerable doubt that the type of utilitarian consideration brought by Mr. Bowie [that oral hearings for every refugee case would constitute an unreasonable strain on IRB resources] can constitute a justification for a limitation on the rights set out in the Charter." Courts generally are unlikely to want to trade off rights for fiscal concerns, particularly if they affect substantive consideration of a case. For example, in *Johl* v. *Min. of Employment & Immigration* (1987), 4 Imm. L.R. (2d) 105, 15 F.T.R. 164 (F.C.T.D.), the applicant applied inland under the *de facto* illegal residents policy. The court noted that the shortage of personnel to handle such applications was no excuse for it not to be handled properly and fairly. Conversely, see *Lakhani* v. *Canada (Min. of Citizenship & Immigration)* (1997) 36 Imm.L.R. (2d) 47 (F.C.T.D.), where a two year delay between interview and the issuance of a refusal letter for criminal inadmissibility was found not to be unreasonable. The difference in the result of these cases suggests that a crushing work burden will not be faulted if it simply causes procedural delay. However, if it goes to substantive consideration of the case, then a reviewable error has occurred.

dilemma, at least. As a general strategy, government was increasingly resorting to user fees to offset program costs, on the theory that those using the service should be most responsible for paying its costs.[348] Immigration was no exception. For some time, it had been apparent to government administrators and finance specialists that immigration need not be viewed simply as a cost item. Rather, because of the nature of its business, CIC held the promise of becoming a cash-cow, potentially capable of generating sufficient revenues to sustain itself.[349] Accordingly, in conjunction with program expenditure reductions, significant new fees were added and existing fees hiked. Government, at least in the case of CIC, was now truly in the business of business. And increased fees added to the quandary of doing more with less, since higher fees inevitably lead to greater expectations for prompt and efficient service.[350] Although BPR promised client service improvements as part of its program, such a promise would obviously be difficult to keep when the means for delivering that service were to shrink. Clearly, the task before CIC in juggling these various demands and expectations was formidable.

But what were the specific strategies adopted under BPR to meet the need for

---

[348] The importance of cost recovery fees to the government's bottom line (and it is a government wide bottom line, since immigration fees are poured back into the government's general revenue fund, rather than to a specific CIC fund) is evident from the fact that they now offset a significant portion of CIC's operating costs. According to CIC's own estimates, gross revenues [generated by processing fees] represent 54% of planned program expenditures for 1996-97. This will rise to 63% in 1998-99 as planned expenditures decrease. This is consistent with the approach of shifting a larger proportion of the cost of our program from the general taxpayer to the direct beneficiaries." See CIC, *Departmental Outlook on Program Expenditures and Priorities, supra* note 339, at 18.

[349] The pressure on CIC to generate sufficient fees to pay at least part of its own costs arises from an agreement with Treasury Board, the Government of Canada agency that controls funding for all departments, whereby CIC must generate a total of $330 million in revenues from its various user fees. Under the agreement, if such revenues are not provided, then shortfalls must be taken out of CIC's own operating budget. The importance of fees collected overseas is apparent by the fact they that represent more than 50% of all revenues collected by CIC, totaling more than $200 million. See "Looking ahead: An interview with Gerry Campbell, Director-General, International Region" (Winter 1995/Spring 1996) 11 *Entre-nous* at 6.

accountability, affordability and sustainability in the new CIC? And, more particularly, what was their effect upon the availability and use of discretion in overseas selection of independent immigrants? The balance of this section explores the various initiatives instituted and the changes they have wrought, and provides some comments and assessments on their efficacy and whether expectations have been met.

2.2.2 Specific Initiatives

BPR set out an ambitious plan for revamping and revitalization of CIC operations and processes that was to be carried out in stages over a period of several years.[351] At National Headquarters, reorganization was carried out so as to focus all activity on three central activities – "service lines" (relating to policy development and program design), "program delivery" (organized essentially along geographic lines and comprised of the International Region and five domestic regions) and "strategic support" (which includes branches providing Ministerial and executive support services, strategic policy and planning, and management of legal services, information technologies and human resources). Concurrently, redeployment of field resources was undertaken. The attainment of the imperatives of reduced costs and increased efficiencies was sought there principally via a tripartite approach focused on centralizing resources, pushing work "down" to the lowest possible levels and standardizing methods, procedures and criteria.

---

[350] Somewhat ironically, as well, the augmentation of fees has actually added new work burdens associated with collection, processing and, where necessary, refunds.

[351] "Looking ahead", *supra* note 349, where it is stated that BPR was completed during the 1995-96 fiscal year. The projected savings from BPR initiatives is apparent in the following: "CIC completed its intensive BPR review which identified a series of principles for Departmental renewal and some $ 35 – 45 million in potential savings. Evaluations of pilot projects are ongoing."

2.2.2.1 Centralizing Resources

"We serve you better by seeing you less" was a slogan coined in CIC to describe the notion that there could be profit for clients in having a less intimate relationship with decision-makers. Though the slogan was soon abandoned, the concept was not. One method of achieving savings was to strive for the economies that often arise from the sheer size of an endeavour. With this in mind, a network of "super-visa offices" was conceived to replace many of the smaller, less efficient offices typical of CIC's overseas operations. These new offices, called Regional Processing Centres (RPC's)[352], are designed around the concept of bulk processing. Central to that design is the fact that their operations are restricted to processing of paper and so they are largely inaccessible to clients. These offices are intended to receive almost all applications submitted worldwide for immigration to Canada. They are supplemented by a network of smaller offices whose job it is to conduct any interviews, verify documents and carry out other work that cannot conveniently be undertaken at the RPC's usually remote location.[353] The ultimate configuration of the overseas office network is described in the following passage from a CIC publication:

> Immigration processing ...will be centralized in eight to ten locations around the world. These Regional Program Centres (RPCs) will be supported by a network of Satellite offices which will assist RPCs with immigrant interviews, [and] perform other core functions. A number of standalone Full Service Centres will continue to deliver all aspects of the immigration program. Missions at which immigration applications can be processed will be reduced while missions issuing

---

[352] Or, alternatively, "Area Processing Centres" (APC). This, of course, reflects the model that was similarly implemented in Canada through creation of two Centralized Processing Centres (CPC's), located at Vegreville, Alberta and Mississauga, Ontario, that handle receipt of all domestic applications.

[353] In some cases, such as the Buffalo, N.Y. operation, for example, a "satellite" visa office is co-located with the RPC.

visitors visas will increase.[354]

The first pilot of an RPC was launched at the visa office in Buffalo, New York. It serves as the hub of a network of visa offices in the U.S. that includes satellites in New York City, Detroit, Buffalo, Los Angeles and Seattle. Work patterns in the RPC revolve around case selection conducted in the absence of personal interviews, primarily on the basis of documentary evidence. Interview, once the heart of all immigrant selection, is now the exception rather than the rule.[355] The rationale for this move is evident in the words of a former manager of the Buffalo RPC, Murray Oppertshauser, given at an immigration law conference hosted by the Law Society of Upper Canada:

> "All applicants used to be interviewed", Mr. Oppertshauser observed, but now, he tells his interviewing officers that they "can't afford to bring in the folks and have a chat." We are moving the resources from interviewing out front to the analysis of the case before the interview. This is a fundamental difference in how we do business", he said. Since the most expensive commodity he has are interview officers, the fewer interviews the better. If an applicant has easily verifiable and understandable qualifications, and the application looks good on paper, then an interview will be waived.[356]

In cases where the interview can be waived, the RPC is tasked to process the file to conclusion as a purely paper exercise. In the event that an interview is deemed necessary, the RPC farms out the file to whichever satellite office was indicated by the applicant as her preferred location.

Since the exercise in the RPC is confined to a simple review of the case on paper,

---

[354] CIC, *Departmental Outlook on Program Expenditures and Priorities, supra* note 339, at 14. Note that standalone Full Service Centres are to be retained in certain locations because of communications or other difficulties which render the RPC/Satellite office model non-viable. See also "Looking ahead", *supra* note 349 at 6, where the final configuration of visa offices is envisaged to contain "...8-10 Regional Processing Centres (RPCs), 10-12 Full Processing Offices (FPOs) and 30-35 satellite missions reporting to RPCs."
[355] See *supra* note 276 citing a waiver rate in excess of 50%.
[356] Derek Lundy "Assemble complete application package if seeking waiver of interview: lawyer" *The Lawyers Weekly* 16:30 (13 December 1996) at 12.

staff at the RPC are not meant, in the ordinary course of events, to have direct, personal contact with clients. Thus, clients no longer are able to personally meet with immigration personnel to provide verbal explanations and descriptions of any unique circumstances or to request discretionary processing. More importantly, if the client is unaware of opportunities for discretionary processing, she may not even think to mention circumstances that might justify it.[357] Manifestly, the RPC model works best with a clearly defined set of rules for qualification that are as objective as possible. As a general rule, substantive discretionary decision making is not meant to be part of the role of a case analyst in an RPC and it is not something which would ordinarily be considered by them of their own initiative.

One exception to this is where an applicant falls a few points short of a pass mark on paper-screening, but otherwise appears to be a "good candidate" who is likely to gain those necessary few points on an interview. In such a case, the case analyst has authority to waive the interview, since it would add little "value" to processing of that application. In the event that the applicant falls short of the pass mark, but has positively asked for discretionary processing, the matter is most likely to be passed on to a satellite office for an interview to review all of the facts of the case.

Waiver of interview obviously lies at the core of the RPC/Satellite office model. The drive to waive interview wherever possible was conceived of and developed under the concept of "risk management". The risk management policy is designed to reduce

---

[357] The matter of availability of discretionary processing is not dealt with adequately, or even at all, in many of the application materials provided by CIC. Given that the applicant bears the burden of providing sufficient information to carry her application forward, this deficit of information is all the more significant. For more on the applicant's burden of proof, see generally the discussion above, under section

time and effort devoted to sifting and sorting of files so that resources are freed up for other, more valuable work. Thus, if it is clear on paper that an applicant is likely to be passed at interview, and no significant security or safety issues are evident, then waiver of interview is appropriate. But risk management involves more than just a simple calculation of points as a means for gauging the necessity for interview. More importantly, it involves a radical new approach to processing that actually seeks to have decision-makers refrain from an activist approach in their handling of each application. This is evident in the words of a senior departmental official who described it as an opportunity for "...his officers to have the time to use their judgment on important, borderline cases – and not to get caught up in paperwork. *Visa officers should not get bogged down in looking for every possible ground of inadmissibility or in checking every family relationship*". [emphasis added][358]

At the same time, risk management has also been seized upon as an important method by which system integrity might actually be enhanced. Since almost all application intake is done in a limited number of locations, with a limited number of persons conducting paper-screening, an opportunity arises to capitalize on the fact of concentration. Fewer people looking at more cases can facilitate waiver decisions by allowing the case reviewers to develop skills for ascertaining and assessing potential problems. Thus, "[a]n important element of the central processor is that a small number

---

2.1.1 Procedural Discretion, commencing at page 102.

[358] Gerald Owen, "List of 'designated occupations' for immigrant selection is being expanded" *The Lawyers Weekly* 13:23 (22 October 1993) 10, quoting (former) Assistant Deputy Minister Raphael Girard. The context of the discussion quoted in this source specifically concerned use of discretion and Mr. Girard's comments were meant to convey that the department wished a broader approach generally to be taken to case processing. Risk management necessarily involves a large element of discretion, since it entails a decision as to whether or not a particular part of an application bears detailed investigation.

of people – six case analysts in Buffalo – look at a large number of cases. As a result, they can pick up trends and identify questionable documents."[359]

The development of waiver of interview as a processing tool raises issues of concern for both the Department and the bar.[360] CIC, for its part, sees waiver as a discretionary tool that obviates work burdens associated with interview, but only where no problems are evident on the file. Lawyers, on the other hand, would prefer a more formal, rules based policy on interview waiver enabling them to predict when a client is likely to be called for interview.[361] It is the classic struggle between preferences either for positive rules or a more functional approach. The upper hand in the debate, of course, is held by CIC, since the matter of waiver is nowhere encoded in statute or regulation.[362] As such, it remains an extraordinary exemption from the ordinary requirements of the law. Thus, a whole new element of discretion, though primarily of a procedural nature, has

---

[359] Lundy, *supra* note 356.

[360] Although lawyers generally favour the interview waiver policy, offering as it does speedier service to clients, the lack of personal contact between decision-makers and applicants even causes them some anxiety. See Owen, *supra* note 358, where the reactions of some lawyers to the advent of widespread interview waiver is discussed:

> ...[Toronto lawyer Peter] Rekai suggested that a whole system of phantom immigrants is developing, with neither officials nor lawyers meeting their clients. Earlier [at a CIC-CBA meeting, lawyer Howard]...Greenberg had said that he often deals with clients only by fax and telephone: "I can't tell you how many people I've never met." Carter C. Hoppe of Hoppe and Jackman remarked that he had spoken only to the voicemail of one client. "Who the hell is seeing these people?" exclaimed Mr. Rekai. He reported that before the panel started Mr. Girard [the CIC official attending the meeting] had said informally that the immigration department will come to look more like Revenue Canada. Correspondingly, immigration lawyers are being turned into accountants, in Mr. Rekai's view.

[361] Both sides of this issue were canvassed in an informal internet email "chat group" that the author participated in with members of the Immigration Subsection of the Canadian Bar Association in 1996. Because of the shifting membership of that group, it is impossible for me to acknowledge the individual participants, other than collectively, for their contributions to the present discussion.

[362] Pursuant to s. 8 of the *Regulations*, visa officers are required to assess applications from independent category applicants against the factors set out in Schedule I. Section 11.1, however, merely uses permissive language to say that an interview need not be held, if an applicant fails to receive certain required units of assessment set out in the Schedule. This device permits refusal of applications on paper without the necessity of interview. It does not purport to grant applicants dispensation from the requirement of interview.

been injected into immigrant processes.[363] Further, while broad guidelines have been developed to inform and guide the application of waiver policy, it remains for each individual office to fix the specifics of that policy, as it is applied to its own caseload. Whatever the case, for professional immigration advisors, the visa "game" is no longer so much one of seeking out offices whose decision makers are most likely to be sympathetic to applicants at interviews. Rather, it may be even more important for those advisors to figure out how best to influence the discretion inherent in the interview waiver decision.[364]

Quite naturally, a decision centre isolated from direct contact does little to inspire confidence among clients that their matters are being handled expeditiously and fairly. The distance between the decision-maker and the applicant has been further increased by a drive to reduce direct contact even for routine matters, such as status requests on the progress of file processing. To make up for the lack of direct contact between decision-maker and applicant, call centers were instituted to handle client queries that could no longer be handled at CIC counters.[365] Such a strategy was consistent with the trend to

---

[363] The decision to waive interview, though ostensibly just a procedural step, contains also a substantive element, since it revolves around the selection decision that is so central to application processing.

[364] A too generous waiver policy does not properly balance the facilitation and control objectives of the *Act*. For an example illustrating the importance of achieving a proper balance, see Dianne Rinehart , "Alleged triad leader's entry traced to bid to save jobs" *Vancouver Sun* (4 November 1997) as found at http://www.vancouversun.com. That story details the errors which apparently allowed Lai Tong Sang, alleged leader of the Wo On Lok or Shui Fong (Water Room) Macau triad to enter Canada as an investor immigrant. A new program manager was sent out to the Los Angeles visa office in September, 1995, at a time when office closures and job losses at visa offices were under consideration. In an apparent effort to justify the existence of his program and its jobs, he actively recruited applications, including offshore applications. "His efforts were wildly successful. In the last three months of 1995 the office received 1,652 applications – more than the previous nine months or all of 1994... These figures indicate the office was feeling the pressure of its self-generated workload." According to a CIC investigator who examined the practices of the office after the entry of the alleged triad figure, the office was dealing with 2,508 active applications by May, 1997. "Of these only 140 files were from applicants who listed their last country of permanent residence as the United States!" In the haste to deal with that volume, it appears that the office cut corners and failed to conduct a routine check with the visa office in Mr. Sang's country of origin – in this case, the Hong Kong visa office.

[365] Rather than calling the particular office that is handling the file to inquire as to the status of their

wringing productivity gains out of the economy of scale that batching of like functions was intended to produce. Call centres, of course, are a phenomenon of our current so-called "information age". They are designed to allow the delivery of services from a central location to widely scattered consumers[366] and is a particularly cost effective solution where the service provided is information.

In the case of CIC, call centres facilitated elimination of counter staff dealing with walk-in traffic. Instead, Canadian sponsors and applicants are given a toll free number to call for updates and other information relating to processing of their applications. The call centre network, still under development, is envisioned to provide one-stop information for all cases in process worldwide. The downside for applicants, of course, is that call centre staff typically can provide only generalized information. They will not be intimately familiar with case specific details and are reliant upon clear and concise data entry by decision makers to explain any unusual features or difficulties encountered in processing. Likewise, call centre staff may have no direct case processing experience and so may be unaware of the subtleties and nuances of the processes they are describing to clients. This is balanced, however, by the fact that direct communication between the client and the decision maker is still part of the processing continuum, at least in so far as problems or difficulties become apparent on individual files.

---

application, applicants are directed to contact a "call centre". The client calls one of several regional toll free telephone numbers where general information as to the current status of the application is available. For an account of some of the relative merits and demerits of telephone call centre service, see Mary Gooderham, "Call centres let consumers dial up service" *The [Toronto]Globe and Mail* (3 March 1997) A1.

[366] *Id.* This article notes benefits to both companies and consumers from "dial up service". Companies are able to save costs by ever greater centralization and automation. Similarly, at A8, it is noted that "[c]onsumers short of time demand the convenience of doing business on the phone and have grown comfortable with telemarketing...."

However, such contact is ordinarily initiated by the decision-maker, rather than the client. This is consistent with policies respecting transparency of administration that have been adopted primarily to alleviate some of the burdens associated with answering routine status queries. So, for example, an acknowledgement of receipt of application was mandated to be sent out within four weeks of receipt of the application. The acknowledgement is intended also to give the applicant an estimate of how long processing is likely to take and when they can expect to receive further communication from the visa office. Outside of these time frames, applicants are discouraged from contacting the visa office, unless the need for contact is other than a simple status query. Thus, the policy serves to keep applicants informed and realistic in their expectations, while forestalling more time consuming labour that can arise when no information is provided.[367]

2.2.2.2 Pushing Work Down

RPC's and call centres are not the only measures which have been seized upon as a means for reducing the number of staff devoted to answering queries and providing counseling. Another initiative focused on finding ways to push work burdens down to the lowest possible level in the processing chain.[368] The lowest link in the chain, of course, is the client herself. To this end, detailed client self-assessment kits have been

---

[367] See *Lexbase* (October 1997 Sending) at 3, citing an unnamed CIC document accessed pursuant to *Access to Information Request 97-226*, where it is noted that the agreement on Standards on Representations "...must be adhered to by all missions, barring unforeseen circumstances, as failure to do (sic) may result in the third party representative resorting to alternate means such as requests under the *Access to Information Act*."

[368] The notion of pushing work down to the lowest levels is sometimes also referred to in popular management jargon as "empowerment", which imports the notion that it is not just work which has been shifted, but also responsibility or authority.

devised. Since CIC can no longer provide in-depth, individualized counseling, the purpose of the self-assessment kits is to enable the client to determine for herself her chances for a successful application. In this way, the work burden and responsibility for counseling and application preparation was shifted from CIC directly to the client.[369] In conjunction with the self-assessment kit, CIC also devised the notion of the "one step application". The theory of self-assessment and one-step processing is evidenced in the following extract from the Immigration Manuals:

> The one-step application procedure is designed, through the use of self-assessment kits, to reduce the number of times a file is reviewed prior to a decision being taken, to reduce processing times, and to place the onus on the applicant to ensure that only completed applications, including the appropriate cost recovery fees, are submitted for assessment. Incomplete applications or those which are not accompanied by the appropriate fees will be returned to the applicant and no file will be created.[370]

As is apparent , the one-step concept envisioned that every application submitted would be complete in every detail, thereby greatly reducing the administrative burden associated with piecemeal submission of information. This would serve at the same time to increase processing speed and client satisfaction. It was intended that incomplete applications would simply be returned unprocessed, with instructions as to missing information. However, the plan was unworkable for several reasons, including the difficulties of specifying what was needed for every applicant, no matter their country of origin, and concern with the fact that applicants might be prejudiced by their inability to

---

[369] See CIC All Mission Message OMSQ0002 (18 January 1994) advising that:

> One of the objectives of the Independent self-help guide is to eliminate the PAQ by shifting more responsibility to the applicants. Guides should contain sufficient information to enable applicants to determine if they are likely to be successful in obtaining the visa category and if they should risk the cost of the fee to apply. [paragraph numbering omitted]

[370] CIC IM Chap. OP-5, Para. 2.1 b) (Ver. 05-97) "Self-Assessment Kit".

"lock-in".[371] "Lock-in" refers to the date that a completed application is received. Its importance is obvious where regulatory or statutory changes are about to take place, which might make qualification more difficult or onerous.[372] In the result, the matter of insistence upon a complete application up front has been left to the discretion of individual visa offices, to be determined in light of local conditions and overall feasibility.[373]

In tandem with the move to shift more responsibility for application completion onto applicants, there was also a vision that a closer relationship with immigration advocates could be cultivated, to the mutual advantage of clients, advocates and CIC. Thus, initiatives, such as publication of service standards and the development of directives concerning more open communications with applicants' representatives were undertaken. The theory was that advocates, being better informed and so better able to advise their clients, would also be less likely to make frivolous inquiries wasteful of departmental resources. Presumably, by promising greater communication and

---

[371] This was the major concern cited by the C.B.A. and was the reason that the bar was unwilling to support the one-step concept. See text accompanying note 708, *infra*.

[372] For more on the importance of the "lock-in" date, see CIC IM Chap. OP-1, 4 (General Procedural Guidelines), Para. 3, "What is the lock-in date?", at 5, which notes that the lock-in date is used to freeze certain factors. In the case of Independent immigrants, the lock-in date determines points to be awarded for items such as Occupational Demand and age. According to para. 3.4.1, *id.*, "[t]he lock-in date is the day the Department has physical possession of ... an application for permanent residence in Canada (IMM 8)..., as well as the correct and complete fees (cost recovery processing fees)."

[373] The complexity of the application forms likely contributed to the necessity for some discretion at the local office level in this matter. The basic IMM8 form itself runs to four pages and asks for an abundance of information touching upon virtually every aspect of an applicant's personal and professional life. In addition, the applicant may be required to submit various supplementary forms covering items such as family composition, consent to disclosure of information by foreign authorities, occupational assessment and so on. Though the forms are available in French and English, they are daunting enough for those conversant with these languages. The problems associated with the complexity of the forms and application process are obviously magnified for those who possess ability in neither language. Likewise, the sophistication of clientele, at least in terms of dealing with government and bureaucracy, varies from post to post and it was unrealistic to expect that a level of compliance suitable to one region might be expected in another.

transparency, CIC hoped too that advocates might come to feel a sense of "ownership" in the program and so might exercise a greater degree of discrimination in the quality of cases presented. To emphasize the importance of the relationship, a senior official was designated as the Assistant Deputy Minister (ADM) – Partnerships.[374] However, it may be that expectations were too high. A number of spectacular incidents of fraud amongst some of the less scrupulous advocates also raised concerns as to what sort of partnership was possible.[375] Certainly, such incidents served to remind that the interests of the Department and of private immigration advisors were not as co-extensive on certain key issues as may have been desired. In the end, the ADM – Partnerships position was subsumed in the new post of ADM – Corporate Services.[376]

Pushing work burdens "down" was not just a case of offloading responsibility for

---

[374] Admittedly, "partnerships" was envisioned as a broader concept that was not just restricted to advocates, but also included other levels of government, non-governmental organizations and the like. The ADM-Partnerships was one of two ADM positions, the other being the ADM-Operations. Both of these positions reported directly to the senior departmental civil servant – the Deputy Minister (DM).

[375] For a number of reasons, not least of which is the difficulty of proving actual fraud, it seems as though only the most egregious cases of dishonesty and deceit result in charges being laid against consultants. Nonetheless, the existence of a significant number of unscrupulous immigration advisors is well known and is discussed in further detail below in section 3.4.3 The Role for Counsel, commencing at page 289. CIC's offloading of work onto applicants and their counsel raises interesting questions about how far the departmental expectation can go that the applicant is properly represented. Quite simply, is administrative fairness observed where applicant's counsel is incompetent? What onus is there on the department to intervene where the applicant appears to be poorly represented? In one case, the federal court was prepared to hold that total incompetence of applicant's representative at an immigration hearing was, on the facts, grounds for holding that there had been a reviewable breach of the rules of procedural fairness. *Shirwa* v. *Canada (Minister of Employment & Immigration)* [1994] 2 F.C. 51 (F.C.T.D.), per Denault J. See also *Canada (Attorney General)* v. *Sorkun* (1988) 34 Admin. L.R. 131 (F.C.T.D.). In this latter decision, the court recognized the dangers of allowing cases to be built on allegations of incompetence by representatives but felt that this could be controlled by careful exercise of judicial discretion and a requirement of exceptional circumstances for intervention. For a discussion of this problem generally, see Evans, *supra* note 2 at 147. The obvious criticism of this approach is the slippery slope argument that there would be difficulty in getting finality in administrative decisions.

[376] See CIC All Mission Message "Senior Management Structure" (04 November 1997). More recently, CIC has also issued new guidelines for dealing with client advocates that flatly rejects the notion of a "partnership", at least in a case specific context. See CIC OM OP 98-15/PE 98-13 (29 May 1998) "Policy and Instructions on Dealing With Client Representatives". In particular, para. 1(i) of that OM states, "[c]lient representatives are not our processing partners whenever they represent individual cases."

application preparation on clients. It also meant that decision-making authority was to be decentralized[377] and devolved lower into the organization.[378] In particular, more case processing decisions were to be made directly by locally engaged staff, rather than by Canada based visa officers, who are viewed as one of the more expensive components of the immigration program. Thus, part of the redesign initiative involved evolution of the job package of Canada based visa officers away from actual processing decisions and into more of a managerial role. According to one senior official, "[t]he function of the [foreign service] visa officer will continue to change and the involvement of officers early in their career in actually doing the processing and making processing decisions will continue to shift towards managing the process using more locally engaged staff and having technology do the work of screening and documenting people who want to come here."[379] The implications for discretionary decision making remain to be fully determined, particularly since the process of reorganization is yet to be fully completed. However, the hiring criteria for locally engaged program officers are less rigorous than for the foreign service.[380] Accordingly, locally engaged officers may be less well educated than Canada based officers and perhaps more parochial in their outlook and experience, since they generally will not have had the same opportunities for travel and

---

[377] CIC, *Departmental Outlook on Program Expenditures and Priorities, supra* note 339, at 15.
[378] See for example the delegation of rehabilitation authority cited at note 295, *supra*.
[379] "Immigration from the Top, the Inside and Abroad", *supra* note 346, 30 at 35.
[380] There are several levels of locally engaged staff that may be involved in application processing. Most senior of these are the "Designated Immigration Officers" who have been accorded full visa issuance authority pursuant to section 109(2) of the *Act*. Such officers possess the same authority as regular foreign service visa officers. There are various other local staff positions below the level of Designated Immigration Officer, such as Immigration Program Officers and Program Assistants. None of these, however, possess visa issuance authority.

service in different locales.[381]

2.2.2.3 Standardization and Simplification

As may be apparent, an increase in standardization was essential to achieving success in pushing work burdens down. Such standardization is evident, for example, in procedural matters such as the self-assessment kits (meant, as far as possible, to be the same worldwide) and the move to one-step processing. However, the scope of possibilities for standardization was limited in many ways by the procedural requirements placed upon the selection process by the courts. In particular, the doctrines of reasonableness and fairness have limited the corners that could be cut. This is especially true for cases which involve features or issues that are not straight forward. As a result, the greatest gains from standardization have been achieved in the handling of the majority of cases which are routine and ultimately result in approval and issuance of visas. That said, however, even the matter of refusals has not been untouched by the efficiency drive. For example, fairness does not require an oral hearing in every instance and CIC has incorporated this notion into the design of its processing strategy for completion of paper screening decisions. What fairness is really concerned with is the adequacy of the opportunities provided to an applicant to put her case forward and to know the case she must meet.[382] CIC has worked around the notion of administrative fairness by placing

---

[381] Although generalizations are, of course, fraught with peril, it has been my observation that locally engaged officers sometimes tend to be more critical of their own countrymen than is the case for Canada based officers. I cannot say whether this is some sort of chauvinism or simply the product of a better sense of local culture that enables a finer ability to sort the plausible from the fantastic. Who the decision-makers are, though, does seem to have a bearing on how and when discretionary decision making will be undertaken. For more on this, see generally section 2.3 Discretion and Sociology beginning at page 165.

[382] See for example Wilson J. in *Singh, supra* note 64, 17 D.L.R. (4th) 422 at 465, who gives these criteria

much emphasis upon development of adequate, standardized self-assessment kits. Not only do better kits shift some of the work of application preparation to the client, but they also provide more complete information as to the hurdles she must cross. Being better informed at the outset, she has less cause for complaint if her application is not successful at paper-screening. Fuller and more cogent information also gives less cause for the courts to intervene in the interests of procedural fairness.

In addition to improving application materials, another important feature of standardization involved enhancement of computerization and use of computerized methods to improve client service and eliminate work burden. Thus, CIC has been innovative in adopting new technologies to provide better and more current information in more cost-effective ways. Application forms and counseling materials, for example, are now provided by some posts to their clients on computer floppy disks and CIC maintains an internet World Wide Web site for the same purpose. From an internal administrative perspective, one computer standardization project in particular held great promise for delivering the increased efficiencies envisioned by BPR planners. CIC currently operates with several different computer systems that are largely incompatible.[383] A project was conceived, therefore, to develop a uniform, department-wide, modern computer system that would provide a continuum for following each client from initial receipt of an immigration application right through to an eventual grant of citizenship. The benefits and advantages of such a system are obvious – a file would be

---

in relation to a refugee hearing.

[383] The primary computer systems employed by CIC for case processing are the Computer Aided Immigration Processing System (CAIPS), used exclusively overseas in visa offices, and the Field Operational Support System (FOSS), used by domestic CIC's. The two were developed independently of

created only once and would be accessible right across the spectrum of services that a client might require. Unfortunately, however, funding problems have put off this project indefinitely.

Standardization was not just limited to procedural and administrative matters. It also included substantive components. In particular, a major initiative was to develop "generic" selection criteria for the Independent category that were as objective as possible. Such objectification furthered several goals, including a desire for global consistency. Because processing occurs in widely scattered offices, consistency of decision making has always been difficult to achieve. This is particularly so with respect to discretionary authority which draws as much from mindset as from legislation and written policy. By standardizing the application process and objectifying the selection criteria, consistency would be enhanced. Just as importantly, by importing as little discretion as possible, selection can be reduced to an almost routine application of well defined rules that could be carried out by even the lowest level of decision maker. Indeed, a clearly defined set of rules would even empower the client to effectively act as her own decision-maker, thereby potentially reducing work for CIC. If it were clear to an applicant at the outset that she would be unlikely to qualify, presumably she would not bother even to submit an application. Further, well-defined selection criteria facilitate automation and more comprehensive use of computers and other technology for conduct of application receipt and processing work. The apparent incompatibility of discretionary

---

each other, at a time when the immigration Foreign Service was still a component within the (then) Department of External Affairs and International Trade Canada.

decision making with increased efficiencies was made clear in a message from CIC headquarters to overseas immigration offices. It reads:

> This is year one of the Departmental Strategic Framework. Although, within the ISG [International Service Group, now "International Region"], it is very much a transition year in terms of how the program looks on the ground, our business this year is largely that of processing the remaining applications in the current selection system while we attempt to shift gears and rebalance the program in a way that attracts a larger share of economic migrants.[384]
>
> Concomitant with this change, we need to develop a selection system that is more transparent to the people whom we wish to attract. We simply do not have the resources to do a lot of sifting from among the millions of people who might be tempted to give Canada a try. *To me, this means that we will not be able to rely too heavily on the use of positive discretion by an officer should the selection system prove to be dysfunctional.* In the not too distant future there will be far fewer people whose job will be to scrutinize applications that are initially rejected on basic selection criteria, and then to retrieve them, if the individuals concerned seem to have what it takes to settle successfully in Canada. [Paragraph numbering omitted, emphasis added][385]

There was, therefore, a very conscious shift away from a more traditional view that positive discretion would be available as a remedy for system design and implementation shortcomings. Recognizing also that the needs of the economy often shift faster than immigration law's ability to keep pace, the Department determined that a new standard for Independent selection was sorely needed. To this end, an initiative was undertaken to attempt to de-link the Independent movement from specific occupations,

---

[384] A goal of the Strategic Framework is to redistribute the balance between humanitarian and economic categories for immigrants coming to Canada. In 1994, for example, economic migrants represented 43% of the total intake, while 57% was represented by all other categories. The plan is to shift this balance so that by the year 2000, 53% of the intake will be represented by economic migrants and only 47% by other categories. See CIC, "Highlights - Into the 21st Century: A Strategy for Immigration and Citizenship" (Hull, Que.: Min. of Supply & Services Canada, 1994). See also CIC *Departmental Outlook on Program Expenditures and Priorities, supra* note 339 at 5, where it is noted that the "...projected shift between the economic and family categories, ...expected to be achieved by the year 2000, was actually realized in 1995."

[385] CIC All Immigration Mission Message OFB0049 (unclassified), 23 February 1995, at para. 3-4.

allowing for selection on a broader, more generic basis.[386] The wisdom of devising more generalized selection criteria focusing on skill sets, rather than training and experience in a particular occupation, was obvious for labour market reasons. But such a selection system also held the promise of facilitating selection processing to proceed on a less intensive basis, since generic criteria, importing more objectivity, are easier to apply in a rote manner. In drafting a completely new set of selection criteria, emphasis was placed on devising and incorporating elements revolving around the basic premise of Independent selection – namely, that they are motivated persons who possess the assets and talents to establish quickly and easily as self-supporting individuals, able to contribute immediately to the economic and cultural life of Canada. This premise, of course, is the same one that has been the foundation of Independent selection since promulgation of the current *Act*. The difference was to re-jig the selection criteria to better emphasize those skills thought most important to successful establishment within the economy particularly, and society more generally.[387]

The first step was to move Independent selection away from the specific job skill focus that was the core of the Canadian Classification and Dictionary of Occupations (CCDO).[388] This occupational dictionary was imported into the selection criteria, via the

---

[386] See for example, "Immigration from the Top, the Inside and Abroad", *supra* note 346 at 31, where the Deputy Minister, responding to a question about how immigration and domestic economic policies complement each other, stated that "[t]he immigration program in Canada is no longer linked to specific job demands. ... Immigration is linked to a more generally stated objective that "we are in the [independent] immigration business for the economic interest of Canada.""

[387] This is a goal which has recently been reiterated in a report by a Legislative Review Advisory Group that was struck by the Minister of Immigration to examine possible reforms. For a discussion of the recommendations of this Group, see below, section 4.2 Reforming Discretion - Immigration Legislative Review Report, commencing at page 314.

[388] Manpower and Immigration, *Canadian Classification and Dictionary of Occupations 1971* (Ottawa: Information Canada, 1971). This main volume was supplemented by five additional volumes, adding new occupations, released between 1977 and 1986. In addition, a guide volume was issued annually up to the

factors set out in Schedule I of the *Regulations*. It provided the standard against which potential immigrants were required to demonstrate their training and experience in the particular occupation that was the basis for their selection.[389] The focus of the CCDO is on detail oriented job descriptions, describing the training, qualifications and work elements that each occupation entails. In the late 1980's, updates to the CCDO were stopped altogether. Although no longer updated, the CCDO was cemented by regulation into the selection criteria as the backbone of the Independent selection system. The results were predictable. The selection system spiraled out of touch with the economy, as immigrants continued to be selected according to increasingly antiquated job requirements.[390] At the same time, restructuring in the Canadian economy and shifts in

---

ninth and final edition in 1989. See Occupational and Career Information Branch, *CCDO Guide*, 9th ed. (Ottawa: Minister of Supply and Services Canada, 1989). While supplements added new occupations from time to time, occupations described in the original 1971 volume were not as a rule updated.

[389] The importance of occupation to Independent selection is obvious from the fact that four of the nine selection factors listed in Schedule I relate directly to occupation. These are specific vocational preparation (now "educational training factor"), experience, occupational demand and arranged employment/designated occupation. A fifth factor, education, also contains strong links to occupation, since points may be awarded under this factor for certain types of occupational or professional training.

[390] The incongruity caused by outdated CCDO job descriptions and a judicial tendency to enforce the strict letter of the law, no matter the result, is seen in *Haughton* v. *Canada (Minister of Citizenship & Immigration)* (1996), 34 Imm. L.R. (2d) 284 (F.C.T.D.). There, the applicant applied in the Independent category pursuant to the alternative occupations of "executive secretary", "secretary" and "administrative assistant". In refusing her application, the visa officer found, at 285-6, that Haughton lacked:

> ...the requisite experience or training in the above occupations in that you have no experience or training in the operation of a personal computer; word processing, database and/or spread sheet software applications, facsimile technology, local area networks, electronic mail systems, electronic voice mail or office telephone networks, all of which are standard equipment and tools of a secretary, executive secretary or administrative assistant in a Canadian office setting.

The CCDO definitions for these various occupations, having been written in the 1970's, made no mention of the technology and job duties cited by the visa officer. Rothstein J., in overturning the decision, noted that the CCDO definitions were imported as the standard for measuring specific vocational preparation under Factor 2 of Schedule I to the *Regulations*. Contrary to the Minister's position that the CCDO definitions were meant to be a guide, rather than a complete set of definitions, he found, at 287, that the legislative scheme left "...no room for a Visa Officer to import his or her own criteria into the requirements for a specified job."

It is interesting to speculate what the result might have been, had the opposite facts been present. What if the secretary in question had been experienced in all of the modern equipment and technology cited by the visa officer, but had no experience using a typewriter, did not know how to make multiple document

labour market needs were creating demands for new occupational skill sets and know how, unknown and likely unimaginable to the authors of the CCDO at the time they crafted their work. Because of this disconnection between the CCDO and economic realities, it was often the case that the particular occupation selected for was not necessarily the one that an immigrant would actually end up working in upon arrival in Canada.[391]

The CCDO was replaced by a new standard for measuring occupational qualifications, the National Occupational Classification (NOC) guide.[392] Unlike the CCDO, the NOC focused on skill sets seen to be common to a particular level of occupation. Under the CCDO, an applicant might be found to be unqualified in her stated occupation if she had no experience in a variety of functions that might be ascribed to that occupation. However, with the NOC, the precise details of the applicant's experience or training in a particular occupation are no longer so important. Rather, the salient question is whether she possesses the general skill set specified for that level of occupation. The NOC system was thus essential to the development of a more generic selection procedure.

---

copies with a carbon paper and was generally unfamiliar with other office processes common when the CCDO description was written. This sort of scenario was not uncommon, particularly toward the end of CCDO usage. In my experience, counsel were usually quick to ask for use of discretion to supplement the obvious shortcomings of the CCDO and one suspects that courts would have sympathy with an argument that discretion was improperly fettered, if not exercised in such circumstance.

See also *Lee* v. *Canada (Minister of Citizenship & Immigration)* (1995), 29 Imm. L.R. (2d) 222 (F.C.T.D.) (CCDO is a binding document and job requirements not specified therein are invalid) and *Prajapati* v. *Canada (Minister of Citizenship & Immigration)* (1995), 31 Imm. L.R. (2d) 182 (F.C.T.D.) (Visa officer is obliged to take the whole of a CCDO occupational description into account and to interpret it appropriately).

[391] The expanding disconnection between the occupational definitions of the CCDO and the real needs of the labour market inevitably placed ever more importance on the use of positive discretion as a means to supplement the shortcomings of the selection criteria. For example, many of the newer computer related specialty occupations were not described at all under the CCDO and so visa officers were required to use some imagination in ascribing suitable occupations to individuals employed in such fields.

[392] Human Resources Development Canada, *National Occupational Classification* (Ottawa: Minister of

However, while the NOC may have remedied many of the defects of the CCDO, it is not abundantly clear that it has displaced the need for discretion, at least in so far as it relates to interpretation of qualifications and application of the selection criteria to same. Since skill sets are more personal than occupational experience and achievement, adoption of the NOC may actually have increased the necessity for adjudicative discretion.

In the end, the drive to more generic selection criteria suffered a setback that has yet to be overcome. The NOC was just one element of the new selection criteria and other important changes were envisioned. In addition to honing the details of specific selection criteria, it was intended also to redistribute the weighting accorded to various factors, so as to place greater emphasis on those seen to be crucial to successful establishment. Increased emphasis, for example, was to be attached to knowledge of the English and French languages. Likewise, the factor of "personal suitability", involving a subjective assessment by a visa officer as to the applicant's "adaptability, motivation, initiative resourcefulness and similar qualities"[393] was to be replaced by an "adaptability" factor. Stiff opposition to these changes was encountered from immigration lawyers who found the new adaptability factor, in particular, to be too "vaguely defined and evaluated".[394] Their concerns about the poor definition of this factor were compounded by the fact that its value was pegged at16% of the overall points tally. This was an increase over the "personal suitability factor", which accounted for only about 10% of an applicant's potential score. According to a brief delivered to CIC by the C.B.A.'s

---

Supply and Services Canada, 1993).

[393] See Factor 9 in Column I of Schedule I to the *Regulations*.

[394] See Lila Sarick, "New immigrant selection rules put on hold" *The [Toronto] Globe and Mail* (9 January, 1996) A8.

Immigration Subsection, the new factor gave too much discretion to visa officers and made the setting of universal standards impossible.[395] Scheduled for implementation on February 8, 1996, the new selection criteria were put on hold indefinitely while CIC examined further the "complex issues related to selection standards"[396] that they raised. The problems associated with the CCDO, however, were too pressing to wait for further study and so its replacement by the NOC went ahead nonetheless.[397] Although the government still intends to come forward with new selection criteria, the exact date when that will happen remains uncertain.

CIC's move to standardization has also incorporated the conceptualization of immigrant services as product lines. For planning purposes, such lines are counted, tracked and tabulated through computer systems, as though they are uniform units. The problem with this approach, however, is that it tends to view immigrants more as a commodity and so may underestimate the individuality of each applicant. This is especially so with "problem" cases that present unique features or difficulties that take them outside normal processing parameters. In short, those cases where an exercise of discretion, or at least considered judgment, may be necessary. With the pressure to meet productivity targets that are relentlessly monitored as units of production by unblinking computer generated statistics, there is a danger for discretionary authority to be reduced to a mere coping mechanism for overworked officers. Saying "yes" is, of course, easier and faster than saying "no" since the burdens of justifying a positive decision are lighter than those for a negative decision. Certainly, it is the case that most of the gains in client

---

[395] *Id.*

[396] CIC *Departmental Outlook on Program Expenditures and Priorities, supra* note 339 at 10.

service have come in processing that vast majority of cases which fit the mold of a square peg into a square hole, and scant attention has been paid to factoring in allowances for difficult cases. While tracking and tabulating for purposes of resource planning and deployment is appropriate and indeed, necessary, the current methods for devising those statistics are faulty and do not reflect the totality of the workload that is present in field offices. This is a critical fact that central planners must to be cognizant of when setting individual office workload targets. If not, the nature of "commodification" is such that it will force discretion to move in one direction, regardless of whether that direction is justified or intended.

The importance of dialogue and information exchange between the field and headquarters during the implementation of BPR initiatives is obviously crucial, if expectations and results are to be matched. Certainly, it has often been the case in the past that headquarters' initiatives that were too particularized in their detail, or which were instituted without sufficient regard for field input, have gone awry. The Right of Landing Fee, for example, which was originally implemented as an up-front fee, collectable upon initial submission of an application, proved ill-conceived. As a "privilege fee", rather than a "fee for service", it had to be refunded in the event an application was not granted.[398] The work in refunding monies to failed applicants proved

---

[397] The CCDO was replaced by the NOC effective May 1, 1997.

[398] The difference between the two fees is explained in the following paragraph taken from CIC's *1997-1998 Expenditure Plan Estimates*, as cited in the July 1997 Sending from LEXBASE, at 3: "Under section 19(2) of the *Financial Administration Act* [R.S.C. 1985, c. F-10]..., the level of fee cannot exceed the cost to provide a service. CIC's processing fees recover a different portion of the delivery costs for each service; for example, CIC recovers 82% of the processing costs of adult immigrant applications, 90% of the processing cost of visitor visa applications and 55% of the processing cost of citizenship grant applications, based on the January 1997 fee schedule. The Right of Landing and Right of Citizenship fees were established under the authority of section 19.1 of the *Financial Administration Act*. They are privilege

sufficiently resource intensive to offset some of the gains from the fee. Though it was apparent to the bar and officers in the field that the up-front nature of the fee would pose problems, fiscal imperatives and headquarters' judgment were allowed to prevail over practical application issues. After much trial and error, the policy has recently been changed to allow for collection at the time of visa issuance or landing instead, thereby alleviating refund problems.[399]

Fortunately, centralization of routine case processing in dedicated paper-screening units has siphoned off much of the rote workload, allowing those conducting interviews more time to concentrate on the unique aspects of those cases called for interview. And, in the end, dealing with such cases has been largely left to the creativity of individual missions, who are able to fashion solutions that work best for them. In fact, some recognition of the need for field sensitivity has been factored into BPR models for a reworked office network and processing system. Headquarters planners have explicitly stated that they do appreciate that "a wide degree of operational flexibility"[400] is needed in the implementation of specifics of the overall redesign. This is evident in the fact that there is no expectation, for example, that interview waiver rates should be the same at

---

fees, not processing fees. Privilege fees are designed to partially compensate Canada for the many intangible economic, social and legal rights and privileges that Canadian residence/citizenship confers. By regulation, privilege fees are not associated with the delivery of any specific service provided by CIC."

[399] The problem of the center dictating a course of action, however difficult or impractical of application is, of course, not a new one. See for example, R. Sampat-Mehta, *International Barriers, supra* note 12 at 121-123, where he relates the situation of E. S. Doughty, a Special Immigration Officer for Canada in Hong Kong before and during WWII. In 1939, Doughty cabled headquarters in Ottawa to seek direction on how to deal with a large number of displaced persons, most of whom were destitute, applying at his office to go to Canada. The response from H.Q. was simply not to offer any hope of admission to them. As Sampat-Mehta observes, at 123, "[t]his may have been one of the advantages to having an Immigration office thousands of miles away in Hong Kong – refusal was so easy for Ottawa officials who did not have to be in contact with applicants...."

[400] CIC unpublished discussion paper entitled "The Overseas Network: Charting the Course" at 1.

every satellite or RPC.[401] This is also clear from the way conduct of interviews has been conceived of under the RPC/satellite office model. Where an interview is deemed necessary, it is expected that the RPC would provide a rationale for the interview to the satellite office conducting the interview. The intention is to keep the interview short and focused. At one point in the BPR planning cycle, there was talk of a "20 minute" interview as the standard for such interviews. However, this expectation dwindled off in the face of the realities that the new interview model presented. Generally speaking, only cases presenting unusual features or difficult issues were to be called for interview and since no "easy" cases were to be interviewed, the intensity and complexity of interview loads was increased. Likewise, although the RPC is expected to specify the particular aspects of a case that should be the focus of the interview, it is recognized that such direction cannot serve to limit or restrict the interviewing officer's latitude. Thus, the following instructions were provided by CIC on this point:

> Notwithstanding a short, focused interview, applicants must still be accorded the elements of procedural fairness and be given an opportunity to respond to issues unresolved at interview. None of the RPC's instructions are meant to limit or prevent the interviewing officer from reviewing any aspect of the file which is deemed necessary. The officer, naturally, retains the flexibility to go wherever an interview leads regardless of the focus initially directed by the RPC.[402]

On the other hand, though many of the ways and methods of case processing have changed, one thing has not. Each mission, regardless of whether it be an RPC, a satellite or a full processing mission, continues to be assigned a yearly target number of cases that it should complete (referred to within CIC as "final dispositions" or "FD's"). Headquarters planners are most pre-occupied with that number and it is one standard by

---

[401] *Id.* at 10.

which the performance of individual offices and managers are judged. It is a number which presents both opportunities and challenges for each office. Since it is assigned as a global figure[403], it remains for each program manager to marshal her resources, as she judges best, to meet the target. As a result, considerable freedom remains for creativity within individual offices as to exactly how the required FD's will be delivered. This is as it should be, for local peculiarities are always such that the inherent burdens of file loads differ from office to office. The real trick in this process, of course, is for individual offices to realistically assess their own capabilities and to adequately convey this to headquarters planners.

Unfortunately, the process for setting of FD targets is hampered by an incomplete appreciation by headquarters for the differing resource commitments involved in generating positive and negative dispositions, that has been alluded to elsewhere in this study. Likewise, dislocation between expectations and deliverables is heightened by the fact that more than one measure of FD performance is used within the department. Visa offices are expected to deliver FD's, regardless of whether they be positive or negative in character. The Minister, however, delivers a yearly plan to Parliament that prognosticates the total number of immigrants who will arrive, or "land", in Canada over the next twelve month period. The Minister's number is entirely based upon positive decisions, since it requires that a fixed number of bodies actually turn up in Canada, and takes no account of any positive to negative ratio that might be involved in actually delivering those bodies.

---

[402] *Id.*

[403] I use the term global in the sense that it is usually an absolute number that the particular post is expected to achieve. Within the overall figure, an expected number of FD's within various categories, such as Refugees, Quebec destined cases, etc., may be specified.

Though landings and FD's are obviously different measures, yet it is ultimately the landing number that is used for purposes of setting individual office FD targets. Inherently, there is a dislocation between the two that is susceptible of creating expectations that are difficult to fulfill. This, in turn, may generate pressure on individual offices to produce FD's that exceeds what may be feasible under all of the circumstances. Not surprisingly, such pressure could foster a tendency for offices to focus on the least difficult or tedious work with the highest FD return ratio, and to ignore or put off complicated or difficult work with a lower FD payoff. This problem of two different measures, of course, is one that pre-dates BPR and has not been the subject of any research or discussion heretofore. It is impossible to say, therefore, whether the problem is real in practice or not. What is important, though, is that CIC planners should be cognizant of it, and should ensure that it is not inordinately impacting upon discretionary decision making, in particular. Similarly, as the renewal initiatives within CIC are rolled out to their conclusions, it will be important for the Department to be sensitive to placing too much emphasis on productivity and monitoring of statistics.

2.2.3 Conclusions on BPR

Credit must be given to CIC for the remarkable job that has been done in meeting the many challenges thrust upon it and over which it had little control. Budget cutbacks, increased pressures from globalization and ever more litigiousness, just to cite a few, have demanded significant responses and serious rethinking of ways, means and methods. And clearly, the stakes have been high for CIC, since they implicate such fundamentals as relevance of the program to the needs of the country and the economy, overall system

integrity, and the crucial nature of a broad base of public support. In the final analysis, however, while some work burdens have been reduced and much efficiency achieved, the renewed CIC envisioned by BPR remains incomplete and may never be quite fully attained.

As noted, a number of important initiatives, like one-step processing, adoption of new selection criteria and computerization have suffered setbacks, so that promised savings, both in terms of efficiency and reduction of work burdens, have not been generated. Likewise, many legislative bits of the puzzle remain unfinished and so CIC has only incomplete control over the resources that it must expend on application processing.[404] Substantive discretion, too, remains codified in the same places within legislation that it was before BPR, and the locations for its exercise in the process remain unchanged. The hope that it could be eliminated as an adjudicative tool, or at least reduced, has not been fulfilled. And, while institutionally its use may not be favoured, yet the reality is that it continues to be asked for by clients and exercised daily by line

---

[404] For example, there are few restrictions on when, where or how often an applicant may apply. Though section 10.1 of the *Act* grants the Minister authority to dictate where an applicant might submit their application, CIC has been loathe to implement same. The only exception has been its recent use to designate 9 visa offices as "Business Immigrant Centres", tasked with receiving all such applications. As of June 1, 1998, all applications in the Entrepreneur, Investor and Self-Employed classes may only be submitted at one of these Centres. The Minister is quoted as stating that "[c]oncentrating the appropriate personnel in a limited number of centres provides all applicants access to our expertise in business immigration. At the same time, we can better screen applications for fraud or inappropriate business activities, thereby ensuring the integrity of the program is maintained globally." See CIC News Release 98-27 (26 May 1998) "Centres To Process Business Immigrants".

However, no such restriction has yet been placed on any other immigrant category. Thus, a non-business category applicant may legitimately have applications processing in two or more different offices, in separate regions of the world, in different immigration categories. Further, an applicant is free to submit application after application, even while another may still be in process or even immediately after a previous refusal. The realities of the legal doctrine of fairness, with its requirement for individualized processing requiring fresh consideration of each application, are such that a stubborn applicant need not necessarily be dissuaded by past experience. The only real deterrent to persistent applicants may be the significant application fees that are now part of the immigration landscape. A possible suggestion for legislative change might be to limit Independent applicants to one application every year or two, so that

officers. There is obviously much work left to be done if the renewal agenda on substantive processing issues is to be moved forward.

The procedural side of matters, however, presents a different story, with big gains having been realized. For example, consistency of decision-making, a complaint of long standing, has been enhanced by the move to fewer decision centres. At the same time, dramatic improvements in overall productivity, application processing times and general client satisfaction have also been registered.[405] Perhaps the most interesting observation to be made about these gains is that they have actually served in many instances to invigorate procedural discretion. Indeed, it is fair to say that this form of discretion has actually provided many of the efficiency gains realized.

While the new system eschews the sort of intensive labour associated with positive substantive discretion that must be exercised in the setting of individual client interviews, it does favour use of such discretion as a procedural tool for batch processing. Ironically, this has only added justification for the retention of some measure of substantive discretion in the selection process. The desire to waive interviews, even for applicants who do not obtain sufficient points for an outright pass mark, requires that some substantive discretion be exercised in tandem with the procedural discretion granting such waivers. Thus, BPR reductions and efficiency measures seem to have rendered positive discretion, of whatever variety, more essential than ever.

Moreover, the changes are not just limited to positive discretion. New thinking

---

there is time for fresh circumstances to accrue.

[405] Certainly, productivity increases are evident in the fact that the same number of immigrant visas have continued to be issued even after staff reductions were made. Likewise, waiver of interviews have helped to reduce processing times, at least in routine cases, which has obviously increased client satisfaction.

affects the use of negative adjudicative discretion as well. Just as the system no longer has the resources to devote to sifting closely for those who have fallen through the cracks, so too it does not have the resources to closely scrutinize all those who are winnowed in. Thus, fewer persons are likely to be screened out by the negative exercise of substantive discretion.

The revitalization of positive discretion has, however, wrought profound changes on the ways of immigrant selection which need to be recognized. In particular, it has fostered a situation where the "packaging" of clients is emphasized more, while their intrinsic merits and abilities perhaps count for less. Though substance still has precedence, form has clearly been elevated in importance. Certainly, a client who puts up a good front on paper is more likely to ease through the system than is an applicant who devotes less attention to completion of forms. This is hardly surprising, since one of the goals of re-engineering was to shift work burden from CIC to its clientele. This has placed greater control over the supply of information to decision-makers in the hands of applicants and their advisors. The perils of this are manifest, since the selection process may be more easily derailed and is in greater danger of not selecting those candidates who are seen as essential to the continued viability of the economy and cultural life of Canada.[406] The situation is compounded, of course, by the fact of fewer people doing

---

[406] For a critique suggesting that at least one part of the Independent immigrant program, the Immigrant Investor Category, has been seriously compromised for such reasons, see Shar Levine and Andrew Phillips, "Citizenship on sale" *Maclean's* (1 July 1996) 14. That article focuses on the Investor immigrant flow from Taiwan and details problems caused by unscrupulous consultants taking advantage of CIC resource constraints. In particular, at 14-15, the following is stated:

> In effect, say the critics, Canada has given up control of a major aspect of its immigration policy to foreign-based consultants, many of whom use unscrupulous methods including falsification of documents to qualify their clients for Canadian visas. ... Canadian officials familiar with the trade say that many consultants operating in Taiwan have become so sophisticated in preparing

more work. With less time available to spend on any one particular case, the possibility for errors and oversights by decision-makers is increased.

It is a situation where increased vigilance by decision-makers and efficient, effective quality control methods are necessary.[407] Some of those measures are apparent in the system design, such as the concentration of case screening in the hands of a small number of case analysts who are well placed to spot trends and patterns.[408] Just as importantly, CIC has shown a willingness to profit from its mistakes and to accept that some initiatives just don't work. This flexibility will be important as the full BPR program is rolled out in the next several years, since other adjustments are sure to be necessary. For example, the trend to specialization and the gains it has offered in terms of productivity and protection of system integrity must be offset by a realistic assessment as to feasible workloads. This will require ongoing monitoring and a willingness to adjust targets, as experience and understanding about the optimum outputs from the new methods is acquired. Likewise, given the fact that BPR changes have not been implemented to the extent originally envisioned, CIC might do well to consider a study to assess the trade-offs that have been made and their impacts on the selection system as it now exists. The effect that all the changes have had upon discretionary decision making,

---

their clients' applications that they – not Canadian immigration officers – effectively control who can get into this country through the investor immigrant and entrepreneur programs. "There isn't staff to check all the applications," says the Immigration official. "It's mostly a paper transaction between lawyer and consultant. It's a Potemkin village, a charade, and the taxpayer's interest is not being served."

[407] Time will tell whether the perils of placing greater control over the flow of information into the hands of applicants and advisors is ill advised or not. Clearly, however, interview waivers present many opportunities for misleading and misinforming decision makers. For an apparent example of interview waiver facilitating the entry of a criminal in the business category, see Dianne Rinehart, *supra* note 364.

[408] This same justification was evidently behind the Minister's recent decision to designate nine visa offices as "Business Immigrant Centres". See note 404, *supra*.

in particular, certainly merits in-depth assessment and study. As I have attempted to demonstrate, despite CIC's desire to move in the opposite direction, discretionary decision making seems now to be even more central and essential to the way immigrant selection is conducted, than it was before BPR.

2.3 Discretion and Sociology

Sociological studies of discretion draw a strong link between organizational settings and the manner in which discretionary power is exercised. Admittedly, the full extent of the massive institutional and organizational changes underway in CIC and the ultimate impact they will have upon discretionary authority remain to be seen. Nonetheless, during this period of transition, it is useful to consider the insights offered by sociology and the possible implications they suggest for immigration discretion that arise out of institutional renewal.

Rather than focusing on discretionary power as an aberrant phenomenon within a system of rules, sociologists have instead employed a holistic approach, much like that of the functionalist school of jurisprudence.[409] It is not just a case, however, of studying discretion in context. Sociologists take this a step further by asserting that consideration must be given to the influence that context holds over discretionary power. In their view, while discretion is both pervasive and indispensable in any system of rules application, institutional, organizational and situational factors ensure that it is neither so unconstrained nor unpredictable as traditional jurisprudence might suggest.

In the view of social scientists, the structure and values of an organization shape

---

[409] For a discussion of this school of jurisprudence, see above, section 1.3 Dicey Undone - The

and mold workers' understanding of their discretionary power and impose expectations as to appropriate outcomes that tend to make discretionary decision-making much more regular and predictable.[410] It is a viewpoint which asserts that discretion is more than just a property of rules – it is also one of behaviour and perception.[411] While context is important as a background to the exercise of discretionary power, it is more than that. It is also a dynamic force, acting upon discretion to guide and shape its exercise. Thus, the factors that affect discretion are not just formal legal rules, but include a multitude of informal rules arising out of social, situational and pragmatic concerns. Recognizing this, one's eyes are opened to the full panoply of influences and dictates which can direct the use of discretion in any given case. Just as importantly, these factors tend to act much as formal legal rules, leading to structuring and containment of discretion, and fostering greater predictability as to its exercise.

Sociologists do not just acknowledge that discretion is an inevitable component of rules, they maintain that it is actually good. They cite functional benefits for legal systems, such as filling in gaps between rhetoric and reality, and obscuring lack of consensus or ambiguities in the law and policy.[412] Further, rules devised to attain some general purpose may give rise to conspicuous lack of justice when applied in a particular, concrete case, demanding a decision to mitigate or even to avoid their effects. Keith

---

Functionalist Approach commencing at page 23.

[410] See generally Martha Feldman, "Social Limits to Discretion: An Organizational Perspective" in Keith Hawkins, ed., *The Uses of Discretion*, *supra* note 9, 163 at 163-183.

[411] Richard Lempert, "Discretion in a Behavioral Perspective: The Case of a Public Housing Eviction Board" in Hawkins, *The Uses of Discretion*, *id.* at 226.

[412] Keith Hawkins, "The Use of Legal Discretion: Perspectives from Law and Social Science" in Hawkins, *The Uses of Discretion*, *id.*, 1 at 37.

Hawkins refers to this as the "gap problem"[413], when notionally impartial rules give rise to inequitable or unjust results in a given case. In his view, it is an irony that viewing discretion as a concern in socio-legal studies has been to view it critically, as the reason for a lack of fit between the values and rules of the written law and the practices of legal actors. He asserts that legal actors tend to behave more consistently than is recognized, though he acknowledges that apparent inconsistency does exist. Arguably, however, such apparent inconsistency may actually be justice at work – that each case is individual and so demands an individual, particularized result. Somewhat paradoxically, this is often an ostensible goal of rules, too. However, rules are best suited to engendering consistency and uniformity in outcomes, but such outcomes may be derived without regard to the unique traits, characteristics and needs of each applicant. To attain those outcomes, there is an emphasis on process, the theory being that fair process must inevitably give rise to fair results. Such a focus, however, sometimes leaves substantive justice sacrificed at the altar of procedural fairness.

Discretion, on the other hand, can act as the bridge between procedural fairness and substantive justice. Sociologists see it as the essential interpretive behaviour behind a sorting and prioritization that often must occur between rules and of discerning the applicability, meaning and effect which should be given to them. But they also see this process as a two way street, with use of discretion shaped and informed by rules though, again, these may be social and organizational in source, rather than legal. The significance of this thesis is seen in the fact that, for sociologists at any rate, it explains the perception of despotic power which clings to discretionary decision-making. As

---

[413] *Id.* at 38.

Hawkins explains:

> ...the 'arbitrariness' or 'capriciousness' of discretion (as lawyers and others might see it) resides in the disjunction between expectations prompted by a reading of legal rules, on the one hand, and the patterned forms of behaviour engaged in by legal actors in their routine work, on the other. It is the lack of fit between the legal expectations about how a decision should be made and how it is socially determined in practice which may give rise to accusations of arbitrariness or irrationality.[414]

Thus, the differing attitudes towards discretion, apparent between sociologists and lawyers, arise inevitably because of the disparate viewpoints from which they tend to conduct their investigations from. For legal philosophers, the primary focus is on words and rules and the choices these appear to allow for discretionary decisions, while social scientists orient their focus instead on the processes and goals that may be inherent in a system.[415] It is this difference in emphasis which causes Richard Lempert to argue that traditional jurisprudence has failed to account for the host of social and other factors which may contain and structure discretion. In his view:

> Legal philosophers tell us that, when rules authorize discretion, it means that decision-makers are free to choose from a range of legally permissible options. Yet, if we look at how adjudicative discretion is actually exercised – that is, at the pattern of decisions generated – little advantage may be taken of this supposed freedom. ... What the law gives in discretion – that is the authorization to reach one of a number of possible decisions and the awareness of this freedom – social forces may take away. This is not surprising, for what legal discretion necessarily accords is the freedom to be influenced by factors other than the law.[416]

But just what are these social forces and how do they act upon discretion? In his opinion, discretion is a factor of rules, of behaviour, or of the sense that decision-makers have of

---

[414] *Id.* at 13.
[415] *Id.* at 14.
[416] Lempert, *supra* note 411 at 226-227.

their own scope for freedom of action.[417] Because any one or more of these factors may be present in any given decision, it is sometimes difficult to discern where one factor has left off and another has begun. However, some examples of these influences in action are not difficult to provide.

2.3.1 Serial Discretion

Serial discretion occurs where an individual decision can be seen as just one in a sequence of decisions. While each decision may be conceptually or even legally conceived of as a unique creature unto itself, yet it does not occur out of context and so is, inevitably, a creature of that context. Thus, a decision-maker who is reliant upon another for the collection of information or preparation of reports upon which the decision is to be based, may be influenced by the form of the evidence, the tone of the report and other factors.[418] The watershed case of *Re Singh and M.E.I.*[419], for instance, contains just such an example, albeit in the context of refugee determination. Under the procedures then extant under the *Immigration Act*, Refugee claimants were required to be examined under oath about their claim by a Senior Immigration Officer. A copy of the claim and a transcript of the examination were then forwarded to the Refugee Status Advisory Committee which reviewed these items and forwarded an opinion to the Minister as to whether status should be granted. In this case, the Minister's decision was predicated upon a prior decision by the Refugee Status Advisory Committee. Though the Minister possessed discretion to disregard or accept the Committee's opinion, quite obviously that

---

[417] *Id.* at 185.

[418] See Hawkins "The Use of Legal Discretion: Perspectives from Law and Social Science", *supra* note 412 at 31.

opinion was influential to the Minister's decision making process. Similarly, in the event that the Minister's decision was negative, the claimant was entitled to appeal to the Immigration Appeal Board for a reconsideration of the matter. However, that Board, beyond considering materials and information supplied by the appellant, was also required to consider an opinion from the Minister of Immigration, who had previously passed on the merits of the claim. Beyond certain rudimentary reasons, the claimant was not afforded an opportunity to know the details upon which the Minister's determination was based and so to counter them.

Under the circumstances, the Supreme Court of Canada held that the applicant's right to "life, liberty and security of the person" under s. 7 of the *Charter* had been infringed, since the process was defective in terms of fundamental justice. The Immigration Appeal Board's mode of adjudication in this instance was serial in nature, depending as it did upon receipt of an opinion by the Minister.[420] Though there was no suggestion that the Board was partial or biased in favour of the Minister, yet the procedure raised concerns as to what weight and effect the Minister's determination carried. Was the Board the sufficiently independent not to be overly swayed by the Minister's opinion? Further, given the secrecy surrounding the Minister's determination, it was impossible to say with certainty what facts and matters had been considered by the Minister. In the absence of an opportunity for the applicant to respond to such facts and matters and to counter any deficiencies, the Court felt that there was a danger that the Board would simply accept that the Minister's opinion was sound and should be

---

[419] *Supra* note 64.

[420] Though, for that matter, the Minister's determination also appeared to be of a serial variety, depending

followed.

The problem of serial decision-making seen in *Singh* has since been obviated in Refugee determination cases by the adoption of revamped determination procedures that are much more judicial in nature than was formerly the case. Nevertheless, the type of serial decision seen in *Singh* is still a common occurrence in Canadian immigration law. The issuance of a Minister's Permit to overcome inadmissibility, for example, often requires that field officers seek concurrence from senior officials at headquarters. Those senior officials, having never seen the applicant, depend upon a report and recommendation from the examining officer to aid them in their decision. A similar situation obtains with respect to discretion under sections 2.1 and 11 of the *Regulations*. In both instances, the determination by an examining officer that an exercise of discretion is appropriate requires the concurrence of another more senior officer. Of course, the senior officer typically has not seen the applicant and is reliant upon the assessment and recommendation of the examining officer.

Another example of serial discretion which was considered in the BPR plan, but never implemented, centred on CIC's office network restructuring plan. That plan has adopted a hub and spoke system of offices, with a central "mother office" at the hub of the system, receiving all applications. The mother office processes to completion all routine cases. More problematic cases are farmed out to smaller satellite offices, where personalized investigation and consideration can be completed. Although the satellite offices now have complete responsibility for the file once received, under an earlier model, it was envisioned that they might only investigate the particular aspect of a case

---

as it did upon the recommendation of the Refugee Status Advisory Committee.

seen as problematic. In this "split-interview" scenario, the satellite was to undertake an investigation and report back with a recommendation to the mother office, which would then complete the file as deemed appropriate. The theory of this model was that the investigations of the satellite office would be simply that – an investigation but not really a decision. Serial decision making, of course, is often anathema under our legal system, since it runs contrary to fundamental notions of administrative justice and fair play seen in maxims like "she who hears must decide". One assumes that the "split-interview" model was discarded for the reason that it was unlikely to withstand serious scrutiny upon judicial review or appeal.

Serial discretion is also implicated in situations where staffing may be inadequate to keep up with volume. In those circumstances, resort may be had to a sort of binary typification system, whereby cases can be quickly disposed of by classifying them as either "good" or "bad".[421] Discretion in such situations may tend to err on the side of caution. Paper-screening at high volume case processing centres, in particular, may be highly prone to such caution. In the paper-screening vetting process, officers are required to categorize the application in one of the immigrant classes and then briefly assess it for content, completeness and, most importantly, compliance with criteria for approval in the particular category. If the case appears to be within typical parameters for such cases, the officer may choose to waive the requirement for interview. If there is anything even slightly amiss or missing, the decision may be taken to convoke interview where more time is available to sort out such details. The consequences of interview are substantial for both CIC and the client, involving outlay of additional resources and effort. This is

particularly unfortunate if the matter is one of minor detail that might be easily resolved by a simple telephone call or letter. However, productivity and other constraints may lead to a sort of buck passing, where the case is sent on down the line to a location where volume is less valued. Likewise, productivity concerns may put a case into a process where lack of personal responsibility leads to a total failure of discretion. In such an extreme, an application may flounder in limbo awaiting a small, but essential exercise of discretion. The lack of a single responsible decision center, coupled with absence of an effective oversight system, may leave a complete application in limbo, resulting in greater energy expended further down the line to salvage the matter.[422] It is important, therefore, for managers of high volume case processing centers to be sensitive to the balance that is necessary between short term productivity goals and overall efficiency. Too much emphasis on the former can give rise to overly simplistic binary typification that may eventually obviate any gains.

Somewhat related to the problem of binary typification is that of "consecutive discretion", a phenomenon which Lempert refers to as "familiarity breeding precedent".[423] As he describes it, high volume tribunals, in an effort to reduce work burdens, may actually restrict their use of discretion by developing shorthand ways of typifying cases. In his study of a public housing eviction board, for example, he found that the more cases the board heard, the less time was actually devoted to each case. He saw this turn of

---

[421] Hawkins, *supra* note 412 at 39-41.
[422] For an apparent example of this, see Parker Barss Donham, "For better, for worse", *supra* note 203. There, a Nova Scotia resident married a U.S. citizen, whom he sponsored for permanent residence in the family class. The article details a "14 month ordeal of red tape" suggesting bad information, poor communication and absence of individual responsibility by and within CIC. The matter was apparently finalized only after direct involvement by the Minister of Citizenship & Immigration.
[423] Lempert, *supra* note 411 at 208.

events as a factor of precedential experience being built up over time.[424] As the board gained in experience and as its caseload increased, it relied upon precedent to reduce the work burden each case entailed. He concludes, therefore, that authorities which process large numbers of factually similar cases tend to act to curtail their discretion as a coping mechanism.[425] Discretion, it seems, may be a luxury reserved mostly for small volume tribunals which tend to hear factually dissimilar cases.[426]

Serial discretion may also be seen at work in more general instances as well. Where a client has been refused a particular service in the past, that refusal may create presumptions that the client will need to positively overcome in order to obtain a contrary decision. For example, a previous deportation suggests a willful disregard by the applicant for Canadian immigration law. This presumption speaks to credibility and character and so may well influence subsequent decisions on re-admissibility, at least in so far as there may be an element of discretion available in any such decision.[427] Further, because of institutional and other factors, immigration officers may be hesitant to countermand previous decisions made by colleagues in that office or other offices.[428]

---

[424] *Id.* at 207.

[425] This observation presents an argument in favour of the importance of judicial review as a mechanism for monitoring administrative tribunals. One of the most important grounds for review, of course, is the allegation that a tribunal has unduly fettered its discretion.

[426] He uses the example of the U.S. Supreme Court as such a tribunal, which tends to prefer to retain its discretionary authority. See Lempert, *supra* note 411 at 208-209. See also Schneider, "Discretion and Rules: A Lawyer's View", *supra* note 118 at 82-83, who observes, for example, that "[t]he more work a court must do, the less time it will have for the work of exercising unfettered discretion. Such a court may then exercise discretion in deciding how to decide cases, but will have an incentive to construct principles of decision that are easily applied and to follow those principles as routinely as possible. Such a court will thereby have constrained (although not entirely prevented) its own exercise of discretion in the future. [footnote omitted]"

[427] See s. 55(1) of the *Act* detailing the requirement for "Minister's Consent" to overcome the effects of a previous deport. For a review of the discretionary nature of a grant of consent by the Minister, see *Singh* v. *Canada (Min. of Employment & Immigration)* (1986), 6 F.T.R. 15 (Fed. T.D.).

[428] This is particularly so, since offices confronted by an application for Minister's Consent are advised to

Certainly, where the fact of previous refusal surfaces, standard procedure is to investigate the circumstances giving rise to that refusal. Only where there has been a material change in circumstances, or the decision is shown to be in error, is the applicant likely to receive a different outcome.

Clearly, serial decision-making may implicate an untoward degree of fettering of discretion, if the subsequent decision-maker perceives herself to be bound by the previous decision. But where she considers that prior decision as just one fact or matter among many to be considered, and so long as she stays alive to all of the circumstances as they currently exist, she is unlikely to be faulted for fettering her discretion.

2.3.2 Rule Constraints

Sociologists emphasize that rule structure has important implications for the relative freedom or constraints that may arise in the delegation of a discretionary power. Where the delegation is accomplished by way of a simple rule, there is likely to be less relative freedom for the exercise of discretion. Simple rules tend better to capture the true essence of what a power is actually about. A more complex rule, however, is more likely to obscure real intent and leave decision-makers with a wider scope for interpretation and action.[429] It might be added, as well, that a simpler rule is less likely even to incorporate

---

seek input from the deporting office. See CIC IM Chap. OP-1, Para. 17.4 (Ver. 11-96) "Requests for Minister's consent", at 29, which provides the following direction for visa offices:

> You must obtain all available information about the removal from the responsible office in Canada. You should ask for the removing office's recommendation about approving or denying the request.

[429] See Hawkins, *supra* note 412 at 36 who states: "The form and complexity of a rule have important implications for the degree of discretion created. ...[T]he simpler the rule the more likely it is that the principle embodied in it will be adhered to, while the more complex the rule the greater the discretion available to individual decision-makers in its interpretation and application. Similarly, complex systems of rules, though highly specific, may also have the effect of creating greater discretion in practice...."

an element of discretion *ab initio* than is a convoluted rule, which may be accompanied by reams of explanatory material. An illustration of this might be the policy concerning processing of applications for permanent residence from religious personnel. Nowhere in the *Act* or *Regulations* is provision made for handling of applications from priests, nuns and other religious personnel. While such applications are processed in the Independent category, no religious occupations are listed on the Open Occupations List. Ordinarily, this would be fatal, as lack of "occupational demand" is a complete barrier to a successful Independent application.[430] However, a single, short paragraph in a policy manual provides authority to overcome such a defect.[431] So long as the religious official has an informal offer of employment[432] from a church in Canada, and it appears that adequate provision for a "reasonable standard of living" has been made, then the application has met the substantive requirements stipulated for such cases. So short and cursory is this policy statement that it leaves little room for discretionary action. A letter signed by someone who purports to be an official associated with the particular church or congregation is generally sufficient proof of the job offer. Likewise, most church groups

---

[430] See section 11(2)(a) of the *Regulations* which prohibits a visa officer from issuing a visa to Independent category applicants who do not obtain "...at least one unit of assessment for the factor [of occupational demand] set out in item 4 of column I of Schedule I...." A demand factor is attached to each occupation on the Open Occupations List. Those not on the list are considered to be "zero demand".

[431] See CIC IM Chap. IS 1.36.

[432] This is opposed to the more formal "validated job offer', which is the norm in Independent category cases. Validation is a two step process involving the Labour Market Services section of the Canada Employment Centres (CEC) and the overseas visa offices of CIC. If an employer is able to satisfy CEC that there is a paucity of domestically available workers willing or able to take up the offered employment, then CEC will issue a validation that is of one of two types: temporary or permanent. A temporary validation will enable a foreign worker to obtain only an employment authorization of a fixed, though usually renewable, duration. A permanent validation, on the other hand, typically will enable the foreign worker to qualify for both permanent residence in Canada and an employment authorization to tide them over while the permanent residence application is in process. See s. 20 of the *Regulations* and also, generally, J.R. Bart & B.J. Trister, *Work Permits and Visas* (Scarborough, Ont.: Carswell, 1995) at 191 – 214.

tend to be registered for tax purposes as non-profit societies and can usually provide evidence of their existence by way of some sort of registration. There is also little scope within the policy even to question the qualifications of the immigrant to engage in the calling of a religious minister.[433] As a practical matter, therefore, the only real scope for discretion arises in relation to the question as to sufficiency of the financial and other arrangements providing for a "reasonable standard of living". Although CIC occasionally publishes guidelines suggesting the amount of income a typical immigrant requires for successful establishment in metropolitan areas of various sizes, these are mere guidelines only and everything is dependent upon the particular circumstances in each case. In practice, it is recognized that the support of a religious congregation may well mean that while the actual salary is low, yet the applicant will be able to draw upon considerable community support. Likewise, the nature of the religious calling may be such that the particular applicant may have relatively simple needs. Hence, discretion tends to favour a lower threshold than might be expected of regular Independent category applicants.[434]

The concept of rule constraint, however, is not just as straightforward as saying simpler rules leave less room for discretionary decision making. Changing the rules, for example, to eliminate discretionary power may not, in some cases, actually eliminate it. Instead, it may simply cause such power to be shifted to another location on the

---

[433] I recall, for example, issuing an immigrant visa to a steelworker with no previous specialized religious training or experience as a minister. The policy contains no stipulation as to qualifications and so congregations in Canada are free to hire whomever they see fit to minister to their spiritual needs.

[434] Indeed, this example may also serve to illustrate the difficulties that may be inherent in attempting to produce a fixed rule for all cases. Nuns and monks, for example, tend to follow a vow of poverty that requires them to eschew worldly possessions. Moreover, they may be required to forego any sort of regular income or even to rely entirely upon the largesse of strangers. Though not impossible, a fixed rule of general application dealing with all of the variety and complexity inherent in the personal circumstances in each of these cases would tax the abilities of even the most imaginative legislative drafter.

administrative continuum.[435] Thus:

> The particular way in which discretion will be exercised may not be predictable from the particular forms of rules. ... Since discretion is adaptive in character, rules may serve to displace discretion to other sites for decision-making within a legal system, and thereby possibly to enlarge it, or to create conditions for its exercise in more private, less accountable settings. A telling example of this effect is to be found in the efforts to curtail discretion selectively to release prisoners on parole in California by use of legislatively fixed, presumptive sentences which served to push effective power to dispose of serious criminal cases into the hands of those who engage in pre-trial bargaining.[436]

In the context of CIC operations, the cost saving drive that has seen reduction of staff and centralization of processing in high volume offices, insulated from direct client contact, appears to have driven more control over discretionary authority into the hands of applicants and their counsel. Interview waiver is heavily reliant upon case presentation and form becomes almost as important as substance, when the process of selection is completed without any personal contact between the client and the decision-maker. The client, or her advocate, has greater control over what will be seen and considered by the decision-maker. Just as the California law pushed more power down to offenders to achieve plea-bargaining, so does interview waiver push more opportunities into the hands of applicants to gain a favourable selection decision. Since the advocate representing a client may be the only person to actually see the client, the advocate's bargaining position in "negotiation" for a positive selection decision is enhanced. Accordingly, skilled lawyers and consultants understand that presenting cases in the "right" fashion is essential

---

[435] See generally Joel Handler, "Discretion: Power, Quiescence, and Trust" in Hawkins, ed., *The Uses of Discretion*, *supra* note 9 at 331-360, who notes that the importance of discretion can arise in situations removed from the point where it might obviously be employed.

[436] Hawkins, *supra* note 412 at 36.

to obtaining a favourable exercise of waiver discretion.[437] This implies not just simply submitting a fully completed application form and full documentation, but also emphasizing skills, qualities or attributes of the applicant that might be considered desirable in a prospective immigrant. This can be done, for example, by including information or materials not strictly relevant to the selection criteria, but which may reinforce the notion that the applicant is a "good person".[438]

Another facet of the rule constraint notion is the sense that decision-makers may have of being constricted in their discretion, even when the rules do not actually restrict them. That is, a multiplicity of rules may actually induce an erroneous sense of little effective freedom. Or, conversely, though the rules may specify a freedom of action, yet the decision-maker may misapprehend the scope of action available to them. This can arise for a number of reasons, including a lack of confidence arising through inadequate training or preparation, a perceived lack of support for "free-wheeling" judgment within an organization or even because of an undue regard for the possibility of appeal.

---

[437] See Derek Lundy, *supra* note 356 at 12, where the following is given:

> Toronto lawyer Joseph R. Young told *The Lawyers Weekly* that to represent clients properly, lawyers should put together as complete an application as possible to increase the chances of getting an interview waiver of the personal interview.
>
> Waiver will expedite getting a visa, and could cut down the time it will take a client to get into Canada to three or four months, from a year or longer if the client is put into the interview queue. ...
>
> Mr. Young noted that a completed IMM8 form and fee payment was technically an application, but that a complete application should include all the documents the government needs to decide on eligibility and waiver of interview.

[438] Though such information may not be directly relevant to the selection criteria and qualification for immigration, it may suggest that the applicant is a well-rounded individual and will get on well irrespective of the number of points awarded on an assessment conducted pursuant to the selection criteria. This, of course, is the sort of information which may motivate a visa officer to consider a grant of positive discretion. In one case, for example, I recall seeing an applicant who had suffered polio as a child, with the result that one leg was atrophied. Nonetheless, he did not allow this to prevent him from pursuing a passion for badminton to a semi-professional level. Any shortcomings in his application were rendered insignificant in light of the personal courage and drive this story revealed. In my opinion, it is exactly this sort of initiative and motivation that the selection criteria attempt, though inadequately, to describe and

This latter case can be seen in the discretion accorded to visa officers under section 11(3) of the *Regulations*. Though both a positive and negative discretion are available, officers have the perception that the two discretions are not equal.[439] CIC is unlikely to appeal a positive exercise of discretion by one of its own and, since a successful applicant is also unlikely to complain, any repercussions from granting a dispensation are either non-existent or inconsequential. On the other hand, officers know that an exercise of negative discretion is almost certain to result in an application for judicial review by the applicant. This invariably results in extra work for the officer, in the way of preparation of affidavits, cross-examination on affidavit and the like. If little credit is given for such work in overall work targets, an officer may be hesitant to engage in any decision-making viewed as carrying an "appeal risk".[440] Further, notwithstanding the notion of civil servant anonymity under the doctrine of ministerial responsibility, there is the possibility on review of being personally chastised or otherwise found lacking in common sense or decency, an invariably unpleasant experience.[441] Such public

---

capture.

[439] The perception actually has some grounding in reality, in part because of the restrictive approach taken by the courts with respect to negative discretion. See generally the discussion below in section 3.3.4 Negative Discretion, concerning the courts' handling of negative discretion.

[440] See Roy Sainsbury, "Administrative Justice: Discretion and Procedure in Social Security Decision-Making" in Hawkins, ed., *The Uses of Discretion*, *supra* note 9 at 295. Sainsbury notes that the appeal process is double edged. While it forces decision-makers to scrutinize their own decisions more closely and allows for bad decisions to be righted, it may also retard discretionary decision-making. He states, at 319-320, that it may "...encourage... taking the easy option in hard cases by allowing a claim where perhaps it is not justified. This prevents appeals, since claimants awarded a benefit generally do not complain, and, even if the decision is not justified, there is only a slim possibility that the case will be scrutinized as part of a monitoring check. Such practices are not officially sanctioned but are attractive to busy adjudication officers."

[441] See for example, *So* v. *Canada (Min. of Employment & Immigration)* (1995), 28 Imm. L.R. (2d) 153, 93 F.T.R. 153 [hereinafter cited to 28 Imm. L.R.], where the actions of the visa officer are described by Justice Rouleau, at 155, as the most blatant example of willful bad faith and abuse of discretion he had ever encountered during his tenure on the bench. For another example, see also *Tsung-Yang Hu* v. *Minister of Citizenship & Immigration* (5 November 1995), (F.C.T.D.) [unreported] where, although the visa officer's decision was sustained by the court, the court did so using mixed metaphors, saying "...while the visa

censure, of course, also carries the risk of wide ranging negative publicity for the employer. Because the media tends to prefer to focus on what has gone wrong, rather than what has been done right, a siege mentality can develop, whereby officials are even more hesitant to act for fear of embarrassing themselves and their employer and to avoid potential negative career consequences.

Another significant organizational factor that may dramatically impact upon discretionary decision-making is the pressure that both the courts and the central immigration bureaucracy may impose upon functionaries to conform to a single, narrow ideal of what discretion is or should be. Such pressure is often gussied up as consistency, which is generally seen as a good thing and fundamental to our notions of justice and fair play. Simply stated, it means that like cases are to be treated alike. This principle is derived largely from the common law courts, where it is known under the Latin term, *stare decisis*. And indeed, precedent is the platform upon which rules are built. Discretion, however, exists on the other side of this principle, as a tool for doing justice where the rules are incapable of doing so.

The earlier example of the bureaucracy frowning upon one officer lightly overturning the decision of another officer is a good specimen of a mild form of the favouritism shown to the ideal of consistency. From a management perspective, it is also useful to encourage conformity since it aids the achievement of productivity goals. Since rules offer the clearest guidance, they are central to any drive for increased efficiency. For these reasons, an environment striving for productivity will inevitably relegate

---

officer may have been somewhat harsh in his assessment that no dependency existed, in my view, it could not be said that his determination was so unreasonable as to warrant the interference of the court."

discretion to secondary importance, whether or not that result is intended.[442] However, a potential downside may arise, if decision-makers feel themselves forced into a sort of game playing just to meet production targets. This occurs, for example, when decision makers choose to handle a case in one fashion rather than another, even if that other is more expeditious, simply because greater credit is somehow given for a particular method of case handling.

In discussing *rule constraints*, it must be recognized that an exceedingly important source of influence affecting exercise of discretion must come from the very ideology upon which a particular statutory regime may be founded. Though a statute may provide a host of rules for application in any case, yet there is inevitably a guiding ethos hanging over the whole exercise. In the case of Canadian immigration law, that ideology is one of facilitation, rather than control. At common law, the rule was quite simply that no foreigner had a right of entry except with leave, which might be arbitrarily withheld or, if granted, might be subject to very onerous terms.[443] The *Immigration Act* represents a fundamental shift from the common law position, taking for its primary *raison d'etre* the facilitation of immigration.[444] This principle stands first and foremost among those declared for our immigration law and wields considerable influence as to how discretion is viewed in the immigration bureaucracy, the judiciary and the legal

---

[442] Hawkins, *supra* note 412 at 39.

[443] *Attorney General of Canada* v. *Cain*, *supra* note 152.

[444] See for example, *Hajariwala*, *supra* note 269, 6 Imm. L.R. (2d) 222 at 226, where the following interpretive guidance is provided:

> ...it is important to bear in mind that Parliament's intention in enacting the *Immigration Act* is to define Canada's immigration policy both to Canadians and to those who wish to come here from abroad. Such a policy cannot exist without complex regulations, a good many of which appear to be restrictive in nature, but the policy should always be interpreted in positive terms. *The purpose of the statute is to permit immigration, not prevent it.* [emphasis added]

community generally.[445] And it is this concept, positioned as a sort of "super-rule" over all other rules, which percolates down to the lowest levels of the immigration bureaucracy and provides an *animus* for all other rules.[446] Notwithstanding this, however, it is also true that our immigration law does provide for controls in various circumstances. The conflict is resolved simply by a compromise that says immigration shall occur unless otherwise prohibited.

It is apparent then that decision-makers can be subjected to competing, antagonistic influences that pull in opposite directions. These can be contained in the rules themselves or they may be found in the approach taken toward the rules. The fact of potentially cross purposes being embodied in a single system creates a sort of administrative schizophrenia that is indeed a hallmark of our immigration law. For example, while the system tends to favour rules and is wary of discretionary power, yet strict adherence to rules is synonymous with bureaucracy.[447] Though, it is often a fine and difficult line to walk between compassion and indifference, it is nonetheless one that our immigration system demands unrelentingly. The difficulty of following that line is

---

[445] Skeptics will, of course, cite particular cases as examples militating against the proposition that the bureaucracy sees itself primarily as facilitation oriented. Such cases, however, need not be viewed as disproving. Of the ten objectives listed in s. 3 of the *Act*, eight are essentially directed to facilitation while only three have a predominant control orientation. The public, on the other hand, appears to have a much more mixed understanding of the purposes of the *Act*, as reflected in opinion polls and the media. Some of this is doubtless attributable to lack of familiarity with the *Act* and media influence which tends to dwell on sensational cases that represent the extremes of what immigration is really about.

[446] At least, it does so in the case of those whose primary job function is to process immigrant applications. There is, however, an interesting dichotomy in philosophy that seems to obtain within different branches of CIC. Port of Entry officers, for example, appear to be more affected by a control orientation than are visa officers situated abroad, engaged primarily in selection. During my four year tenure as Deputy Immigration Program Manager at the Canadian Consulate General in Seattle, Washington, the tension between these two outlooks was a constant source of frustration, since the fallout from control decisions at nearby border crossing points invariably wound up at the Consulate for ultimate resolution. In many cases, a difference in philosophy between the POE and the Consulate was apparent. The problem was not simply a POE/Consulate one, however, for a more or less rigid control orientation could also be seen between

such that discretion may harden over time into rules, which become a shield to deflect criticism. The bureaucrat may tend to act more bureaucratically in order to avoid responsibility for difficult decisions that are seen as risky.

The real question, of course, is how to keep discretion alive in order to avoid bureaucratization. Obviously, functionaries within the system must be empowered to feel that they have authority to mold the discretionary rules. Likewise, they need to have time and be rewarded for taking the effort to ameliorate and individualize the rules, rather than blindly adhering to and applying them. There must also be a sense of institutional support for such efforts. An undue focus on productivity and fiscal concerns will inevitably displace independent action in favour of rote, high volume routine, which gives little quarter to discretion. In a situation of restructuring and re-engineering, the answer does lie, at least in part, by reducing work burdens that add no value. In this way, resources may be freed up to devote to the minority of cases where value is added by intensive, individualized judgment. So too, since discretion is a habit best acquired from experience and practice, shifting discretion to specialized centres focused on particular aspects of discretion may offer better use of resources. Officers dealing exclusively with a waiver decision can hone their skills in that one particular area. Likewise, officers dealing with discretion only at selection interviews will develop expertise in that particular situation. Expertise must eventually beget efficiency. Both of these, of course, are strategies that have been adopted by CIC. The gains from such innovations, however, can be adversely impacted by excessive emphasis on productivity and so CIC needs to

---

POE's, with larger volume POE's tending to be more lenient.

[447] See generally Wade, *supra* note 36 at 360-366 on "Over-Rigid Policies".

remain alive to the necessity for a proper balance between these items, as it continues restructuring.

2.3.3 Relational Distance

While discretion can be a useful tool for adapting rules during periods of rapid social change, yet institutional change may also work to limit the availability, utility or efficaciousness of discretion. Downsizing and restructuring within CIC has led to centralization of resources in high volume flow centres. Given that client contact is not part of the normal operating methodology of such facilities, the availability of adjudicative discretion is inevitably reduced. This may be both good and bad. A lack of intimacy between the adjudicator and the subject, while fostering greater objectivity, may also result in more indifference.[448] Thus, geographic isolation or physical insulation can give rise to a distance that is potentially capable of being both facilitative and restrictive. Such a separation between decision-maker and applicant is referred to by social scientists as *relational distance*. Relational distance, however, goes beyond mere physical separation. It also implicates an important connection between discretionary decision making and the social and professional backgrounds of the decision-makers. The social status of both adjudicator and client are factors that can increase or lessen relational distance between these parties. The greater the relational distance, the greater the likelihood that discretion will not be exercised in the applicant's favour, while the opposite holds true where the separation is less. The character of both adjudicator and applicant are thus highly relevant, according to this theory.

---

[448] M.P. Baumgartner, "The Myth of Discretion" in Hawkins, ed., *The Uses of Discretion*, *supra* note 9,

In respect of the decision-makers, Feldman posits that professionals, like doctors and lawyers, hired by bureaucracies tend to behave less bureaucratically than do other types of workers.[449] These bureaucrats, rather than shrinking from discretion, prefer instead to engage it actively in carrying out their duties. And, "[w]hen there is a conflict, professionals tend to value their professional judgment over their bureaucratic duties and affiliation".[450] Beyond professional formation and experience, decision-makers also bring to their work social backgrounds that may influence how they react in the use of their power. A person from a particular socio-economic background is more likely to relate favourably to others with a similar background, since they will feel a greater personal connection.[451] In a system dealing with immigrants, a practical effect of this influence is that one could expect immigration officers with some recent immigrant experience in their family or close circle to be more generally predisposed towards immigrants.

Another aspect of the concept of relational distance relates to the social status of both decision-maker and applicant. In particular, social scientists describe a connection between high status and case outcomes. As Baumgartner states, "[w]ealth and prominence have a consistent and patterned effect on official decision-making...."[452] She assets that a higher status official will generally tend to be more authoritative in their decision-making than is a lower status official. On the basis of her studies of legal personnel, Baumgartner concludes that if permitted to exercise free choice, they will

---

129 at 131.

[449] Feldman, *supra* note 410 at 166-167.

[450] *Id.* The obvious implication seems to be that where more discretionary decision-making is desired, then a more highly educated staff is necessary. Conversely, a less skilled work force would seem to lead to a less discretionary environment.

[451] Baumgartner, *supra* note 448 at 152.

[452] *Id.* at142.

consistently favour some groups of people over others for reasons that are not strictly related to the dictates of the law. For example, she observes that black judges are less likely to convict than are white judges and that better educated juries tend to convict more often than their less well-educated counterparts.[453] The upshot is that legal personnel are not so interchangeable as legal ideology might claim, or at least desire.[454] Rather, those personnel tend to respond in ways that are consistent with their social background, cultural identity and other influences.

Moreover, since moral evaluation is implicated in decision-making, the makeup of the applicants themselves is an important source of influence on any discretionary decision-making. In the case of immigration, the importance of this notion is not to be underestimated. In marginal cases, at any rate, where a positive application of discretion may be necessary to overcome an impediment, it suggests that a high status applicant is more likely to receive the benefit of any doubt. However, it does not stop at the notion that some types of applicants may be favoured by some types of decision-makers. It also means that advocates too will tend to work harder for clients considered by them to be high status.[455] Thus, they may attempt, for example, to obtain special treatment for such clients like pre-vetting of the application by the intended office of filing, or a conference with the officer in charge to discuss handling of the case.[456] Certainly, if sociologists are correct in ascribing considerable importance to social standing of an applicant as an

---

[453] *Id.* at 155.
[454] *Id.* at 156.
[455] It is not uncommon, for example, to receive representations on a case wherein the statement is thrown out that "these are good people." The apparent implication is that the applicants are high status and hence desirable.
[456] Such individualized treatment is prohibited by CIC. See CIC OM OP98-15/PE 98-13, "Policy and Instructions on dealing with client representatives", *supra* note 376. However, this does not prevent some

influence on discretionary decision-making, then this is a point not lost on lawyers and consultants. It may be one reason why they will persist in their efforts to make personal contacts with decision-makers. By doing so, they will hope to gauge the decision-maker and obtain a sense of what sorts of factors, including social status, may be considered particularly weighty or relevant to that decision-maker. Although the status of the applicant is not likely to be the only factor determining how a case will be handled, it may be a significant one in the minds of some decision-makers. More familiarity with the particular decision-maker thus enables advocates to predict more accurately the sorts of decisions that might be expected.

The notion of client status and respectability has other interesting implications. The importance of paper-screening is such that the client must have their best foot forward if they are not only to clear this important hurdle, but also to gain a waiver of interview. And good advocates know that the applicant's "respectability" may mean the difference between smooth sailing, a rough ride or no ride at all. Regrettably, therefore, in the current environment, it seems there must inevitably occur some favouritism for clients with sufficient resources or wherewithal to seek out a professional to ensure the job of presentation is done right. It is not just a case of application preparation expertise that is being purchased though. Immigration middlemen also make it their job to discern patterns of acceptance and rejection, so that they may offer advice to clients as to where best to file their applications.

Certainly, it is this which underlies the entire matter of forum shopping, a well-

---

lawyers from attempting to seek it out nonetheless.

known phenomenon in immigration case processing.[457] Forum shopping goes on because no geographical restrictions are imposed under Canadian immigration law to limit where applicants might apply. Since applicants are not obliged to submit their applications to the visa office serving their country of origin, they are free to apply wherever they choose, for whatever reasons suit them. While the legislative condition which gives rise to forum shopping is easily defined, the reasons why it goes on are more complex. Those reasons may be illegitimate, such as a criminal hoping to slip through undetected at a visa post where his notoriety is not known.[458] Or, they may be more banal, relating to the fact

---

[457] See for example, Paulette Peirol, "Rules for business immigrants panned – Bid to cut fraud by urging entrepreneur applicants to apply in home nations called bad for economy" *The [Toronto] Globe and Mail* (12 March 1997) A6, discussing a meeting between CIC officials and a CBA delegation. At that meeting, CIC urged that business immigrants and skilled workers apply for immigration at the post serving their home country. CIC hopes to reduce the risk of criminals gaining entry to Canada by discouraging forum shopping amongst certain categories of applicants. The idea was not well received by the CBA, as evidenced by the following:

> Catherine Ann Sas, a Vancouver lawyer who was at the meeting, said the association agrees in principle that applicants should apply from their home countries – but only when there is a level, and predictable, playing field in terms of processing times. "It's not fair to have some clients wait two years and others only four months." She and other lawyers readily admit to "visa shopping," or hunting for relatively hassle-free and efficient foreign missions to process their clients' applications. And that will likely continue until the processing backlogs are cleared, they say. Visa offices in cities such as Los Angeles, Buffalo, Seattle, London, Manila and Damsacus, for example, are known to process applications far more quickly than those in Beijing, New Delhi and Belgrade. "If your home country is slow, you have no choice, no recourse. And this, I find offensive to people in China and India, where volumes are high and resources are down," Ms. Sas said. "If you have all posts operating on the same level, with a six-to-12 month waiting period, then you won't see people shopping around," she added.

It is difficult to deny that if all offices offered the same processing speed, much forum shopping would likely be ended. On the subject of processing delays, however, it is interesting to note that one person's problem may be another's opportunity. For example, prior to the take over of Hong Kong by China on July 1, 1997, the demand for immigration out of Hong Kong was tremendous. After the take over, however, and the calming of many fears as to the likely implications of mainland Chinese rule for Hong Kong residents, that demand has now ebbed. Interestingly, as well, while speed of processing is often cited as the justification for forum shopping, it is not always speed that is sought. In the case of Hong Kong residents, their case files were to be found scattered amongst almost all visa posts worldwide. In some cases, their interest was sometimes not in fast processing, but rather lengthy processing. With one eye on the take over date, their preference seems to have been just to have a case in the queue, as a sort of insurance policy. Accordingly, such applicants were willing to wait as long as possible to get a final decision. Missed interviews were common. If pressured under threat of refusal to attend at a rescheduled date, a request for the file to be transferred to another office was often the result.

[458] This problem is a significant one and causes much embarrassment for the department. For a couple of

that one post may be more convenient because of good transportation links or because it holds the promise of faster case processing. More saliently for the present discussion, however, it may also occur because of a perception that a particular office may, for any number of reasons, including status or respectability of particular types of clients, be more willing to engage discretion than another.

Whatever the reasons, the opportunity for forum shopping affords a significant opportunity for outside actors to exert influence on the workings of the system. Schneider refers to this as "publicly enforced private government".[459] It is most effective on those parts of the system which are least affected by rigid rules and allow for discretionary decision making. During recent reorganization, there was a period where CIC actively studied its physical resources in order to determine which offices could be reduced or eliminated and which could be enlarged by centralization of labour and capital assets. While the potential cuts were under consideration, some advocates handling large volumes of cases saw an opportunity to maximize the potential success for their cases. Careful always to mind the line between legitimate advocacy and conduct unbecoming, they would inquire about specifics of individual office decision-making in an effort to ascertain whether the particular office was more or less disposed to be large and liberal in

---

examples, see "Drug suspect let into Canada", *supra* note 115, and "Alleged triad leader's entry traced to bid to save jobs", supra note 364. Though cases of high profile criminals entering Canada on visas issued directly to them are comparatively few in number, they always attract much adverse media attention. Invariably, such entries are traced to forum shopping and the actor having taken advantage of an unsuspecting immigration post, far removed from their country of origin. For this reason, CIC has issued a policy directive making mandatory the necessity of record checks for non-resident applications. Any mission receiving an application from a person not normally resident in the territory of the mission is required to conduct a record check with the mission responsible for the applicant's usual place of residency. See CIC "All Mission Message - OFB197" 25 August 1995.

This problem has also prompted the department to recently designate 9 "Business Immigrant Centres". See CIC News Release 98-27, *supra* note 404.

[459] Schneider, *supra* note 118 at 56.

its interpretation of the *Act* and *Regulations* and in the use of discretion.[460] Given the nature of the bureaucratic tendency to empire building, the lawyers were sensitive to the pressures upon individual office managers at that period, when office cuts were under contemplation, to justify the existence of their operations. As a result, they were not loath to dangle the expectation of an increased file load as a plum in hopes of obtaining a favourable reaction from a beleaguered office.[461] In the end, CIC appeared to make office closures based upon rationalizations focused more on overall geographic sense, and less on work volumes in particular offices.

Relational distance may be a phenomenon that is reaching its fullest potential in the 1990's. As is apparent from CIC's example, it has been seized upon as a way to increase productivity and reduce costs through reduction of personal interaction with clients. However, it is not a phenomenon limited to immigration law. It is, in fact, a trend that now affects many industries. Advances in the potential of electronic communication and advent of the Internet have made much of this possible. From email to Internet shopping, the need for direct human contact has been reduced across many facets of life today.[462] As the capability of alternative methods of communication and interaction has grown, so too has acceptance of impersonal transactions, even from

---

[460] For a brief discussion of some of the ethical issues faced by lawyers in advising their clients about which visa office to file with, see Cecil L. Rotenberg, Q.C. and Robert J. Moorhouse, "A Practice Note: Ethics and Influencing Your Client's Choice of Visa Offices" (1995) 30 Imm. L.R. (2d) 271.

[461] I am unaware of any agreements of any kind being formed between consultants and an office of CIC. Nonetheless, this does not obviate the fact that there was method behind the madness displayed by such consultants in their efforts to ferret out which offices they hoped might be more disposed to a large and liberal approach to selection, and the use of discretion in particular, as a means to draw clientele to justify the continued existence of the office.

[462] See for example, "The Virtual Banker" *The [Toronto] Globe and Mail Report on Business Magazine* (March, 1998) 106, detailing the experience of the Vancouver-based Citizens Bank of Canada, which maintains no physical retail branches and which operates entirely via telephone, fax and the Internet. According to Linda Crompton, the bank's manager, their clientele are unconcerned about the lack of

institutions that were once seen as intensely personal, such as government. It is not therefore a case of "pining for the good old days". Rather, the importance of relational distance is to recognize its impacts and to be aware of its drawbacks. In this way, its benefits may be fully realized and its shortcomings minimized.

2.3.4 Forms of Decision-Making

Social scientists offer a couple of competing theories to explain the forms that decision-making can take. The first is *rational decision theory* which is premised upon the view that decisions are purposive choices made by informed, disinterested, and calculating actors working with a clear set of individual or organizational goals.[463] The central focus of this theory is only on the end product, with the result that any lack of uniformity in outcomes is eschewed. This is, of course, the decision-making methodology preferred in legal and judicial circles, where consistency is an important goal. The major criticism of this theoretical method is that it fails to account for the fact that decision-makers may not always be entirely disinterested in the outcomes of the cases before them. For example, it might happen that immigration officers, as members of the communities to which intending immigrants are destined, may be consciously or unconsciously influenced by their own perceptions as to what qualities in an immigrant might be most suitable to facilitate adaptation to a particular community.[464] In the Independent category particularly, the use of a "personal suitability factor" in the selection process seems designed to promote consideration of what might be termed

---

personal contact that virtual banking implies, especially because of the convenience that it offers.

[463] See generally Hawkins, *supra* note 412 at 20-24.

[464] Of course, leaving aside for the moment the question as to whether such a consideration is at all

"community standards" and other unenumerated criteria. Likewise, as in most areas of decision-making, immigration decision-makers may be faced with goals that are not always free of conflict. Thus, while an officer might have a production target to meet for immigrant decisions, it may be such that he or she is struggling to meet it. The result is that only "clean" cases are finalized, while "problem" cases, involving greater effort, are left aside. Clearly, the officer in such a situation is not entirely disinterested or dispassionate as to which cases might be approved and which are refused or simply never resolved.

The *Naturalist Perspective*, on the other hand, has notions of context and meaning central to it. It prefers to focus on the processes of decision-making. It has shown, in an external sense, how an appreciation of context and pattern is valuable in extending the focus beyond the individual case and in an interior sense by exploring the significance of meaning to individual legal actors who must choose. It draws attention to the need of an individual or organization for survival. People not only follow rules, they make rules, norms, and patterns of expected behaviour. Rational decision theory says that decisions are a result of conscious planning for particular outcomes, while naturalism says these decisions and actions are not the result of choice or conscious planning. Naturalism, as a more holistic approach, emphasizes that decision making is a collective process.[465]

Neither theory is entirely persuasive since, as we have seen throughout this study of sociological methods, the decision making process is infinitely complex and it is difficult to say with any certainty just how influential particular factors may be in a given

---

legitimate.

[465] Hawkins, *supra* note 412 at 26.

case. A factor considered important in one case may prove to be negligible in another. This may be so because of other surrounding details, or it may be so because one decision-maker may not be as troubled by it as another. Indeed, Feldman points out that an obvious criticism of the sociological approach must be the lack of weight it accords to the notion of individual choice.[466] Though it is realistic, and doubtless necessary, to take cognizance of the multitude of social and organizational factors which may constrain and tame the supposed free-wheeling nature of discretion, yet that nature should not be altogether overlooked. Examples of decisions that appear to go against the conventional tide occur frequently. And though these may well be just exceptions to the rule, yet they do exist.

Sociologists might explain these as the result of a deviant decision-maker who either feels sufficiently empowered to risk stepping out of the realm of the expected or is simply so ostracized as to feel no identification with the social forces in play all around her. Another view might be to suggest that these decisions are actually the result of justice in action – that discretionary decisions are being made against the rules precisely because the rules are unjust. Whatever the case, it seems prudent to admit that individual choice remains a wild-card in the sociological deck. Likewise, another criticism must be the limited weight that sociology extends to legal rules as a factor influencing the use of discretionary power.[467] For sociologists, the emphasis is on informal rules. Yet, it must be conceded that legal rules still have an important and influential role, though it may not

---

[466] David Feldman, *supra* note 183 at 289.

[467] See for example Hawkins, *supra* note 412 at 13 who, in summarising the view of sociologists concerning the rules that may effect the exercise of discretion, posits that "[t]hese rules, however, tend not to be legal, but social and organizational in character."

be quite as strong as traditional jurisprudents may have thought, or even desired. At a minimum, it is likely that legal rules retain an influence at least as great as that of more informal rules.

Sociology tells us that discretionary decision-making is an enterprise that is both intensely personal and yet also inevitably collective. Each decision-maker is unique in their outlook and in the personal influences that shape their worldview. However, each also is part of a larger whole and it is a whole which can exert considerable pressure in a particular direction, especially where legal rules exist to guide judgment. At best, therefore, it may be safe to say simply that it is likely a mixture of all these internal and external forces that go into any decision. Notwithstanding this, however, there is still cogency in social scientists' assertion that discretion does not necessarily result in arbitrariness or capriciousness. Thus, we return to their observation that what may appear irrational is actually the predictable result of these internal and external forces which work to foster regularity. It is simply, therefore, a matter of recognizing and collating the forces. If this is done, then the end result typically will produce few surprises.

CHAPTER 3 – The Limits of Discretion

3.1 Introduction

The amount of discretion available to any administrative tribunal is a factor of the constituent legislation establishing the tribunal. Even then, however, the ambit of such discretion is directly controlled by any review panel which oversees its operations. In the case of Independent immigrant selection, that review panel is the Trial Division of the Federal Court. In this chapter the handling of discretion within overseas Independent immigrant selection processes by the courts is examined and the impact that individual decisions have had on the availability of discretion, in both a procedural and a substantive sense, is traced. In this post-*Charter* era, with its emphasis on individual rights, I argue that the courts' attention has been focused primarily on safeguarding applicant rights, with the result that administrative discretion has been significantly circumscribed. This is so, both in the application of substantive discretion to individual cases and in the procedural discretion available to administrators for formulating new ways and methods of dealing more expeditiously with case processing. On the substantive side, for example, it is seen in the approach that the courts have adopted with respect to the selection criteria, which have been taken as fixed, specific and comprehensive measures for qualification, rather than as a general framework within which selection is conducted. Similarly, on the procedural side, the courts have exhibited intolerance for procedural innovations perceived as impinging in some way upon the right of an applicant to a full and fair hearing.

It is in fact a more positivist approach which the courts have followed. This approach has involved scant attention to the difficulties of the legislative drafter, the larger public policy underlying Independent selection and the pressures and constraints facing administrators in maintaining an overseas selection network that is both fair to applicants and to the public interest. The practical consequences court decisions have had on development and application of the Independent immigrant selection system are examined in a number of examples given in this chapter. I conclude consideration of the courts' handling of discretion by offering some suggestions as to the balance that should be sought in Independent immigrant selection matters and how it might be better effected. Since this chapter is about the limits of discretion, I also examine some of the extra-judicial sources of influence that are engaged to contain or manipulate it. That discussion includes some analysis as to how such influences work in the selection system and opinions as to their efficacy.

3.2 Judicial Review

In Canadian immigration law, the domain of discretionary power is found at the interstices between the formal law and rules encapsulated in statutes and regulations and the policy guidance set out in Immigration Department manuals and Operations Memoranda. The central purpose of CIC policy formulations is to provide interpretative guidance as to how discretionary power should be wielded to fill in blanks left in the written law. However, even in the presence of detailed guidance, the proper exercise of discretionary power is hardly uncontroversial. Regardless of how specific and comprehensive they may purport to be, even the guidelines themselves will require some

interpretation and judgment in their application. Moreover, a determination of the proper use of the guidelines is inevitably coloured by the philosophical approach of the person or agency considering their application in individual instances. In practice, the two groups most intimately involved with the workings of the immigration system - lawyers and consultants, on one side, and the bureaucracy on the other – bring broadly disparate views to the interpretation of guidelines and actual usage of discretion. Those views can be roughly divided between the positivist rule of law approach and the broader view of administrative action espoused by the functionalist camp. Positioned between these two groups is the judiciary, whose role it is to keep discretionary power and rule of law ideals in an optimum balance.[468]

Our "rule of law" system, of course, does not permit discretion to exist without limits upon its use. The legal limits are prescribed by what are called variously as "bad faith", "excess of jurisdiction", "dishonesty", "failure to exercise jurisdiction" or "irrelevant considerations"[469]. Since the rule of law mandates that regular courts should exercise an oversight function in respect of administrative tribunals, the boundaries of these legal limits have in fact largely been a judicial creation. The common law practice of *stare decisis* has seen the limits expounded and expanded, in an incremental fashion, over the course of many case decisions.[470] Such an incremental approach, of course,

---

[468] H.W. Arthurs, however, would simplify this description even further by asserting that there are really only two opposing views, those harboured by administrative tribunals and the opposite view held by members of the judiciary and the bar. The bar and bench, in his view, being drawn from the same intellectual pool, are uniform in their suspicions against administrative power and processes and their devotion to judicial review as the ultimate and best form of protection from administrative excesses. See generally H.W. Arthurs, "Protection against Judicial Review", *supra* note 62 at 277.

[469] For fuller discussion of the content of these concepts within the context of immigration law and practice, see below, section Review: A Bifurcated Approach.

[470] See for example, Grey, *supra* note 1. Writing in 1979, he observed that a period of expansion of

means that the matter of limits is continually in a state of some flux and contingent, to some extent, upon all of the circumstances of a given case.[471] Despite this, the general principles which guide the courts' review of discretionary power are reasonably clear and can be stated with some precision.

The principle concern on judicial review is first and foremost on the propriety of the process that was utilized by a tribunal. Because of the focus on process, the exercise of judicial review is most centrally a study of procedural rights and whether they were properly observed.[472] In the mythology of bench and bar, the administrative process is sometimes portrayed as a struggle of classic proportions, pitting the collective and massive might of the government, in the guise of its administrative machinery, on the one hand, against the lone individual, yearning for justice, on the other.[473] Certainly, a comparison of the apparently unlimited resources of the government, on the one hand, and the usually restricted means of the affected private party, on the other, reinforces the view by some that judicial review is an inherently unequal struggle, with individuals at a disadvantage.

Although this somewhat melodramatically overstates the case, it is not farfetched

---

judicial control of administrative discretion was then underway. A lot of water has passed under the bridge since then and the case is perhaps more strongly made today that, at least in immigration matters, there is ample evidence of a judicial trend towards greater control of discretionary power. See generally CHAPTER 3 – The Limits of Discretion, below, for more on this.

[471] See for example Grey, *ibid.* at 132, who posited that the trend to expansion of review of discretion was justified by a corresponding expansion of government and inherent increased potential for abuse.

[472] See generally Evans, *supra* note 2 at 36 to 44.

[473] See for example, H.J. Lawford, "Appeals Against Administrative Decisions: I. The Function of Judicial Review" (1962) 5 *Can. Pub. Admin.* 46. Although this article was written some time ago, it serves to remind how deeply the roots of mistrust of administrative power go. Lawford, at 47, provides the following example:

> Speaking to the Commonwealth and Empire Law Conference in Ottawa in September, 1960, Donald McInnes of Halifax, President of the Canadian Bar Association, urged lawyers to preserve the rights of individuals "from the hand of ruthless and untrained administrative bodies".

to say that there continues to be a certain amount of mistrust of administrative tribunals amongst the judiciary and the bar. The trend in recent times to afford greater procedural protections to individuals caught in the web of administrative law is a clear manifestation of such continuing misgivings.[474] Procedural rights are the counterbalance that offsets administrative power and contains discretion. The role of the courts in reviewing administrative action is therefore both a study of the scope of procedural rights and the limits they impose on discretionary power.

3.2.1 Jurisdiction

Courts have long asserted an inherent jurisdiction to supervise the business of governmental action.[475] However, in earlier times, this jurisdiction was marked by a pronounced reluctance to second-guess administrative outcomes. There has been a reversal of this attitude in more recent decades, with courts now exhibiting expanded interest and zeal for reining in executive discretion. They have been particularly disdainful of any declared zone of exclusivity for discretionary power, brushing aside even privative clauses[476] in enabling legislation to get at the workings of the administrative world.[477] Although, at one time, it was thought that some discretionary powers accorded by statute were simply unreviewable, that line of thinking is clearly no

---

[474] See Evans, *supra* note 2 at 41-42, who notes that the "fairness" doctrine has resulted in an expansion of procedural rights during the last 15 years.

[475] Wade, *supra* note 36, at 284, notes that "[t]he courts of law have inherent jurisdiction, as a matter of common law, to prevent administrative authorities from exceeding their powers or neglecting their duties." See also Evans, *id.* at 24, discussing courts' inherent jurisdiction to conduct judicial review.

[476] That is, clauses which purport to deprive courts of jurisdiction to review administrative actions. Canadian immigration legislation does not contain any such clauses.

[477] See for example Arthurs, "Rethinking Administrative Law", *supra* note 30 at 7, who states that privative clauses are disregarded "...as a matter of presumption, interpretation, public policy, or constitutional principle". See also Jones and deVillars, *supra* note 86 at 121-122, and Evans, *supra* note 2 generally at

longer in vogue.[478] As de Smith observes, "...no statutory power is any longer inherently unreviewable."[479] Even an "unfettered", "sole" or "pure" discretionary authority may be subject to review for legality in its exercise.[480] Quite simply, the presence of a privative clause or use of expansive words, like "unfettered", will not prevent a court from doing justice where it sees fit.[481]

Though unreviewability is no longer a part of our law, this is not to suggest that all discretions are created equal. As was noted earlier[482], there is a range of deference shown by the courts to discretionary power, depending upon who wields that power, the nature of the considerations which are relevant to its exercise and whether it is a "pure" or more narrow discretion. Minister's discretion is, of course, notable by the reluctance courts evince to interfering with its exercise. But reluctance will nonetheless give way to justice and good conscience if illegality, improper motives or illegitimate purposes are implicated in its use. Thus, while greater latitude may be allowed to some discretions, none are ever completely beyond the pale of judicial oversight.[483]

813-965.

[478] See Grey "Discretion in Administrative Law", *supra* note 1 at 127 where he says, "The final conclusion on unreviewability must be that it is no part of our law. Some discretions (e.g., wartime or prerogative ones) are stronger (in Dworkin's sense) than others, but all are subject to review at some point."

[479] De Smith, *supra* note 190 at 311.

[480] De Smith, *id.* citing *Padfield* v. *Minister of Agriculture Fisheries and Food* [1968] A.C. 997 at 1060, where Lord Upjohn remarked:

> [T]he use of that adjective [unfettered], even in an Act of Parliament, can do nothing to unfetter the control which the judiciary have over the executive, namely, that in exercising their powers the latter must act lawfully and that is a matter to be determined by looking at the Act and its scope and object in conferring a discretion upon the Minister rather than by the use of the adjectives."

[481] See for example, J. Grey, "Discretion in Administrative Law", supra note 1 at 108, footnote 8, who notes that he attempted vainly to find an example in public law of such bad faith or dishonesty which the courts declined to rectify because of what he called "unreviewable discretion".

[482] See generally above, section 1.5.3 Ministerial and Delegated Discretion.

[483] Evans, *supra* note 2 at 1021-1022, who observes that there are no "unlimited public powers" in the Canadian legal system and so "...it is an essential function of the courts to determine what those limits are, by reference to the terms of the enabling statute, common law principles and the *Constitution Acts, 1867-*

This is the bedrock principle upon which justification for judicial review of discretion is founded. The case of *Roncarelli v. Duplessis*[484] contains a now famous enunciation of this fact by the Supreme Court of Canada. The outermost permissible limits of discretion are apparent in the *dicta* of Rand J., who observed:

> A decision to deny or cancel such a privilege[485] lies within the "discretion" of the Commission; but that means that decision is to be based upon a weighing of considerations pertinent to the object of the administration.
>
> In public regulation of this sort there is no such thing as absolute and untrammelled (sic) "discretion," that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; any clear departure from its lines or objects is just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair? The ordinary language of the legislature cannot be so distorted.[486]

It is clear then that, at a minimum, every official exercising discretionary power must use it only to carry out the purposes for which it was granted. Motives or reasons not founded in the legislation are an abuse of the discretion and illegitimate. According to Wade, this rule is derived from several central constitutional doctrines; the rule of law, the sovereignty of Parliament and the power of the independent judiciary. All of these come together to spawn the doctrine of *ultra vires,*[487] the principle avenue through which most judicial interventions occur. "This doctrine merely states that public authorities

---

1982."

[484] [1959] S.C.R. 121, 16 D.L.R. (2d) 689.

[485] In this case, a restaurant liquor license.

[486] *Supra* note 484, S.C.R. 121 at 140.

[487] Wade, *supra* note 36 at 8.

must act within powers given to them by Act of Parliament."[488] In practice, then, the courts are concerned upon review to ensure that the tribunal under scrutiny has observed and stayed within the "jurisdiction" of the powers delegated by statute.

Jurisdiction is typically explained in administrative law by parsing it into two distinct senses; a broad sense, referring to authority for conduct of all matters that are necessary and proper to carrying out the legislated activity, and a narrow sense, relating to authority to undertake the particular activity at all.[489] Within the broad sense, jurisdiction is implicated in such matters as whether irrelevant considerations were taken account of in the decision-making process, whether the requisite level of fairness was adhered to and whether the decision-maker acted under direction or other improper motives. The narrow sense focuses on whether the decision-maker had authority *ab initio* to take any action, such as rendering a decision, respecting the matter in question. In either event, a decision which does not appear to be in accordance with the intentions of Parliament will be struck down.[490] Where the statute provides no appeal, courts rely upon the doctrine of *ultra vires* to invoke their jurisdiction. This is so since the notion of government under law implies a presumption not only that discretionary powers should be limited in scope, but also that the agency in question should not have free reign to determine the extent of its own jurisdiction.[491]

Since judicial review has ostensibly evolved as a singular focus oversight mechanism, courts profess little interest in the "merits" of administrative decisions and,

---

[488] *Ibid.*
[489] Jones and deVillars, supra note 86 at 120.
[490] Wade, *supra* note 36 at 9.
[491] Evans, *supra* note 2 at 1023.

instead, confine their role to procedural enforcement.[492] The distinction between merits and procedure is especially important, since it controls the nature of the inquiry that occurs upon judicial review. Courts are concerned only with statutory interpretation and administrative processes, and not with actual outcomes. Since only decisions spawned by defective processes may be faulted, it means that even good decisions will fall before bad processes. Conversely, good processes may serve to protect bad decisions.

There are, of course, limits to the doctrine of judicial disinterest in substantive decisions and outcomes. Those limits are found in the "rule of reasonableness" that overlays all of administrative law, and which "...can be used to control the substance of an administrative decision...."[493] Just as a misapprehension as to the scope of its authority will cause an administrative tribunal to render a reversible error[494], so too will some types of errors that go as much, or more, to substance than procedure. Often referred to as an "abuse of discretion", these types of errors are a sub-species of jurisdictional error found in administrative outcomes sometimes characterized as "patently unreasonable". They arise when a tribunal is found to be "...acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, [or] breaching the principles of natural justice...."[495] A patently unreasonable error is to

---

[492] If it were otherwise, the result would be to turn the judiciary into a "superexecutive" which Julius Grey says, in "Discretion in Administrative Law", *supra* note 1 at 132, "...would probably be administratively unmanageable, as well as constitutionally undesirable."

[493] Wade, *supra* note 36 at 10.

[494] This type of error is called a "jurisdictional error". It was described in *Syndicat des Employes de production du Quebec et de l'Acadie* v. *Canada Labour Relations Board* [1984] 2 S.C.R. 412 at 420-421 (S.C.C.), per Beetz J. thusly: "A jurisdictional error results generally in an excess of jurisdiction or a refusal to exercise jurisdiction, whether at the start of the hearing, during it, in the findings or in the order disposing of the matter. Such an error, even if committed in the best possible good faith, will result nonetheless in the decision containing it being set aside."

[495] *International Union, Local No. 333* v. *Nipawin District Staff Nurses Association* [1975] 1 S.C.R. 382 at 389, *per* Dickson J. (as he then was).

be distinguished from a "mere error of law", which is one "...committed by an administrative tribunal in good faith in interpreting or applying a provision of its enabling Act, or of an agreement or other document which it has to interpret and apply within the limits of its jurisdiction."[496] It is an essential part of administrative law dogma, therefore, that tribunals have a right to be wrong, but only so long as they have properly observed their jurisdiction, and acted fairly and faithfully in doing so.[497] Thus, the notion of judicial review as a limited exercise, focused only on process and procedural rights[498], is tempered somewhat by the broadness of the concept of jurisdiction. Certainly, it is jurisdiction which affords opportunities for courts to involve themselves in the merits of individual decisions, if they are inclined to overturn same.

3.2.2 Procedural Review and the Duty of Fairness

Procedural rights belonging to applicants translate into procedural duties owed by the administrative tribunal. These rights and duties are captured in the term "natural justice", which is a common law creation for describing process obligations.[499] It is essentially a shorthand phrase concerning the entitlement of an applicant to a decision by an impartial decision-maker, after a fair hearing. It is also known as the doctrine of *audi*

---

[496] *Syndicat des Employes, supra* note 494 at 420.

[497] However, jurisdiction is a broad concept which allows for considerable scope on any review. In the opinion of Robert F. Reid, "Hot Buttons: An Overview of Recent Developments in Adminstrative Law", in Philip Anisman, & Robert F. Reid, eds., *Administrative Law Issues and Practice* (Scarborough, Ont.: Carswell, 1995) 1 at 5, administrative law is essentially comprised of subjective principles which are held out as objective. The concept of jurisdiction is part of this charade, in his view. The practical implication of this is that jurisdiction may be so broadly construed as to include review for matters touching upon the merits of an application, even though, in theory, this should not be the case.

[498] See generally Evans, *supra* note 2 at 36 to 44.

[499] Wade, *supra* note 36 at 10. See also de Smith, *supra* note 190 at 377-379.

alteram partem ("hear the other side")[500], which stipulates that no one should be "condemned unheard".[501] As the range of actors, agencies and circumstances in which duties are owed has expanded, so too has the range of duties. The result is that the term "natural justice" has been largely supplanted today by the more expansive term, "duty to act fairly".[502] Upon judicial review, the notion of a "duty of fairness"[503] is used as the essential yardstick for measuring the fitness of a particular decision. The concept of a duty of fairness was enunciated by the Supreme Court of Canada in *Nicholson* v. *Haldimand-Norfolk Regional Board of Commissioners of Police*[504] as applying to all administrative tribunals, regardless of their function. A duty to act fairly, however, is not the same as a duty to act judicially. Thus, an immigration officer is obliged to act fairly, but not necessarily to act like a judge.[505]

Since the duty of fairness is ostensibly a gauge for procedural matters only, it is not to be applied to the merits of a particular decision. There is always, however, a large question to be answered as to how much courts may be influenced by a bad decision in finding that a bad procedure was used.[506] It is not one that admits of an easy answer, particularly since the "duty of fairness" is hardly a static, fixed measure. As Dickson J.

---

[500] Evans, *supra* note 2 at 41.
[501] *Black's Law Dictionary*, 5th ed. (St. Paul, Minn.: West Publishing, 1979) at 120.
[502] Evans, *supra* note 2 at 36. The authors note though, that both "natural justice" and "duty of fairness" create some confusion since they suggest substantive, as well as procedural rights.
[503] This principle is known by various other names, such as natural justice, procedural fairness and so on.
[504] [1979] 1 S.C.R. 311 (S.C.C.).
[505] S. A. de Smith, *Judicial Review of Administrative Action*, 3d ed. (London: Stevens & Sons, 1973) at 208-209, as cited in *Nicholson, id.* at 324-325, per Laskin J. (as he then was) (speaking for the majority).
[506] This is a question which is pertinent also to the notion of unreasonableness. See for example, Evans, *supra* note 2 at 1051, who writes: "It may often be very tempting for a reviewing court to accede to an argument that an agency has abused its discretion because it has attached too much or too little weight to an admittedly relevant factor. However, determining the weight to be given to competing considerations is at the very heart of discretion, and courts should normally be reluctant to invalidate an exercise of discretion as based upon an "unreasonable" weighing of the relevant considerations."

(as he then was) pointed out in the *Martineau*[507] decision, "[t]he content of the principles of natural justice and fairness in application to the individual cases will vary according to the circumstances of each case...." Thus, the extent to which a discretionary power will be reviewable depends, in every case, upon all of the circumstances. As noted earlier, the existence and strength of any countervailing rights or duties determine the extent to which courts will intervene in the exercise of discretionary power. This is true, as well, for overseas immigrant processing. Depending upon the level of entitlement, courts will be more or less reluctant to review the exercise of power. The usual remedy is to strike down the impugned decision[508], and order a rehearing upon proper considerations, or to prohibit any further action, as appropriate.

3.3.3 Review: A Bifurcated Approach

Independent immigrants and visitors have no statutory right of appeal.[509] Accordingly, their only means for obtaining an oversight remedy is to apply in the courts for judicial review.[510] If dissatisfied with the decision of a visa officer[511], applicants are entitled to commence an application for judicial review in the Trial Division of the Federal Court.[512] This is to be contrasted with the case of Family Class applicants who

---

[507] *Martineau* v. *Matsqui Institution Disciplinary Board (No. 2)* (1979), 106 D.L.R. (3d) 385 at 412, [1980] 1 S.C.R. 602 at 630, 50 C.C.C. (2d) 353.

[508] Wade, *supra* note 36 at 9.

[509] See the *Act*, s. 77(3). See also *Brown et al.* v. *Minister of Employment & Immigration et al.* (1988) 3 Imm.L.R. (2d) 299 (Fed. T.D.) where the court confirmed that exclusive jurisdiction for hearing appeals in family class refusals lies with the Immigration Appeal Board (now the IAD).

[510] De Smith, *supra* note 190, at 956, who notes "Where there is no statutory right of appeal, an immigrant's only remedy is judicial review."

[511] Because of the general statutory scheme requiring immigrants and visitors to Canada to obtain a visa before presenting themselves at a port of entry (see the *Act*, section 9(1)), the decision in dispute will be that of a visa officer, rather than of a domestic immigration officer.

[512] Pursuant to section 18(1)(b) of the *Federal Court Act*, R.S.C. 1985, c. F-7 as am., S.C. 1992, c. 49, the trial division of the Federal Court has exclusive original jurisdiction to provide hear applications for relief

are entitled to appeal a negative decision to the Immigration Appeal Division (IAD) of the IRB. The advantages are that IAD appeals are conducted by way of *de novo* hearing and equitable relief is available, even where the original decision is determined to have been "correct" in law.[513] No equitable jurisdiction exists in the courts upon judicial review and, since review is not a *de novo* exercise, it is limited to an examination only of the facts and matters before the original decision-maker and the process by which the impugned decision was reached.[514]

The grounds for judicial review are contained in section 18.1(4) of the *Federal Court Act*, which reads as follows:

> The Trial Division may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal
> (a) acted without jurisdiction or refused to exercise its jurisdiction;
> (b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
> (c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;
> (d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
> (e) acted, or failed to act, by reason of fraud or perjured evidence; or
> (f) acted in any other way that was contrary to law.

Though courts exercise an inherent supervisory function over administrative

---

against any decision by a federal board, commission or tribunal.

[513] Presumably, the fact that there is an "affected" Canadian sponsor, whose own rights may be impinged by the decision, also provides part of the rationale for the unique appeal provisions relating to the family class. See *supra* note 509, discussing the IAD family class appeal process that involves a *de novo* hearing. Such a hearing, of course, is unavailable to independent immigrants. Note also that the situation of failed refugee claimants in Canada is somewhat more complicated than might appear at first glance. If subject to a removal order, for example, they are entitled to appeal against the propriety of that order to the Appeal Division of the Immigration and Refugee Board, which has sole jurisdiction pursuant to section 69.1 of the *Act*. For a review of the jurisdiction and powers of the Appeal Division, see generally Bagambiire, *supra* note 151, 295-333.

[514] Since judicial review is not a *de novo* hearing, for example, new evidence, not available to the original decision maker, is not ordinarily permitted to be put before the court on judicial review.

tribunals[515], the *Federal Court Act* makes that jurisdiction explicit by stating that the Court has authority to review the decisions or orders of any federal board, commission or other tribunal[516], including those issued by Canadian visa offices located abroad.[517]

Beyond confirming the impugned decision, the other possible outcomes of a judicial review are specified in section 18.1(3) of the *Federal Court Act*, which provides:

> On an application for judicial review, the Trial Division may
> (a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or
> (b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.[518]

The remedies available in Federal Court to effect such outcomes are the so-called prerogative orders[519], of which *certiorari, mandamus* and prohibition are the most commonly used in the overseas context.[520] To access these remedies, overseas applicants must, of course, file an application for judicial review, in Canada, with the Federal Court.[521] All applicants affected by a decision of a federal tribunal are subject to a thirty day limitation period, commencing from the time the decision was communicated to

---

[515] See text accompanying note 475, *supra*.
[516] *Federal Court Act, supra* note 512, s. 18(1).
[517] Section 82.1(1) of the *Immigration Act* states that an application for judicial review under the *Federal Court Act* may be taken with respect to "any decision or order made, or any matter arising, under this Act or the rules or regulations thereunder", though such action may only be commenced with leave of the court.
[518] *Supra* note 512.
[519] See *Federal Court Act*, s. 18(1)(a), which states that the Trial Division of the Federal Court has exclusive original jurisdiction "...to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal...."
[520] For a discussion of the availability and uses of these remedies in immigration matters, see Bagambiire, *supra* note 151, at 349 – 360.
[521] Section 18.1(1), *Federal Court Act* and section 82.1(1), *Immigration Act*.

them, within which to file their application for judicial review.[522] For overseas applicants, this limitation period poses obvious special challenges. If not already represented, they will have to find, retain and instruct counsel in Canada on a priority basis. Alternatively, an applicant might choose to represent herself. For most persons, however, this may be an unlikely option, since it would entail research as to the forms and procedures of a distantly located foreign court - the Federal Court of Canada. Added to this is the necessity of appearances before the court. Beyond the expense such appearances might entail, a failed applicant might also have to obtain a visitor visa just to obtain entry to Canada for the purposes of such appearances.[523] Presumably, because of the peculiar difficulties faced by overseas applicants, an application for review of a visa officer's decision is not subject to the ordinary requirement for leave of the Court as a pre-condition to commencing such an action.[524]

Just as the range of matters with which administrative law generally concerns itself is broad, so too does the range of rights, and entitlement to fair procedure, vary. Everything is case specific, hinging upon the type of subject matter involved, the type of procedure that has been provided for by the legislature and the consequences which may accrue to the individual involved.[525] This is evident from a series of pronouncements by

---

[522] Section 18.1(2), *Federal Court Act*.

[523] Granting of a visitor visa to a failed immigrant applicant is by no means a certain proposition. Like every other applicant for a visitor visa, a failed immigrant must rebut the presumption found at s. 8 of the *Immigration Act*, that she is an intending immigrant. The prior immigrant application clearly adds to the difficulties of rebutting that presumption.

[524] Pursuant to subsection 82.1(2) of the *Immigration Act*, decisions of visa officers under sections 9, 10 or 77 are specifically exempted from the requirement of leave. See Bagambiire, *supra* note 151 at 340, who suggests that lack of easy access to Canadian courts for foreign based litigants provides the justification for the dispensation from the requirement of leave. He opines that such applicants are less likely to launch frivolous applications or otherwise abuse the facilities of the Federal Court.

[525] For discussion of the varying nature of the duty of fairness, see generally Evans, *supra* note 2, at 35-43.

the Supreme Court of Canada. Estey J., for example, noted that "[w]hile it is true that a duty to observe procedural fairness, as expressed in the maxim *audi alteram partem*, need not be express...it will not be implied in every case. It is always a question of construing the statutory scheme as a whole in order to see to what degree, if any, the legislator intended the principle to apply. [footnote omitted]" [526] In *Cardinal v. Director of Kent Institution*[527], the Court refined this further by stating:

> 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.... [W]henever those three elements are to be found, there is a general duty to act fairly on a public decision making body.

While the existence of these three elements provides the minimum threshold for invoking a duty of fairness, a more interesting issue concerns how they are measured and, consequently, the level of fairness owed. Though there is no fixed formula for prioritizing the three factors, the impact of the decision on individual rights is obviously a serious concern and may be most important. This point was made apparent in *Irvine* v. *Canada (Restrictive Trade Practices Commission)*[528]. Estey J., speaking for the Court, stressed that the existence of any personal impact for the applicant must significantly influence the level of fairness owed to her. As he stated, "[f]airness is a flexible concept and its content varies depending on the nature of the inquiry *and the consequences for the individuals involved.* [emphasis added]"[529] In assessing the duty of fairness owed in the

---

[526] *Attorney General of Canada* v. *Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735 at 755, per Estey J. for the Court.
[527] [1985] 1 S.C.R. 643 at 653, per Ledain J. for the majority.
[528] [1987] 1 S.C.R. 181.
[529] *Id.* at 231.

exercise of discretionary immigration powers, it is essential therefore to ask several questions: to what extent has Parliament intended the duty of fairness to apply, what type of decision is implicated and what are the ramifications for any individual rights?

The last question is particularly cogent when inquiring as to the level of fairness owed to Independent immigrant applicants. Of all the immigrant categories, it is manifest that Independents have the least at stake in terms of personal investment and potential ramifications. Family Class migrants, for example, may face permanent separation from close family while Refugees risk potential persecution from a denial of opportunity to enter Canada. Independents, however, are people who voluntarily seek migration, usually in search of better economic opportunities. They will ordinarily have no substantial ties to Canada[530] and are not subject to the type of pressing humanitarian concerns that may affect other applicants. As such, denial of an immigrant visa to them will most likely involve only the loss of an opportunity.[531] Accordingly, the entitlement of Independent applicants to procedural fairness, at least on the basis of personal consequences, is less than for other categories of immigrants.

This difference in entitlement to procedural fairness is illustrated by the curious

---

[530] An obvious exception to this would be the "Assisted Relative" subcategory within the Independent class. These immigrants are defined at section 2(1) of the *Regulations* as being an immigrant, other than a member of the family class, who has an aunt or uncle, sibling, child, grandchild or nephew or niece in Canada. In recognition of this connection, while Assisted Relatives are made to qualify on the ordinary Independent selection scale, they are effectively awarded a bonus of five additional points for the fact of a relative in Canada. Thus, assisted relatives need obtain only 65 points to qualify for permanent residence (s. 10(1)(b), *Immigration Regulations*), which is to be compared to the 70 points needed by "regular" independent applicants (s. 9(1)(b)(i), *Immigration Regulations*).

[531] In an effort to minimize any consequences to failed applicants, CIC's application and information materials routinely include an admonishment that any plans for departure should not be finalized until the application has been fully approved. See for example, CIC "Applying for Permanent Residence in Canada: A Self-Assessment Guide and Application Kit for Independent Applicants" (New Delhi Application Kit version (undated) consulted for this citation) at 24, where the following advice to potential applicants is given: "Please do not quit your job, sell or give away your possessions until you have been issued an

position of the *Charter of Rights and Freedoms* in immigration law and its seeming irrelevance to overseas immigrant selection. Generally, persons applying abroad for immigration services have no entitlement to a determination process that incorporates *Charter of Rights and Freedoms* standards. However, other applicants in very similar circumstances, but located in Canada, do benefit from *Charter* protections.[532] The overall relationship of *Charter* issues to litigation in the administrative context was noted by Wilson J. in *Re Singh and M.E.I.*[533]. "If, as a matter of statutory interpretation," she stated, "the procedural fairness sought by the appellants is not excluded by the scheme of the [Immigration] Act, there is, of course, no basis for resort to the Charter."[534] Quite simply, therefore, the Charter is only relevant in so far as procedural fairness has been compromised by a legislatively mandated process. In the absence of such, the applicant is left to rely upon the usual panoply of administrative and judicial review remedies. More particularly, while the courts have held that *Charter* protections extend to all persons physically present in Canada[535], they have declined to extend such protections to persons dealing with visa offices outside Canada.[536] This, despite apparent rejection by the Supreme Court of Canada, in the *Singh* case, of the American position where such a

---

immigrant visa."

[532] For a brief discussion of this apparent incongruity, see Waldman, *supra* note 104, at 2.1 – 2.4, §2.1 – 2.6.

[533] *Supra* note 64.

[534] *Id.*, 17 D.L.R. (4th) 422 at 445.

[535] See *id.*, per Wilson J.

[536] See *Canadian Council of Churches* v. *Canada* [1990] 2 F.C. 534, 10 Imm. L.R. (2d) 81 (C.A.); *affd* [1992] 1 S.C.R. 236, 88 D.L.R. (4th) 193 (S.C.C.); and see also *Ruparel* v. *Minister of Employment and Immigration* [1990] 3 F.C. 615, 36 F.T.R. 140 (C.A.). The hesitancy of the courts to extend the rule of Canadian law abroad is a matter whose logic is somewhat controversial. For a critical view of this geographically based dichotomy, see Donald Galloway, "The Extraterritorial Application of the Charter to Visa Applicants", (1991) 23 Ottawa L. Rev. 335.

dichotomy is endorsed.[537]

However, it may be that what the courts have refused to do through the front door, namely apply the *Charter* to cases processed abroad, has actually been done through the back door by legislative enactment. Section 3(f) of the *Act* states immigration policies, rules and regulations are to be designed and administered so as to "...not discriminate in a manner inconsistent with the *Canadian Charter of Rights and Freedoms*." Thus, regardless of whether or not the *Charter* applies directly, the standards it mandates for prohibited discrimination, which would be encompassed in the notion of procedural fairness, certainly do.[538] However, it will obviously be more difficult to obtain the *Charter's* protections when that document is seen not to be directly applicable. And certainly, refusal to apply *Charter* provisions to all those dealing with the Canadian government, no matter where situated, has created two different standards for procedural fairness that potentially cuts across immigrant categories.[539] It follows from this that fairness in the use of discretion in any individual case, while requiring reference to a common standard with other decisions of a like kind, can and will vary from one type of case to another. Since different levels of "interest" or "right" are inherent in the various categories of applications, the level of fairness owed shifts accordingly.

---

[537] *Singh*, *supra* note 64, 17 D.L.R. (4th) 422 at 462, where Wilson J. said, "I must confess some reluctance to adopt this analogy from American law that persons who are inside the country are entitled to the protection of the Charter while those who are merely seeking entry to the country are not."

[538] The obvious difference in not having the *Charter* apply directly would be to deprive applicants of certain remedies, for example.

[539] For example, refugee claimants may apply in Canada or at a visa office abroad. Those applying in Canada will be entitled to rely directly upon the *Charter* while those abroad will be left to attempt to import *Charter* protections indirectly through the device of section 3(f) of the *Act*. A similar result is possible also for applicants within the family class. Spousal applicants, for example, may be granted a discretionary dispensation under s. 114(2) of the *Act* to allow their cases to be processed from within Canada.

Notwithstanding this, there is still a minimum level of fairness due even to those who have no fixed right to the benefit they seek. A Minister's Permit, for example, is the primary tool under the *Immigration Act* whereby a temporary dispensation from the rigid letter of the law is granted. With certain exceptions,[540] the Minister has discretion, pursuant to s. 37(1), to grant relief to any person seeking entry to Canada who is a member of an inadmissible class. In exercising that discretion, the courts have held that the power to grant a permit must be exercised fairly and in accordance with principles consistent with the purposes of the *Act*. In the context of a refugee claim, Wilson J. observed that the "...Minister is required to exercise his discretion to give a permit under s. 37 fairly and in accordance with proper principles and, if the Minister fails to do so, the Convention refugee may have a right to take proceedings under s. 18(a) of the *Federal Court Act*."[541] The notion that there may be a duty of fairness, even in the absence of any right in the applicant to the service or benefit, is rooted in the hypothesis underlying grants of discretionary power that they must be exercised reasonably.[542]

But what are the minimal components of procedural fairness in the context of Independent processing? CIC's own *Immigration Manual* summarizes them as follows:

> There are a considerable number of components to the notion of fairness, or natural justice, that affect overseas processes. These have been reviewed and enunciated by the courts in ample fashion over the years. Some of the more important components that apply to overseas processes include the following:
> - Processing must occur without undue delay;

---

[540] See s. 37(2) of the *Act*, which prohibits issuance of Permits to persons under an unexecuted removal order and failed family class applicants whose appeal has been dismissed by the Appeal Division of the IRB.

[541] *Singh, supra* note 64, (1985) 17 D.L.R. (4th) 422 at 448, citing *Minister of Manpower & Immigration* v. *Hardayal* (1977), 75 D.L.R. (3d) 465 at 471, [1978] 1 S.C.R. 470 at 479, 15 N.R. 396 (per Spence J.); *Re Brempong and Minister of Employment & Immigration* (1980), 113 D.L.R. (3d) 236, [1981] 1 F.C. 211, 36 N.R. 323.

[542] Wade, *supra* note 36 at 9.

- Whoever hears, must decide;
- Applicants must have an opportunity to be heard and to respond to any concerns;
- Decisions must be based upon the *Immigration Act* and *Regulations*; and
- All applicants must receive fair and equitable treatment.[543]

These principles are obviously broad in nature and scope and it remains for the courts to determine in every case how they are to be applied and whether or not they have actually been met.[544] Particular examples of their application will be explored in greater detail later in this chapter. Suffice to say at this juncture, though they must be seen as minimum standards, yet they provide the essential foundation out of which springs the duty of fairness applicable to discretionary immigration decision making.

3.3.3.1 Protecting Discretion

The courts have an ambivalent relationship with discretion. On the one hand, they are loath to see it "fettered" and require that it remain open ended. At the same time, however, they also insist that it be closely confined and structured.[545] It is for this reason

---

[543] CIC IM "Overseas Processing", Chap. OP-1, para. 10 (ver. 12-95) at 17-18.

[544] However, even the notion of procedural fairness and what it entails is hardly free from competing priorites, as exemplified by the following two examples. In *Castroman* v. *Canada (Secretary of State)* (1994), 81 F.T.R. 227, McKeown J., in a case where the C.R.D.D. elected to proceed with a hearing even after counsel chose to withdraw, found that the right to a fair hearing takes precedence over the need for a quick and speedy hearing. However, see also *Singh (Gurmit)* v. *Canada (Minister of Citizenship and Immigration)* (1995), 106 F.T.R. 66 at 70, where Simpson J. opined as follows: "In my view, fairness requires that an applicant receive a timely decision." Thus, the only conclusion is that the specific details of procedural fairness will fluctuate according to the dictates of justice in every case.

[545] This sort of dialectic approach may well be a factor of the two guiding principles which Grey, in his book, *Immmigration Law in Canada*, *supra* note 181, ascribes to administrative law generally. He characterizes them, at 1, as follows:

> There can be no power or authority exercised by an official without a statutory or a prerogative source, and all grants of power are generally to be narrowly construed.
> Where a discretion is granted to an official, the courts will not review his decision on its merits, but only to see if he stayed within the bounds of his authority and exercised it in a reasonable manner.

As he describes it, these two rules are somewhat antagonistic and pull in different directions. Though our administrative law involves a synthesis of the two, it is not a seamless one and so courts perhaps tend to meander from side to side, while still attempting to steer the middle course. For a more in depth discussion of this, see Grey generally, *id.*, at 1-5.

that Wade ascribes two broad categories to the conduct of judicial review; one concerned with protecting the discretion accorded by Parliament and the other focused on preventing its abuse.[546] Somewhat ironically, then, it seems that judicial review is meant to ensure that discretion remains ample, but not too ample.

In the first category, protecting the scope of discretionary power, the courts seek to ensure that the power has been exercised by the rightful donee, unfettered and without artificial restrictions drawn from outside the terms of the grant. These strictures are captured in the Latin maxim *delegatus non potest delegare*, which holds that power accorded to one may not be exercised by another. As John Willis states, "[i]ts most important application...is to authorities which are by statute empowered to exercise discretions affecting the rights and interests of the public...."[547] While it is merely a rule of construction[548], rather than a binding legal doctrine, it ensures that the intended donee of power is the one to actually use it.[549] The theory is that by tying the power to the donee, accountability is increased, thereby enhancing the likelihood of its responsible exercise. Willis notes that this rule of construction is rooted in the concept of the "rule of law" and the notion that government officials and private citizens are all equal before the law.[550] As such, the *delegatus* rule is intended to prevent interference, whether political or otherwise, with the rights and interests of private persons, save to the extent legitimately permitted by statutory provision. Irrespective of the type of power involved,

---

[546] Wade, *supra* note 36 at 9.
[547] Willis, "Delegatus Non Potest Delegare", *supra* note 215 at 257.
[548] De Smith, *supra* note 190 at 358, who notes that courts have sometimes construed it as a rigid and complete doctrine, allowing of no exceptions. Nonetheless, he points out that it merely raises a rebuttable presumption. Conversely, both de Smith, at 358, and Willis, "Delegatus Non Potest Delegare", *id.* at 260, note that the presumption is not difficult to rebut.
[549] Willis, *id.* See also de Smith, *id.* at 358.

whether judicial, quasi-judicial, ministerial and so on, the rule against sub-delegation is applicable.[551]

In the case of the *Immigration Act,* far more powers are delegated to the Minister of Immigration than she is able to personally exercise herself. To get around the rule against sub-delegation, Parliament has made express provision in the *Act* to permit sub-delegation of her authority.[552] Notwithstanding this, the convention of ministerial responsibility in parliamentary government ensures that the Minister remains ultimately accountable for the proper exercise of any authority she passes on to lower level officials.[553] Under the *Immigration Act*, it is only immigration and visa officers[554] who have authority to exercise delegated powers. Further, once seized of a matter, the individual visa officer is required to form her own opinions as to the outcome for a case. Though she is entitled to seek guidance from various sources, including colleagues and supervising officers, the decision remains hers alone and she must not fetter her discretion by following the dictates of those colleagues or superiors.[555]

---

[550] Willis, *id.*

[551] De Smith, *supra* note 190 at 358.

[552] S. 121(1).

[553] See also s. 121(2) of the *Act* which codifies this convention. Any act carried out pursuant to a power delegated by the Minister is deemed to have been performed by her.

[554] See definitions of "immigration officer" and "visa officer" contained at s. 2 of the *Act*, which simply distinguishes between them according to whether they are exercising their functions inside Canada or abroad. In either case, these are officers who have been designated pursuant to s. 109 of the *Act.* In visa office practice, there are a couple of more officer designations that are relevant. These are the "Designated Immigration Officer (DIO)" and the "Immigration Program Officer (IPO)". The first has been designated pursuant to s. 109 of the *Act*, while the latter has not. Both categories consist, usually, of foreign nationals hired locally in their countries of residence to handle case processing. Since DIO's have the same authority as regular immigration officers, they are able to render decisions on individual cases. IPO's obviously do not possess such authority. As a matter of expediency, however, they may be found rendering positive decisions in cases, since such decisions are never appealed.

[555] In *Baluyut* v. *Canada (Min. of Employment & Immigration)*, [1992] 3 F.C. 420, 56 F.T.R. 186 (Fed. T.D.), for example, the applicant sought to quash the decision of an officer refusing to interview her with respect to her application for permanent residence. The applicant's husband was resident in the Philippines and unable to attend an interview at the Canadian Consulate in Los Angeles where the application had been

An obvious question that arises in relation to immigration processing matters concerns the position in law of the copious policy manuals, operations memoranda and other guidelines issued by the Minister and CIC Headquarters to inform officers in their use of discretion. These manuals and policy statements are meant to guide the use of that discretion deemed necessary to fill in cracks and crevices between the rules. Where a general discretion has been delegated, the courts have upheld the adoption of guidelines implemented to inform its exercise.[556] Such guidelines have been noted to serve, legitimately, the purposes of ensuring consistency of decision-making and of providing objective standards for the application of general discretion to specific cases.[557] Evans, for example, offers the following on the legitimacy of guidelines:

---

lodged. The applicant had explained various circumstances that militated against her husband being able to attend an interview in the U.S., then showed up alone for the interview. The officer consulted an immigration vice-consul about what decision should be made, then told the applicant that the interview could not be held in the absence of her spouse. The court found in the result that the officer had failed to exercise her own discretion in the matter, allowing her actions to be dictated by the supervising vice-consul. *Mandamus* was issued to order that the interview proceed and that the file be transferred to the Canadian visa office in Manila thereafter, if interview of the spouse was necessary. For a similar result, see *John* v. *Canada (Min. of Citizenship & Immigration)* (1997), 36 Imm. L.R. (2d) 192 (F.C.T.D.) where the visa office in Guatemala sent Trinidadian education documents to the visa office in Trinidad for an opinion as to their equivalence to Canadian educational attainment. Based on that opinion, the visa office in Guatemala awarded no points for education to the applicant. The court found this an impermissible fettering of discretion, since the Guatemala office blindly applied the opinion offered by the Trinidad office. In the view of Heald D.J., the defect could have been remedied by affording the applicant an opportunity to respond to the equivalence offered by the Trinidad office, which was not done.

[556] See for example, *Burke* v. *Canada (Employment & Immigration Commission)* (1994), 79 F.T.R. 148 (F.C.T.D.).

[557] See for example, *Vidal, supra* note 211, 13 Imm. L.R. (2d) 123 at 142-143, where Strayer J. stated the following:

> No doubt when Parliament conferred the power under subs. 114(2) [of the *Immigration Act*] on the Governor in Council to make exceptions to the requirements of the Act and Regulations it expected the Governor in Council to exercise that discretion with some sort of consistency throughout the country and not purely arbitrarily or by whim. More particularly, by the principles of parliamentary government the Governor in Council must be responsible to Parliament for the exercise of his discretion. As the Governor in Council is in the vast majority of cases dependent on the recommendations of immigration officers, as approved by the Minister, for the exercise of his discretion, it is highly desirable that immigration officers have some sort of guidance as to what factors the Minister thinks important in making recommendations to the Governor in Council in this respect.

> It is sometimes assumed, especially by lawyers, that while a rule-bound solution to a dispute requires the decision-maker to base it on precedent and general legal principles, those exercising discretion need to consult only their own preferences. However, this is a caricature of the exercise of discretion. Discretionary decisions must be made not only by reference to the statutory purposes and other legal limits of the power, *but they should also be informed by any policy objectives formulated by the agency, guidelines that it has issued, and its past practice.* Arbitrariness is as much the antithesis of the effective exercise of discretion as the mechanical application of rules is of the just administration of law. The differences between discretionary and rule-based decisions are of degree, not kind. [emphasis added][558]

However, blind adherence to such guidelines is also not permitted. Though the decision-maker is entitled to educate herself from the guidelines as to what a proper approach may be, she must still ensure that her mind remains open to the subtleties and nuances of the individual case before her. As Wade notes, discretion must not be fettered "by self-imposed rules of thumb" and "a distinction must be made between following a consistent policy and blindly applying some rigid rule."[559] In *Cabalfin* v. *Canada (Minister of Employment and Immigration)*[560], for example, Joyal J. noted that close adherence to ministerial policy not founded in the *Act* or *Regulations* would result in a fettering of discretion and, hence, constitute an excess of jurisdiction. Thus, while consistency is desirable, it is only desirable to the extent that it allows for flexibility, which remains of the essence to discretion.

Occasionally, it happens that courts will actually enlarge discretion in their

---

[558] *Supra* note 2 at 1021-1022.

[559] Wade, *supra* note 36 at 9. For a discussion theorizing as to possible fettering of discretion by Immigration Medical Officers relying too closely upon guidelines contained in the Medical Officer's Handbook, see P. Harris Auerbach "Discretion, Policy and Section 19(1)(a) of the Immigration Act" (1990) 6 Journal of Law and Social Policy 133. But, for a view decrying a lack of guidelines to control Medical Officer discretion, see Rotenberg, "Medical Inadmissibility: Selection Without Standard?", *supra* note 151.

[560] [1991] 2 F.C. 235, 12 Imm. L.R. (2d) 287, 40 F.T.R. 147, 49 Admin. L.R. 100 (F.C.T.D.).

attempts to protect it. In the *Ismaili* case[561], for example, Cullen J. found part of s. 22 of the *Regulations* to be *ultra vires* the *Act*, with the result that the discretion of immigration medical officers was expanded. That section had been promulgated pursuant to the authority granted the Governor in Council under s. 114(1)(m) of the *Act* to make regulations prescribing factors to be considered in determining whether a person is likely to be a danger to public health or safety or might cause excessive demand on health or social services. Section 22 contained a list of factors medical officers were required to consider in reaching a determination as to the likelihood of excessive demand by an immigrant with a health impairment.[562] The factors included any medical reports, communicability of the disease, whether the supply of the particular health or social service in Canada was somehow limited, what sort of care or hospitalization might be required and so on. Bill C-86[563] had amended s. 114(1)(m) of the *Act* by deleting explicit reference to excessive demand on health and social services. The Court found this to be fatal to the legality of the factors set out in section 22 of the *Regulations* vis-à-vis assessment of excessive demand. It was still fine, however, as concerns public health and safety, since reference to those concerns had not been eliminated by the C-86

---

[561] *Ismaili* v. *Canada (Min. of Citizenship & Immigration)* (1995), 29 Imm. L.R. (2d) 1, 100 F.T.R. 139. For an opinion on the effect of this ruling, see Rotenberg, "Medical Inadmissibility: Selection Without Standard?", *supra* note 151.

[562] Every prospective immigrant and their dependants are required to pass a medical examination. Medical test results are assessed and an opinion as to implications for public health and safety and demand upon health and social services is given by Immigration Medical Officers employed by CIC. That opinion is then passed to the visa officer who must consider same in rendering a final decision. A visa officer has no discretion with respect to a medical opinion. *Jaferi* v. *Canada (Min. of Citizenship & Immigration)* (24 October 1995), IMM-4039-93 (F.C.T.D.). The officer also has no authority to review the diagnostic assessment by medical officers. However, the duty of fairness requires that the visa officer ensure that the medical officer's opinion is reasonable. If not, a visa officer decision based upon an unreasonable medical opinion will be set aside. *Ajanee* v. *Canada (Minister of Citizenship & Immigration)* (1996), 33 Imm. L.R. (2d) 165, 110 F.T.R. 172 (F.C.T.D.).

[563] *An Act to amend the Immigration Act and other Acts in consequence thereof*, S.C. 1992, c. 49.

amendments. Because the amendment had removed the authority upon which the excessive demand factors in section 22 rested, medical officers were found to be unduly fettering their discretion by routinely relying upon the factors as per their former practice. Though they were still entitled to consider those factors, they were no longer restricted by them.[564] As Rotenberg and Lam note, the effect of this decision was seemingly to remove limits upon the discretion of medical officers in assessing such cases.[565] Thus, the list of factors were transformed from an authoritative guide, structuring and confining medical officer discretion, to a mere list of factors that could be considered or ignored, as the individual medical officer determined was appropriate.

3.3.3.2 Controlling Discretion

Conversely, in controlling the exercise of discretion, the court is concerned to see that only that amount of power which was delegated, and no more, is put into play.[566] If the administrative action exceeds what was authorized, the decision-maker will be found to have exceeded her jurisdiction and the action declared *ultra vires* the authority granted.

---

[564] See also *Ludwig* v. *Canada (Minister of Citizenship & Immigration)* (1996), 33 Imm. L.R. (2d) 213, 111 F.T.R. 271 (T.D.). Medical officers are guided in their assessments by a Medical Officer's Handbook reflecting common medical knowledge. A medical officer is entitled to apply the guidance offered there, but only so long as he retains sufficient flexibility to look beyond those guidelines and does not feel bound by them.

[565] *Ismaili*, supra note 561, 29 Imm. L.R. (2d) 1at 5, where the authors offer a case commentary that includes the following: "Certainly, when one reads s. 22 of the *Immigration Regulations* with the *Immigration Act*, limits to the medical officers' discretion were circumscribed. Have these limits been removed? Are we left to the vagaries of each medical officer as to what he considers to be excessive and the facts to be taken into account? [footnote omitted]" Similarly, see Rotenberg, "Medical Inadmissibility: Selection Without Standard?", *supra* note 151. The position of CIC is even more clear on this point. In Operations Memorandum (OM) IP 96-08/OP 96-05, 28 March 1996, "Assessment of Medical Excessive Demands A19(1)(a)(ii) and R22", the department notes that "[i]t follows [from the *Ismaili* decision] that we have presently no authority to regulate the assessment of excessive demands. ... The ruling does not prevent medical officers from deciding if an applicant's admission would or might reasonably be expected to cause excessive demands. It simply means they must exercise "discretion" rather than apply the factors set out in R22." The OM then goes on to detail how that discretion should properly exercised.

[566] As de Smith notes, it is here again that the "rule of law' is to be seen in action – delegates may only act

Grey describes discretion as:

> ...a power that is almost always or always is attached to some level of duty. Review of discretion means determining how far the power extends and at what point the "duty" is ignored and the correlative "right" violated. As soon as that point is reached, the courts can interfere; before that they will abstain from doing so.[567]

Accordingly, controlling discretion also entails some consideration of the balance that should be struck between discretionary power and duties owed to those coming before administrative tribunals.

In *Maple Lodge Farms Limited* v. *Government of Canada et al.*[568], the Supreme Court of Canada reiterated that courts should not lightly interfere with discretion. Speaking for the court, McIntyre J. reaffirmed this principle while also noting the limits for the exercise of discretion, beyond which the courts will intervene to control it. In his words:

> It is...a clearly-established rule that the courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it been charged with that responsibility. Where the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere.[569]

The notion that discretion may only be exercised for the purposes for which it was granted is captured under the notion of "good faith". It is this ground of review which comes closest to trenching upon the merits of individual administrative decisions – an activity which courts ostensibly are hesitant to undertake on judicial review. And yet,

---

within the bounds of the power bequeathed to them, and no more. De Smith, *supra* note 190 at 295.
[567] Grey, "Discretion in Administrative Law", *supra* note 1 at 108-109.
[568] [1982] 2 S.C.R. 2.
[569] *Id.* at 7 – 8.

despite this reluctance, the courts do delve into the merits of cases upon the justification of good faith. In conducting review for this type of misconduct, the content and ambit of the power delegated is obviously of greatest concern to the courts. The particulars of the type of inappropriate action which will cause the courts to intervene against the decision of a tribunal are evident in the statement of Lord Denning, who said, in relation to a power in a government minister to issue television licenses:

> Undoubtedly those statutory provisions give the Minister a discretion as to the issue and revocation of licenses. But it is a discretion which must be exercised in accordance with the law, taking all relevant considerations into account, omitting irrelevant ones, and not being influenced by any ulterior motives.[570]

Lord Denning's *dicta* gives some idea of the broad scope of the concept of good faith. It encompasses a range of problems from perverseness, or patent unreasonability, of the decision, to more particular matters such as failure to accord weight to relevant considerations. Though good faith involves an examination of motivation and frame of mind of the decision-maker, the courts have held that it is capable of determination from all of the circumstances of a case.[571] This is well illustrated in the *So* case[572], which Rouleau J. described as the most blatant example of willful bad faith and abuse of discretion he had ever encountered during his tenure on the bench.[573]

The applicant So applied in that instance to the Canadian Consulate General in New York as an Independent immigrant pursuant to the occupation of "head chef".

---

[570] *Congreve* v. *Home Office*, [1976] 1 Q.B. 629 at 649, [1976] 1 All E.R. 697 at 708.

[571] See *Smith* v. *Vanier (Municipality)* (1972), 30 D.L.R. (3d) 386 (Ont. H.C.), at 390-392, where the Court stated:

> In the house of good faith there are many mansions. Good faith or want of it is not an external fact but rather a state of mind that can be judged by verbal or physical acts. To my mind good faith is a composite thing referable to all the relevant circumstances.

[572] *So* v. *Canada*, *supra* note 441, 28 Imm. L.R. (2d) 153 [hereinafter cited to 28 Imm. L.R.].

[573] *Ibid.* at 155.

Though he had just six years of primary schooling, the applicant had worked for more than twenty years as a chef in restaurants in Hong Kong and, later, in Canada. In addition, he had completed a certificate program in Canada whereby he was recognized by the Ontario Chinese Restaurant Association as a "Class 1 Chef in Cantonese Dishes". The reviewing officer, however, discounted this experience and training, saying that it was not the sort of formal program of qualification that would suffice for the occupation of head chef. As a result, the applicant was assessed in a lesser occupation that resulted in fewer points being awarded to him. Further, though So had been living and working in Canada for a number of years, apparently becoming sufficiently well established to accumulate money and property during this time, the officer did not rate his chances for successful establishment highly. He was awarded just four points out of ten for the factor of personal suitability as a result. In ordering *certiorari* to quash the decision, Rouleau J. stated the following:

> There is simply no question good faith was not present here. ...[I]n making his decision, he [ie. the visa officer] clearly disregarded pertinent and relevant facts, such as the applicant's twenty years of experience as a chef and his certificate as a Class 1 Chef in Cantonese Dishes, and was influenced, more aptly described as obsessed, by factors which should not have played a role in his decision-making at all, such as the applicant's having remained in Canada after his status had expired. His conclusion that Mr. So had only a forty per cent chance of becoming established in Canada is perverse, in light of the fact the applicant has saved a substantial amount of money since his arrival in 1990, has purchased two cars and has secured gainful employment as a head chef at the rate of $900 per week.[574]

Good faith is also called into question by the fact of how much time and attention a visa officer may give to materials and other evidence provided in support of an application. While it is a requirement of good faith that due consideration and attention

---

[574] *Ibid.*

be given to each application, the actual amount of such attention will vary according to the complexity of the matter, the amount of the evidence offered and other circumstances. In *Vaca* v. *Canada (Minister of Employment & Immigration)*[575], for example, Cullen J. found that the consideration extended by an immigration officer was inadequate. There, a large volume of material appears to have been digested in the course of a thirty-minute interview, after which a negative decision issued.

By contrast, in the *Williams* decision[576], the applicant failed to prove on the balance of probabilities that insufficient attention had been devoted to her request for humanitarian and compassionate landing under s. 114(2) of the *Act*. Though the interview had been 45 minutes in length, and involved presentation of considerable materials, the court held nonetheless that it was not credible to infer lack of good faith. Noting that the decision was not rendered until five days after the interview, Muldoon J. discounted counsel's premise that "the immigration officer reviews, cogitates and ruminates on "h & c" applications, only while seated at his or her desk in a C.I.C. office"[577]. Under all of the circumstances, the court was satisfied that there had been due consideration of the applicant's materials and evidence. A related concept is that of a discretionary decision which is so manifestly wrong that it is said to be perverse on its face. Such a decision is symptomatic of both a lack of good faith and a failure to accord weight to relevant considerations, or of having given weight to improper considerations. In either case, it will result in a decision to quash the impugned decision.[578]

---

[575] (1991) 15 Imm.L.R. (2d) 315 (Fed. T.D.).
[576] *Williams* v. *Canada (Min. of Citizenship & Immigration)* (1996), 32 Imm. L.R. (2d) 256 (Fed. T.D.).
[577] *Ibid.* at 257.
[578] See *Williams* v. *Canada, supra* note 220, where the court noted, even in the absence of written reasons, a

3.3 The Courts' Handling of Discretion

"It cannot be too often pointed out that the "rule of law", on which our democracy so largely depends for its sanction, is no stronger or wider than the courts may care to make it...,"[579] wrote F.R. Scott some 60 years ago. These words remain just as true today as does a corollary – that the rule of law will brook only that much discretion as the courts may choose. Immigration law has provided fertile ground for playing out the struggle between discretionary power and rules in recent years. The reasons are not hard to discern. Twenty years ago, in overseas applications at any rate, it was rare to find an applicant assisted by counsel. Today, it is only a minority that is not assisted to some extent or other by a professional in the preparation and submission of their applications. And counsel have been resolute in urging the courts to pursue a reductionist, rights oriented approach toward immigration law and policy. It is an approach that is largely blind both to the wider policy involved and the difficulty of developing precise selection measures, capable of being applied worldwide, that are fair and produce consistent results. Moreover, it is an approach that has been bought into by the courts, but only in a positive way to benefit applicants. Thus, there has been much judicial activism focused on constraining negative discretion while, at the same time, nominally at least, a hands off approach has been followed with positive discretion. The goal of containing negative discretion has been pursued with such single-minded determination that the courts have been seemingly oblivious to the incongruous results that have followed.

Indeed, the overwhelming impression that one obtains from reading court

---

judgment that flies in the face of reason will be overturned. Though there may be no requirement for written reasons, a discretionary decision will be set aside where it is manifestly perverse.

decisions is that discretion is a highly misused administrative tool. Admittedly, discretion is a highly used tool, employed daily, in one form or another, in almost every application that is processed. In the overwhelming majority of cases, however, it is used sensibly to the satisfaction of all. It is, in fact, only the most egregious cases of misuse which end up before the courts on judicial review. In many instances, judicial disdain for discretion as exercised in the circumstances of the case before the court is well founded. Regrettably, however, it is the indefensible which prompts judicial pronouncements that sometimes have the effect of disabling discretion in the remaining majority of cases where its application had benefits for both administrators and clients.

3.3.1 Discretion and the Selection Process

The courts' handling of discretion, of course, occurs in the context of the selection scheme provided for by the *Act* and *Regulations*. It is appropriate, therefore, to consider briefly the approach adopted with respect to selection generally. The preference of the immigration bar, who favour a strict rights based approach to selection, is seen in an editorial by C.L. Rotenberg decrying the use of negative discretion.[580] In it, he argues that, in certain circumstances, use of such discretion offends against the concept of double jeopardy. Citing informal reports from other counsel, he notes a trend to refusal of Independent applicants for lack of language facility, notwithstanding that such applicants may have obtained the necessary 70 units of assessment. In his estimation, this constitutes double jeopardy, since language is a factor expressly provided for in the

---

[579] F.R. Scott, Comment [1936] Can. Bar Rev. 62 at 66.

[580] C.L. Rotenberg, "Conundrums – 1. Visa applicant refusal where applicant has more than 70 units for lack of language facility – Double jeopardy?" (1987), 1 Imm. L.R. (2d) 72.

selection measures and should not be counted again when the use of discretion is considered. To do otherwise, he contends, would be to accord it greater weight than was contemplated by the Governor in Council. Ability to successfully establish has a very specific meaning under the regulatory scheme, in his view, and is defined by obtaining an award of 70 or more points. "The weight to be given to a lack of language fluency is clearly contemplated by the Governor in Council as being a numerical factor and no more than that."[581] Thus, to consider it again later with respect to R. 11(3) discretion is to effectively count it twice. Clearly, for him, "successful establishment" is demonstrated by a mechanical application of the selection criteria and is indicated, in a hard and fast way, by the calculation of a numerical value that is either acceptable or unacceptable.[582]

This assumes, however, that the selection factor system is more than what it really is – a sociologically based tool for prognosticating future success. It is not an infallible measure. How could it be? The real quality that the system seeks to gauge is not capable of precise calculation. Assessment of language, for example, is not simply a measurement of language for its own sake. Rather, it is one factor within a larger system of measures meant to serve a higher objective – assessing potential for "successful settlement". That is the whole point of the exercise. The tally system rating language ability, educational attainment, occupational formation and experience, age and so on is simply a grouping of individual indicators seen to be relevant to an overall assessment of settlement potential. To look at any one of the selection factors in isolation from all the

---

[581] *Id.* at 74.

[582] Or is it? In a later article, Mr. Rotenberg admits that, when it comes to independent immigrant selection, "[s]uccessful establishment in Canada is the name of the game." This would seem to suggest that he has revised his opinion to recognize that a more holistic approach to the selection criteria is appropriate.

other factors simply distorts the value of that factor by assuming that it is somehow complete unto itself. Yet, this is what Rotenberg urges when he cites double jeopardy as a concept relevant to Independent immigrant selection.

But obviously, the broadness of the selection criteria suggest that more was intended. Occupational assessment lies at the heart of the selection system.[583] As a more or less objective measure, it is free from many of the complaints about capriciousness that afflict a more discretionary factor, like personal suitability. Still, there is widespread criticism that occupational assessment does a poor job of selecting immigrants.[584] This is true if what is sought is simply a particular occupational skill set that is readily applicable to the current domestic labour market.[585] Manifestly, however, the selection system is intended to capture more – it is meant to weigh human qualities too, as evidenced by the personal suitability factor. And, in my experience, the inchoate human qualities, such as initiative, adaptability, motivation and so on, are actually the most important. Professional engineers, for example, have enjoyed high occupational demand on immigration occupation lists for many years and there is little doubt that many job opportunities exist in engineering fields in Canada. However, it is not enough for foreign

---

See C.L. Rotenberg "Conundrum" (1988) 3 Imm. L.R. (2d) 238 at 238.

[583] Four out of nine selection factors are directly focused on occupation. These are occupational demand, the educational/training factor, experience and arranged employment/designated occupation. A fifth factor, education, also obviously has a close connection to the assessment of occupation.

[584] See for example, CIC "Daily Wrap" (4 May, 1998) quoting a story by Adrienne Tanner carried in the May 4, 1998 editions of the *Vancouver Province* and *Edmonton Journal*. According to Tanner, regardless of the occupation they are selected against:

> ...most immigrants we chose end up driving taxis, delivering pizzas and washing dishes. Former immigration department program manager Donald Cameron calls the point system for selecting immigrants "a silly game." Applicants are forced to measure up to "irrelevant" standards for occupations they'll never work at in Canada, he says.

[585] It is simply beyond the scope of this paper to explore alternative selection systems that might be devised. Hence, my focus remains limited to the role of discretion in the selection system as presently configured.

engineers to simply turn up in the domestic labour market. Some employers, for example, may be skeptical as to the value of foreign credentials and experience and may prefer a known commodity – a Canadian trained candidate with Canadian experience. To succeed, immigrants in this position need to be prepared to compete in the job market. Though the particular job qualification is a starting point, it is human qualities like motivation, flexibility, initiative and other personal factors which see an immigrant best through the rough times of settlement in Canada and ensure ultimate success.

This point was not lost on Parliament. Though it struggled to fashion as objective a set of measures as possible, it also recognized that the selection system was not infallible. Thus, it made express provision against the possibility of a failure in the rules for qualification by the inclusion of an overriding discretion in s. 11(3) of the *Regulations*.[586] If, as Rotenberg asserts, any selection factor was meant to be simply a numerical value and no more than that, and if the attainment of 70 units of assessment was really a conclusive, magic number, then the inclusion of R. 11(3) is redundant. But they are not. R. 11(3) discretion was left to hang over the entire selection system, for use in a global way, in consideration of the total sum of all the parts. A reading of that subsection makes this apparent:

> (3) A visa officer may
> (a) issue an immigrant visa to an immigrant who is not awarded the number of units of assessment required by section 9 [ie. independent immigrants] or 10 [ie. assisted relative category immigrants] or who does not meet the requirements of subsection (1) or (2), or
> (b) refuse to issue an immigrant visa to an immigrant who is awarded the number

---

[586] See *Zeng* v. *Canada (Minister of Employment & Immigration)* (1989), 27 F.T.R. 56 (F.C.T.D.). Parliament has recognized, through the device of R. 11(3) discretion, that ability to successfully establish in Canada is a consideration that may outweigh other factors, including accumulation of a specified number of points.

> of units of assessment required by section 9 or 10,
> if, in his opinion, there are good reasons why the number of units of assessment awarded do not reflect the chances of the particular immigrant and his dependants of becoming successfully established in Canada and those reasons have been submitted in writing to, and approved by, a senior immigration officer.

If it is impermissible to consider the individual parts of the selection system and their inter-relationship, when determining how best to exercise R. 11(3) discretion, then what else is left? Surely Mr. Rotenberg would not have visa officers considering factors unconnected to the enumerated selection factors?

3.3.2 Formalism

Nonetheless, the reductionist course has largely carried the day, with the courts seduced to the notion that the selection system, and use of discretion, should be approached in a piecemeal way. Thus, the selection factors have been found to be individual measures of specific abilities which may not be "double counted".[587] Not only is this contrary to the intent of Parliament, but it leads to an approach where strict

---

[587] *Zeng* v. *Canada (Minister of Employment & Immigration)* (1991), 12 Imm. L.R. (2d) 167 (Fed. C.A.). See also *Ho* v. *Canada (Min. of Employment & Immigration)* (1994), 88 F.T.R. 146. The Court found a reviewable error where language ability (assessed under Item 8 of Schedule I) was considered in an assessment of personal suitability (Item 9 of Schedule I). The problem of "double-counting" is also highlighted in the Immigration Manuals, CIC IM Chap. Op-5, para. 2.5.3 "Assessment of occupations", where it is stated:

> The officer must use care to avoid a double assessment of selection factors: for example, the applicant has already been assessed on their official language capability. However, if the occupation is such that labour market information indicates that a much higher level of language proficiency is required to work in that occupation AND the applicant has not prepared financially or in other ways for these settlement problems, the officer may consider negative discretion.

The rule on double counting has been ameliorated somewhat by the concession that a discrete factor, otherwise assessed on its own, may be considered again in certain circumstances. In particular, a factor such as age, for example, may be considered under personal suitability, but only insofar as it speaks to the applicant's motivation, resourcefulness and other qualities that are the crux of such a personal suitability assessment. *Ahmad* v. *Canada (Minister of Citizenship & Immigration)* (1998), 40 Imm. L.R. (2d) 121 (F.C.T.D.) citing *Ping* v. *Canada (Minister of Citizenship & Immigration)* (1997), 37 Imm. L.R. (2d) 135 (F.C.T.D.); *Stefan* v. *Canada (Minister of Citizenship & Immigration)* (1995), 35 Imm. L.R. (2d) 21 (F.C.T.D.).

formalism is demanded from the administrative process of selection. Though administrative law processes are intended and designed to be expeditious and less involved than judicial procedures, because of the approach adopted by the courts, the results in practice have clearly been otherwise.

The assessment process is governed by section 6(1) of the *Act*. It states that:

> ...any immigrant...may be granted landing if it is established to the satisfaction of an immigration officer that the immigrant meets the selection standards established by the regulations for the purpose of determining whether or not and the degree to which the immigrant will be able to become successfully established in Canada, as determined in accordance with the regulations.

That assessment, of course, is conducted in accordance with section 8(1) which provides that:

> ...for the purpose of determining whether an immigrant and the immigrant's dependants...will be able to become successfully established in Canada, a visa officer shall assess that immigrant or...the spouse of that immigrant...on the basis of each of the factors listed in column I of Schedule I.[588]

Schedule I of the *Immigration Regulations* goes on to provide a series of nine factors against which applications are assessed.[589] Among other factors, an Independent immigrant is selected on the basis of their intended occupation in Canada. To succeed, however, the applicant must possess any requisite training needed for the occupation, as well as at least one year of relevant experience.

While the *Act* establishes the necessity for an assessment, it is not just any assessment which will do. According to Rothstein J., "[a]n assessment is not an informal

---

[588] This section has been held to place a positive duty upon visa officers to conduct a formal assessment in respect of any claimed intended occupation in Canada. See *Uy* v. *Canada (Min. of Employment & Immigration)* (1991), 12 Imm. L.R. (2d) 172 (Fed. C.A.).

[589] For a list of the selection factors against which Independents are scored, see Appendix A "Independent Immigrant Selection Grid", below at page ???

or preliminary determination by a visa officer. The terms "assess" or "assessment" mean the process of applying to the prospective immigrant the factors listed in column I of Schedule I of the Regulations."[590] Quite simply then, the visa officer is required to go through a formal process of weighing every claimed intended occupation against all of the factors set out in the schedule. This is so, no matter how farfetched an intended occupation may be. Because of this demand for formality from the courts, visa offices are not able to quickly shrug off unlikely intended occupations by merely pointing out that it does not appear to be supported by the evidence on file. Instead, a painstaking process of calculating points and justifying the number awarded must be conducted for each and every potential occupation. It is a not uncommon practice for applicants to list multiple intended occupations in an application, many of which may have little or no basis in the applicant's educational and occupational grounding. This is not to suggest that an applicant should be denied a fair and full assessment for each and every occupation. However, the question has to be asked whether the ends of justice might not be just as fully served by allowing for a less cumbersome assessment process for occupations which are ill-founded on the evidence presented with an application. An assessment conducted in accordance with the *Immigration Act* and Regulations is a *sine qua non*. However, to require that it be conducted in a rigid, detailed manner for each and every part of an application is to impose a formalism that gives no breath of life to the administrative process to experiment with alternative processing methods beyond those of a judicial nature.

---

[590] *Issaeva* v. *Canada (Min. of Citizenship & Immigration)* (1997), 37 Imm. L.R. (2d) 91 at 95 (F.C.T.D.).

Another example is seen in the *Hoballahi* decision[591], where the applicant had been awarded more than enough units to meet the required pass mark in the Assisted Relative sub-category of the Independent class. Nonetheless, the visa officer felt the applicant would not be able to successfully establish himself in Canada and so exercised negative discretion under R. 11(3) to refuse the application. In doing so, the officer noted that the applicant's spouse had no "work skills" to assist settlement. The Court, however, noted that the officer had not mentioned in his refusal letter the assistance the Canadian relative might provide to aid settlement. To the Court's mind, it was obvious that the officer was aware of such potential support, since the application had been assessed as an Assisted Relative. Failure to specifically mention such assistance led the Court to conclude that relevant evidence, the potential family support, had not been considered.[592]

This reasoning, however, imports to the administrative sphere the sort of mechanistic approach that is a hallmark of judicial processes. On the facts, one might just as easily conclude that the assistance had been properly accounted for. Assisted Relatives need obtain only 65 points overall for a pass mark, as compared to 70 for regular Independents. In effect, they are given a five point "bonus" in recognition of potential family support. Implicitly, the officer recognized this when assessing the applicant at the lower Assisted Relative standard. However, it is apparent also that in exercising negative discretion, she did not feel that the family support would be sufficient to overcome the applicant's poor settlement prospects. To ask her to expressly and explicitly deal with the issue of family support in the exercise of discretion is to ask her to

---

[591] *Hoballahi* v. *Canada (Minister of Citizenship & Immigration)* (1996), 124 F.T.R. 164, 37 Imm. L.R. (2d) 98 (F.C.T.D.) (hereinafter cited to Imm. L.R.).

effectively "double count" it and accord it more weight than it was apparently meant to have.[593]

On a number of occasions, CIC has attempted to implement streamlined procedures, only to find that it has run afoul of the courts' notions of fairness. It is very much a dance of "one step forward-one step back", with CIC and the judiciary often pulling in different directions. The *Lam* case[594] provides an illustration of this immigration "two-step." Shui-Man Lam applied for immigration in the self-employed category. However, his application was rejected upon initial review (or "paper-screening") without the benefit of an interview. Lam had failed to provide sufficient supporting evidence with his application to convince the visa officer that he could qualify for immigration, even if an interview was held. The Federal Court, however, found that the wording of the regulations was such as to leave no discretion in a visa officer to refuse an application without interview. The practical result was that literally thousands of failed applicants had to be afforded an opportunity for interview, no matter how hopeless their chances of success.[595] It was an immense exercise for CIC that consumed

---

[592] *Id.* at 100.

[593] Offers of support to Assisted Relatives are to be distinguished from sponsorships under the Family Class. Family Class sponsorships are formal undertakings, of a fixed duration, whereby Canadian residents and citizens accept legal responsibility for settling an immigrant and her family, if any. An offer of support to an Assisted Relative is entirely different in kind. It is simply an informal promise of help for which there is no enforcement mechanism under the *Act* or the *Regulations*. Further, with respect to the value of offers of support in Assisted Relative cases, it is interesting to note that the "bonus" was once set at 15. Some years ago, however, Parliament evidently felt this overvalued such offers and so reduced the "bonus" to its present value of 5.

[594] *Lam v. Canada (Minister of Employment & Immigration)*, (1991), 15 Imm. L.R. (2d) 275, 49 F.T.R. 200 (T.D.).

[595] See Department of External Affairs and International Trade Canada, Telexes OSD-0006 (13 January 1992) and URR-0143 (25 February 1992) "New Call-In Procedures Following Lam Decision". These telexes provided guidance to immigration missions respecting calling for interview applicants who had previously been failed at paper-screening, but were to be afforded an opportunity for interview as a result of *Lam*.

vast interview resources. Just as importantly, it caused many applicants to expend considerable time, money and effort to attend interviews with little likelihood of success. The necessity for these interviews clearly held out false hope for some applicants and doubtless led many of them to draw their own conclusions about Canadian justice and fair play. In the result, a regulatory amendment was necessary to spell out when a case might be refused in the absence of a personal interview.[596]

The imposition of court-like thinking and processes upon the immigration system has led not just to increasing formalism in the immigration system. It has, in fact, also contributed to the bureaucratization of immigration processes, with functionaries hesitant to extend themselves, lest they be faulted by the courts. This is evident, for example, in the standard form response CIC has developed for dealing with representations by failed applicants. Although in practice such representations often cause a visa officer to go back and have a "second look" at the file, there is no percentage in revealing this fact, if the review still results in a negative decision. Under the *Federal Court Act*, an applicant has thirty days from notification of a tribunal decision to undertake an application for review. That limitation period is subject to a form of novation, if the decision-maker responds in any sort of substantive fashion to subsequent representations.[597] Appeals, of course, result

---

[596] See *Immigration Regulations*, section 11.1, which was promulgated in response to the decision in *Lam*. Also see Employment and Immigration Canada (EIC) Operations Memorandum (OM) IL 92-02 *"Immigration Regulations, 1978 – Amendment"* (07 April 1992), describing the problems for the department arising out of the *Lam* decision and the necessity for enacting s. 11.1 of the *Regulations* which came into effect on February 21, 1992. At 2, it is noted that "Immediately ... [the *Lam*] decision entitled all immigrant applicants worldwide to a personal interview with a visa officer. It has long been standard procedure for visa officers to paper screen applications and only interview those applicants who had some prospect of meeting minimum selection standards.

Because of the serious consequences of the Lam decision for immigration operations worldwide, the amendment to Regulation 11 was instituted on a priority basis."

[597] *Soimu* v. *Canada (Secretary of State)* (1994), 83 F.T.R. 285. The court distinguished there between a "true review" and a mere "courtesy response", noting that a true review after refusal constitutes a decision

in additional work burdens to visa officers in preparing the file and affidavit evidence for judicial review, being available for examination on affidavit, and the like. As a result, a standard form letter is usually issued simply advising the applicant that her case was previously considered on its substantive merits and, where appropriate, for possible humanitarian and compassionate grounds. The response goes on to indicate that the matter was refused on both accounts and that a letter of a certain date was previously sent to her advising of these events. It concludes by directing the applicant to submit a fresh application, if new or different information is available.[598] The necessity of such an empty reply is obviously a direct response to the technicalities of judicial limitation periods. Sadly, though, it contributes to an immigration system that is more Byzantine and less responsive to clients' needs and interests.

3.3.3 Positive Discretion

With respect to the use of discretion in the selection process, however, formalism gives way to inconsistency. Immigration counsel, for example, are not consistent in their opinions over its usage. While they are vocally critical of negative discretion and claim preference for a positivist view wherein the rules are strictly applied, yet they do not hesitate to seek positive discretion to allow exemptions from those rules. Certainly, when

---

which will start the 30 day limitation period running anew. Likewise, see *Dumbrava* v. *Canada (Min. of Citizenship & Immigration)* (1995), 31 Imm. L.R. (2d) 76, 101 F.T.R. 230 (F.C.T.D.), where the Court refused to entertain an application that was outside the 30 day appeal period. For a discussion of the 30 day limitation period, and the apparent perils and problems it poses for the private bar, see C.L. Rotenberg, Annotation to *Dumbrava, id.*, 31 Imm. L.R. (2d) 76 at 77-79. The problem discussed here is larger than just the example of novation of limitation periods. It accounts as well for the reluctance of visa officers to provide explanations in the vernacular in refusal letters that might be more meaningful to failed applicants. Instead, the safe approach is to recite tried and true snippets of the *Act* and *Regulations* which will sustain a refusal upon review. Though these meet the courts' requirements, they often are found obtuse and abstract by applicants.

it comes to positive discretion, their only complaint tends to be that it is not used enough. Thus it is that positive discretionary policies are the subject of litigation, if withheld from a particular applicant. This is true to the point where even the courts must occasionally throw up their hands in frustration at unending attempts to "judicialize" positive discretion[599] and will generally not grant *mandamus* to force its exercise.[600] Occasionally, though, it seems that the impulse of good judges to want to do the right thing will even overwhelm this hesitancy.

A case in point is the *Ting* decision[601], where the Court felt obliged to suggest a substantive outcome requiring an exercise of positive discretion. Zhang Xi Ting had worked as an interpreter, tour guide and French teacher in Hong Kong. She possessed a Bachelor and a Master of Arts degrees from Chinese universities and was also studying at a Quebec university for a second Master's degree. Her application for permanent residence as a skilled worker stated her intended occupation was that of an interpreter in Vancouver, B.C. Though Ting was apparently fluent in the French language, the visa officer noted that she was much less proficient in English and so awarded only minimal points for this language. Noting this deficiency and the negative impact it might have on Ting's adaptation to the predominantly English language job market she was destined to, the visa officer awarded just four of a possible ten units for personal suitability. The end result was that Ting obtained only 68 points overall, two short of the tally for a successful

---

[598] See CIC-All Immigration Message ORD-0361/E, (30 November, 1993) "*Responses to Enquiries after Refusal Letter Issued*".

[599] See the comments of Muldoon J. in *Khalon, supra* note 185, regarding a propensity by counsel to attempt to bring every aspect of discretion under the sway of the courts.

[600] *Young* v. *Canada, supra* note 141.

[601] *Ting* v. *Canada (Minister of Citizenship & Immigration)* (1996), 36 Imm. L.R. (2d) 197, 122 F.T.R. 238 (T.D.) (hereinafter cited to Imm. L.R.).

application.

Citing a lack of good faith in the visa officer's seeming failure to take into account all relevant circumstances (such as the applicant's university training, proficiency in three languages and adaptability demonstrated by successful establishment at a French university in Quebec), Dubé J. set aside the decision and ordered a re-determination. Apparently vexed by the logic of the visa officer's determination, the Court did not leave the matter there, however. A confusing discussion of the proper use of discretion in this case was also offered, together with the Court's opinion as to the fitness of the candidate, in these terms:

> Secondly, the visa officer failed to exercise her discretion under subsection 11(3) of the *Immigration Regulations, 1978* which allows the visa officer to issue a visa to a person who was not awarded the required number of units of assessment if there are good reasons why the number of units of assessment awarded do not reflect the chances of that particular immigrant of becoming successfully established in Canada. *A proper exercise of that discretion would have resulted in the awarding of two more units so as to grant a visa to this highly qualified applicant.* [emphasis added][602]

With respect, Dubé J. appears to have lost sight of the distinction between the discretion available to a visa officer under s. 11(3) of the *Regulations* and the discretion inherent in assessment of the selection factor of personal suitability. R. 11(3) discretion may not be employed to award further units of personal suitability, as he suggests. Instead, its use is restricted to situations, precisely like the one in *Ting*, where the applicant has failed to obtain sufficient points, but appears to have potential for settlement in excess of that reflected by the total points award. It cannot be used to boost the number of points actually awarded for any assessment factor. That involves use of

---

[602] *Id.*, 197 at 200.

any discretion inherent within the calculation of the particular selection factor. Though use of the two kinds of discretion is obviously complementary and overlapping in the sense of contributing to the final overall result, they are nonetheless distinct and different. In the end, though *mandamus* did not issue to compel the favourable exercise of discretion, the court certainly left little doubt for the visa officer about the appropriate course of action on reassessment.

3.3.4 Negative Discretion

On the other hand, any hesitance against "judicializing" discretion falls away when negative discretion is involved, particularly when its application affects substantive outcomes.[603] A review of the case law makes clear that, in this current era of a rights sensitive approach to immigration, negative discretion has increasingly fallen into disfavor with the courts.[604] Accordingly, it is not lightly tolerated and the courts strive to contain it whenever possible. This reality is well illustrated by the case of *Chen*.[605]

The applicant Chen had been living and working in Canada and the U.S. for four years when he applied for permanent residence in the Independent category in July, 1987.[606] He was interviewed in September, 1987 and received a score of 73 units of

---

[603] Even some procedural discretion, such as the decision whether to give an applicant a PAQ or a full application, may have a substantive impact. As in *Choi*, *supra* note 270, for example, handing out a PAQ had the effect of depriving Choi of a substantive opportunity to lock in his application. Hence, procedural discretion had a substantive outcome.

[604] The *Charter of Rights and Freedoms*, of course, has been a major influence in recent years, harbingering the trend to emphasis on rights. For a review of its application and impact on discretionary decision making, see generally June M. Ross, "Applying the Charter to Discretionary Authority" (1991) 29 Alta. L.R. 382.

[605] *Chen* v. *Canada (Min. of Employment & Immigration)*, [1995] 1 S.C.R. 725, 27 Imm. L.R. (2d) 1, 179 N.R. 70, 123 D.L.R. (4th) 536, rev'g (1994) 22 Imm.L.R (2d) 213 (Fed. C.A.), rev'g (1991) 13 Imm. L.R. (2d) (Fed. T.D.) 172.

[606] The factual summary provided here is drawn from the trial court's decision reported at (1991) 13 Imm. L.R.(2d) 174. In particular, see "background facts" as set out at 174-177.

assessment, more than enough to meet the 70 point threshold. In particular, Chen received seven of the possible ten units of assessment for the factor of personal suitability. At that time, he was advised that his application had been provisionally accepted, subject to completion of medical and security checks. In September, 1988, his work permit in the United States expired. By December, 1988, the security checks still had yet to be completed.[607]

During this long interval, he contacted the visa officer by correspondence on two occasions and "...offered to pay any "costs or fees" in order to expedite the matter."[608] Finally, Chen sent a Christmas card to the interviewing officer, enclosing the sum of five hundred dollars in American funds and thanking her for her efforts on his behalf. The officer brought this apparent bribe to the attention of her superiors, who convened a further interview for Chen, before a more senior officer. He initially denied sending any money when the subject of the "gift" was raised. Pressed on the issue, he eventually

---

[607] One must have some compassion for Chen's plight. Some eighteen months after he had been given approval in principle for his application, he was still in a waiting game. Such delay is sure to annoy and upset anyone. However, it must be recognized that fault for delay does not always lie entirely with CIC. In Chen's case, it was completion of "background checks" that held up matters. Those checks obviously involve verification of who the applicant is and ensuring that she is not a criminal, security or other sort of risk to the public health or safety. This may entail complex and protracted liaison with police, security and other officials, both domestic and foreign. Relying upon information derived primarily from other agencies, CIC nonetheless remains on the firing line for criticism with the slow pace of background checks. Though most of the work in completing such checks is often not within its actual control, yet it is the agency which must suffer the criticisms when an applicant is unduly delayed or, worse yet, a war criminal, senior official of a despotic regime, organized crime kingpin or other undesirable is granted entry because of a failure in background checking. Every case of immigrant processing must involve a balancing of the right of the applicant to speedy processing against the right of the Canadian public to be protected. This is especially true where, as in Chen's case, the applicant has deliberately chosen, for reasons known usually only to her, to apply outside of her country of origin. CIC makes no secret that processing in such cases is delayed by the necessity for referral back to the visa office having geographic responsibility over the applicant's country of origin. See the procedure described *supra*, note 458. Though delay to the applicant is regrettable, the bottom line must favour the security of society over the convenience of the applicant. Thus, every application kit contains an explicit warning to applicants that they should make no preparations to move to Canada until they actually have a properly issued visa in hand. Chen's frustration was understandable, but his actions were not.

recanted and provided various excuses including that it was an Oriental custom to give presents to "special friends" at holidays and, later, that it was to cover any special costs, such as long distance telephone charges or the like.[609] Subsequently, though the second officer did not alter the units of assessment awarded to Chen, a letter was sent to him refusing his application. Amongst other reasons, the officer invoked negative discretion under s. 11(3) of the *Immigration Regulations* to refuse his application, notwithstanding that he had received sufficient units of assessment to qualify. In the officer's estimation, the points actually awarded to Chen did not reflect his true potential for successful settlement.

In the Trial Division of the Federal Court, the grounds upon which negative discretion might be used to overcome an otherwise successful assessment was the central issue. Strayer J. reviewed closely the selection criteria promulgated in Schedule I of the *Regulations* pursuant to the authority of the Governor in Council under s. 114(1)(a) of the *Act* to make regulations.[610] "While it is nowhere clearly spelled out," he posited, "the selection standards authorized for use by para. 114(1)(a) of the Act, and the actual factors identified in Sched. I of the Regulations appear to be essentially related to the ability of an immigrant to make a living in Canada or to be economically sustained other than by the state."[611] Because of this apparent emphasis on economic factors as an indicator of ability to successfully establish, Strayer J. found it "...difficult to read the discretionary power granted to a visa officer by subs. 11(3) of the Regulations as allowing him to

---

[608] *Chen, supra* note 606 at 175.
[609] *Id.* at 176.
610 See Appendix A, below, which provides a listing of the selection criteria mandated by Schedule I of the *Regulations*.

ignore the number of units of assessment and to determine, for essentially non-economic reasons, that an immigrant does not have a chance of becoming successfully established in Canada."[612] In the result, he held that the visa officer's decision had improperly factored in concerns about the applicant's potential for "social success" that were irrelevant to the statutory selection scheme.

In the Court of Appeal, the majority found the opposite to be true and so reversed the lower court. In their view, while many of the selection factors had an economic focus, they were not restricted exclusively to such a focus. Social success, according to the court, was inherent alongside economic success in factors such as age, education and language ability.[613] The Court also observed that the factor of "personal suitability" was defined in the regulations[614] as reflecting a person's adaptability, motivation, initiative, resourcefulness and other similar qualities. They were unwilling to accept that these factors were to be limited only to ability to earn a living. To do so, they felt, would unduly narrow the phrase "to become successfully established in Canada" by inserting the word "economically" into it.[615]

Dealing with a further concern that Strayer J. had about the apparent open ended nature of the discretion accorded under s. 11(3), Létourneau J.A. responded by noting that that section also contained the qualifying words "good reasons", and that these acted as a limiting factor:

In determining whether there are good reasons to so conclude [that the points

---

[611] *Chen, supra* note 606 at 180.
[612] *Id.* at 181.
[613] Per Létourneau J.A. (Isaac C.J.. concurring). *Chen, supra* note 605, 22 Imm. L.R. (2d) 213 at 218.
[614] At Item 9 of Schedule I of the Regulations.
[615] Per Létourneau J.A., *supra* note 613 at 219.

> awarded do not reflect the immigrant's chances for successfully establishing, either socially or economically], the visa officer is required to form a personal opinion which must have an objectivity foundation. To put it another way, the words "good reasons" import a measure of objectively (sic) in the process and ensure that the exercise of discretion under subs. 11(3) is justifiable in the circumstances and not arbitrary or capricious.[616]

On the other hand, Robertson J.A., in dissent, refused to accept that subs. 11(3) could have been intended to vest a broad residual discretion in visa officers. He stated that he was "...troubled by the prospect of giving judicial recognition to a criterion which hinges on notions of "good reasons" and "social success..." and "...the prospect of being called upon to evaluate the objective merit of visa officers' subjective assessments."[617] Accordingly, he preferred the approach adopted by Strayer J. in the Trial Division. A further appeal by Chen to the Supreme Court of Canada was granted, with the result that the Trial Division judgment was restored. Regrettably, the Supreme Court issued no reasons for doing so, beyond simply expressing a preference for the views of Robertson J.A. and Strayer J.[618]

Chen must be regarded as an important decision for administrative discretion in immigration law, not just because it has been followed in subsequent cases[619], but also because of the narrow approach it sanctioned respecting discretionary power. As was evident, even an express statutory grant of power was insufficient to overcome deep seated judicial suspicion of negative discretion. The text of section 11(3) does not

---

[616] *Id.*

[617] *Id.* at 222, per Robertson J.A.

[618] *Chen*, *supra* note 605, [1995] 1 S.C.R. 725, 27 Imm. L.R. (2d) 1, 179 N.R. 70, 123 D.L.R. (4th) 536 (S.C.C.).

[619] See Maria Lavelle, "Positive and Negative Discretion Under Subsection 11(3) of the Regulations" (3 April 1998) 3 (CIC) Litigation Management Newsletter at 2, where the author states that "[s]ince *Chen v. M.C.I.*, all subsequent cases involving subs. 11(3) have followed the *Chen* focus on economic considerations."

explicitly refer to economic ability to establish and, as Létourneau J.A. observed, the court was required to employ an *ejusdem generis* methodology to read meaning into the grant of power that was obvious neither on its face nor in context.[620]

It is indeed the case that many of the selection factors enumerated in Schedule I have either a total or partial focus on economic establishment. This is not surprising, since matters such as job skills, training, work experience and the like are most readily adapted to a points assessment scheme. What is less easily captured is the notion of social success – does this person have the wherewithal to get on readily with life in Canada, both inside and outside of work? This is not an irrelevant or trivial consideration. As was noted in the Court of Appeal, social success is a consideration evident in many of the selection factors, alongside the notion of economic success. Certainly, the two are not nearly as neatly separable as the Trial Division, the minority in the Court of Appeal and the Supreme Court would have one believe. Successful economic establishment, for example, must inevitably entail familiarizing oneself to a sufficient degree with basic matters such as employment and tax laws, regulations pertaining to personal finances, housing issues and the like. Indeed, successful economic establishment must even involve the acquisition of some knowledge of socially acceptable workplace behaviour and etiquette. These all import a healthy degree of social

---

[620] See for example, Philip L. Bryden, "Developments in Administrative Law: The 1994-95 Term" (1996), 7 S.C.L.R. (2d) 27 at 77, where the author notes that from the viewpoint of statutory interpretation, the decision in *Chen* is surprising. In his view, it is not obvious from a textual standpoint that R. 11(3) discretion should be limited to the matter of verifying that the points system is a true reflection of potential for economic establishment alone. As a result, he posits, *id.* at 77-80, that the decision may be explained as a reaction to two concerns. First is the courts' traditional mistrust of grants of broad discretion, particularly where it is employed in a negative fashion, and a related fear of an increased volume of litigation, if "social adaptation" was a ground for refusing applicants. Second is concern that the selection system not be used as an informal mechanism for, effectively, delivering punishment meant to protect the integrity of the

settlement ability.

Further, it is simplistic to suggest that ability to economically establish is just a question of being able to get a job. Assuming that minimum wage standards reflect a bottom line, or at least an officially sanctioned one at any rate, as to the level of income needed to provide a reasonable livelihood in our society, it is hard to imagine any able bodied immigrant who will not be capable of establishing economically. Certainly, many menial labour jobs paying minimum wage require no particular skill set or even an ability to read, write or speak one of Canada's official languages. As a result, a refusal on negative discretion would appear tenuous for lack of any job skills or training.

Certainly, it seems that the Courts went to some lengths to find sufficient justification to limit R. 11(3) discretion in the fashion that was done. Robertson J.A.'s difficulty with the notion of courts having to judge objectively the subjective decisions of visa officers, for example, rings hollow. It is actually a commonplace for them to be called upon to engage in such activity upon judicial review. This is part of the reason that judicial review claims not to be interested in the merits of a decision, only the manner by which it was reached. Similarly, the strictly economic focus adopted in *Chen* appears repetitive. By judicial interpretation, negative discretion under s. 11(3)(b) has been limited to the same considerations covered in s. 19(1)(b) of the *Act*. It reads as follows:

> 19(1) No person shall be granted admission who is a member of any of the following classes: ...
> (b) persons who there are reasonable grounds to believe are or will be unable or unwilling to support themselves and those persons who are dependent on them for care and support, except persons who have satisfied an immigration officer that adequate arrangements, other than those that involve social assistance, have been made for their care and support; ...

---

immigration system.

It is questionable to conceive that Parliament would have intended to duplicate this express power elsewhere in the legislative regime.[621]

Unfortunately, Strayer J. and Robertson J.A. appear to have concluded that the exercise of negative discretion in *Chen* was little more than a covert attempt to punish the applicant for potentially criminal behaviour, and so used whatever justifications were at hand to strike it down.[622] However, this focus ignores the fact that the behaviour concerned had a direct bearing upon the qualities and attributes being selected for. Irrespective of whether or not his actions were criminal, the inappropriateness of the approach made by Chen is striking and spoke directly to the notion of adaptability that is central to the selection criteria. Even those who might regard *Chen* as good law will likely concede it is built on bad facts.[623] This was not a case of a confused foreigner, hampered by language barriers, and otherwise addled by his first encounter with western bureaucracy. In reality, Chen was a well-educated professional who had been working at

---

[621] This point appears not to have been argued in any level of court in *Chen*.

[622] Under Canadian law, there are a couple of possible offences that may have been committed by Chen. Under the *Immigration Act* itself, for example, s. 94(1)(m) makes it an offence for anyone to knowingly induce any person to contravene a provision of the Act. Chen's "gift", of course, would have to have been offered intentionally as an inducement to the visa officer to issue a visa somehow contrary to the scheme provided for by the Act. More likely, however, is the offence of "fraud on the government" pursuant to s. 121(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, as am., which provides:

> Every one commits an offence who
> (a) directly or indirectly
> (i) gives, offers, or agrees to give or offer to an official ...
> a loan, reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with
> (ii) the transaction of business with or any matter of business relating to the government ...
> whether or not, in fact, the official is able to cooperate, render assistance, exercise influence or do or omit to do what is proposed, as the case may be....

Under s. 121(3), every such offence is punishable by way of indictment and liable to a maximum term of imprisonment of up to five years.

[623] This much appears to be conceded even by Robertson J.A. himself in his dissenting opinion, when he states, "[u]ndoubtedly, there are those who will view the disposition of this appeal in terms of achieving a just result. My concerns are also noted in the prospect of being called upon to evaluate the objective merit

universities in Canada and the U.S. for five years before this episode. His inability to profit from all of that experience surely speaks volumes about his adaptability.[624] Moreover, this was not a case of theorizing as to how he might adapt. Surely his actual performance was as good an indicator of future performance as any selection criteria that legislators might be inspired to devise?[625] Admittedly, it is a set of facts which raises the interesting, but difficult, question as to how much immigrants are expected to adapt to our society[626], and how far society should be expected to accommodate individual and cultural differences. At a minimum, however, the line must be drawn at the threshold of criminal activity.

There is another aspect to the concern that immigration law was being used to mete out punishment. The courts themselves have always had an inherent jurisdiction to control and protect their own processes, as witness the contempt proceedings in *Bhatnager*.[627] It is a jurisdiction, however, which they obviously are unwilling to allow for administrative tribunals. Speaking from personal experience, the problem of inappropriate, and even illicit, approaches to visa officers in hopes of expediting an

---

of visa officers' subjective assessments." Chen, *supra* note 605, 22 Imm. L.R. (2d) 213 at 222.

[624] Not to mention that his actions would have been improper even in his country of origin. Certainly, newspaper accounts of official corruption trials in China make evident that bribery of a public official is also an offence there, notwithstanding any custom to the contrary.

[625] The selection process is meant to be a forward looking exercise. *Singh (Gurmit)* v. *Canada, supra* note 544 at 70. Given the prospective nature of an assessment of potential for successful settlement, the need for some discretion is indispensible since the matter entails weighing a variety characteristics that are incapable of reduction to precise mathematical calculations.

[626] Clearly, legislators intended that some adaptation by the immigrant take place. This is obvious from the fact that the selection factor of personal suitability specifically identifies "adaptability" as a relevant consideration, though obviously the courts have narrowed it to economic adaptability. This is seen also in statements from Parliament that suggest a wider adaptability, involving social settlement, is also within the expectations of legislators. Regulatory Impact Analysis Statement SOR 92/101 (6 February 1992), for example, in describing various changes being made to family dependency definitions, begins by stating that, "[i]mmigrants coming to Canada are expected to accept the Canadian cultural reality."

[627] As noted earlier, in section 3.2 Judicial Review, the prerogative remedies offered by courts are

application is fairly common and it is a rare visa officer who does not have a story to relate about such advances. Indeed, they are apparently sometimes taken even to the highest levels of government.[628] It is interesting to note that at the time the facts of the *Chen* case arose in 1988, there were no mechanisms available under the *Immigration Act* to deal with an act or omission that might give rise to criminal liability, but which had yet to be prosecuted. Perhaps in response to the *Chen* decision itself, the *Act* was amended in 1993 by Bill C-86[629] to plug this apparent loophole.[630]

---

discretionary and may be withheld, if the applicant does not "come to equity with clean hands". See also Bagambiire, *supra* note 151, at 355.

[628] See for example Shar Levine and Andrew Phillips, "Citizenship on sale" *Maclean's* (1 July 1996) 14 at 14-15, which details an incident where even the Prime Minister was evidently asked to intervene in an immigration case:

> The image is striking, but not completely revealing. Prime Minister Jean Chretien smiles out from the pages of a Taiwanese-Canadian newspaper and clasps the hand of Gordon Fu, the president of a high-profile company that specializes in immigration from Taiwan to Canada. What the photograph does not show is that during the private meeting in the Prime Minister's Office in Ottawa on Feb. 28, Fu took the highly unusual step of personally handing Chretien a letter asking that the Prime Minister speed up his application for permanent residence in Canada. Fu was angry that although he heads the biggest consulting company in what has become the hottest Asian market for Canadian business immigration, his own application had been stalled by federal officials. ... Later, however, Fu acknowledged that it was inappropriate for him to ask the Prime Minister to intervene in his case. "That is a mistake," he said, adding that "cultural differences" between Canada and Taiwan accounted for his gesture.

It is beyond my abilities and the scope of this paper to canvas the issue in other than a cursory fashion. For the reverse twist on illicit approaches, however, see Adrienne Tanner, "Immigration Scams Probed" *The Vancouver Province* (03 February 1998) A2. That story details allegations of bribes being solicited by locally engaged staff in Canadian visa offices in New Delhi and Islamabad. According to Surrey, B.C. M.P. Gurmant Grewal, who raised the allegations, the "...hiring of foreign nationals to work at immigration offices is risky because they have no interest in Canada."

[629] *Supra* note 563.

[630] For a summary of the many changes wrought by C-86, see CIC OM IS 93-01(e) of 12 January, 1993. In particular, C-86 added the following provisions to section 19 of the *Act*:

> (1) No person shall be granted admission who is a member of any of the following classes:
> (c.1) persons who there are reasonable grounds to believe
> (ii) have committed outside Canada an act or omission that constitutes an offence under the laws of the place where the act or omission occurred and that, if committed in Canada, would constitute an offence that may be punishable under any Act of Parliament by a maximum term of imprisonment of ten years or more....
> (2) No immigrant and, except as provided in subsection (3), no visitor shall be granted admission if the immigrant or visitor is a member of any of the following classes:
> (a.1) persons who there are reasonable grounds to believe
> (ii) have committed outside Canada an act or omission that constitutes an offence under the laws of the place where the act or omission occurred and that, if committed in Canada, would constitute

Dubious justifications were met also by a lack of balance in the approach employed. Rather than a functional assessment involving some consideration of the purposes of the legislation and the nature of the problem before the decision-maker, the Courts' focus was primarily fixated on the procedural rights of the applicant. When account was taken of the purposes of the *Immigration Act*, it was done so in a unitary fashion, emphasizing only that the act was meant to facilitate immigration. In their haste to contain negative discretion, though, the Courts may have failed to appreciate the wider implications that follow from the approach employ. In particular, if negative discretion under subsection 11(3)(b) is limited to economic considerations only, then the corollary must also be true – that positive discretion under subsection 11(3)(a) is likewise limited. Judicial interpretation of negative discretion thus seems to have put a fetter on positive discretion.[631]

More generally, by fighting the "good fight" on negative discretion, under the banner of the rule of law, the courts may have reinforced the notion that a discretionary policy, at least when it is positive in character, is largely beyond the pale of judicial

---

an offence that may be punishable by way of indictment under any Act of Parliament by a maximum term of imprisonment of less than ten years....

[631] Representations on case files extolling the social skills and virtues of applicants are common. For example, many applicants provide information as to their past participation in voluntary community service work. In light of *Chen*, though, such information is arguably irrelevant, unless it can somehow be linked to ability to participate in the economy.

However, CIC's own Immigration Manual continues to suggest a holistic approach toward use of positive discretion. CIC IM Chap. Op-5, para. 4.2 provides that "[d]iscretion may be used to overcome insufficient units of assessment, a lack of employment experience in a specific occupational group or the fact that the applicant's occupational skills are not among those selected as open for immigration." It is clear from this that CIC itself recognizes the limitations of the selection system set out at Schedule I to the Regulations and prefers its visa officers to take a broader view of what the applicant has to offer. This is so, to the point of ignoring the occupational factors which are at the heart of the economic establishment potential that the courts in *Chen* were so preoccupied with.

supervision.[632] Certainly, by shutting down negative discretion, it would be tenuous for them at the same time to adopt an activist role to enlarge positive discretion. The best that can be done, therefore, is for the courts to follow their traditional course of insisting only that positive discretion not be unduly fettered. Thus, cases like *Chen* may also stand for the proposition that the many positive discretionary policies of CIC are to remain simply that – voluntary policies which, subject to occasional interventions by the courts, immigration officers are largely free to apply or, most poignantly, not apply.

A case in point may be the recent retrenchment by CIC on a discretionary policy concerning children of immigrant families separated because of an obligation to complete compulsory military service. In some countries, permission to emigrate is not given unless and until the required period of service is completed. Typically, a family that migrates to Canada before their children are of an age to serve in the military is forced to leave those children behind, until the obligation is fulfilled. In many cases, such children have met all existing immigration requirements and are even issued immigrant visas with the rest of the family. But, they are unable to use the visas because exit permission is not forthcoming. If the rest of the family has migrated to Canada in advance of a child gaining exit permission, under the dependency rules contained in the *Regulations* there is a possibility that permanent separation may occur. Upon completion of the military service, the child often is too old and not sufficiently dependent to qualify for sponsorship as a "dependant"[633] in the Family Class. As such, their only recourse is to apply in the

[632] The courts' treatment of applications for "humanitarian and compassionate" consideration available under section 114(2) of the *Act* has been marked by a reluctance to "judicialize" this positive discretion made. See for example, *Yhap*, *supra* note 200, *Vidal*, *supra* note 211 and *Kahlon*, *supra* note 185.
[633] Defined at section 2(1) of the *Regulations*. The most common scenario is that, by the time of

Assisted Relative subcategory of the Independent class. However, if their occupational background is comprised only of military service, the child is unlikely to obtain sufficient units of assessment to qualify on their own merits for a visa to Canada. Recognizing that there might be a significant humanitarian component to such cases, CIC had an informal policy to favourably process such applicants.[634] It was a policy, of course, that had no foundation in the *Act* or *Regulations*. Instead, it was based upon comments contained in a Regulatory Impact Analysis Statement describing the effect of certain regulatory changes undertaken in 1992.[635] That policy, however, has now apparently been rescinded.[636]

---

completion of military service, the children are over the 19 year age cutoff set by the family class definition.

[634] CIC's critics might point out that such pragmatism may only be necessary because CIC has not implemented rules in the *Act* or Regulations to deal with these situations. However, the rejoinder is contained in an excerpt from the Regulatory Impact Analysis Statement SOR 92/101 06FEB92, the full text of which is cited *infra* at note 635, where the practical difficulties of drafting "a definition which would satisfy all cultural norms or cover all situations" is noted.

[635] The entire policy of CIC in this respect was set out in an All Immigration Mission telex (Number ORD-0017, 01 February 1994) entitled "Immigration Policy; Overage Dependents", as follows:

> Several posts have sought guidance on whether to include dependents doing compulsory military service.,(sic) This matter was dealt with in the "Regulatory Impact Analysis Statement SOR 92/101 06FEB92" and the pertinent paragraph from this statement is worth repeating. It reads quote Immigrants coming to Canada are expected to accept the Canadian cultural reality. Furthermore, in many cultures, children begin working early and are already independent before they reach the age of 19. It would be impossible to come up with a definition which would satisfy all cultural norms or cover all situations. A person performing military service is normally no longer considered dependent on his parents. Those under the age of 19 at the time of the application would, however, be eligible and could come to Canada once they have completed their service, provided they were still unmarried unquote. The bottom line, therefore, is that a child doing compulsory military service is a dependent only if the parent has submitted the application prior to the child@s (sic) nineteenth birthday and the child remains unmarried.

According to this policy then, so long as the parents of a child submitted an application for permanent residence in Canada before their child attained 19 years of age (the cutoff age for consideration as an "accompanying dependent" in the parents application), the parents could proceed to Canada and have the child join them later, after military service obligations were rendered. In practice, the child was required to submit an application as an Assisted Relative, with such application being approved on discretion pursuant to this policy. Effectively, this left a large window of opportunity for the child that is illustrated by the following example. If the child entered full time post-secondary studies before attaining the age of 19, the ability to qualify as a dependent was continued, since children of any age continuously engaged in full time studies from the age of 19 are deemed dependent upon their parents. If that child completed 5 years of post-secondary education from 18 years of age, followed by 2 years of compulsory military service, she was entitled to favourable processing at 25 years of age, notwithstanding that her parents had gone to Canada some 7 years earlier.

In the end, therefore, the courts' treatment of negative discretion in *Chen* seems to have sent a signal to the bureaucracy to follow the tendency noted by H.W. Arthurs, and others in the functionalist camp, to do as little as is necessary to carrying out its mandate. It is ironic that the rule of law approach argued for in cases of negative discretion may well encourage development of case processing habits in immigration officers that are more "discrete" than "discreet" in character.[637] It seems that the concept of the rule of law has been left in a weakened condition. The wording and context of s. 11(3) clearly suggest that the discretion granted was meant to be a broader tool, capturing situations that speak to who the applicant is overall. The notion of adaptability, in particular, is central to the power and such adaptability must, of necessity, include some willingness in the applicant to buy into the fundamental institutions and mechanisms of our society. Few would argue that concepts contained within the notion of the rule of law should not at least point up a reasonable minimum level of "buy in" that might be expected. Among

---

[636] See *Lexbase Sending 1998 – July/August* (Vol. 9, Issue 7) at 2, where under the heading of "Dependency and Compulsory Military Service" an extract is given of a letter dated June 17, 1998 from the Director General, Selection Branch, CIC/HQ to lawyer Peter Larlee. Apparently responding to a query from Mr. Larlee regarding the policy set out in All Immigration Mission telex (Number ORD-0017, 01 February 1994), *supra* note 635, the Director General states that CIC actually has no policy to grant favourable consideration to dependents forced to undergo compulsory military service. Though some missions had processed dependents in such situations favourably for a number of years, the Director General suggests that this treatment proceeded from a misunderstanding of the meaning and effect of the Regulatory Impact Analysis Statement in question.

[637] My thanks to Carter Hoppe, Barrister and Solicitor, for pointing out the difference between these two adjectives. That difference is apparent from the following dictionary entries:

> -dis·crete (dĭ-skrēt') adjective
> Constituting a separate thing; distinct.
> Consisting of unconnected distinct parts. See synonyms at distinct.
> -dis·creet (dĭ-skrēt') adjective
> Marked by, exercising, or showing prudence and wise self-restraint in speech and behavior; circumspect.
> Free from ostentation or pretension; modest.

those concepts are an acceptance of the notion of a society governed by the rule of law, where each is expected to abide by the laws of the community, to accept both the burdens and benefits imposed by those laws and to accept that an orderly society involves accommodation for both individual rights and the rights of the whole community. And certainly, the central premise of the rule of law is that no one has the right to expect that they may disregard the law for their own benefit. It is frankly illogical, therefore, that willingness to abide by the fundamental rules of society is no part of the process by which membership is gained to that society.

3.3.5 Personal Suitability

The courts' treatment of R. 11(3) discretion has been mirrored in its' handling of the selection factor of personal suitability. It is assessed pursuant to Factor 9 of Schedule I to the *Regulations*, which provides as follows:

> Units of assessment shall be awarded on the basis of an interview with the person to reflect the personal suitability of the person and his dependants to become successfully established in Canada based on the person's adaptability, motivation, initiative, resourcefulness and other similar qualities.

Personal suitability is, of course, the most subjective of the selection criteria and so a good deal of discretion is inherent in its application. Of the potential total of 97 points that may be awarded to a prospective immigrant pursuant to the selection factors, personal suitability is worth a maximum of 10 points. Because its comparative value is low, many applicants are able to obtain a pass mark (and to have the interview waived as a result) even without obtaining any points for personal suitability. Similarly, an applicant may not be failed for obtaining zero units for personal suitability. As such, it is sometimes necessary to combine lack of personal suitability with section 11(3) negative

discretion to found a refusal, unless the applicant is also unqualified on other grounds, such as obtaining insufficient units overall.[638] In fact, when a refusal is indicated, the ordinary visa office practice is to refuse directly on the selection criteria, if possible, rather than on discretion. As *Chen* illustrates, discretionary refusals are subject to the strictest scrutiny in the courts and so it is infinitely more defensible, and simpler, to deny an application on a strict application of the selection criteria.

Because this factor employs terminology concerning "successful establishment" similar to that in R. 11(3), it too has been limited by judicial interpretation to consideration of potential for economic success alone. The consequences, however, are even more far reaching than is the case with R. 11(3) discretion. With this factor, it is no longer just a case of ignoring illegal or improper behaviour. Incredibly, according to the case law, a proper application of the personal suitability factor may actually demand that such behaviour be rewarded with additional units of assessment for personal suitability!

In *Kim Mui*[639], for example, the applicant had been living and working illegally in Canada as a hairdresser for fifteen years. Upon his application for permanent residence as a Self-Employed hairdresser, the visa officer awarded only four units of assessment for personal suitability. Commenting upon this aspect of the case, the Court stated:

> [The Self-employed class, a subset of the Independent]... category usually involves a judgment as to whether a prospective immigrant possesses qualities (such as resourcefulness) that make it likely that he or she will be able to become

---

[638] For the need to combine low personal suitability with an exercise of negative discretion, see CIC IM Chap. OP-5, para. 4.3. The question of what weight a subjective factor like personal suitability should be given in any selection system is obviously one that the legislative drafters must have considered when devising the selection criteria. At present, it represents 10 units out of a potential maximum of 97 units. There is, of course, no one correct answer and everything will depend upon such considerations as the type of qualities being selected for, preferences regarding a rules based selection system and the like.

[639] *Kim Mui* (20 March, 1998) Federal Court File No. IMM-1079-97 (F.C.T.D.) as cited in *Lexbase*, (May 1998 Sending) 9.

> established in Canada. *It does seem perverse that a person who has been established here for 15 years was not given the full 10 points. ... It is clear that in making the first assessment the visa officer was strongly influenced by the fact that the applicant had been an illegal immigrant in Canada for so many years.* [emphasis added][640]

The message is clear - those who establish themselves in defiance of Canadian law actually enhance the chances for a successful application later on. It is incredible to comprehend that such an inducement to unlawful behaviour could be offered by a regulatory scheme that ostensibly is predicated upon providing for an orderly flow of migration. In one masterful stroke of judicial interpretation, the selection system is turned on its head and its entire *raison d'etre* undermined. Those who pay no heed to the rules can actually derive an advantage over those who do. This illogical and incongruous result makes a mockery of the rule of law and sends a dubious message to the world about how our legal system operates and what Canadian society stands for. And, it is a result that significantly alters the balance between facilitation and control that is the chief hallmark of the legislative regime conceived of by Parliament. The consequences remain to be fully appreciated and realized. Clearly, however, they are potentially far reaching and could strike to the very foundation upon which the immigrant selection system rests – namely, public confidence in the handling of immigration matters.[641]

3.3.6 The Case for a Rule

The need for shoring up the control side of the immigration equation is particularly acute because of an increasing disjunction between the legislation and the

---

[640] *Id.*, 9 at 10.

[641] For a discussion of the importance of maintaining a proper balance between the facilitation and control objectives, see *infra* note 681 and accompanying text.

way immigration is actually conducted. The move to a more mechanistic approach to selection has been accompanied by the development of a sort of self-selecting, honour system, with interviews the exception and most applications proved only by documentary evidence. In such an environment, increased opportunities for fraud and deceit are obvious and the tools available under the present statutory regime are not wholly adequate to penalize and discourage misconduct and fraud. The present *Act* and *Regulations* were devised more than twenty years ago, in a different time, before the *Charter*. A time doubtless when it seemed a more certain proposition that broad residual discretion could be used to paper over any shortcomings in regulatory language. But the law does not stand still and a new state of evolution in thought about discretionary power has come to pass. Broad substantive discretion is no longer the utilitarian tool it may once have been. This alone should give pause to legislators to consider the need for an explicit rule to protect the integrity of the selection system. However, the problem is not solely confined to the fact that substantive negative discretion has been neutered. In fact, it is also exacerbated by the trend to reductionism and formalism in the courts, which encourages strict construction of any grounds for exclusion. It is a trend that has severely limited the efficacy of even the few exclusionary tools that are in the legislation.

Section 9(3) of the *Act* places a positive obligation upon applicants for truthfulness in their dealings with immigration authorities. It reads:

> Every person shall answer truthfully all questions put to that person by a visa officer and shall produce such documentation as may be required by the visa officer for the purpose of establishing that his admission would not be contrary to this Act or the regulations.

The courts have interpreted this section to cover only falsehoods directly related to the

actual grounds for selection. If the misinformation is not material to the grounds for selection, at the time when a decision concerning admissibility is made, then it cannot be used as a basis for refusal.[642] Further, it is only falsehoods that concern the applicant's own grounds for admissibility that will sustain a refusal.[643] Thus, even where the applicant participates in presentation of false documentation to the visa office to support the alleged dependency of a claimed dependant, for example, it is only the dependant, and not the principal applicant who may be denied a visa.

All of this fails to recognize the creative ways in which deception is practiced on visa offices. One bit of deceit, for example, may be used to found another. Thus, an applicant may claim kinship with another person who is not actually their relative. Once in Canada, the immigrant may be eligible to sponsor the third party in the Family Class, even though a proper relationship does not exist. In countries where the keeping of birth and marriage records is poor or non-existent, visa offices often are forced of necessity to rely upon family information supplied in prior applications to determine kinship in later sponsored cases. This is just one example and it is obvious that the limits for creative deceit are expanded where, as in the current environment of reduced resources and cost cutting measures, it is well known that verification of information is unlikely or improbable.

This is not to suggest, however, that unlawful or deceptive behaviour should be an

---

[642] *Kang* v. *Minister of Employment & Immigration* (1981), [1981] 2 F.C. 807, 37 N.R. 55 (Fed. C.A.), leave to appeal to S.C.C. refused 39 N.R. 353n (S.C.C.), where it was held that lying on an application does not render an applicant inadmissible under section 19(2)(d) of the *Act*. See also *Sandhu* v. *Canada (Min. of Employment & Immigration)* (1989), 8 Imm. L.R. (2d) 312 (Imm. R.B.). With respect, the *Kang* decision is an example of where technical legal reasoning leads to a disconnection between legislative intent and substantive justice, on the one hand, and procedural fairness on the other.

[643] *Mundi* v. *Canada (Min. of Employment & Immigration)* (1985), 63 N.R. 310, 24 D.L.R. (4th) 285 (Fed.

automatic or complete bar to entry. On the contrary. It is in the best traditions of our conceptions of justice and compassion to forgive and forget. Equally so, however, transgressions should not be a reason for reward. Rewards must be made to accrue from adhering to the rules, not from ignoring them. This is fundamentally the way a just society under the rule of law must operate. What might be appropriate, therefore, is simply that immigration misconduct should be one factor which, legitimately, may be accounted for in any overall assessment of likelihood for successful establishment. If it involves a matter, such as deportation or conviction for an offence under the *Immigration Act*, for which a separate rehabilitation process is prescribed, then a grant of rehabilitation would render it spent.[644] If not otherwise spent, then it should be an item that the prospective immigrant is required to address and resolve positively. At a minimum, it should not be a reason for reward. Anything less sends the wrong message. As one newspaper editorialist has stated:

> We must have rules for deciding who qualifies [for immigration to Canada] – and one of the first qualifications must be a willingness to live by them. To do otherwise is unfair to the millions of foreigners who would make excellent Canadians, but patiently wait outside in line for their turn.[645]

The case for an explicit rule denying visas to dishonest applicants is all the more compelling in the absence of any consensus or plan for regulating the immigration consulting community and the advantage that has been taken of the reduced ability of CIC to closely scrutinize each and every application. Certainly, it is a reform that seems likely

---

C.A.).

[644] This would be consistent with the general scheme for rehabilitation from criminal offences that is covered by section 19 of the *Act*. Since a pardon or approval of permanent rehabilitation is a precondition to the issuance of an immigrant visa, offences already pardoned cannot not form the basis for a negative finding on personal suitability or settlement potential.

[645] CIC "Daily Wrap" (05 January, 1998) at 6, quoting an editorial from the January 3, 1998 edition of the

to enjoy a broad consensus of support amongst reputable immigration advisors who have been urging government action on this issue for some time. Cecil Rotenberg, for example, has noted the need for more stringent controls. Speaking generally about the lack of regulation that allows anyone to become an "immigration consultant, he is quoted as observing that:

> ...[T]he minister [of Immigration] has refused to seriously consider some sort of licensing process to regulate who can represent potential immigrants. Barristers and solicitors, as the only legal representatives authorized by the province to deal with matters of legal interpretation, are not provided any greater standing than a 'representative' in a foreign jurisdiction.
>
> As a result, said Mr. Rotenberg, the public has no way of knowing who is sufficiently qualified to act on behalf of a potential immigrant. What is the effect on the current system? "Fraud, like mosquitos, will come into a room through any crack which is left open," warned Mr. Rotenberg. "And fraud has certainly entered the room. Just this past year alone in Toronto, I have dealt with countless cases involving fraud by immigration consultants. And this is only what I have seen. Just imagine what else is out there." ...
>
> The government is downsizing the immigration ministry's staff by at least 20 per cent, he pointed out, and is encouraging "risk management", a theory that potential immigrants do not need an interview where their documents are adequate. "This is an invitation to more fraud," said Mr. Rotenberg. "The wide prevalence of fraud in our immigration system has helped to create a cynicism by which Canadians and foreigners alike laugh at our laws."[646]

Although part of the answer in combating fraud may be in regulating the immigration consulting community, it is unlikely that CIC would willingly assume such a burden. Certainly, in the overseas context, such regulation would only be possible if CIC were responsible for verifying who the consultant is and whether she has somehow been properly accredited. However, in an era of cutbacks and reductions, there is little interest in acquiring new responsibilities, let alone one that is on the peripheries of the

---

Edmonton Journal.

[646] Adam Szweras, "Authoritative immigration lawyer calls for reform of current system" *The Lawyers Weeekly* (13 December 1996) Vol. 16, No. 30 at 12.

department's real business.

The only practical compromise, therefore, is to ensure that a clear connection is made between the benefit of a visa and the behaviour that will result in its grant. Often, both the applicant and their advocate may be located outside of Canada and so beyond the pale of any effective enforcement by our laws. Quite simply, the denial of a visa is the most direct and efficacious sanction and is more likely to have a salutary effect than any other penalty that might be devised. But how best to incorporate a mechanism into the selection system to prevent the "guilty" from being rewarded? Realistically, the tide is now so generally against discretionary power that any enlargement of it is unlikely. The focus on rights that predominates in the current legal and political environment is so firmly entrenched that it is inconceivable that the courts might reverse themselves or even that sufficient support for such a turn might be found among legislators or the general public. Moreover, it is not just a question of overcoming reluctance in the bar, the judiciary or at the political level. Even the immigration bureaucracy is unlikely to support this option. The current direction in immigration matters is to ever more reductionism and a greater emphasis on rules. The only feasible option therefore is to create a rule in the legislative scheme to give CIC jurisdiction to protect the integrity of its processes.[647] That is the preferable method in any event, since it affords opportunities for debate and consensus as to what sorts of behaviours are to be censured, the factors to be considered, the extent of any penalties and the process for rehabilitation. Clearly, however, the penalty should involve at least some period of disqualification from the

[647] See Bryden, *supra* note 620, for a similar view that the object of protection of the immigration system is best achieved by express mechanisms incorporated in the legislation, rather than by a roundabout method

prize of a visa.

But a rule is not enough. The courts will also have a role to play, if system integrity is to be safeguarded. They need to be prepared to adopt a functional, pragmatic approach to their review of any cases where a visa has been denied in such circumstances. This must entail weighing not just the applicant's right to a fair process, but also the objectives of the immigration legislation and the public interest in a maintaining a reputable system of facilitation that involves controls and qualification on the basis of merit or other stipulated criteria. The weighing must also recognize that, at least in the case of Independent migrants, denial of a visa involves, at best, the withholding of an opportunity and not a vested right. Making clear that an application can be refused for deceit or malfeasance, even where the criteria have been met, will go some distance not only to ensure integrity, but also to restore some of the public confidence Rotenberg feels has been lost.

3.3.7 Shortcomings of Judicial Review

As is apparent, the process of judicial review has not been one characterized by much tolerance for negative discretionary action. Many argue, of course, that that is as it should be. Certainly, the purpose of review is to infuse accountability. Of necessity, accountability entails the adherence to some standards and limits. Moreover, there can be no quarrel that it is properly the role of the courts both to ensure that those limits have been observed and, where necessary, to demarcate the limits. Still, a serious question to be asked concerns how well the courts have performed their supervisory function in

---

using the selection criteria.

overseas immigrant selection matters. More often than not, the answer seems to be that there is much room for improvement.

The central reason for this is that the courts too often are ill-informed of all the realities and subtleties of the processes they supervise, or have inadequate information placed before them as to the significance of information that drove a decision. Such deficits leave them ill-equipped to provide balanced, well-reasoned decisions, based upon a proper weighting of all relevant matters. The problem of incomplete information about overseas processes was highlighted by Mr. Justice Rothstein in the *Issaeva* case. In discussing the requirement for assessment of occupations under the regulatory scheme, he noted that:

> [t]here was no evidence before me as to the amount of time and effort involved in an assessment according to the Act and Regulations as opposed to an informal preliminary determination in cases where a visa officer is of the opinion a prospective immigrant is not qualified in a claimed occupation. I cannot conclude that compliance with the *Immigration Act* and Regulations is an onerous, time-consuming process that would be unreasonable to impose upon visa officers.[648]

Obviously, where there is an absence of evidence, the court will be hesitant to make a determination that would inevitably have to be based upon speculation and conjecture. It is not surprising, therefore, that Rothstein J. was unwilling to grant any flexibility in the matter before him.

A similar problem was evident also in the *Chen* case. For example, the question of why the applicant should be rejected on negative discretion when his personal suitability points were so high was not directly addressed in the reported case decisions.[649]

---

[648] *Supra* note 590 at 96.

[649] Chen received a total score of 73, with 7 out of a possible 10 units of assessment awarded for the factor of personal suitability.

However, it was very likely a factor in the minds of the judges as they struggled to rationalize a discretionary power to reject an applicant who had both surpassed the necessary overall points threshold and who had achieved a very respectable personal suitability assessment.[650] Certainly, it seems illogical that an applicant should have such a high personal suitability rating while simultaneously being rejected on negative discretion. Prior to the *Chen* decision, however, it was not obvious that a low personal suitability score should be a pre-condition to the exercise of negative discretion under R. 11(3). This is particularly true since personal suitability may not be used to "double count" other factors.[651] Given the apparent need for personal suitability to be considered as a discrete factor in its own right, it is likely that the visa officer felt no particular compulsion to lower personal suitability points, prior to employing negative discretion.[652] Rather, positive or negative discretion appeared to be the only tool for dealing with the

---

[650] Anecdotally, from personal discussions with counsel from the Department of Justice, I understand that this issue was raised at the Supreme Court by a question from one of the justices. Counsel, however, was apparently unfamiliar with the subtleties of overseas immigrant processes and was able to offer no explanation why the personal suitability points were not lowered, either in tandem with the decision to employ negative discretion or alone (to the point where the applicant would have failed to achieve a pass mark).

[651] See *supra* note 587 and accompanying text discussing "double-counting".

[652] The case is now otherwise. In light of this decision, CIC has issued instructions to visa officers to ensure that an award of personal suitability points is consistent with a decision to invoke negative discretion. See CIC IM Chap. OP-5, "Independent Immigrant Processing" , para. 4.3 (ver. 06-97) "Negative Discretion" where the following is stated:

> The court [in Chen] observed that it is conceivable that discretionary power under R11(3) could properly be used where an immigrant was so lacking in one of the factors listed in Column 1 [of Schedule I of the Regulations] that a zero rating [for personal suitability] would not adequately reflect the negative impact of that deficiency of (sic) his ability to become successfully established. This point was not specifically argued.
>
> Further it is recognized that the obligation to reduce personal suitability to zero as a precondition to the use of negative discretion would be extremely restrictive. Therefore, in certain instances, you may find that the use of negative discretion is warranted although personal suitability has not been reduced to zero. These cases may give rise to litigation on this very point and cases must be carefully documented to explain why you have not reduced the personal suitability assessment to zero before resorting to negative discretion. It is expected however, that cases recommended for the use of negative discretion will always reflect low personal suitability assessment.

"total package".[653] Regardless of how many units were received for any particular item of assessment, and regardless of the total number of points received overall, it appeared prior to *Chen* that discretion, either positive or negative, could be used to overcome any failings or idiosyncrasies of the points system. Since *Chen*, however, no such flexibility is available to the decision-maker. Personal suitability should now reflect potential use of discretion, if a negative decision is to survive scrutiny upon judicial review.[654]

This is an unfortunate restriction, particularly since it does not recognize the realities of the processing system and the peculiarities of the Computerized Immigration Processing System (CAIPS) used overseas for immigrant processing. As was evident in *Chen*, processing in an individual case can sometimes consume a lengthy period of time and, as in *Chen*, relevant information may not come to light until after the selection decision had been made. Although the selection decision may be made on one date, yet the case may not be finalized until another more distant date. The most common reasons for significant delay between selection decision and final disposition generally have very little to do with the visa office directly, or the visa officer concerned. The two most common reasons are delay in obtaining background checks and medical clearances.[655] Very often these two items are not complete at the time a selection decision is rendered. In between selection and finalization, often while awaiting the results of either of these two, the discovery of new information may give pause to the visa officer to reconsider

---

[653] Although CIC continues to employ positive discretion as a tool for dealing with the "total package", notwithstanding the limitations placed upon negative discretion. See *supra* note 631.

[654] See instructions given by CIC to visa officers, *supra* note 652.

[655] In its recent reorganization efforts, CIC has made tremendous gains in speeding up the availability of medical results. Formerly, medicals were completed by medical staff employed by Health and Welfare Canada. However, those medical staff were integrated into CIC and the initiative to speed up medical clearances has yielded good results. It is background checks which remain the single greatest source of

whether the selection decision, or at least a particular element of it, was correctly made.

However, the peculiar design of the CAIPS system renders it difficult to revisit selection decisions, once they are entered. Ostensibly because of concerns about manipulation of data, CAIPS was designed to allow only a "once through", linear type of processing function[656], with data captured permanently once entered.[657] Information once entered on the CAIPS record cannot be changed after the particular activity is completed. Thus, notes placed in the electronic file cannot later be deleted or altered. Likewise, once the selection decision screen has been completed, it is not possible to go back and reduce the points awarded for a particular factor, such as personal suitability.[658] The only possible way an addition or correction to the points tally can be accomplished is to close the file, by showing it as "refused" or "withdrawn"[659], and then reopening it. Such a process, however, leaves a permanent record on the file that it was closed and re-opened. Frankly, a refusal on negative discretion that shows this kind of history is bound to look somewhat contrived and to raise suspicions as to what actually went on. Thus, a practical result of the peculiarities of the CAIPS system is that they place emphasis on the

---

delay. For a related discussion on background checks, see *supra* note 607.

[656] CAIPS was conceived in the late 1980's as a replacement for a paper based system that was used in CIC. It first went into service in 1990 in U.S. visa offices. The structural design of CAIPS is not sophisticated. It simply adapted and converted to an electronic format, the various steps that were part of the paper based process it replaced - paper-screening (called the "T-11" stage in the paper system), selection decision (T-12) and final decision (T-13). The paper system was obviously based on the premise that all parts of a processing stage would be completed more or less simultaneously.

[657] My informal understanding is that CIC was deliberately forced to design the system in this fashion in order to allay fears from the bar and the bench that "corrections" would be made to files after the fact, when it became apparent that an appeal or review action was to be taken. The CAIPS record forms a part of the official file, which is made available in appeal situations along with any paper file that may exist.

[658] In fact, I understand that the question was raised on appeal in the S.C.C. as to why Mr. Chen's points for personal suitability were not reduced after the fact, but that counsel were unaware of the peculiarly linear nature of the CAIPS program and so the question was unanswered. See also note 650, *supra*.

[659] To show it as "accepted" results in finalization of the case and generation of a printed visa. It should be recognized also that closing the file in one of these two methods and then reopening it only enables the

necessity of getting the selection decision "right" before it is entered.

In light of such practical considerations, it is not surprising that the officer in *Chen* should have preferred to follow a straightforward path involving reliance upon discretion alone. Regrettably, the reasons for the lack of a zero rating on personal suitability were apparently never placed before the court. And, without a detailed understanding of the functioning of the CAISP system, it may have been easy for the reviewing courts to misinterpret what took place and why. Had a low rating on personal suitability been present, Chen would have failed on points and the issue on review might have simply revolved around the propriety of the number of units awarded for this factor. Alternatively, assuming substantive negative discretion would still have been the central issue, a better correlation between suitability points and the exercise of negative discretion might have caused a different reaction amongst the judges. The courts might have been less tempted to read too much into the manner of handling of Chen's application and may never have gone so as far as to restrict substantive discretion to purely economic considerations. Either way, it does seem as though *Chen* is a bad decision, based as it is upon apparent miscues by the department and a misapprehension of the workings of the selection system by the courts.

Another example of the courts' lack of appreciation for the realities and subtleties of overseas immigration processes is seen in the *Choi* case[660]. The appellant inquired at the Commission for Canada in Hong Kong about the requirements for immigration and was given a Pre-Application Questionnaire (PAQ). The PAQ is used to enable applicants

---

selection screen, so that the points tally can be manipulated. Case notes previously entered in the electronic file still remain extant in the reopened file and may only be added to, but not altered or deleted.

to obtain an informal assessment of their ability to qualify for immigration, prior to payment of the significant, non-refundable processing fees that a regular application entails.[661] Choi received a favourable assessment on his PAQ and so later submitted a full application. However, the Open Occupations List[662] was changed in the interim so that his occupation no longer was included and so his application was failed for lack of "occupational demand".[663] There is little to fault with the court's determination that fairness required that Choi be processed on the basis of the criteria on which he was encouraged to apply. However, in *obiter*, the court went on to speculate that CIC policy was to deliberately withhold information from applicants about the differences between a PAQ and a full application. In the court's view, the PAQ involved less processing effort on the part of visa officers, giving rise to an irresistible conclusion that internal departmental policy was to favour its use over that of ordinary applications.

The reality, however, is exactly the opposite. Because of CIC workload accounting methods, visa officer preference is actually to deal with complete applications. Officer productivity is measured largely via the CAIPS system, which counts only decisions made on full applications. PAQ's have never been measured in CAIPS and, other than an informal, internal office accounting method to ensure the PAQ

---

[660] *Supra* note 270.

[661] CIC IM Chap. OP-5, para. 2.1, which notes that "[t]he PAQ serves as an initial means of assessing an independent applicant's ability to meet the selection criteria without requiring the completion of formal applications for permanent admission (IMM 008) and payment of cost recovery fees."

[662] The Open Occupations List contains a list of occupations in which independent immigrants may qualify for immigration to Canada.

[663] Item 4 of Schedule I. Failure to obtain at least one unit of assessment for this factor results in automatic refusal of the application in accordance with section 11(2)(a) of the Regulations. Only occupations contained on the Open Occupations List are awarded points for occupational demand. The importance for an applicant to have experience in an occupation contained on the Open Occupations List is therefore obvious.

load is spread equitably amongst officers, screening of PAQ's generally receives little credit in the workload measure of individual decision-makers. Rather than reducing the workload burden on officers, the PAQ actually increases it, and does so in a manner for which visa officers are likely to receive little recognition. The distribution of PAQ's to the public proceeds, therefore, not from administrative economy, but rather from a sense of client service and an attempt to obviate the impact of non-refundable fees. However, the Court's willingness to find ulterior motives suggests that the attempt was misguided and is an apparent example of field sensitivity falling before appellate review.[664]

The result has been the virtual elimination of the PAQ system and consequent loss to applicants of a free, expert opinion about their chances for success. Distribution of PAQ's is now an immigration post-specific activity, with their use left to the discretion of individual program managers.[665] While some posts continue to use them, most do not. The decision in *Choi* doubtless spurred development of better application materials by CIC. In particular, application kits are now provided which contain sufficient information to enable potential applicants to self-assess their own chances for success.[666]

The problem of insufficient information arises not only with respect to procedures, but also in consideration of foreign evidence. The interface between Canadian law and foreign evidence is a central feature of selection conducted abroad.

---

[664] See for example, H. Wade MacLauchlan, "Developments in Administrative Law: the 1990-91 Term" (1992) 3 *Sup. Ct. L. Rev.*(2d) 29, where the author discusses the dangers of field sensitivity being countermanded by evidentiary review.

[665] See CIC IM Chap. OP-5, para. 2.1 "Submission of applications" which states:

> The use of Preliminary Application Questionnaires (PAQ's) is the decision of the program manager based upon processing abnormalities at the post which do not lend themselves to the sending of a self-assessment kit.

[666] Though application materials are now more complete, they are also somewhat more complicated. The formalism demanded by the *Choi* decision may have served, at least in some measure, to drive more clients

The major advantage of overseas selection is that the visa office, by being located in the particular locality, is able to develop expert knowledge about local culture, customs and laws and is well placed to assess their significance vis-à-vis the selection criteria. Canadian courts, on the other hand, while expert in the interpretation and application of Canadian law, are at a disadvantage with respect to foreign evidence. Certainly, what may seem so obvious at a visa office abroad oftentimes is a matter whose relevance or importance is obscure and puzzling in a Canadian courtroom. Commonly, therefore, courts are reliant upon the visa office for an explanation of such evidence. Unfortunately, the provision of useful explanations is an uneven practice.

For example, in the recent case of *Yong Qi Zhu et al.*[667], it appears that the visa office did a poor job of leaving a sufficient record on the file to explain the significance of a piece of evidence that was crucial to the final decision. There, a visa officer in Beijing found that one daughter had a different "Hokou" number from other family members, which led her to question whether the daughter was truly a member of that family. In reviewing the matter, Reed J. stated that he "...could find nothing in the file that explains what a Hokou number signifies."[668] Accordingly, he found the number to be a "problematic" basis for rejecting evidence from the daughter as to her relationship to other family members. In other words, the court did not find reliance upon the Hokou number to be inherently unfair. Rather, it was simply a lack of evidence as to its significance that led to the rejection. Presumably, had the visa officer done a better job of

---

to seek the services of immigration consultants.

[667] *Yong Qi Zhu et al.* v. *Canada (Minister of Citizenship & Immigration)* (14 October 1997) Federal Court File No. IMM-2710-96 (F.C.T.D.) [unreported] per Reed J., as cited in *Lexbase* (December 1997 Sending) at 6-7.

explaining the import of the Hokou number and any other relevant subtleties of the types of proof dealt with locally by her in the Beijing visa office, the result might have been different.

Clearly, if their decisions are to be sustained on appeal, visa officers need to recognize the importance of maintaining transparent processes that include proper explanations of the relevance and weight attached to evidence. This is important, not just because it aids the court, but it also aids Department of Justice lawyers who represent CIC on judicial reviews. Many of those counsel, like the courts, have limited exposure to and understanding of the ways and methods of visa offices and the particular evidence that they deal with. Full and complete information is essential to their preparation, if an adequate defense is to be mounted. And indeed, the responsibility for providing full information to the court upon review is a shared one between the visa officer and Justice counsel. The visa officer is obviously best situated to explain and place on the record of the file relevant local circumstances that have affected processing. However, Justice counsel, for their part, must ensure that they alert visa officers as to any items of likely importance that have been overlooked or not fully explained. Indeed, the role of Justice counsel, as an intermediary between the courts and the visa office, is to anticipate items that may capture the courts' attention and ensure that explicit affidavit evidence from the visa officer, explaining same, is placed before the courts.

The problem of inadequate information is one that the courts themselves recognize, but over which they apparently have little control. The fault in this respect lies to some extent with court processes and conventions that militate against a proactive role

---

[668] *Id.* at 7.

for judges. For example, the conventions of statutory interpretation prevent them from going outside the borders of a statute to interpret its meaning. Likewise, the court has limited ability to compel evidence, even when it is obvious that further information is needed.[669] However, it is compounded too by a certain hardness of attitude that courts exhibit towards administrative tribunals. Though the administrative sphere is intended to be more informal and expeditious than judicial proceedings, the courts have been reluctant to make many concessions, at least to immigration law at any rate. Thus, arguments of economic impracticality in carrying out detailed, individualized processing of immigration applications have been consistently rejected. In *Re* Singh, for example, Wilson J. dismissed such arguments in the context of Refugee claims[670] and that attitude has carried over as well to Independent processing.[671] Certainly, the courts have been oblivious to the problems of visa offices in dealing with volume and have tended to be critical only of perceived shortcomings of visa office practice. It is an attitude which has required immigration tribunals to behave much like courts and which has hampered the innovativeness of administrators to deal with the problem of volume. This has been an

---

[669] See for example, *id.* at 7, where the Court speculated about problems in the Beijing visa office. Reed J. observed:

> ...that everything about this file indicates a rushed and over-hasty decision by the visa officer. It may be that the Beijing visa office is simply understaffed for the work load. It may be that there are organizational problems there. *The court cannot know what the situation is*, but it looks from the file as though many of the problems that arose with this decision were the result of a too-hurried review of the applicants' situation and a too-hasty decision making process [emphasis added].

[670] See *Singh*, *supra* note 64. The conclusion as to a possible judicial double standard seems irresistible when one considers those remarks in light of the court's decision in *Canadian Council of Churches*, *supra* note 536. Speaking for the court, Cory J. appears to have relied upon such economic arguments to circumscribe public interest standing when he stated, 88 D.L.R. (4th) 193 at 204, that, "[i]t is essential that a balance be struck between ensuring access to the courts and preserving judicial resources."

[671] See for example, the comments of Rothstein J. in the *Issaeva* case, *supra* note 590, dismissing any suggestion "...that compliance with the *Immigration Act* and Regulations is an onerous and time consuming process that would be unreasonable to impose upon visa officers."

especially important issue during this era of declining resources.[672]

Moreover, notwithstanding the significant expertise that inevitably arises from dealing with large caseloads, the courts have been reluctant to invest much confidence in the expertise of immigration decision-makers of first instance. Thus, while greater deference has been accorded to specialized tribunals which courts consider to be expert in their particular field, it is not every such tribunal that will benefit from such deference. Securities commissions are a notable example of an agency whose expertise engenders great respect from the courts.[673] In the immigration field, however, the courts have been loath to accept that either CIC or the IRB are expert panels deserving of any significant deference[674], notwithstanding that they deal with large volumes of cases. This attitude was captured in *Connor* v. *Canada (Min. of Citizenship and Immigration)*[675], where the Court observed that although volume may generate significant experience, it is a double-edged sword, having also "a deadening and fatiguing effect"[676] that may dull expertise.

The courts' apparent lack of regard for administrative tribunals has larger consequences that are not confined just to the tribunal concerned. Philip Bryden, in an essay on the *Chen* decision, posits that that decision was motivated by a desire to provide

---

[672] For a cogent discussion of the potential effects arising from an insistence by the courts on formalism during a period when the resources of administrative agencies are restricted, see Richard J. Pierce, Jr. "Judicial Review of Agency Actions In A Period of Diminishing Agency Resources" (1997) 49 Admin. L. Rev 61. Among the short-term effects, he cites a potential circular phenomenon where, in response to judicial criticisms, resources are reallocated within the agency to concentrate on those types of decisions which are regularly subjected to review. This can lead to poorer decision making and/or greater delays in that larger subset of decisions that are not regularly reviewed. The reduction of quality in the larger subset then leads to a greater caseload in the courts, as more applicants seek review.

[673] See *Pezim* v. *British Columbia Securities Commission et al.*, [1994] 2 S.C.R. 557; 168 N.R. 321; 46 B.C.A.C. 1, 75 W.A.C. 1; [1994] 7 W.W.R. 1; 92 B.C.L.R. (2d) 145.

[674] See note 74 for a further discussion of this matter.

[675] *Id.*

[676] *Id.* at 68.

a unifying theory on use of discretion.[677] He urges the courts, however, to adopt an attitude in administrative law that is more concerned with individual trees and less with the forest, as a whole. In his opinion, productive gains are likelier to be achieved by focusing more on the inevitable subtle variation that is present in every case. Certainly, this is to the point so far as discretion is concerned. Given its inherent characteristic as a case-sensitive tool, the courts should be hesitant to extend themselves too far in developing an overarching approach to guide its use. Yet, it must be recognized also that there is some peril in the path recommended by Bryden. In his seminal article, "The New Property"[678], Charles A. Reich noted the problems that arise when courts approach each case as unique, concerning only the particular litigants involved, and having no broader "public interest" implications. In his view, such an approach is based upon a "fundamental fallacy" that involves a narrowing of the public interest to an irrelevant point.

The *Chen* decision may actually involve a blend of the problems identified by Bryden and Reich. As Bryden states, the courts in *Chen* were at pains to offer an overarching approach to discretion. However, it appears that it was an approach driven equally by a suspicion of discretion and by a desire to place rights out of the reach of discretion. Thus, the unifying theory may be as much about protecting rights as it is about discretionary power. Moreover, it is a result that appears to be based upon the fallacy described by Reich, with scant regard having been given to the public interest.[679] .

---

[677] *Supra* note 620 at 80.

[678] (1964) 73 Yale L.J. 733 at 776-7. Reich's work provides a now classic view of the connection between the growth of government largesse and the rise of the administrative state.

[679] The problem of public interest standing in immigration matters is suggestive also of a buy-in to Reich's

The public is intimately affected by immigration and so, not unreasonably, has an expectation that the program is being managed on their behalf in an orderly fashion, consistent with the legislation. This necessarily involves not just facilitation, but also control.

Moreover, while the Court in *Chen* brushed aside concerns about a just result in favour of judicial convenience[680], it was clearly a choice made without regard to the larger public interest in immigration matters and any damage that might be inflicted on it. The *Immigration Act* and *Regulations* are shot through with opportunities for discretionary processing outside of the normal operation of the rules. By including such opportunities, it is clear that Parliament intended that immigration processing include not just a fair process, but also some measure of substantive justice. It is an intention, however, that has apparently eluded the courts. In their desire to protect rights, they have been blind to, or have deliberately overlooked that the public interest in immigration includes a desire that real justice be done. Certainly, the popular understanding of our immigration law is that it is meant to facilitate entry of deserving persons while simultaneously excluding the undeserving. More simply put, these are the notions of control and facilitation which are at the heart of the current immigration regime. The evidence for this view is to be found everywhere in the press. The public is outraged whenever bureaucratic obstinacy denies entry to apparently deserving applicants. But the public is equally outraged when criminals or other undesirables are let in. Quite obviously, the public interest is

---

fallacy. See for example, the decision in *Canadian Council of Churches*, *supra* note 536, where the Supreme Court of Canada, in the context of a challenge to provisions of the *Immigration Act*, dealt with the issue of public interest standing. That decision makes clear that interested third parties will not easily gain standing.

stimulated whenever a disconnection between their perceptions of immigration processes and the reality of those processes occurs. Decisions that focus exclusively on process and take no heed of substantive justice run the risk of eroding public confidence in the ability of government to exercise control over immigration. And that is a high stakes game with potentially far reaching consequences. As the United Nations has noted, balancing facilitation and control are essential to the "immigration contract"[681] which exists between the Canadian Government and the public. That contract engenders high public support for high levels of immigration primarily because of the appearance that those charged with carrying out the policy are exercising some control.

Further, the courts have employed a two pronged approach that has sought to keep positive discretion broad, while simultaneously narrowing negative discretion. This approach has also served to de-emphasize the broader goals and purposes for which immigration is undertaken and contributed to a seeming lack of balance between the wider interests of Canadian society and the rights of individual applicants. Moreover, the formalistic approach of the courts to applicant rights has been pursued without concern for the means and ability of CIC to respond, and without regard for administrative flexibility and what might be just and appropriate in the particular circumstances. This approach has occasionally forced CIC into a game of legislative amendment, creating a new, more specific rule whenever the consequences of a court decision constraining

---

[680] See the comments of Mr. Justice Robertson in *Chen*, cited *supra* at note 623.

[681] UNHCR, *"The State of the World's Refugees 1995* (Oxford: Oxford University Press, 1995) at 212, where it is stated: "Under the terms of this arrangement [ie. the "immigration contract"], immigration is carefully controlled, but allowed on the basis of openly-stated criteria: family reunification, labour requirements, educational and professional qualifications, linguistic competence and employment-creating capital." The article goes on to note, at 213, that the value of such contracts has been recognized by the Director General of IOM who sees them as contributing to the goal of orderly worldwide migration

discretion have simply not been reconcilable with the public interest or the cause of administrative flexibility.[682] Usually, of course, the discretion in question has involved practices seen as adversely impacting the rights of applicants. The result is a potentially spiraling circle of judicial action and legislative reaction that has a net effect of increasing the complexity of immigration law and rules. This is ironic, since there are few who would agree that increased complexity is a desirable feature of any immigration system. Certainly, it leads to the formalism that is captured in the epithet "bureaucracy" often thrown out in frustration by those who have been stymied by seeming indifference and a wall of legal jargon.

Courts need to be mindful, therefore, that the limits of discretion implicate the public interest and that it is not always just a case of how best to contain discretion. Thus, they might do well to follow a course of action that blends the approaches suggested by Bryden and Reich. The focus indeed should be on individual trees, but there should be awareness also that there are always two trees to be considered. The proper line is to give consideration to the needs and interests of both, and to strike a balance that is reasonable and just for both. Margaret Young has noted in her treatise on Constitutional issues in immigration law that it is a "very litigious field"[683] of law whose increasing complexity is to be seen in the size of its governing statute.[684] That

---

processes.

[682] A case in point is the *Lam* decision, where the Court refused to accept that there could be any discretion in visa officers to refuse an application without interview. For details of this case and the reaction it provoked from CIC, see *supra* note 594 and accompanying text.

[683] *Supra* note 111 at 2.

[684] *Id.* at 3, where the author notes that the *Immigration Act* increased in size between its 1952 and 1978 versions from 34 pages to 122. This, of course, takes no account of the compendious regulations, policy manuals, operations memoranda and other materials issued to guide implementation and application of Canada's immigration program.

litigiousness and complexity has seen opportunities for the courts to exercise their supervisory function in immigration matters expanded and increased. With respect to discretion, it is obviously a supervisory function that they have engaged actively. It is no exaggeration to say, therefore, that some of the most significant limits on discretion have been those set by the courts. And yet, if the series of misapprehensions which *Chen* was founded upon are any indication, both administrators and courts should be hesitant to find too much precedent, not just in *Chen*, but in any particular case involving the use of discretion.

This is not to be overly critical of the courts. A frank assessment must be that they do the best they can with what they are given to work with. However, as was demonstrated in *Issaeva* and *Zhu*, the courts themselves are often acutely aware of the shortcomings in their understanding of the processes they supervise and the frustration evident in those cases must be seen as something of a cry for help. As I have suggested, some of the help must come from CIC and its counsel, who need to make more effort to ensure that the courts are given full and complete information. Likewise, however, the courts need to show more flexibility and employ a more holistic approach to immigration law - one that strikes a better balance between the interests of applicants and of society. Fair process is essential, but that is not enough. It is time to consider also the need for substantively good decisions, right for both Canada and the individuals concerned. The starting point must be a better appreciation of the unique considerations that apply to Independent immigrant selection. The right of Independent applicants to a fair process is beyond reproach. However, it must be recognized also that this right is not incompatible with substantive justice. This is especially true when one considers that these are

applicants with no higher vested interest. By definition, they do not have a close connection to Canada and their selection is conducted largely for reasons of national interest. The only real consequence to them of a negative decision is the loss of an opportunity to migrate. Accordingly, the courts should be prepared to grant more leeway to decision-makers with respect to discretionary power. I do not suggest, however, that they abdicate their supervisory role. However, if more latitude is granted, it may provide encouragement to functionaries to take more risks and to more effectively and actively engage their discretionary authority.

The functionalist school of jurisprudence has argued in favour of a different supervisory mechanism for administrative tribunals than that of judicial review. However, in my view, there is not enough wrong with the institution of judicial review to warrant its wholesale dismantling. The necessity of a fair and reputable review process is obvious – visa officers are not infallible. This is not a case of admitting incompetence or incapability. It is simply a reality that the complexity of the law, the weight of institutional pressures, and a host of other factors ensure that not every decision in every case is ultimately the right one. It is so in every other area of law and it is no different in immigration law. Further, the alternatives to judicial review do not appear to offer any greater hope of rectitude, acceptance and satisfaction than the courts. And it is not that the courts are incapable or unwilling to serve the ends of justice. Recognizing this, the alternative is clear. The current mechanisms must be made to perform at optimum efficiency. At a minimum, this requires better information before the courts and a better understanding of the processes they supervise.

3.4 Extra-Judicial Influences on Discretion

While this chapter has focused much on the limits set for discretionary power by the courts, it is important also to recognize that there are other actors, outside of the judicial sphere, who have a role to play with regard to those limits.

3.4.1 The Minister

Accepting the sociological thesis that the discretion of a visa officer is likely to be influenced by a host of factors and inputs, and if such influences can be conceived of as a pyramid of persuasion, with the greatest influence and control found at the pinnacle, then it is obvious that the Minister of Immigration stands alone at the summit. Legally and politically, it is she who bears ultimate responsibility in the courts, in Parliament[685] and in the forum of public opinion, for each and every exercise of discretionary authority. It is to her that discretionary authority, both substantive and procedural, is granted under the *Act* and *Regulations* and it is through her delegation that such power is passed on to lower level officials.

Though the Minister's office is large and she is assisted by an able contingent of officials, it is simply not possible for her to attend personally to every case that might warrant an exercise of substantive discretion. As a result, direct exercise of discretion is limited by her to exceptional circumstances. In Independent cases, her involvement typically arises in one of two ways. Either the application implicates some form of

---

[685] Under the *Act*, for example, the Minister is required yearly to provide Parliament with the following:

1. An immigration plan detailing estimates of immigration levels for the coming year - s.7; and
2. A report detailing how many Minister's Permits have been issued to inadmissible persons in the previous year, and the reasons therefore – s. 37(7).

For more generally on the responsibilities of Ministers and the role of Parliament as a form of extra-

inadmissibility which requires her sanction alone to overcome or representations are made directly to her office for a dispensation or other action. In cases of inadmissibility requiring her direct involvement, the matter is straightforward. She retains authority to approve or deny entry and is free to follow the dictates of her conscience. Though she will be informed by the recommendations of the field officer, she may choose to ignore such recommendations.[686]

In other instances, where her authority has been delegated, it is rare that she will intervene directly to instruct a local office how to act. More often, her involvement in delegated decisions arises once a negative determination has been reached. For example, the visa office may be unwilling to grant approval of rehabilitation in a minor criminal conviction case or may be unwilling to extend discretion under sections 2.1 or 11(3) of the *Regulations*. There is nothing to prevent an applicant from approaching the Minister's office to plead for reconsideration. Though it is unusual for the Minister to act unilaterally in a substantive way, it does regularly happen that she will be swayed to recommend a second look by the visa office. Her procedural discretion thus seems to be easier to call upon. And, frankly, once the Minister's attention has been drawn to a case, it does place some pressure upon the examining officer to at least ensure that full and due consideration is given the matter. Further, her scrutiny often serves to ensure that prompt attention is given to an application that perhaps has been overlooked and lying moribund.

---

judicial control, see de Smith, *supra* note 190 at 37-40.

[686] See *Leung*, *supra* note 235. The refusal of discretionary relief by higher officials, notwithstanding the recommendation of investigating officials is not uncommon. Under a previous Minister, for example, it was difficult to obtain approval for rehabilitation of impaired driving convictions. Presumably, in an atmosphere of heightened awareness of this issue in Canada, these types of convictions were seen as too politically sensitive. This result follows, of course, from the principle that discretion may not be unduly fettered. Hence, notwithstanding any report by an investigating officer, the ultimate holder of the authority

Either way, her interest generally will galvanize the attention of her officials and ensure that the strictest level of fairness is observed.

Appeals to the Minister for exercise of her positive authority are regularly made by applicants who have failed to qualify for immigration in the ordinary course. Where she does not choose to exercise that authority in favour of such an applicant, resort is sometimes had to political action to force her hand. Media coverage, for example, is often sought by failed inland claimants as a means of capturing the Minister's personal attention, or even embarrassing her to action. This type of action generally works best where the applicant can present sympathetic circumstances that touch the public heart and mind. Sometimes, this is done in spectacular fashion where, for example, failed Refugee claimants subject to removal seek sanctuary in churches. This approach relies on the applicant's ability to generate sufficient media coverage in Canada and so is not much of an option for applicants located outside the country.[687] Even for those within Canada, the efficacy of this approach is mixed at best. The Minister will naturally be hesitant to accord special treatment to any particular individual. To do so would be to encourage similar applications and could, in the long run, detract from the integrity of the regular process.[688] As a result, many of the sanctuary seekers find that they have simply traded

---

must act independently.

[687] Though it is to be noted that many Independent applicants are actually resident in Canada, on student or employment authorizations, or even without status, at the same time that their applications are in process at a visa office outside of Canada.

[688] The slippery slope of exceptions is to been seen in a recent news story concerning a family that has taken church sanctuary. Advocates in that case are quoted as saying that the rules must be "bent" to allow them to stay in Canada, because a similar exception was apparently made for another family in like circumstances. See CIC "Daily Wrap" (14 July 1998) at 3, citing a story from the July 13, 1998 edition of the *St. John Telegraph Journal*.

one unhappy fate for an equally unhappy one of self-imposed imprisonment.[689]

The nature of discretion is such that it leaves the Minister subject to criticism from both sides of the debate. For example, she may be criticized for being too free with her discretion in issuing Minister's Permits to facilitate the entry of convicted criminals to Canada.[690] Yet, at the same time, the same critics may decry failure to exercise discretion on behalf of someone who has taken church sanctuary. The task of answering these criticisms is made even more difficult because of the *Privacy Act*, which prevents the government from publicly disclosing any information relating to a particular applicant.[691] Thus, while the applicant may seek out notoriety in the media, the department's response to allegations of application mishandling, or even abuse of discretion, must often be limited to a simple "no comment", if consent to disclosure of information has not been given.

Additionally, political action is not simply limited to the device of putting departmental policy or practice under the intense glare of media and public scrutiny. Other forums exist as well to attempt to exert influence on discretionary authority,

---

[689] For a recent example, see CIC "Daily Wrap" (2 April 1998) at 3, quoting a story from the April 2, 1998 edition of the *The Toronto Star*. It details the refusal of the Minister to grant a stay of deportation for a Palestinian family that has taken up sanctuary in a Toronto church. The Minister's lack of inclination to budge on such matters, of course, leaves her subject to much personal criticism. The article, for example, quotes immigration lawyer Mendel Green as saying that "This is the most hard-hearted minister I have come across in my 38 years of practising."

[690] See, for example, CIC "Daily Wrap" (9 June 1998) at 1, citing editorials from the June 9, 1998 editions of the *Ottawa Citizen* and *Ottawa Sun* criticizing the Minister for being too lax in issuance of Minister's Permits enabling convicted criminals to enter Canada.

[691] For more on the *Privacy Act* and the privacy rights of individuals, see below section 3.4.4 Human Rights, Privacy and Access to Information. Because of an applicant's right to privacy, it is also the case that individual departmental decisions are unlikely to be ever challenged by anyone, save the applicant. Even if some member of the public did learn of an individual decision which they wished to challenge, it is unlikely that they would ever gaining standing to pursue an action. See *Canadian Council of Churches*, *supra* note 536 where the court reiterated the criteria applicable to the question of standing and evidenced an unwillingness to tolerate lightly interventions by third parties not directly implicated in a suit.

sometimes on a broader scale, so as to effect systemic change. De Smith, for example, observes that judicial review has often been employed as a form of political action.[692] Those dissatisfied with the state of the law, including immigration law, have sometimes chosen to employ judicial review as a means of holding up government policy and procedures to scrutiny and embarrassment. He notes, however, that while such action may have a salutary effect in the short term, it often achieves little of lasting consequence. This is so, since the government often may cure any defect by the simple expedient of amending the law.[693] Sometimes, however, the change is more substantial and long-lived. A notable Canadian example is the *Singh* case, which led to the creation of the IRB and implementation of more extensive safeguards for consideration of claims by refugee claimants. More commonly, however, lasting change is best effected where the judicial intervention is more narrow and focused, such as in the matter of construction and interpretation of a provision. Such a result is evident, for example, with respect to the negative discretion accorded to visa officers under section 11(3) of the *Regulations* and the manner in which it has been narrowed by judicial interpretation.[694]

3.4.2 Members of Parliament

While the Minister is often too busy herself to attend personally to individual cases, the case is quite the opposite for Members of Parliament (M.P.).[695] In Independent

---

[692] De Smith, *supra* note 190 at 23.

[693] See for example, the *Lam* case, *supra* note 594, which made interviews for assessing the factor of "personal suitability" mandatory. To overcome this requirement, section 11.1 was added to the *Regulations*.

[694] See discussion in section 3.3.4 Negative Discretion, above.

[695] Indeed, one of the first place many applicants seek assistance in immigration matters is at an M.P.'s office. See for example, the advice of columnist Joe Serge in the *Toronto Star* (October 25, 1997 edition) advising one reader, seeking advice on how to accelerate processing of his wife's application for

cases, the assistance of an M.P. is usually sought by a relative or friend of the applicant who is resident in Canada. The importance of the immigration portfolio varies among electoral ridings, depending upon the immigrant make up of each riding. In the large urban centers of Toronto, Montreal and Vancouver, however, immigration complaints and requests for assistance can form up to 80% of an M.P.'s constituency workload.[696] Because of this, many M.P.'s and their staff spend a great deal of time preparing and submitting representations on immigration cases. Indeed, such representations may number into the tens of thousands in any given year.[697] The nature of those representations range from simple queries regarding status of an application and the stage of processing it may be at, to pleas for reconsideration of failed applications and requests for favourable discretionary processing.[698]

The quality and efficacy of M.P interventions, of course, varies widely. The most effective seem to be those who undertake a thorough examination and are familiar with the merits and demerits of a case before approaching the responsible visa office. In my experience, however, this sort of commonsense approach escapes too many M.P.'s and so

---

permanent residence, to contact his local M.P. Cited from digest of article as given in CIC "*Daily Wrap*" (27 October 1997).

[696] See "Ire over Immigration" *Macleans* (20 January 1997) 14. According to Toronto M.P. Dennis Mills, the time consumed by immigration issues is so vast that his office has little attention to give to other issues. Frustrated, Mills pins much of the blame for his workload on the cutbacks that have been experienced by CIC in recent years. The article quotes a disgusted Mills as saying that this immigration workload "...is a most unfair demand on MPs." He adds that it is time for money to be put back into CIC "...to relieve politicians of their burden." The article concludes by noting the importance of the immigration issue for many M.P.'s. In Mills' words, "[t]hings don't look too good for any of us [M.P.'s]...if we can't deliver on immigration files."

[697] For example, in 1997 the visa office in New Delhi, India alone received over 4000 representations from M.P.'s. My thanks to Mr. Jean Roberge, Immigration Program Manager, New Delhi, for this information.

[698] Ironically, to an outside observer, it might appear that, in the Canadian legal system, a traffic ticket is a more important matter than a grant of permanent residence and, ultimately, of citizenship. This is so since M.P.'s are forbidden from intervening in regular court processes, yet may legitimately attempt to influence immigration decision makers.

greatly blunts the force of their interventions. Like any other advocate, M.P.'s need to appreciate that there is often more depth to a case than may be apparent from hearing one side only. Reacting to constituent concerns is, of course, part of the function of an M.P. However, an effective, good faith intervention demands more than simply pummeling an immigration official for claimed delay or mishandling. While it may play well back in the constituency, the confrontational style is rarely efficacious. Substantive discretion is more often effectively manipulated by reasoned, logical arguments, and less often by impassioned rhetoric. Unfortunately, it seems to be a rare M.P who will have spent any time grasping the substantive aspects of a case.

Frankly, the object of the exercise too often seems to be simply one of giving the appearance to a constituent that something substantive has been done on their behalf by the M.P.'s office. It is an appearance that is also reinforced by the apparent abandon with which M.P.'s will give personal references. Quite commonly, M.P.'s offer personal assurances and character references, either for the applicant (less common in Independent cases for the obvious reason that the applicant is not in Canada and so unlikely to be known by the M.P. directly) or, more commonly, for the Canadian "sponsor" and the depth of their commitment to supporting the applicant.[699] Such approaches, of course, decrease in efficacy with the number of references and assurances an M.P. is known to give. Although, as a matter of departmental policy, CIC has undertaken to respond within several days to M.P. representations, no other special consideration is given to

---

[699] There is no accountability on M.P.'s for the references they provide in support of immigration applications. It is a problem that is seen most glaringly in applications for visitor visas. Typically, an M.P. will provide a character reference for the family to be visited in Canada and a bold personal assurance that any terms placed upon a visa issued to the applicant will be strictly observed. When the visa applicant later

them. M.P.'s are simply one other interested party to whom an official may be accountable – nothing more or less. They have no ability to demand a particular substantive outcome.[700] For these reasons, then, it is not often that M.P.'s are able to influence substantive outcomes in immigration cases.

Although, as Page confirms[701], the ability of M.P.'s to influence particular outcomes is doubtful, they are clearly effective as an oversight mechanism to ensure that cases are not overlooked or forgotten. Their position and profile is such that their representations carry significant weight, at least in so far as procedural matters are concerned. They have access to the Minister and the public forum of Parliament, and so hold a trump card to ensure that any dereliction of duty, or even simple mishandling, will not go unnoticed. Accordingly, their interventions can be a useful and economical means for asserting control over discretionary power, at least to the extent of ensuring integrity in its application. The attentions of an M.P. may spur new action on an application that has languished for want of attention, with the result that an overdue processing step may be taken. Alternatively, such attentions may serve also to ensure that scrupulous fairness is adhered to in the exercise of substantive discretion.

---

overstays in Canada or otherwise fails to observe those terms, there simply are no consequences to the M.P.

[700] For an article discussing generally the role of M.P.'s as a form of redress outside of the courts, see Alan C. Page, "M.P.s and the Redress of Grievances" (1985) Public Law 1. This article observes that M.P.'s really came to be inundated with requests for assistance after the Second World War, with the rise of the welfare state. Interestingly, the article, (though speaking of Britain but with similar applicability to Canada) doubts that M.P. representations result in many different decisions than would otherwise have been the case. Though it seems that such interventions make little difference to actual outcomes, the author does still note a number of advantages, such as making constituents feel better by having someone that will listen to them.

[701] *Id.*

3.4.3 The Role for Counsel

As discussed earlier, the continuing cutbacks in CIC have fueled increased roles for lawyers and consultants.[702] CIC no longer has the capacity to provide individualized service, information and counseling. The result is a potential bonanza for lawyers and consultants. However, these two groups have so far shown little aptitude for capitalizing on the new opportunities. In the case of lawyers, a large part of the problem seems to stem from a lack of attention to details and an inability to get over an adversarial mindset.[703] Lawyers are trained as litigators and spend most of their careers dealing with judicial and quasi-judicial types of tribunals where formality is the norm and there are often opposing parties to be represented. The visa application process, however, does not fit into such a mold and lawyers seem to have difficulty adjusting to this.

---

[702] The role of immigration consultants who are not lawyers has recently been called into question by the decision in *Law Society of B.C.* v. *Mangat* (14 August 1997) Vancouver Docket No. C932910 (B.C.S.C.) [unreported]. In that case, the Law Society sought and obtained an injunction to prevent the defendant, a non-lawyer, from representing clients at immigration hearings. In granting the injunction, the court agreed that the *Immigration Act* does not authorize non-lawyers to represent clients, for a fee, in such hearings. Further, the court found that even if this reasoning was incorrect, federal law, such as the *Immigration Act*, could not be used to trench upon an area of provincial jurisdiction, such as regulation of the legal profession. The case is currently under appeal to the B.C. Court of Appeal and its ultimate outcome remains to be seen. However, its impact, at least for overseas processing, is likely to be minimal. At most, it would simply drive consultants offshore, beyond the reach of any law society, where many of them already have offices. Alternatively, it might force some consultants to work under the auspices of a lawyer, where a number of them already have their practices located. For some analysis and commentary on the *Mangat* decision, see Robert Matas, "Immigration hearings in limbo" *The [Toronto] Globe and Mail* (20 August 1997) A1.

[703] There is a unique nature to immigration practice that brings with it many challenges not seen in other areas of the law. For a review of some of those challenges, see Derek Lundy, "Unique ethical problems face immigration lawyers" (1996) 16:30 *The Lawyers Weekly* 11. For an example describing a case where an immigration lawyer claims to have been duped by his clients, see Cecil L. Rotenberg, Q.C. and Robert J. Moorhouse "Practice Note to the Profession" (1995) 30 Imm. L.R. (2d) 273. That Note describes the woes of one Toronto lawyer who assisted a "delegation of more than 80 so-called Chinese investors" to come to Canada on a fact finding visit only to find that all of them disappeared shortly after arrival. He was left to disabuse the R.C.M.P. of the notion that he was operating a "sophisticated alien smuggling" operation.

Similarly, many lawyers seem to be hampered by a traditional mindset that prefers suspicions of ill-gotten motives by visa officers. Such a mindset is abundantly apparent in the views of one eminent counsel, for example, who observes that:

> "Immigration officers (visa officers) recoil in horror at the doctrine of procedural fairness because they contemplate that such doctrine may not in itself be fair to them. In their service which presently makes ever-increasing demands upon officers to process an ever-increasing volume of cases with historically less resources, the obligation to provide procedural fairness is regarded as a millstone around their neck. However that may be, quality of service demands procedural fairness, especially if the Immigration Service of Canada is ever going to obtain respect from Canadians and the appropriate overseas ethnic communities where immigration is being recruited."[704]

Though written some years ago, my interactions with the immigration bar suggest that the attitude evident in this passage is still fairly common. Regrettably, these words evidence a lack of any insight or concession to the integrity of rank and file visa officers and highlight the lack of common ground that obtains between the bar and the bureaucracy. Not surprisingly, instead of a cooperative relationship, theirs is sadly one containing significant elements of mutual mistrust and suspicion.[705]

At the risk of perhaps generalizing too much, my observation has been that visa officers prefer to view immigrant selection as more of an exercise in substantive justice, while lawyers tend to fix their gaze almost exclusively on procedure. The penchant for procedure, of course, is a habit consistent with training and experience aimed at gearing lawyers to function in the adversarial forum of courts. Because of it, many lawyers bring

---

[704] C.L. Rotenberg, "Conundrums" (1987) 1 Imm. L.R. (2d) 72 at 75.

[705] For a thought provoking article on a divergence of aims and objectives between government policy and lawyers' interests, and the possible consequences of same, see Peter Tompkins, "Immigration: Governments and Lawyers on a Collision Course" (1995) 17 Loy. L.A. Int'l & Comp. L.J. 891. The author cites a widening gulf between the positions of these two interests that is marked by ever more fractious confrontation. In his view, at 891, such confrontation is "...of little benefit to either side and...may weaken the democratic process in those countries that value it most."

an adversarial mindset to their immigration practice. Such an attitude, however, often entails modes of operation and methods of practice that are unsuited to effective visa office advocacy. This is particularly true where the objective may be to induce and influence an exercise of discretionary power. The object of a visa office interview is to ascertain reality and determine how the law is applicable to such reality. The role of the visa officer is to afford an impartial assessment of the facts and the law applicable to them. They should have no vested interest in the matter and no preference as to the outcome.

Lawyers, on the other hand, are not bound by considerations of impartiality. They are advocates in the service of a client and so are expected to put forth their best effort for that client. However, the point is sometimes lost on lawyers that the visa officer is the decision-maker, rather than the adversary. And in the absence of a true adversarial process, the legitimacy and efficacy of adversarial methods and tactics becomes questionable. Threats, bullying and use of pressure tactics, for example, often simply produce intransigence rather than the desired decision.[706] Likewise, counsel blunt their own effectiveness by employing the usual panoply of adversarial tactics, such as over-glorifying their client's virtues while glossing over, trivializing or ignoring altogether a fault which may be a significant stumbling block to a successful application. A one sided approach to visa office advocacy is rarely so effective as a balanced approach, where pluses and minuses are acknowledged and dealt with openly. Certainly, a visa officer who senses honesty and forthrightness in the presentation of an application is far more

---

[706] The tactics can range from "tattling" on an officer to her superiors to threatening judicial review. For the most part, these tend to bc ineffective and usually result in even greater intransigence on the part of the

likely to be co-opted as an "ally" to aid the applicant to overcome any substantive problems. Where the case presents no unusual features, there is still importance to fostering a relationship of respect and cooperation. Procedural discretion exists to favour the client with faster, less intense processing and this discretion is more likely to be swayed where the decision-maker reposes confidence and trust in the advocate. The importance of this relationship is difficult to overestimate, particularly in the current era where the client's advocate may well be the decision-maker's sole source of information.

The practical result has been a continuing failure of lawyers to fully understand and capitalize on the changes going on within CIC.[707] All of the restructuring and re-engineering has literally driven clients into their arms because of the bewildering array of documents and information now required of applicants. The current need in immigration is for increased cooperation, rather than increased litigiousness. Recognizing this, CIC launched an outreach initiative captured in the notion of "immigration partnerships", which involved a conscious effort to provide more and better information and communication with the bar and consulting communities. However, the initial flush of anticipation over partnerships has now faded. CIC has perhaps become more realistic in its expectations of what the profession is willing and able to deliver in terms of application quality and integrity and just how willing counsel are to support new initiatives. For example, the development of the "one-step application" concept of file

---

decision-maker.

[707] In fairness, some lawyers do appear to have some recognition of the opportunities and challenges that BPR changes have presented to them. See Owen, "List of 'designated occupations' for immigrant selection is being expanded", *supra* note 358, where the reaction of CBA members to various BPR changes is given. For example, "Peter Rekai of Toronto's Rekai and Johnson thought that there would be more need for lawyers under the new regime. "But we will be different people and so will the visa officers," he predicted. The system is becoming more complex and numerical, he said. It will be working more on

processing should have been a boon to immigration advisers.[708] Under this concept, the applicant ran the risk of having her application rejected in its entirety, for example, with no processing undertaken at all, if it was not totally complete. Unable to easily access a live person at CIC to assist with application preparation and submission, many applicants, particularly those unfamiliar with English or French, naturally turned for information and assistance where they could find it, most often for a fee. The concept failed to catch on however. Though there were some design and delivery problems highlighted by pilots that were undertaken, these were not intractable.[709] A significant reason for its demise was simply the unwillingness of immigration advocates to embrace it.

Immigration consultants[710] do not suffer so much from the adversarial mindset of the lawyers. Unfortunately, this does not mean that they are any better at dealing with visa offices. There is a significant problem of competence that affects this group, largely because there is no regulation of the business of immigration consulting and so no standards concerning capability and integrity.[711] The problem is noted in a submission made by the C.B.A. to a Parliamentary Committee on Citizenship and Immigration:

> Anyone can set up business as an immigration consultant, regardless of qualification. These immigration consultants are not subject to any test of competency before they provide advice to would-be immigrants and refugee claimants. Where former employees of Citizenship and Immigration Canada

---

paper, by mail.'"'

[708] See text accompanying note 370, *supra.*

[709] The obvious problem was the issue of "lock-in" discussed *supra,* in text accompanying note 372.

[710] For the purposes of the present discussion, it suffices to define "immigration consultants" as "non-lawyers", being persons who are not members of and licensed to practice law by any provincial law society in Canada.

[711] The problem of competence, of course, is not one limited just to consultants, though it does seem more apparent with this group than with lawyers. See, for example, Craig Harper, "Refugee lawyers say 'inept' colleagues hurt practice" (24 May 1996) 16:3 *The Lawyers Weekly* 3. The article lists complaints by lawyers against other members of their profession who are alleged to lack even the most basic skills and knowledge for dealing with refugee cases.

> establish immigration consulting businesses, they may indeed possess a higher level of competency than fly-by-night immigration consultants who prey on would-be immigrants. The concern, however, is with the standard of competency in general. At present, no federal or provincial regulation governs the qualification of immigration consultants.[712]

These concerns have prompted some consultants to band together to form the Organization of Professional Immigration Consultants (O.P.I.C.). One of the primary objectives of O.P.I.C. is to increase the competence of its members by providing training. However, participation in the organization remains voluntary and so many of the worst consultants remain beyond the reach even of the minimal supervision offered by OPIC.[713] Although the C.B.A. would like CIC to be involved in regulating consultants, it is not likely that CIC will soon assume such responsibility.[714] As a result, the current environment within which private immigration advice and assistance are offered continues to be characterized by extremes in competence and capability, both within the

---

[712] Canadian Bar Association, "Submission on Immigration Consultants" (Submission to Parliamentary Standing Committee on Citizenship and Immigration) (June, 1995) at 13. Although the C.B.A. submission concedes something to those consultants who are former employees of CIC, I would offer that an even better case is to be made for them. At the risk of being accused of bias, it has nonetheless been my experience that former CIC officers tend to be amongst those who are most effective in dealing with visa offices. This is, of course, a generalization and I admit also to having dealt with some notable exceptions to this rule. In general, however, former departmental employees are most likely to understand the nature of the workload and pressures in a visa office and to put extra care into application preparation, so as to minimize the frustrations of the processing officer. My perception is that because of their experience inside the visa office, such practitioners appreciate better the importance of getting details right.

[713] OPIC has no mandatory authority even over those consultants who opt to join the organization. See OPIC, "Code of Ethics & Rules of Professional Conduct" (OPIC, undated), where it is stated that members "voluntarily submit to the scrutiny and discipline necessary to maintain high standards of ethical practice." Although OPIC has a complaints process, the most serious penalties appear to be an "order" to return the client's fee and/or termination of membership in OPIC. Even the "order" to return a fee, however, is not enforceable by any compulsive means on the part of OPIC.

[714] See, for example, H. Greenberg, "Immigration Alert No. 27 – Unofficial Minutes of CBA and CIC Meeting on November 4, 1996" (Toronto: CBA, 6 November 1996). At that meeting, while the CBA expressed its desire that CIC should assume responsibility for regulating consultants, the department expressed its reluctance to do so. In particular, CIC noted that such responsibility would necessarily involve additional costs to the department and, in an environment of fiscal restraint, CIC was unlikely to convince the Finance and Treasury Board of the Government of Canada to make more funds available to it for this purpose.

bar and the consulting community. These range from the very good to the very bad and even into the realm of the dishonest and deceitful.[715]

Notwithstanding this, it is clear that to constructively participate in the new paradigm of visa processing, professional advisors of all stripes need to get beyond their traditional habits and practices. This is particularly true since the need for good quality professional assistance is greater than ever before. The fundamentals for any professional immigration advisor who wishes to capably represent her clients must be integrity and scrupulous attention to detail. Like any other field of advocacy, advocates in the immigration world quickly develop a reputation regarding their reliability and trustworthyness and visa offices do share information amongst themselves on such matters. Even the rumour of a lack of integrity in a particular advocate can be damaging. Any advocate tarnished by the taint of a lack of ethics or diligence will find that procedural discretion will rarely be exercised, with the result that few of their applications will enjoy the benefit of a waiver of interview. Such a taint may also affect the exercise of substantive discretion, with circumstances cited to justify same subjected to more rigorous scrutiny and the benefit of doubt less easily granted. This is only natural in an atmosphere where CIC decision makers may never meet the client and are forced to rely more and more on the information collected, interpreted and presented by the applicant's

---

[715] See for example, David Hogben, "Negligence, fraud alleged in immigration business" *Vancouver Sun* (8 November 1995), as cited in DFAIT "INFOFLASH" (8 November 1995). The article details concerns by the Law Society of B.C. that immigrant applicants are being preyed upon by unscrupulous and incompetent immigration consultants. See also CIC "Daily Wrap" (14 May 1998) 1, citing a story from the May 14, 1998 edition of the *Vancouver Sun* where Reform Party immigration critic John Reynolds complains that a "Vancouver immigration consultant charged with passport forgery, people-smuggling and other crimes shouldn't be allowed to remain in business." The story relates that the consultant was charged in March, 1998 "...with 18 counts, including forgery, assault, threatening and counselling (sic) his clients to lie to immigration officers. Since the charges were laid, Rezaei [the consultant] has continued to operate his

counsel. It should be obvious, then, that much depends upon the reputation of the advocate.

Attention to integrity must also be combined with the acquirement of new skills. In particular, for too long it seems that advocates have viewed the preparation of the application for permanent residence – the basic IMM8 application form – as a mere clerical matter, best left to a secretary or junior in their office. Such an attitude misses the point entirely. It is no longer adequate to simply fill out that form in the haphazard manner of former days. The IMM8 is the essential, central document by which all immigration processing is carried out. In an atmosphere where there is no longer much capacity in the system to remedy mistakes, the proper completion of this document is crucial. In a very real sense, the IMM8 *is* the application. It provides a road map to the applicant's file and is the reference guide to which all else is appended. This is particularly true for screening officers who may see dozens of files in a day. For them, the IMM8 is the starting point and, while an application may contain reams of supporting material[716], no other document is ordinarily studied, reviewed and referred to in the same intensive manner as the IMM8. The importance of giving complete and accurate information in this document is reinforced by the fact that it contains a declaration, which the applicant must sign, attesting to same. Accordingly, advisors must appreciate and understand the significance of every bit of information sought in the application and must ensure that it is presented in an immediately useable fashion.

---

business at 204-1149 Hornby, directly across the street from the Canada Immigration Centre."

[716] Indeed, too often an application contains supporting information that is of little or no real value. The glaring nature of such a problem is highlighted when the file contains such fluff but then lacks other very relevant information.

For advocates, the importance of the information gathering stage to their client's overall chances for success cannot be stressed enough. Officers no longer have the same time available to verify missing, unclear or erroneous information. Since fairness at the paper-screening stage does not require an oral hearing, applicants may be refused if it is not clear on the face of the application that they qualify. Likewise, while the paper-screening officer may not be the officer to ultimately approve the application, that first officer wields the discretionary procedural authority to waive the necessity of interview. Recognizing that discretion may be influenced by a host of sociological and organizational factors, the job of the advocate should be to make the life of the paper-screening officer as easy as possible. All necessary information to justify waiver should be submitted *ab initio* with the application. On the other hand, superfluous or gratuitous information should be omitted, lest it create a negative impression of obsequiousness or a lack of sincerity.[717]

Similarly, counsel need to appreciate the role of screening officers, or case analysts as they are called at some posts, who may review dozens of applications in a day. These officers face productivity measures which ensure that they have only a finite

---

[717] In my experience, there is no end to the irrelevant information that counsel will submit with an application, apparently on the theory that more is better. For example, one applicant's counsel thought it necessary to submit a letter showing that she had been one of eight persons winning the "Smile Campaign" at her place of employ. Would counsel have the selection process conducted on the basis of looks? Other examples I have encountered include submission of a certificate from an ice skating course that the applicant took. Although this was presumably intended to suggest preparation for life in Canada, it is equally suggestive of a naïve perception of what skills are really necessary. Perhaps the most amusing and perplexing example I have encountered was that of a couple whose child was born to them in Canada, while on a month long tourist visit. At interview, they presented the child's passport to verify that she was a Canadian citizen. Perhaps to emphasize the fact that they did indeed have a Canadian relative, a small plastic bag was then pulled out and presented to me. On closer inspection, it was revealed to contain the child's now desiccated and shriveled up umbilical cord, which had been stapled to a card issued by the hospital. In the face of this overwhelming evidence, there was clearly no basis to dispute the citizenship of the child.

amount of time to spend on any one application. In case of doubt, their inclination may be to refer the matter to interview where ambiguities and doubts can be explored more fully, in a block of time that specifically allotted to the case for that purpose. Accordingly, a simple, but effective technique to sway any discretion in favour of an applicant is to fully utilize the IMM8 application form. Too often, out of laziness or habit, counsel choose not to fill out boxes on the IMM8 dealing with education and work experience and simply include a note to "see attached". The frustration level of the screening officer with this device increases in proportion to the amount of material that has been attached to a file and the frequency with which they are directed to "see attached". There is never an excuse for not filling out the education and work history portions of the IMM8, particularly since these are meant only to cover the most recent employment and education. Filling out the education box, for example, with kindergarten and grade school information is the hallmark of a marginally competent counsel. Instead, the point of the exercise is primarily to determine what is the highest level of education that an applicant possesses. If an applicant has more relevant education than can be included in the IMM8 (which is rare), then the details should be listed in reverse order with the highest level of education listed first and so on. Similarly, unless the client has a very spotty and inconsistent work history, there is little reason that the highlights of that work history cannot be provided on the IMM8.

Understanding the IMM8 and integrity come together with the assessment of language proficiency. The form asks applicants to indicate whether they speak, read and write English and French "fluently", "well", "with difficulty" or "not at all". It is hard to accept that a serious effort to gauge language ability has been undertaken, for example,

where fluency is indicated but the applicant attends interview with an interpreter. While the categories for language ability are hardly certain and precise, there is sufficient clarity in these categorizations that egregious over-estimation invariably reflects poorly on counsel. Additionally, the IMM8 form seeks information about any affiliation or associations the applicant has had with groups such as political parties, student and vocational organizations and whether any military service has been undertaken. Too often, such information is not mentioned at all by the applicant. This information is used to assess the background of the applicant and gauge whether they pose any sort of security risk. Counsel who omit to mention any such affiliation do so at their client's peril. Should the information come out at interview, the inclination of a decision-maker to recommend a positive exercise of discretion is likely to be negatively impacted by the appearance of subterfuge and deliberate concealment. Similarly, considerable delay can be occasioned to the applicant's file, since background checks that could have been commenced on receipt of the application may wait until after interview. The same is true for other questions which ask whether the applicant has ever had serious health problems, a criminal record or has ever been denied a visa anywhere, been deported or denied entry to any country. Providing details up front invariably saves frustration and delay later on.

It is important to recognize that while the big prize from the paper-screening stage for many applicants will be a waiver of interview, this is not the only benefit. For some, simply clearing paper-screening to enter an interview queue may enhance their chances for success. As in so much of immigration work, it is often easiest to refuse applicants at the front end, before the case has time to develop new complexities. The further into the process the applicant goes, the more involvement required of the decision-maker to

document and justify a refusal. Thus, even if an interview is required, the chances for refusal diminish greatly after paper-screening. This is particularly true of discretionary decision-making. It is infinitely more difficult to refuse an applicant, at least from a psychological standpoint, once a personal connection has been made at interview. Similarly, counsel who have asked for an exercise of discretionary power often seem to have adequately counseled their clients as to the importance of demonstrating at interview those positive qualities which are likely to impel an officer to look favourably on their application. Even a sense of humour, though a trivial matter, can be important to establishing a sufficient rapport with the decision-maker that will swing any doubt in their favour. The reality is that the exercise of discretion is made easier when the officer is left with a sense of ease about an applicant and is familiar with them as a person, and not just as a file.

In the event that the client is affected by a problem or condition which may render them inadmissible, counsel will obviously be seeking a grant of positive substantive discretionary authority to overcome same. Pointing up such problems at the time of submission of the application is obviously a better ploy than leaving it to be discovered by the visa officer at interview. But this is not enough. Again, counsel should approach the task of seeking such discretion with the view that anything that can be done to make the decision-maker's task easier should be done. This may involve some research and attention to preparation of the application submission that counsel may not be used to, but the benefits will follow. Specifically, counsel should not leave the task at the point where the problem has been highlighted. Rather, they should identify the ground of inadmissibility and locate it in the statutory regime set out in section 19 of the *Act*. Most

effectively, counsel should provide cogent, articulate reasons why the ground should be overcome. In this regard, it is always impressive to cite from the policy manuals for guidance as to why and how a ground of inadmissibility should be overcome.[718] Further, if the ground for inadmissibility involves criminality, counsel would do well to provide copies of all indictments and police reports, together with a copy of the foreign criminal statute under which the applicant was convicted. The process of rehabilitation from criminal inadmissibility requires that the visa officer determine whether the foreign offence has an equivalent under Canadian criminal law. By supplying all of this information up front, counsel is also well positioned to offer an opinion as to the likely Canadian equivalent, if any. Oftentimes, a foreign offence may be equivalent to two or more different offences, of differing seriousness, under Canadian law. By proactively approaching the question of equivalency, counsel is better positioned to influence the officer's interpretative discretion as to which of a range of potential offences is actually the most equivalent to the foreign offence.

In its submission to the Parliamentary Standing Committee on Citizenship and Immigration, the Canadian Bar Association cited exorbitant fees charged by consultants for simple services as a justification for action to regulate immigration consultants.[719] An example was even given of one consultant who "had charged $500 "just for filling out a form""[footnote omitted].[720] In the majority of visa office cases, the filling out of one form - the IMM8 - will be the most significant task undertaken by an advocate for her

---

[718] The number of advocates I have come across who seem to be unaware even of the existence of the policy manuals is astounding. This reference source should be a basic part of any immigration professional's library.

[719] C.B.A., "Submission on Immigration Consultants", *supra* note 712 at 13.

client. An advocate who approaches this task with diligence and attention will justify their "$500", since its completion can mean the difference between the burden of interview and the benefit of waiver, or even the difference between acceptance and rejection. Moreover, since the majority of cases may be waived the necessity of interview, the rest of an advocate's involvement in case processing may simply be of a "hand holding" variety[721], requiring little or no involved advocacy or special expertise.

The most effective counsel tend to be those who take the time and effort to appreciate the pressures that decision-makers face, who seek to understand the nature of the process by which a discretionary decision will be made and who pay care and attention to presenting facts and evidence in a manner that is logical and consistent. As discussed, this often involves simple things, yet they tend not to be done often enough in practice.[722] In the current era, however, a failure to attend to details could well mean a failure to draw upon available discretion. *Caveat emptor* then to the client left to choose

---

[720] *Id.* at 14.

[721] For example, assisting the client to gather other information, secure medical testing and the like.

[722] A favourite example which causes visa officers much consternation and suspicion as to counsel's competence is to be found in Business Class applications. The tendency of counsel is to submit a foot deep pile of paper to verify assets, business experience and the like. Consisting of financial statements, statistical data, banking information and other similarly tedious documents, they rarely make compelling reading. Given the innate denseness of these types of materials, the importance of logical sequencing and adequate explanations is heightened. Yet, rarely are such documents provided in any sort of order or with any description and summary of their contents and purported significance. The inevitable impression given is that what is sought is obfuscation, rather than clarification. Likewise, another simple but effective technique that eludes many counsel concerns providing an estimate as to how many units of assessment an Independent applicant should be awarded. Some advisors provide no assessment at all while others will provide only a global figure. Providing a points tally, with a specific breakdown of the estimated points for each of the selection criteria, should be routine for any advisor. It aids the screening officer to ensure that their own assessment is correct and serves to dispel the notion that the advisor has exaggerated qualifications or simply made an arithmetical error to overestimate the available points. Similarly, it is foolhardy for a professional advisor to submit an Independent application without specifically stating what is the applicant's intended occupation in Canada. What may be perfectly obvious to the advisor, who probably has met the client and has personal knowledge of her, may not be so obvious to a visa officer reviewing the application. If left to guess as to what the intended occupation might be, the officer may well determine that the applicant has no experience relevant to the General Occupations List, with the

her advisor. Whether her fees are well spent or misspent may depend largely upon care to details.

3.4.4 Human Rights, Privacy and Access to Information

Another source of potential control over discretionary power that bears mention concerns use of the human rights complaint process under the *Canadian Human Rights Act*.[723] As was noted in the *Menghani* case[724], Canadian human rights legislation may be applicable to overseas Independent immigrant processing, though very specific circumstances need to be present. In particular, for the Human Rights tribunal to have jurisdiction, there must be an "affected" relative in Canada to launch a complaint. Wide grounds for complaint, such as discrimination on the basis of source country, leave plenty of scope for such applications. Certainly, improperly exercised discretion may cause a discriminatory effect or may proceed from a discriminatory basis. Either way, the exercise is potentially subject to *Human Rights Act* jurisdiction.

Two pieces of legislation, the *Access to Information Act*[725] and the *Privacy Act*[726] also exert some control over the use of discretionary authority, because of the openness in government operations which they mandate.[727] The *Privacy Act* has two major functions: it allows individuals access to personal information that the government has collected about them and it provides protection to individuals by circumscribing how such

---

result that the application is refused.
[723] R.S.C. 1985, c. H-6.
[724] *Supra* note 175.
[725] *Access to Information Act*, c. A-1, R.S.C. 1985.
[726] *Supra* note 249.
[727] See generally *Access to Information Act and Privacy Act (Information booklet), id.*

information may be used, whom it may be disclosed to and under what circumstances.[728] In the immigration context, the *Privacy Act* access procedures allow an applicant, or their representative, to obtain a copy of their immigration file from the relevant visa office. The complete contents of a file, from the case notes to medical reports and other information are available for inspection. The obvious benefit, at least in so far as controlling discretionary power is concerned, is that it enables an applicant to peruse the information to verify its accuracy, ensure that it was interpreted in a correct fashion and discover the rationale for the manner in which decision making was conducted.

While the *Privacy Act* enables individuals to access their own file, the *Access to Information Act* has broader application. This statute permits Canadian citizens or permanent residents to access non-case specific information held by federal government institutions.[729] An access request can be used to obtain copies of almost any document that is found in a federal government office.[730] An example in the area of immigration law might be any policy document, either in CIC headquarters or at a visa office abroad, which provides guidance as to how discretion should be exercised. If the policy guidance has not otherwise been made public, then an access request provides a practical avenue for its discovery.

Through the two tools of access to information and the CAIPS database, CIC operates in something of a fishbowl. Indeed, because of them, there is probably no other government department or tribunal in Canada that operates under the same intense

---

[728] *Id.* at 7.
[729] *Id.* at 4.
[730] See generally *id.* at 4. Exemptions are allowed under the *Access to Information Act* for material whose release might cause harm or be contrary to law.

scrutiny that CIC receives. The combination of these two has enabled private operators to mine CIC databases for even the finest bit of data. For example, the Lexbase firm, which bills itself as "The National Information Network for Immigration Practitioners", has so inundated CIC with access requests as to keep several employees very busy answering them. And the results of those requests are telling. The information is packaged in the form of a monthly newsletter and sold to subscribers who are provided highly detailed particulars of CIC's internal operations. In a recent issue of the newsletter, for example, case processing statistics concerning the pass, fail and interview waiver rates of individual employees within the Buffalo RPC and Buffalo visa office were given.[731]

While there is a broad justice objective to be served in having the operations of individual visa offices subject to such scrutiny, a note of caution must be sounded as well. As the sociological discussion earlier in this study pointed out, institutional and operative considerations may influence the exercise of discretion just as much as legal constraints. In the case of the Buffalo statistics, for example, there is perhaps a double whammy to be contended with. First, making the statistics available amongst officers within a given work unit, so that each decision maker is made accountable relative to others within her unit, creates pressure for conformity in decision making. But, having those statistics available publicly adds a further dimension, as officers are made individually accountable in a very public way.[732] No longer do nameless, faceless civil servants toil in service to

---

[731] "New Lexbase "Waiver" Chart #1: 1997 Waiver Rates by Category, by Employee" *Lexbase* (August/September 1997 Sending) 2.

[732] While the "New Lexbase Waiver Chart #1", *id.*, refers to those individual employees only by their initials, this is sufficient to ensure that the decision makers in question will be identifiable and known to the

the Minister who bears notional responsibility for each and every decision. Rather, each is now in the spotlight with relentless gathering and publication of their individual productivity measures a constant factor in the back of their minds.[733] With few opportunities to justify or defend their actions, both to headquarters mandarins who monitor such things and to the public who consume them, the pressure to conform and not stand out by reason of undue leniency or untoward severity becomes significant.

While it is beyond the scope of this paper to plumb the exact linkage between publication of such statistics and outputs, intuitively one senses that a correlation will exist, if there are no proper controls over their usage. There is also a question to be asked concerning the uses to which such information is put to by sources outside the department. The fact that such information is regularly sought and provided to immigration practitioners in a monthly newsletter certainly suggests that it is valuable to them. Comparing statistics between offices, and now even between individual officers within an office, is clearly meant to enable advisors to counsel clients as to where and when to lodge a particular type of application, so as to best enhance its chances of success. This issue presents features, such as the impact upon the public interest, immigration system design and the like, which eclipse the more immediate focus of this paper and so will not be pursued further. Suffice to say, discretionary decision making is likely to be impacted when competition between offices and individual decision makers

---

clientele, such as lawyers and consultants, with whom they deal.

[733] The matter actually hits closer to home for civil servants because their email is also subject to access requests. See for example, Carol Turner-Trusca "President's Report" *PAFSO Update (Newsletter of the Professional Association of Foreign Service Officers)* 15:1 (January 1998) at 1, where it is noted that several PAFSO members in CIC have had their email accounts accessed. Pursuant to those requests, the "...members have been asked to supply the entire contents of their e-mail account for extended periods of time (up to six months)...." Of course, even personal messages found in the email account are subject to

can be fostered by the provision of statistics. In an atmosphere where the well being of an office, or even of an individual decision-maker, may be in jeopardy because of institutional or other changes, the provision of such statistics can exacerbate the situation. Conceivably, they may give rise to pressures pushing discretionary decision making to become irrational or divorced from the particulars of each individual case, for reasons that have little to do with the facts presented.[734]

---

public disclosure pursuant to an access request.

[734] See for example, "Alleged triad leader's entry traced to bid to save jobs", *supra* note 364. That article suggests that the alleged triad leader was able to obtain a visa at the Los Angeles visa office because of an overly generous waiver policy. The exercise of discretion to waive interviews was apparently motivated, at least in part, by concerns about the continued viability of the office.

CHAPTER 4 – CONCLUSIONS

"Corruptissima republicae, plurimae leges"[735]

4.1 Discretion Now

Discretion is a broad, multi-purpose administrative tool that has many facets. It exists in tandem with rules to aid their interpretation and to fill in gaps left by rules. It may be positive or negative in its effect and it occurs both in matters of procedure and substance. In the face of impossibility of devising complete, self-executing rules for immigrant selection, discretion has long been seen as essential for carrying out of Parliament's will in this area of public law. There is, in fact, broad consensus that the existence of some discretion is essential in immigration law. However, that consensus evaporates when consideration of discretion moves beyond generalities to specific issues concerning its scope, application and usage. How much, under what circumstances and of what character are hotly debated questions.

Parliament's will in immigration matters, broadly expressed in the objectives contained in the *Immigration Act*, is both expansive and selective. Not surprisingly, therefore, the formulation of discretion in our current immigration regime possesses both positive and negative facets – a power to include and also to exclude. The issue of a dual character for discretion has been the central focal point of bureaucratic and judicial interest. Intervention and reformulation have followed that interest, with the result that a

[735] "The worse the state, the more laws it has." T.R. Reid, "The World According To Rome" (August 1997) 192 *National Geographic* 54 at 64. Reid attributes this quotation to the Roman historian Tacitus.

significant make over of immigration discretion has taken place.

"The very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred."[736] This pronouncement by Lord Diplock in *Tameside Metro. Borough Council* describes the essence of discretion – choice. In recent years, however, that choice has been narrowed and restricted by a confluence of movements, originating in the courts and the immigration bureaucracy, to reduce the availability and scope of substantive discretionary power. Though each side has acted independently for different reasons and motives, the result has been something of a loosely coordinated action whereby substantive discretion has been caught in the jaws of a narrowing vise.

In rethinking discretion, the bureaucracy and the judiciary have approached the matter from different viewpoints and for different reasons. The philosophical footing from which courts have proceeded has largely followed a Diceyan orientation centered on the concept of the rule of law. Thus, while the amplitude of positive discretion has been assiduously nurtured, there has simultaneously been an emphasis on control and reduction of negative discretion. It is a viewpoint that is untroubled by the inconsistency of these apparently contrary approaches to the two sides of discretion.[737] This is because the root focus in both instances has proceeded from a consideration of applicant rights. Thus, regardless of whether procedural or substantive discretion is involved, any

---

[736] *Secretary of State for Educ. & Science* v. *Tameside Metro. Borough Council*, [1977] A.C. 1014 at 1064.
[737] Evans, *supra* note 2, noting that the holding of contrary opinions about discretion is not uncommon. Thus, those who see threats to liberty and the rule of law in negative discretion may hold the opposite view of positive discretion used to confer benefits.

impingement upon rights or entitlements has been met by the strictest scrutiny and control.

Most often, judicial intervention against discretionary power has been justified by the finding that its exercise has involved an untoward infringement upon the right to fairness. The courts have been particularly bothered by the broad scope of substantive negative discretion. Thus, judicial interpretation has been employed to read meaning into the express delegation of such discretion in the *Regulations* to restrict its usage to matters related to the ability of an immigrant to economically establish in Canada. At the same time, the amplitude of positive substantive discretion has been guarded by the stricture against unlawful fettering of discretion.

Procedural discretion, on the other hand, has enjoyed something of a renaissance. This is because its negative side tends to have far less impact than is the case for substantive discretion and its positive usage is uncontroversial. Generally, therefore, judicial interventions with respect to procedural discretion have been limited to occasions where it has been used negatively to somehow unfairly deprive an applicant of an entitlement or right that was due to her.[738] Clearly, the most important reason for the flowering of procedural discretion has been the functional benefits it has provided to the bureaucracy. It has been a major source of the increased efficiencies that were needed because of labour reductions mandated by the fiscal austerity imposed upon CIC. Since applicants have also benefited from such efficiencies, there has no cause for complaint

---

[738] See for example, the *Choi* decision, *supra* note 270, where the visa office exercised procedural discretion to give the applicant a PAQ, rather than an ordinary application form. This decision adversely affected the applicant's right to "lock in" his application prior to a regulatory change. On the other hand, a procedural decision not to waive an interview does not adversely affect any accrued substantive rights the

and so little reason for such discretion to attract judicial notice.

A common rallying cry against negative discretion has centered upon its apparent incompatibility with a central precept of the rule of law - that there should be no penalization, save as clearly defined by law. Reference to the concept of the rule of law has followed a similar pattern to that of judicial intervention on discretion generally. It is cited in relation to negative discretion but never mentioned with respect to positive discretion. Thus, though the rule of law mandates that the law should apply to all equally, it is nowhere to be seen when government moves positively to grant visas outside of the ordinary processes provided for by law.[739] In immigration matters at any rate, the rule of law seems to be more a matter of convenience than one of necessity and strict practice. Thus, discretion in the courts' conception is very large when employed as a positive instrument for qualification, but much narrower when used to disqualify. For most applicants, therefore, the immigration application process will involve only a figurative toss of a two headed coin - one side allowing for qualification by the rules with the other allowing qualification by the exercise of discretionary power.

The other viewpoint, common to the bureaucracy, is more utilitarian and derives its philosophical inspiration from the functionalist viewpoint. It prefers a broader view of discretion, both positive and negative, as a tool for supplementing the shortcomings of the

---

applicant may have. Interview is the ordinary requirement and so failure to waive same has only deprived the applicant of a special benefit, not a right.

[739] See for example, CIC, "*Daily Wrap*" (21 October 1997), providing the following digest of a story cited to articles in the October 21, 1997 editions of the Ottawa Citizen, Financial Post and Hamilton Spectator: "Prime Minister Jean Chretien said yesterday he is ready to offer a visa to a retired Russian navy captain charged with treason for his work on nuclear pollution. [The] Russian Prime Minister was quoted as saying the Mr. Nikitin would be free to go once justice has run its course. He is accused of high treason for having publicize [sic] the danger of pollution posed by aging Russian nuclear submarine [sic]. Mr. Nikitin applied in late 1993 to emigrate to Canada."

rules. That viewpoint, however, has been tempered in the last five or six years by fiscal imperatives and practical concerns that militate against costly, labour intensive processing methods. The exercise of substantive discretion, of course, involves very individualized processing. Regardless of whether such discretion is used positively or negatively, each decision demands a considerable commitment of time and energy from a decision-maker. In an era of restraint and reduction, it is inevitable that use of such discretion should be eschewed. So too, the lessons drawn against positive substantive discretion from fiscal imperatives have also been drawn against substantive negative discretion. Substantive discretion, whether positive or negative, is simply very intensive by nature and hence "expensive". Moreover, working under the supervision of the courts, the bureaucracy has had to reckon with judicial disdain for any form of negative discretion. These two trends have worked to reduce the scope and availability of all substantive discretion, both positive and negative. While some substantive discretion remains available, primarily because it is explicitly provided for in the legislation, it is clearly no longer favoured by the bureaucracy as a tool of general application. On the other hand, the use of procedural discretion has been encouraged and enhanced because of the savings in labour and resources it offers.

Thus it is that a combination of jurisprudential trends and a tight fiscal environment have left substantive discretion in a reduced state. Though the judiciary and the bureaucracy hold apparently divergent views on most aspects of discretion, it is interesting to observe that they have converged in a preference for a more black and white, rules based system. The judiciary favours such a system because of the assurances it appears to offer for safeguarding applicant rights, while the bureaucracy sees efficiency

and savings in it. Ironically then, one tugs towards rules as a way to enhance individualized processing while the other sees an opportunity in rules to increase efficiencies by reducing individualized processing.

There is another shared commonality to the approaches employed by the bureaucracy and the bench. Both have involved a downplaying of the public interest in immigration matters. The notion of a public trust has long animated immigration law and policy, and visa officers have tended to be very conscious of the fact that they are public servants. As such, they tended to believe that their first allegiance was to the public trust, and not necessarily to the client at the counter. According to CIC management, however, such a mindset is no longer sustainable. This is evident in the statement of Raphael Girard, former Assistant Deputy Minister (Operations) who, in 1993, "...acknowledged that most of his officers have a different perspective from his. They think the client is the general public. He thinks [however, that] the client is "the person standing at the wicket.""[740] The courts, for their part, have also pursued a course of focusing only on the individual applicant. The reasons for this are rooted in the nature of judicial review and the singular focus it has upon procedure. This focus has been followed without regard to the substantive consequences that may flow from particular decisions and is epitomized by the notion that even "bad decisions" will be sustained by "good procedures" and vice versa.

Whatever the reasons for it, it is clear that the pressures exerted by both the judiciary and the bureaucracy have reduced the usage of substantive discretion and are adding impetus for the creation of a more rules oriented selection system. That system

has yet to be fully devised, but much recent interest and activity suggests that reform may come sooner rather than later.[741] The ways and means of immigration processing have been radically affected by the divergent, but yet converging, trends of judicial formalism and bureaucratic formalism. Whatever the course of any future reform, the present situation is clear. The relentless progress of judicial intervention and bureaucratic expediency have combined to whittle down the scope and availability of substantive discretion, but enhance the use of positive procedural discretion. In either case, discretion is now primarily an instrument of positivism – for inclusion substantively or for procedural convenience.

4.2 Reforming Discretion - Immigration Legislative Review Report

The role of discretionary power within immigration law and processes remains a topic of current interest as witnessed by the fact that attention has been paid to it in a recent study of possible future directions for reform. Commissioned by the Minister of Immigration, that study, entitled *"Not Just Numbers – A Canadian Framework for Future Immigration"*[742], has suggested radical structural, procedural and substantive changes affecting all aspects of immigration law. Acting on a one year mandate to advise the Minister, the Legislative Review Advisory Group which undertook the study singled out discretion for special attention. In so far as selection of Independent immigrants is concerned, the group's principal conclusion was that the necessity for a "general

---

[740] Gerald Owen, *supra* note 358 at 10.

[741] See generally Chapter 2, above, discussing initiatives by the bureaucracy to reduce substantive discretion. Also, see below, section 4.2 Reforming Discretion - Immigration Legislative Review Report, for a discussion of proposals for reworking discretion offered by a legislative review group that was set up by the Minister.

discretionary power" resting in the hands of visa officers could be eliminated through adoption of completely objective selection criteria. Regrettably, no details of what such a selection system might actually look like have been offered by the Group and so some very important context for assessing their recommendations is lacking. Likewise, such a move naively overlooks the political nature of immigration policy[743] and assumes that the world can be made black and white, with few exceptions for difficult cases.

The new vision of discretion offered by the Advisory Group is set out in five recommendations found at Chapter 10 of the Executive Summary, under the title of "Rethinking Discretion: Residual Powers." The primary recommendation, number 168, reads as follows:

> The Immigration and Citizenship Act should provide for only two types of extraordinary powers to be exercised, at two different levels and not subject to delegation:
> (i) measures taken in the national interest by the Minister of Citizenship and Immigration;
> (ii) measures in a situation of dependency of a person on a Canadian citizen or landed immigrant, or vice versa, taken by the director general of the region concerned.[744]

The obvious key features of this recommendation are that they seek to control the exercise of discretionary power by reducing its application and centralizing it in the hands

---

[742] Legislative Review Advisory Group, (Ottawa: Minister of Public Works and Government Services, 1997).

[743] The highly political nature of immigration law and policy may be evident from the intense interest and almost universal, negative reaction which has greeted the Legislative Review Report. See, for example, Ross Howard "Immigrant groups take on Ottawa" *The [Toronto] Globe and Mail* (26 February 1998) A1, detailing strong criticisms to various aspects of the Report by immigrant groups, the Canadian Bar Association, non-governmental organizations and other "stakeholders". See also Irwin Block, "Immigration proposal denounced" *The [Halifax] Sunday Daily News* (8 March 1998) which describes, for example, a brief on the proposals presented by the National Association of Canadians of Origins in India (NACOI) to the Minister of Immigration at a Montreal public hearing. NACOI stated it was opposed to the proposal for a "...core-standards system, saying it would eliminate those who meet requirements in one area but are deficient in others." Likewise, the group feels that "[s]uggestions that the new policy recover immigrant recruitment costs also discriminates against applications from poorer countries...."

of a select group of high level officials. Unfortunately, if this is meant to appease the critics of discretion, it has fallen short of the mark. The criticisms, of course, are not just limited to concerns about the application of discretion. They also arise, perhaps just as frequently, with respect to its non-application since there are many who argue that discretion is simply not used enough. And hard cases are unlikely to disappear just because more objective selection criteria are adopted. Those cases will remain and, in all likelihood, discretion will simply be driven further underground with line officers devising creative solutions to bridge the gap between the form of statutory enactment and the substance of legislative intent.

The proposal to centralize discretion is also a retrograde move that fails to draw upon previous experience. Centralization would simply restore much of the situation that passage of Bills C-86[745] and C-44[746] had earlier sought to alleviate, where long backlogs of inadmissibility cases awaited personal consideration by the Minister or other high level officials. For example, even routine discretionary decisions, such as rehabilitation for a very old, minor criminal offence would be re-centralized in the Minister's office. The delegation to Program Managers in local offices, in Canada and abroad, of discretionary authority over such cases that was effected by Bill C-86 resulted in a dramatic improvement in client service, with no apparent reduction in protection of the Canadian public.[747] Is it possible that the Review Committee has envisioned a way to completely

---

[744] *Supra* note 742 at 37.

[745] See for example, note 123 *supra*, describing delegation of authority over R. 2.1 "humanitarian and compassionate" discretion to local program managers.

[746] See *supra* note 313 regarding delegation of rehabilitation authority for minor criminal convictions to local program managers.

[747] For example, the waiting period for approval of rehabilitation in minor criminal conviction cases was reduced from an average of 18-24 months to a matter of weeks.

objectify statutory inadmissibility provisions so that discretion will not often be needed to deal with same? If so, they have not given any indication of it in their report.

Moreover, the proposal to centralize discretion increases the risk for political interference, since such power will be wielded only by the Minister and a select group of senior officials. This group may be more subject to political manipulation because of the sensitivity and awareness which they must maintain for public sentiments on immigration related issues. Not that this awareness is bad. On the contrary, it is actually necessary for the larger objective of ensuring that overall policy and practice maintains the necessary high level of public support that is crucial to a successful program. However, it is an awareness that is unnecessary to decisions in the types of routine matters which are currently handled within individual visa offices. Moreover, it is an awareness which may be difficult to counterbalance by a mere paper review of an individual case.

Although some discretion has been provided for by the Advisory Group, likely because of a realization of the impossibility of legislatively providing for every case, its complete removal from local offices would simply increase bureaucracy and delays. Under current law and practice, authority for discretion in routine matters has been localized where it is needed – at the point of contact with the client. Such routine matters are characterized by the fact that the discretion involved is unlikely to implicate significant concerns regarding the wider issues of public health, safety, security or expense. Where such concerns are evident, then discretion has been retained at higher levels, where a balancing of those concerns with the interests of the particular applicant can best be carried out. This dichotomy has worked well to ensure a fair state of equilibrium in immigration law, with due regard for the rights of individual applicants

and the public interest. This split jurisdiction has enhanced the ability of Canadian immigration law to provide humane, individualized responses that maximize justice both for applicants and the public.

Centralizing all discretion, however, is likely only to throw that equilibrium out of balance. In fact, it may actually work to enhance arbitrariness, since it will serve to decrease accountability by insulating decision-makers from clients. It is a situation where field sensitivity may well be allowed to fall before headquarters' and political imperatives. Certainly, splendid isolation seems to be the goal of recommendation 170, which is an adjunct to 168. It states that the Minister or Director General would have no obligation to consider whether to exercise their residual discretionary power, would not be required to provide reasons and any decision would be final. This is hardly a move to enhance the transparency which the committee otherwise appears to favour and does nothing to further accountability.

Similarly, if the Committee's intention was to reduce litigation by referring to decisions of the Minister or a Director General as "final", experience shows that courts are unlikely to be impressed by this attempt to construct a privative clause and will still find reason to assume jurisdiction. Admittedly, however, courts do tend to show more deference to discretionary decisions made by officials at the highest levels of the bureaucracy, with the result that this recommendation would likely make discretion harder to challenge successfully. Accordingly, the position of the department might enjoy some overall enhancement, through some reduction of the litigation burden. However, the gains in this respect are likely to be minimal and may be outweighed by the costs in terms of client satisfaction and public confidence that would likely be inherent in

any move to what is manifestly a more secretive type of process for discretionary decision making. Recommendation 168 suggests a lack of confidence in the judgment of those who deal directly with the clients on a day to day basis and assumes that discretionary power is somehow enhanced and legitimized by its concentration at the highest levels. The reality, however, is that even under this proposal, the higher authority would still be dependent upon the judgement and recommendations of those field officers who actually conduct the investigations. The difference is that any semblance of substantive accountability is dispensed with.[748]

In its place, the committee has offered a sort of procedural accountability that is unlikely to satisfy critics. Recommendation 169 stipulates that an annual report should be made to Parliament summarizing the circumstances and frequency of the usage of discretion.[749] As a global tool, such a report is useful to shed light on general trends in the usage of discretion within the system. Such political accountability is desirable and is to be encouraged. But it is not a substitute for providing reasons directly in individual cases to those personally affected by such decisions.[750]

Beyond the structural aspect to the proposal contained in recommendation 168,

---

[748] This is in fact the situation that presently obtains with respect to certain types of discretionary powers that remain centralized in the Minister's office. For example, approval of permanent rehabilitation in cases involving more serious criminal conviction cases must still come from the Minister's office. A similar situation exists with respect to authority to issue temporary entry Minister's permits in such cases, where approval must be granted by a Director General in a regional headquarters. Accordingly, while the investigating officer may recommend that approval be granted in a given case, the Minister is free to ignore that recommendation. See *Leung*, *supra* note 235. And, in the absence of any requirement for reasons, this leaves even the field officer in the awkward position of attempting to explain a decision whose rationale may not be obvious.

[749] In fact, a partial report to this effect is already given to Parliament pursuant to the Minister's obligation under section 37(7) of the *Act* to detail annually for Parliament the number of Minister's Permits that have been issued by her department.

[750] There may well be certain circumstances, such as cases implicating national security concerns, where some secrecy may be justifiable. However, as a general matter, there seems little justification for denying

there is also a substantive element to be considered. The proposal assumes that all types of residual discretionary decision making powers can be easily isolated into 1 of 2 types and that they are all of a sufficient weight or gravity to justify consideration only by the Minister or a Director General. Yet, a large variety of situations may raise the requirement for some discretionary decision-making. For example, one type of inadmissibility may implicate a whole range of seriousness. Thus, criminal inadmissibility arising from a shoplifting conviction cannot be compared to a conviction for murder. And a positive decision to grant entry, for example, is different in kind from a negative decision to exclude. Thus, declaring a person to be a danger to the Canadian public is an infinitely different decision from deciding whether an applicant is in need of discretionary processing because of the existence of a situation of dependency. Manifestly, all such decisions are not of similar importance or gravity. While some decisions, like that of declaring a person to be a danger to the public, are of a sufficiently serious and extraordinary nature to justify consideration at the highest levels, others, like dependency, are best dealt with at a local office level where experience and expertise in such matters is already present. And again, the notion that discretion could be reduced in the fashion suggested assumes that it is possible to devise a complete legislative scheme of rules that could achieve an almost perfect balance between the public interest in immigration and the interests of applicants.

The recommendations on discretionary residual power also suffer from ambiguity. Recommendation 168 talks about the Minister acting in the "National Interest" but no definition has been offered for this term. Use of the term "national interest" appears to

---

reasons in more mundane cases.

assume that every such case will implicate a weighty issue. However, one example serves to illustrate that this may miss the mark, at least insofar as overseas immigrant selection is concerned. Independent overseas applicants who fall one or two points short of the mark needed for a clear pass, but who otherwise appear to have good potential for settling in Canada, are routinely approved on discretion in current practice. Such decisions are quickly made in local offices by the interviewing officer, albeit with the concurrence of a senior officer. This is not just efficacious but also sensible, since it is the interviewing officer who is best placed to understand all of the subtleties and equities of a given case. Under recommendation 168, however, it seems that such a case could only be approved by the intervention of the Minister, who would need to be satisfied of some "national interest" angle. It is simply unacceptable, both from the perspective of administrative efficiency and in terms of fairness to the applicant, that such a straightforward matter should require direct approval by the Minister. The measures respecting "dependency" also appear designed to promote a drive towards a rules based system that would have none of the flexibility which is the hallmark of current law and practice.[751] Recommendation 168 allows that only Directors General may approve dependency cases. Under recommendation 171, dependency could only be claimed on behalf of those close relatives of a Canadian sponsor who fail to meet some statutory requirement, but who otherwise meet the Family Class definition.[752]

---

[751] The entire measures respecting dependency are contained in recommendations 168, 171 and 172. The review group is inconsistent in its terminology even within these few clauses, using the term "dependency" in 168 and 172, while also referring to "complete dependency" in 171.

[752] Pursuant to the definition of "family" found at section 2(1) of the *Act*, the Family Class currently includes the spouse, the children and the parents of a Canadian citizen or permanent resident. The Review Group has recommended a considerable expansion of the group of persons who might qualify in the Family Class to include any "relative" and even "close personal acquaintances of the sponsor's choice."

And in the end, what is most important to understand overall about the Committee's recommendations on residual powers is that they are predicated upon the move towards a more rules based system, with a resultant decline in the availability of discretion, both positive and negative. This is made clear by their statement favouring the adoption "...of an objective selection process [which] would mean that a general discretionary power would no longer be necessary for a visa officer."[753] The danger inherent in such a move is that there may well arise a situation of disconnection between expectations and results. Just as the reduction of negative discretion may result in the approval of more cases seen to be undeserving, so too it may follow that there is an increase in the number of deserving cases that are rejected because no tools are available to approve them.

In the end, all stakeholders, including the public, applicants, their advocates and functionaries within the system, may find that the rethinking offered by the Committee has not improved the supposed deficiencies of the current system. The Legislative Review Advisory Group has clearly been influenced in its efforts by a positivist view of the world that sees codification as a complete panacea. There are pros and cons to such a development and so it is may be more a matter of personal opinion as to whether such a development is good or bad. However, the potential cost and risks of such an approach need to be fully appreciated. Discretion is the means by which the human element has long been incorporated into the immigration system. Circumscribing its use must

---

See the Executive Summary, *Not Just Numbers"*, Legislative Review Advisory Group, (Ottawa: Minister of Public Works and Government Services, 1997), generally at "Chapter 5 – The Family: Essential for Success".at 18 – 20.

[753] *Ibid.* at 11.

inevitably detract from the capability to provide individualized results that can bridge the deficiencies between legislative intent and drafter's language sometimes apparent in the law. Any reduction of discretion is likely therefore to implicate also a reduction of the humanity and compassion for which the program has been renowned. A less humane system is not likely to be in anyone's interest and it is this result which must be fully considered. Unfortunately, the proposals offered by the Advisory Group do not appear to offer any significant measures to take up the shortfall that would likely follow their prescription. The brevity of the recommendations on "Rethinking Discretion" suggests, however, that the proposals have not proceeded from full and in-depth research and study of this issue.[754] Accordingly, any move to act on these recommendations would be ill advised unless and until the totality of the necessity for and usage of discretion in immigration law and practice, and the implications for its reduction and centralization, are better defined and understood.

As the name of the report suggests, and as the Committee has stressed in its introduction, immigration is not just about numbers. Rather, it is about people. And an incredibly diverse range of people at that. It is about a dynamic, human movement which ebbs and flows with world events. The immigrant pool is drawn from an infinite variety of local conditions worldwide that are best dealt with by generalized legislation, stipulating minimum standards, that is capable of some flexibility in its local application. Particularly in an overseas selection context, both applicants and the public agenda are

---

[754] Indeed, the Legislative Review Advisory Group admits as much, *ibid.*, where the following statements are made: "We caution that our recommendations were often made in light of the limited research and data available. We encourage all parties to strengthen research and analysis activities both inside and outside of government."

better served by delegation of authority to program managers in local offices to deal with conditions as they are found at the selection source. It is this type of flexibility which ensures that the best possible fit between legslative intent and actual practice is achieved. Many of the complaints about immigration delivery stem not from the availability of discretion, but rather the lack of it. And they stem also from compendious rules, imposed by legislation and judicial interpretation, which foster bureaucratic responses. The Advisory Group's proposals for discretion, as conceived, would simply hamstring CIC's ability to respond in a timely and appropriate fashion to shifting events and priorities. Fixing the rules affecting procedures in the stone of statute is actually likely to have the opposite effect from that envisioned by the Committee. Likewise, it will limit the responses available by functionaries within the system, leading to further bureaucratization rather than less. Many of those who study the administrative realm have noted a tendency for bureaucracy to do as little as is required by the courts and their political masters when carrying out their mandate. Reducing discretion, and hence personal responsibility for individual cases may be in nobody's interest, particularly if the cost is a devaluation of the humanity of applicants and of the public interest in immigration. It is this feature which has been so central to the successes of the Canadian immigration program. Discretion recognizes that no legislative scheme is ever perfect and allows for individualized responses that suit the particular circumstances. Reducing discretion in the manner suggested by the Advisory Group is likely only to take away the "focus on people"[755] which the Group claims to favour.[756] If immigration is to be more

---

[755] *Supra* note 742 at 2.

[756] Most of the public interest in the Review Committee's Report has been taken up by proposals that all

than just a numbers game, it is this fact which must be recognized and reckoned. If not, then it may truly come to pass that bureaucracy will reign triumphant.

4.3 Conclusion and Recommendations

In an article about the enduring influence of ancient Rome, T.R. Reid makes the point that one of the most important components of the Roman legacy may be the comprehensive collection of statutory and case law surviving from that period. But it is not the particulars of the individual cases and statutes themselves which are so central to that legacy. Rather, it is the jurisprudential ethos which they represent, a desire to regularize the law in all its expressions, functions and processes that is of exceeding importance. They reflect a hunger for clarity, certainty and precision that found its expression in a penchant for precedent and a compulsion to organize, typify and categorize. It is a hunger which we still know today and its essence is captured in one hallowed doctrine that remains a touchstone for all western legal systems. It is, of course, the *rule of law,* which draws upon "[t]he ideal of written law as a shield – to protect

---

immigrants should have either be fluent in English or French, or be responsible themselves for the costs of language training. Certainly, the public consultations convened by the Minister have been dominated by this particular issue. See, for example, "The language of immigration" [editorial] *The [Toronto] Globe and Mail* (5 March, 1998) A22. As that editorial notes, closing off immigration only to those fluent in English or French is hardly realistic. This is so for a number of reasons, not least of which is the fact that there simply are not enough potential immigrants with such skills to meet Canada's immigration needs. Caught between the jaws of a declining birth rate and an aging population, immigration – in significant numbers – is essential to Canada's continued prosperity, according to most demographic predictions. Thus, as the *Globe* editorial asks, "Why waste any more time discussing such a regressive idea?" Other ill-conceived proposals are apparent as well in the Report, such as the recommendation to expand the family class by allowing sponsor's to define themselves who will be included. Again, the *Globe* editorialist rightly dismisses such unworkable inanity by saying "[t]he panel's recommendations to expand family-class immigration – to the ridiculous lengths of welcoming anyone "known and emotionally important" to a sponsor – should see the same fate as the language requirement." Unfortunately, such hot-button proposals have diverted attention from what is truly significant – that the Report suggests a fundamental restructuring of immigration law and policy that encompasses a shift away from an individualized processing orientation to one that is more rules based, with less capacity for dealing with the exceptional or the unusual. Whether

individuals against one another and against the awesome power of the state...."[757]

Although this doctrine is ultimately attributable to the Greeks, Reid posits that it was the Romans who perfected its practice and that it is their conception of it that continues to influence our law today. Judging from the volumes of statute and case law evident in any law library, it is clear that we have learned the lesson well. Certainly, our propensity to favour written law is manifest in the massive regulatory and legislative intervention that now takes place in all facets of our society.[758] Immigration law, in particular, has not been immune to the trend of micro-management by legislative fiat.[759] The rule of law has brought many of the once broad vistas of discretionary common law immigration powers under the plow of detailed regulatory enactment. But as the quotation at the start of this chapter illustrates[760], even the Romans themselves may have been ambivalent about the extent of justice actually inherent in written law. More poignantly, if it be true, it offers a decidedly sobering comment on the current state of our society.

It seems only natural to those schooled in the western legal tradition to extol the

---

or not we really want this is where the debate should lie. Sadly, however, as is too often the case, public debate in immigration seems more concerned about superficial details than fundamental approach.

[757] T.R. Reid, *supra* note 735 at 63-64.

[758] Perhaps the most notable example of preference for written law in Canadian society is the advent of the *Charter of Rights and Freedom*. Prior to its promulgation in 1982, Canada possessed a mostly unwritten constitution, largely developed in case law, following the British example.

[759] See for example, Margaret Young, *supra* note 111, at footnote 1 on page 3, where the author notes that "Canada's first immigration statute in 1869 had 14 pages; by 1952, it had reached 34 pages." Also, *id.* at 3, she observes that the current *Immigration Act* (R.S.C. 1985, c. I-2) "...came into effect in 1978....Its length – 122 pages – illustrates the complexity of modern immigration regulation.[footnote omitted]" This complexity is further demonstrated, in her view, *id.* at 4-5, by the fact that the *Act* is supplemented by equally lengthy regulations, all of which require interpretative and application guidance that is found in a multi-volume set of policy and procedure manuals published by the Department of Citizenship and Immigration Canada (CIC).

[760] "The worse the state, the more laws it has." *Supra* note 735.

virtues of written law. But it is not the only viewpoint on the matter. Reid notes that the Chinese empire, as old and storied as that of the Romans, actually developed a jurisprudential outlook that eschewed the biases of the rule of law that favour written text. "Confucius and his disciples down through the centuries distrusted written laws. A dusty statute book was too inflexible to handle the infinite variety of human experience, the Chinese sages felt. They chose to trust people, not laws – to rely on innate human goodness as the best guarantee of a civil society."[761] He notes a tenaciousness to this philosophy which continues to induce hesitancy and circumspection. "Even today," Reid writes, "the concept of written law and written contract is fairly weak in China and other East Asian nations within its cultural ambit."[762]

For western legal systems that purport to follow the rule of law, it is important to remember that discretionary power is hardly a new or alien adjunct to our law. Reid observes, for example, that while one uniform system of law was an essential glue binding the many far-flung and variegated portions of the ancient Roman empire together, yet it was flexibility of application and enforcement which gave that glue its staying power through many centuries.[763] Such flexibility, or discretion if you will, permitted regard for local peculiarities and individual circumstances while still adhering to the overall imperial standard. The case is no different today, even after all these centuries. Though the *Pax Romana* has long since passed away, the Roman notion of *discretio* in application remains equally as enduring and vital a legacy to our system of law and conception of justice as the rule of law itself.

---

[761] T.R. Reid, *supra* note 735 at 64. (August 1997)
[762] *Id.*

Nevertheless, there can be no doubt but that our first loyalty is to the notion of the "rule of law".[764] And the importance of this fact cannot be overstated. From it springs the chief incident that devotion to this principle entails and one which is a hallmark of our modern society - a pronounced propensity to reduce every particle of the law, from its rights and freedoms to its duties and obligations, to written form. In an environment of this type, the notion of discretionary power naturally causes discomfort and anxiety. Such power, by its very nature, is incapable of reduction to a precise factual statement. At best, it can be guided by policy statements and contained by judicial interpretations and pronouncements, but never wholly reduced to an unequivocal calculation or a simple mechanical application. And it is this imprecision that troubles devotees of the rule of law most.

Though all signs point toward development of a more rules based immigration selection system, it must be recognized that the complete elimination of discretionary power will never be possible nor, for that matter, desirable. There is always a question of fit – of applying the rules to the particular facts of each case. Without some flexibility of interpretation and application, such a fit is difficult to obtain. And the need for some flexibility in immigration matters is perhaps more cogent than for any other area of law. Immigration rules must be capable of worldwide application under an infinite variety of circumstances. We know from experience that it is virtually impossible to devise rules that will deliver the desired results in every case. The myriad possibilities of human

---

[763] T.R. Reid, "The Power and the Glory of the Roman Empire" (July, 1997) 192 *National Geographic* 2 at 30.
[764] For evidence of the high esteem with which we regard this principle, one need look no further than the preamble to the *Canadian Charter of Rights and Freedoms*, where it is accorded recognition, second only to the supremacy of God.

experience are simply too great. In any case, this sort of interpretive discretion is not all that controversial, particularly as the judicial review process closely monitors it and has remedies well suited to addressing it. The same may be said for procedural discretion. The real problem, of course, is what to do about substantive discretion.

On the negative side of the equation, concerning whom to exclude, the answer is obvious and poses little moral or intellectual challenge. Our notions of justice and fairness irresistibly impel us to formulate ever more concise rules to keep out the undesirable. Certainly, this is in accordance with that part of the rule of law which states that no one should be "condemned", save as expressly provided for by law. The case for inclusion, however, is less capable of reduction to a set formula. While rules do a good job of ensuring procedural fairness, they do not always render substantive justice. Even a fair process occasionally produces unfair results. Admittedly, substantive justice is difficult to achieve and that is why most of our efforts have been concentrated on producing procedural justice.[765] The attainment of substantive justice is also hampered by our preference for predictability and certainty. Indeed, it is the knowledge of these limitations that seems to continually prompt us to query whether technical adherence to the rules and procedures of our statutory scheme is really producing fulfillment of the social philosophy that is embodied in our immigration law. Inevitably, our notions of fundamental justice involve some consideration of substantive justice and the attainment of fair, humane results. Positive substantive discretion remains the essential means by which an indispensable human element is kneaded into the fibers of the law, and a link

---

[765] See for example, Arthurs, *supra* note 30 at 25, who feels that courts are more disposed to judging the technicalities of abused discretion, rather than the substance.

secured between the science of rules and procedures and the art of intuition and common sense.

The shortcomings of rules, of course, are heightened because of the way that Independent selection is conceived and conducted. The focal point of the exercise is to find people who will be able to sustain themselves and make a contribution to the economic vitality of our country. Though we employ any number of selection criteria, such as occupation, language and education, to sort among potential candidates, it is not these particular qualifications which are most important to successful establishment. Instead, they are ones such as adaptability, motivation, initiative and resourcefulness, innate and unique to each individual applicant, that are not so neatly reducible to a system of mechanistic rules. They are laudable qualities which we do want to select for. Though we can recognize them when we see them, devising a system of rules to measure them remains simply a sociologist's pipe dream. The result is that some discretion has always been necessary to overcome the deficiencies of the rules in measuring and rewarding such qualities. Accepting then that the overall objectives of the selection system are always more important than the technical points by which it is administered, some residual discretion, particularly at the operational level where the rules are put into practice, is essential if a tyranny of rules is to be avoided and the substantive goals of the selection system met.

Despite the difficulties of using the notion of "successful settlement" as a selection standard, this does not mean that it should be discarded. In reality, the results from its use have been impressive. A high level of Independent migration has been sustained over a long period of time precisely because those selected have been able to

sustain themselves and make a contribution to the economic and cultural vitality of this country. It is simply a case, therefore, of doing a better job at containing and structuring the residual discretion that must accompany use of this standard. If properly cabined and closely focused, the advantages of discretion will be promoted and its negative aspects limited. But any residual discretion must retain both a positive and a negative character. Just as the rules may fail in a positive way to select those who should be included, it may also fail in a negative way.

A point too often lost in the debate over discretion in immigration matters is that the public interest and the interests of applicants are not inconsistent. Rather, in many ways, they are co-extensive. The public interest is present in the need for a selection system that is fair, open and honest with applicants. Quite simply, it demands that justice be done in every case. Thus, in some cases, it will require that a person who does not meet the strict qualifications be granted entry nonetheless. In other cases, it will mean that a person who has qualified on the criteria must be denied entry, if the basis for her selection appears erroneous and is likely to leave her unable to be self-sustaining in the economy. It must be this way since the public is intimately affected by immigrant selection decisions and it is the public that is left, socially, financially and even morally, to pick up any pieces from a dysfunctional selection process. With respect, therefore, it is naïve to view immigration as simply a question of focusing on the client at the counter. A sustainable program must factor in the needs of another client, the public, whose interests are also affected by each selection decision.

In this post-*Charter* era in Canada, the trend in all areas of law has been to place greater emphasis on rights and to favour rules as the means for safeguarding those rights.

The bureaucratic and judicial initiatives outlined in this study are simply a manifestation of those preferences in the particular field of immigration law. Indeed, it may be that the checkered history of broad substantive discretion in immigration matters added extra cogency to the arguments in favour of rules and rights in this area of law.[766] Whatever the case, it is important to recognize the current state of evolution of immigration law and the path that is likely to be followed in the near future. Certainly, substantive discretion is now in decline and it is unrealistic to expect that a greater availability of it, even if it were desirable, would be attainable. It is patent that a broad, residual discretion is no longer palatable and there is simply no significant will or interest in any quarter to swim against this tide. Accordingly, the way forward is clear.

Efforts should be undertaken to develop a more comprehensive system of rules governing immigrant selection. The current *Act* and *Regulations*, devised some twenty years ago, were built around the notion that a general discretionary power could be used to supplement any shortcomings in the rules. This premise is no longer valid. The vision for substantive discretion now points to it being, at best, a secondary or incidental element of any selection system, rather than at the heart. Greater specificity and clarity in statute and regulation are central to current notions of justice and fair play. If properly conceived, a more comprehensive set of rules for immigration offers the potential advantage of satisfying judicial, bureaucratic and client needs. The key, however, is not just more rules. Rather, selection criteria need to be simpler and better defined than is presently the case. The danger of too many rules is that they may become convoluted and impenetrable, if too much specificity is attempted. Thus, what is needed is a more

---

[766] See Trusca-Turner and Sampat-Mehta, *supra* note 12.

generic selection system, rather than one focusing on the minutiae of education, work experience and skills, and the like. While selection might benefit from less specificity, it is clear that exclusion must be approached from the opposite direction. More particularity rather than less is necessary, if exclusionary decisions are to be sustained in the courts. Thus, it is essential that grounds for exclusion should be codified in detail in the selection regime. Such specificity is more in keeping with current notions of justice and fair play, and enables those to be excluded to discern early and clearly the potential barrier to entry.

In *Re Singh*, Wilson J. accepted an argument by counsel for a Refugee applicant that *Charter* protections must apply equally to all applicants dealing with the Canadian government, both within Canada and outside its borders at visa offices abroad. To do otherwise, she opined, would be to create a duplicitous situation encouraging applicants to disregard our immigration laws, in order to have their claim heard in Canada. She accepted that a geographic boundary for the *Charter* would create an environment that "...would ...reward those who sought to evade the operation of our immigration laws over those who presented their cases openly at the first available opportunity."[767] Though speaking about the particular circumstances of Refugee claimants, Wilson J.'s wisdom is sound and has application to the immigration system whole. If efforts are not made to avoid the scenario of effectively "punishing the innocent and rewarding the guilty", then the notion of the rule of law is seriously undermined. Ultimately, such a development leads to the sort of cynicism that saps the popular base of support on which immigration policy rests. Should a general collapse of public confidence follow, it would have

ruinous consequences for all aspects of the program. Unfortunately, our system as currently devised and operated is so overwhelmed by devotion at the altar of process that it is blind to the delicate balance between facilitation and control that Parliament saw fit to establish within the immigration legislative scheme. It is ironic that in the name of fairness, we restrict the application of discretion to the point where even good rules are allowed to spawn bad decisions.

The need for balance is obvious. The public interest demands it and the causes of justice and fairness deserve it. Recognizing the current penchant for rules, consideration should be given to formulating a specific rule linking applicant integrity with the privilege of a visa. Any deliberate attempt at fraud, deception or other malfeasance that is significant and material, either to a present or a future visa application, should be a ground for refusal. There is no reason in good conscience or in law, why applicants should not be expected to display integrity as a key for qualification. Certainly, it is a quality that is valued and prized in Canada and there is an important message to be sent to prospective members of our community as to the methods and functioning of the society that they are interested to join. Likewise, there is a certain skepticism amongst the Canadian public as to whether effective control is maintained over the immigration program. A clear connection between behaviour in applying for a visa and issuance of the visa itself would serve to carry forward these objectives. A penalty involving disqualification from a visa, perhaps for a minimum period of three or five years, would be appropriate.

Recognizing that some discretion will remain both indispensable and desirable in

---

[767] *Supra* note 64, 17 D.L.R. (4th) 422 at 463.

our immigration system, then some accommodation of it will be necessary. It is an accommodation that will require cooperation from both CIC and the courts. For its part, CIC needs to de-emphasize statistics and numbers. The fiscal concerns of recent years have forced CIC into a mold of wringing ever-greater productivity gains from existing personnel and resources. Such efforts are driven by the yearly numbers crunch and the need for CIC to deliver on the target announced by the Minister. Meeting those targets may become a priority, even at the expense of the quality of service actually delivered. While the number of immigrant landings is closely monitored and tabulated, there are few measures of quality of service in the system. I do not suggest that statistics can ever be totally eliminated. They do serve a useful planning function. However, the adverse impact of a singular focus on numbers must be recognized and conceded. And with such recognition must come a more realistic appraisal of the numbers that are deliverable, while yet maintaining a sufficient level of quality and satisfaction. Further, the system has few measures for determining which officers delivered quality product and few rewards for individual efforts to this end. More can certainly be done in this regard. And de-emphasizing numbers would go far to empowering officers to use more judgment and common sense and to more readily and effectively engage the discretion they possess to ensure humanity and compassion remain an integral part of our selection system.

The courts, as overseers of the immigration process, need to be a full partner in the search for a just system that is fair, both to applicants and to the public interest. This will require less of a rights focus and more consideration of what justice in a particular case really requires. To achieve this, the courts might adopt a two-part procedure for assessing whether any particular decision is fair, both procedurally and substantively.

The first branch of the test would be to ask whether the procedure was flawed, as is presently the case. If not, then that is the end of the inquiry. If a flaw is found, however, then the second branch of the inquiry would be to ask whether substantive justice was nonetheless done, considering all of the circumstances. Was the result fair, considering the goals and objectives of the immigration legislation and the level of entitlement the applicant had to the particular type of visa? If so, then substantive justice has been rendered. Given that this test is similar to that under which courts guide issuance of their own prerogative remedies, a radical rethinking of the administrative process would not be required. It is simply a case of recognizing that immigrant selection must be a pragmatic process, weighing all of the equities in each particular case and balancing the public interest and the rights of individual applicants.

Some concrete steps towards improving the mechanism of judicial review are also needed. Visa officers must do a better job of documenting their decisions so that it is readily apparent on appeal what has gone on and why. CIC Public Relations staff might consider ways to better publicize the means, methods and processes of visa offices and to highlight the many problems that arise in applying domestic immigration law in diverse foreign settings. CIC litigation staff and counsel need to be more proactive in educating the courts as to the realities of overseas processing and to ensure that all relevant facts and materials are before the courts. Indeed, CIC needs to work more closely with Justice staff who represent CIC to ensure their training is adequate and that they have a full understanding of overseas immigration processes. Likewise, the courts need to recognize the limits of their knowledge and understanding and to seek out better education and training and demand more information from counsel when they see it is lacking. Given

the volume of visa office litigation before the federal courts, even their training would likely benefit from more information about, or even first hand exposure to, the operations of a visa office.[768]

Perhaps the most significant aspect of the evolution I have attempted to detail in this work has been the fact that it has taken place largely unnoticed. Certainly, most of the change has occurred as result of quiet developments in the courts and the bureaucracy, with little public recognition or significant opportunity for discussion and debate. The importance of meaningful discussion is obvious, given the profound, fundamental changes that are underway and which are completely transforming the way immigrants are selected. Our immigration law and its selection processes reflect our society, our legal system and our values. That they should be in peril of becoming hidebound by rules and devoid of significant human contact is a worrying proposition. This is particularly true if the transformation is contrary to the popular conception of how the immigration program is constituted and operated. Regrettably, there is little significant media coverage of the actual realities of immigration processing. Instead, sensationalism and worst case scenarios seem to be the only items that regularly garner media attention. The result is that the public is ill informed and has a false impression of how immigration really works.

The two trends of judicial formalism and bureaucratic expedience should be part of a larger debate about how and why immigration processing is undertaken, for what

---

[768] This need not involve lengthy and expensive taxpayer funded junkets to exotic lands. Even a short trip from Toronto to the Buffalo visa office, or from Vancouver to the Seattle visa office, would suffice to give the sort of exposure that would educate and inform as to how a visa office operates and under what conditions.

purpose, and in what way it should be shaped. In this way, it might better reflect who and what we are as a nation. The recent Legislative Review report and the attention it gave to discretionary authority offered some hope of focusing attention and starting the process of debate and dialogue. Unfortunately, the debate that has been generated by that report has been hijacked by emotional, but largely inconsequential issues, such as a proposal that all immigrants should possess a certain level of language skills. Caught between an aging population and a dwindling birth rate[769], a high level of immigration is demographically necessary if we are to sustain the economic growth of Canada. With a stated objective of delivering more than two hundred thousand landings per year, the real problem for Canadian immigration has been one of finding sufficient numbers of skilled, talented immigrants who will be able to successfully establish quickly and easily. Limiting the pool of potential applicants to those already fluent in English or French is a proposal hard to take seriously. There simply are not enough English and French speakers available to meet the landing targets. In the meantime, however, attention has been diverted from real issues of substance. The proposal for reworking of discretion, for example, that is contained in the report will clearly have a profound impact upon the ways of means of immigration, if implemented. Presumably, action will be taken in the near future to implement at least some parts of the Advisory Group's recommendations. The need for broad debate and consensus thus remains urgent and important. Before legislation is drafted and a brave new world of immigration processing cast into the stone of statute,

---

[769] Statistics Canada predicts that natural population growth in Canada will approach zero by the year 2020. Also, in 1996, Statistics Canada estimated that newborns accounted for only 47% of Canada's population increase, while immigration contributed the remaining 53%. See CIC "Daily Wrap" (26 June 1998) at 1, citing stories in the June 25, 1998 editions of the *Halifax Chronicle Herald, Toronto Sun, Winnipeg Free*

fundamental issues, such as a continued role for discretion, should be placed on the public agenda. If not, it may be that few will be happy with the end result, particularly if it means that immigrant processing is reduced to a mere rules based number crunch.

Press, *Edmonton Sun* and *Saskatoon Star Phoenix*.

APPENDIX A- Independent Immigrant Selection Grid

Selection Factor	Criteria	Maximum
1. Education	Points awarded for each level of educational attainment, beginning with 5 points for simple completion of high school up to 16 points for a masters or doctoral level university degree.	16
2. Educational/Training factor[770]	Related to factor 4. Points awarded according to normal training and education required for the particular occupation.	18
3. Experience	Points awarded according to years of experience in an occupation. Less than one year of full time experience will result in a failed application.	8
4. Occupational demand	Occupations open to prospective immigrants in Canada are set out in the "General Occupations List".[771] Every independent immigrant must list an intended occupation in Canada. If the occupation is not on the List, then the application fails.	10
5. Arranged employment or designated occupation	Bonus points for applicants who have a confirmed job offer in Canada, or who are going to work in certain prescribed "high demand" occupations.	10

[770] Formerly known as "Specific Vocational Preparation". This name was derived from the Canadian Classification and Dictionary of Occupations ("CCDO") (Hull, Que.: Min. of Supply & Services, 1978), which was replaced May 1, 1997 by the National Occupational Classification guide ("NOC") (Ottawa: Min. of Supply & Services, 1993). Both of these manuals are essentially catalogues listing occupations and describing the duties inherent in the occupations and the type of training and education that would normally be required to carry out the particular occupation.

[771] Current version dated May 1, 1997. If an applicant does not show their intended occupation as one of the occupations contained on the list, the application will ordinarily fail for lack of "occupational demand".

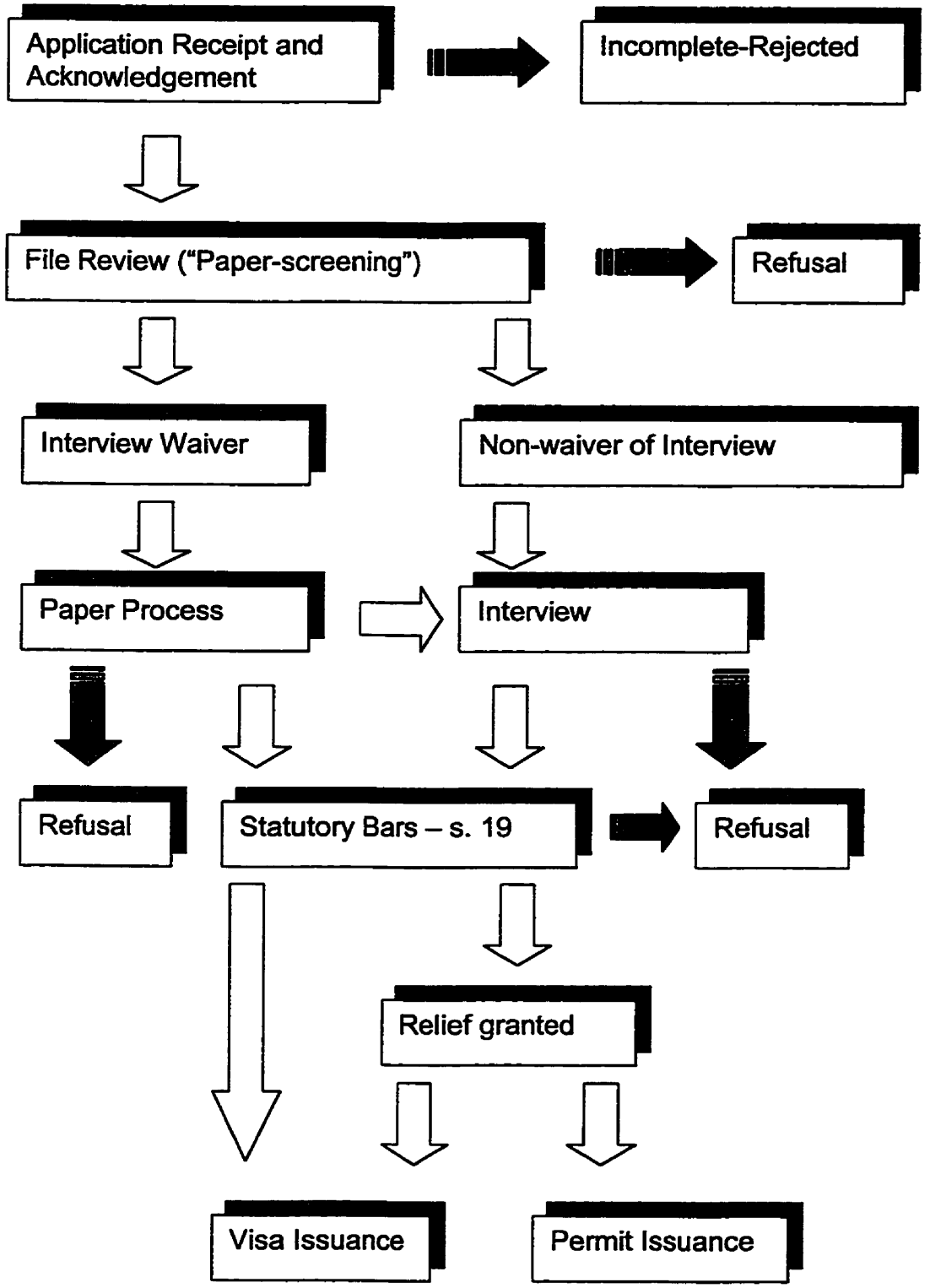
6. Demographic factor	The "levels control" which is adjusted from time to time by CIC.	10 (presently set at 8)
7. Age	10 points awarded to those 21-44 years of age. 2 points deducted for each year above or below that range.	10
8. Language ability	Points awarded for fluency in either or both of French and English. Maximum 9 points for "first" language and 6 for "second" language.	15
9. Personal suitability	Points awarded at an interview for skills that aid successful settlement, such as adaptability, motivation, resourcefulness, and initiative.	10

*Table adapted from CIC, *Applying for Permanent Residence in Canada: A Self-Assessment Guide and Application Kit for Independent Applicants*.

Based on the foregoing grid, Independent immigrants must obtain 70 points overall to qualify for admission to Canada. Assisted Relative applicants effectively receive five "bonus points" for having a relative in Canada, thus reducing the threshold they require for a "pass" mark to only 65 points. Likewise, Business immigrants receive from 30-45 bonus points (30 for self-employed, 45 for entrepreneurs and investors), which has a similar reducing effect on the number of units needed to qualify. In addition, Business immigrants are not subject to all of the factors on the grid.[772]

[772] For more details, see subsections 8(1)(b) & (c) of the *Regulations* which provide exemptions from certain selection grid factors for self-employed, entrepreneur and investor applicants.

APPENDIX B - Independent Immigrant Selection Process Chart



APPENDIX C - ISSUING AND EXTENDING MINISTER'S PERMITS

Level of Concurrence Required[773]

Authority for issuance of Minister's Permits to overcome inadmissibility grounds contained in section 19 of the *Immigration Act* is divided between three different locations. Generally, the Minister has retained direct authority for dealing with those grounds of inadmissibility which are considered most serious. In such cases, visa offices must obtain approval from the Minister, at National Headquarters, prior to issuance of a Minister's Permit. In the case of medical inadmissibility, visa offices will need to obtain the approval of the Regional Headquarters serving the applicant's province of destination, before Permit issuance. Authority in all other cases rests with program managers at visa offices abroad.

A. National Headquarters

- Criminality [A19(1)(c)(c.1),(c.2)] where the person is a prospective immigrant (including those persons who have visitor status and whose application is being processed in Canada or outside of Canada).

All recommendations in criminal cases should be addressed to the Director, Case Review (BCM), Case Management Branch, NHQ.

- War crimes and crimes against humanity [A19(1)(j)]

Any recommendation about someone falling into this class of inadmissibility must be scrutinized by Case Management Branch (BCD). Address your recommendation to Security Review (BCZ) in BCD and copy the geographic desk in the International Region (RID).

- Security and Public Safety – section 19(1)(d), (e), (f), (g), (k), (l)

All recommendations in security or public safety cases should be addressed to the Security Review, (BCZ), Case Management Branch (BCD), NHQ. Concurrence may be sought from NHQ without reference to RHQ where the recommendation originates in Canada. When the recommendation originates outside of Canada, visa posts will seek concurrence from NHQ and copy the information to Regional authorities/CIC's in provinces where the inadmissible person is destined.

---

[773] Adapted from CIC IM OP-19, Appendix A "Issuing and Extending Minister's Permits" (ver. 01-97) at 21.

B. Regional Headquarters

- Medical Inadmissibility – section 19(1)(a)

C. Local Level (CIC or Visa office)

- Criminal Inadmissibility - Visitors
- Criminal Inadmissibility - Immigrants - section 19(2)(a), (a.1) or (b)
- All other cases

APPENDIX D – SUMMARY OF RECOMMENDATIONS

1. A more highly rules based system of selection for Independent immigrants should be devised. Central to any such system is a need for more generic selection criteria that do not inherently require the making of overly fine distinctions.

2. Since the purpose of any selection system that might be devised is to select those with potential to establish and settle successfully in Canada, the concept of "successful settlement", and the measures against which it is to be assessed, should be defined with specificity and clarity.

3. Broad residual substantive discretion should not be a feature of any such system.

4. Recognizing the need for a mechanism to alleviate against rule failure, however, some residual substantive discretion, but only of a highly restricted variety, should be provided for in the selection system design. Such discretion should be limited in its scope by tying its use to the concept of successful settlement. Any exercise of such discretion unrelated to the definition of successful settlement would be invalid. Other than for this limited purpose, discretion should not available as a general exclusionary mechanism.

5. To the extent possible and practical, discretionary power should be localized in the field offices where it is to be exercised.

6. CIC should evaluate the emphasis that is placed on statistics within the organization and the effect that this may have upon the use of discretionary power and the quality of decision-making generally.

7. In conducting judicial review in Independent selection matters, courts should adopt a 2 part test allowing consideration of substantive justice, as well as procedural fairness.

8. A specific rule allowing for exclusion in instances involving deliberate misrepresentation or other willful non-compliance with immigration law should be devised. The rule should include a mechanism for obtaining relief from its operation.

9. More debate and discussion on the operations of the immigration system as a whole, and on the particular role of discretion in that system, is desirable.

SELECT BIBLIOGRAPHY

1. BOOKS

Adelman, Howard, ed., *Refugee Policy: Canada and the United States* (North York: York Lanes Press, 1991).

Aleinikoff, Thomas A. & Martin, David A., *Immigration: Process and Policy,* 2d ed. (St. Paul: West Publishing, 1991).

Angus, William H., *Canadian Immigration Law, Policy and Process: Materials and Cases* (Toronto: York University, 1996).

Anisman, Philip, *A Catalogue of Discretionary Powers in the Revised Statutes of Canada 1970* (Ottawa: Law Reform Commission of Canada, 1975).

Anisman, Philip & Reid, Robert F., eds., *Administrative Law Issues and Practice* (Scarborough, Ont.: Carswell, 1995).

Anker, Deborah E., *The Law of Asylum in the United States: A Guide to Administrative Practice and Case Law* (Washington: American Immigration Law Foundation, 1991).

Appignanesi, Richard and Chris Garratt, *Postmodernism for Beginners* (Cambridge: Icon Books, 1995).

Bagambiire, Davies B.N., *Canadian Immigration and Refugee Law* (Aurora: Canada Law Book, 1996).

Bart, Jacqueline R. & Trister, Benjamin J., *Work Permits and Visas, 1996,* (Scarborough, Ont.: Carswell, 1995).

Bayles, Michael D., *Hart's Legal Philosophy* (Dordrecht: Kluwer Academic Publishers, 1992).

Black's Law Dictionary, 5th ed. (St. Paul, Minn.: West Publishing, 1979).

Boswell, Richard A. & Carrasco, Gilbert P., *Immigration and Nationality Law: Cases and Materials* (Durham: Carolina Academic Press, 1991).

Canada, Parliament, Standing Committee on Citizenship and Immigration, "Immigration Consultants: It's Time to Act" in *Ninth Report of the Standing Committee on Citizenship and Immigration* (December 1995) (Chairperson: Eleni Bakopanos).

Canadian Bar Association, *The 1996 Immigration Law Conference (Conference Materials)* (Vancouver: Canadian Bar Association, 1996).

-------- *The 1997 Immigration Law Conference (Conference Materials)* (Toronto: Canadian Bar Association, 1997).

-------- *Submission on Immigration Consultants (Submission to the Parliamentary Standing Committee on Citizenship and Immigration)* (Canadian Bar Association, June 1995).

Citizenship and Immigration Canada, *A Stronger Canada – 1998 Annual Immigration Plan (Tabled 23 October 1997)* (Ottawa: Minister of Public Works and Government Services Canada, 1997).

-------- *Applying for Criminal Rehabilitation: A Guide for Persons who are Inadmissible to Canada because of past criminal activity,* IM-299-07-94 ed., (Ottawa: CIC (Communications Branch/Immigrant, Visitor & Refugee Programs Branch), July 1994).

-------- *Canada's Immigration Law* (Ottawa: Minister of Supply and Services Canada, 1992).

-------- *Departmental Outlook on Program Expenditures and Priorities – 1996-97 to 1998-99* (Ottawa, Min. of Supply, 1996).

-------- *Facts and Figures: Overview of Immigration* (Hull: Minister of Supply and Services Canada, 1994).

-------- *Immigration Consultations Report* (Hull: Minister of Supply and Services Canada, 1994).

-------- *Into the 21st Century: A Strategy for Immigration and Citizenship* (Hull: Minister of Supply and Services Canada, 1994).

-------- *Staying the Course: 1997 Annual Immigration Plan* (Ottawa: Minister of Supply and Services Canada, 1996).

-------- *You asked about...citizenship and immigration* (Ottawa: Minister of Public Works and Government Services Canada, 1997).

Cole, George F., *The American System of Criminal Justice*, 7th ed. (Belmont: Wadsworth, 1995).

Corbett, David C., *Canada's Immigration Policy: A Critique* (Toronto: Univ. of Toronto Press, 1957).

Cornelius, Wayne A., Martin, Philip L., & Hollifield, James F., eds., *Controlling Immigration: A Global Perspective* (Stanford: Stanford University Press, 1994).

Davis, Kenneth Culp, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge, La.: Louisiana State University Press, 1969).

De Smith, Stanley, The Right Honourable The Lord Woolf & Jeffrey Jowell, *Judicial Review of Administrative Action*, 5th ed. (London: Sweet & Maxwell, 1995).

------- *Judicial Review of Administrative Action*, 3d ed. (London: Stevens & Sons, 1973).

Devlin, Richard F., ed., *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery, 1991).

DeVoretz, Don J., ed., *Diminishing Returns: The Economics of Canada's Recent Immigration Policy* (Toronto: C.D. Howe Institute, 1995).

Dicey, A. V., *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: MacMillan, 1960).

Dirks, Gerald E., *Controversy and Complexity: Canadian Immigration Policy during the 1980's* (Montreal: McGill-Queen's Press, 1995).

Dworkin, Ronald M., *Taking Rights Seriously* (London: Gerald Duckworth, 1977).

Evans, J.M., H.N. Janisch and David J. Mullan, *Administrative Law: Cases, Text, and Materials*, 4th ed. (Toronto: Emond Montgomery, 1995).

Ferguson, Kathy E., *The Feminist Case Against Bureaucracy* (Philadelphia: Temple University, 1984).

Fisher, William W., Morton J. Horwitz & Thomas A. Reed, eds., *American Legal Realism* (Oxford: Oxford University Press, 1993).

Fragomen, Austin T. and Steven C. Bell, *Immigration Fundamentals: A Guide to Law and Practice*, 1992 ed. (New York: Practising Law Institute, 1992).

Freeman, M.D.A., *Lloyd's Introduction to Jurisprudence*, 6th ed., (London: Sweet & Maxwell, 1994).

Galligan, D.J., *Discretionary Powers: A Legal Study of Official Discretion* (Oxford: Clarendon Press, 1986).

Goodwin-Gill, Guy S., *The Refugee in International Law*, 2d ed. (Oxford: Clarendon Press, 1996).

Gowlland-Debbas, Vera, ed., *The Problem of Refugees in the Light of Contemporary International Law Issues* (The Hague: Martinus Nijhoff, 1996).

Grahl-Madsen, Atle, *Territorial Asylum* (Stockholm: Almqvist & Wiksell Int., 1980).

Grey, Julius H., *Immigration Law in Canada* (Toronto: Butterworths, 1984).

Handler, Joel F., *The Conditions of Discretion: Autonomy, Community, Bureaucracy* (New York, Russell Sage Foundation, 1986).

Harris, J.W., *Legal Philosophies* (London: Butterworths, 1980).

Hart, H.L.A., *The Concept of Law* (Oxford: Clarendon Press, 1961).

------- *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983).

Hashemi, Ashkan, *Control and Inadmissibility in Canadian Immigration Policy: Bill C-86 and the "Humanitarian Tradition* (Vancouver: Committee for Racial Justice, 1993).

Hathaway, James C., *The Law of Refugee Status* (Toronto: Butterworths, 1991).

------- *Rebuilding Trust: Report of the Review of Fundamental Justice in Information Gathering and Dissemination at the Immigration and Refugee Board of Canada* (North York: Osgoode Hall Law School, 1993).

Hathaway, James C. & Dent, John A., *Refugee Rights: Report on a Comparative Survey* (Toronto: York Lanes Press, 1995).

Hawkins, Freda, *Canada and Immigration: Public Policy and Public Concern*, 2d ed. (Kingston, Ont.: McGill-Queen's University Press, 1988).

------- *Critical Years in Immigration: Canada and Australia Compared*, 2d ed. (Montreal: McGill-Queen's University Press, 1991).

Hawkins, Keith, ed., *The Uses of Discretion* (Oxford: Clarendon Press, 1992).

Hinojosa, Jose Rolando, *Discretionary Authority Over Immigration: An Analysis of Immigration Policy and Administration Towards Mexico* (Ann Arbor, Mi.: University Microfilms International, 1984).

Hiscox, Diane & Le Bouthillier, Yves, *Globalism and Regionalism: Options for the 21st Century (Proceedings of the 1995 Conference of the Canadian Council on International Law)* (Ottawa: Canadian Council on International Law, 1995).

Hogg, Peter W., *Constitutional Law of Canada*, 3d ed. (Supplemented) (Scarborough: Carswell, 1992).

Human Resources Development Canada, *National Occupational Classification* (Ottawa: Minister of Supply and Services Canada, 1993).

Humphrey, John, *No Distant Millenium: The International Law of Human Rights* (Paris: UNESCO, 1989).

Jones, David P. & Anne S. deVillars, *Principles of Administrative Law*, 2d ed. (Scarborough: Carswell, 1994).

Kindred, Hugh M., ed., *International Law (Chiefly as Interpreted in Canada)*, 5th ed. (Toronto: Emond Montgomery, 1993).

Law Reform Commission of Nova Scotia, *Discussion Paper: Agencies, Boards and Commissions-The Administrative Justice System in Nova Scotia* (Halifax: Law Reform Commission of Nova Scotia, 1996).

Law Society of British Columbia, *Submissions of the Law Society of British Columbia to the (Parliament of Canada) Standing Committee on Citizenship and Immigration – Subcommittee on Immigration Consultants and Diminishing Returns* (Law Society of British Columbia, 12 September 1995).

Legislative Review Advisory Group, *Not Just Numbers: A Canadian Framework for Future Immigration* (Ottawa: Minister of Public Works and Government Services Canada, 1997).

Legomsky, Stephen H., *Immigration and the Judiciary* (Oxford: Clarendon Press, 1987).

-------- *Immigration Law and Policy* (New York: The Foundation Press, 1992).

Loescher, Gil, ed., *Refugees and the Asylum Dilemma in the West* (University Park: Pennsylvania State University Press, 1992).

Marrocco, Frank N., & Henry M. Goslett, eds., *The 1998 Annotated Immigration Act of Canada* (Scarborough, Ont.: Carswell, 1997).

Martin, David A., ed., *The New Asylum Seekers: Refugee Law in the 1980s* (Dordrecht: Martinus Nijhoff, 1988).

Mashaw, Jerry L., *Due Process in the Administrative State* (New Haven: Yale University Press, 1985).

Matas, David, *The Sanctuary Trial* (Manitoba: Legal Research Institute, 1989).

Meissner, Doris M., Robert D. Hormats, Antonio Garrigues Walker & Shijuro Ogata, *International Migration Challenges in a New Era* (NewYork: The Trilateral Commission, 1993).

Minister of Manpower and Immigration, *Canadian Classification and Dictionary of Occupations 1971* (Ottawa: Information Canada, 1971).

Morgan, Edward M., *International Law and the Canadian Courts: Sovereign Immunity, Criminal Jurisdiction, Alien's' Rights and Taxation Powers* (Toronto: Carswell, 1990)

Occupational and Career Information Branch, *CCDO Guide*, 9th ed. (Ottawa: Minister of Supply and Services Canada, 1989).

Pauw, Robert and Jay Stansell, *Immigration Consequences of Criminal Convictions* (Seattle: Washington Law School Foundation, 1992).

Plender, Richard, *International Migration Law*, rev. 2d ed., (Dordrecht: Martinus Nijhoff, 1988).

Plender, Richard, *Basic Documents on International Migration Law* (Dordrecht: Martinus Nijhoff, 1988).

Roach, Kent, *Essentials of Canadian Law: Criminal Law* (Concord, Ontario: Irwin Law, 1996).

Royal Commission Inquiry into Civil Rights: Report No. 1, Honourable J.C. McRuer, Commissioner (Toronto: Queen's Printer, Ontario, 1968).

Sampat-Mehta, R., *International Barriers* (Ottawa: Harpell's Press, 1973).

Slatter, Frans F., *Parliament and Administrative Agencies* (Ottawa: Law Reform Commission of Canada, 1982).

St. J. MacDonald, R., Morris, Gerald L. & Johnston, Douglas M., eds., *Canadian Perspectives on International Law and Organization* (Toronto: University of Toronto Press, 1974).

Stenberg, Gunnel, *Non-Expulsion and Non-Refoulement* (Uppsala: Iustus Forlag, 1989).

Thompson, John B., *Critical Hermeneutics: A study in the thought of Paul Ricoeur and Jurgen Habermas* (Cambridge: Cambridge University Press, 1981).

Tribe, Laurence H., *American Constitutional Law*, 2d ed. (Mineola, N.Y.: Foundation Press, 1988).

United Nations High Commissioner for Refugees, *The State of the World's Refugees 1993: The Challenge of Protection* (New York: Penguin Books, 1993).

-------- *The State of the World's Refugees 1995: In Search of Solutions* (New York: Oxford University Press, 1995).

U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Public Access to Criminal History Record Information* (Sacramento: Search Group, 1988).

------- *Criminal History Record Information: Compendium of State Privacy and Security Legislation, 1992* (Sacramento: Search Group, 1992).

------- *Open vs. Confidential Records: Proceedings of a BJS/SEARCH Conference* (Sacramento: Search Group, 1988).

------- *National Conference on Criminal History Records: Brady and Beyond* (Sacramento: Search Group, 1994).

United States Immigration & Naturalization Service, *Pocket Field Guide (Prepared by Vancouver PFI)* (Vancouver: USINS, June 1994).

Wade, Sir William & Christopher Forsyth, *Administrative Law*, 7th ed. (Oxford: Clarendon Press, 1994).

Waldman, Lorne, *Immigration Law and Practice* (Toronto: Butterworths Canada, 1992).

Weinreb, Arthur & Rocco Galati, *The Criminal Lawyers' Guide to Immigration and Citizenship Law* (Aurora, Ont.: Canada Law Book, 1996).

Weis, Paul, ed., *The Refugee Convention, 1951: The Travaux Preparatoire Analysed* (Cambridge, University Press, 1995).

Weissbrodt, David, *Immigration Law and Procedure in a Nutshell*, 3d ed., (St. Paul, West, 1992).

Yogis, John A., Randall R. Duplak & J. Royden Trainor, *Sexual Orientation and Canadian Law* (Toronto: Emond Montgomery, 1996).

2. ARTICLES AND OTHER MATERIALS

Abel, Albert S., "Appeals Against Administrative Decisions: III. In Search of a Basic Policy" (1962) 5 Can. Public Admin. 65.

Aleinikoff, T. Alexander, "Non-Judicial Checks on Agency Actions" (1997) 49 Admin. L. Rev. 193.

Allan, T.R.S., "The Limits of Parliamentary Sovereignty" [1985] Public Law 614.

Arthurs, H.W., "Protection against Judicial Review" (1983) 43 Revue du Barreau 277.

--------- "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17 Osgoode Hall L.J. 1.

Auerbach, P. Harris, "Discretion, Policy and Section 19(1)(a) of the Immigration Act" (1990) 6 Journal of Law and Social Policy 133.

Bacon, David, "For an Immigration Policy Based on Human Rights" (199???) 23 Social Justice 137.

Barendt, Eric, "Dicey and Civil Liberties" [1985] Public Law 596.

Bartlett, Robyn J., "Waivers of Deportation: Failure to Delineate Standards for Convicted Aliens Seeking Waivers of Deportation Renders Relief Illusory" (1994) 17 Suffolk Transnat. Law Rev. 551.

Baumgartner, M.P., "The Myth of Discretion" in Keith Hawkins, ed., *The Uses of Discretion* (Oxford: Clarendon Press, 1992) 129.

Bell, John, "Discretionary Decision-Making: A Jurisprudential View" in Keith Hawkins, ed., *The Uses of Discretion* (Oxford: Clarendon Press, 1992) 89.

Bear, Leroy Little, "Dispute Settlement Among the Naidanac" in R.F. Devlin, ed., *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery, 1991).

Bertrand, Paul, "An Operational Approach to International Refugee Protection" (1993) 26 Cornell Int'l L.J. 495.

Broadbent, Donald, "Individual differences in response to low discretion jobs" (1994) 37 Ergonomics 641.

Bryden, Philip L., "Developments in Administrative Law: The 1994-95 Term" (1996), 7 S.C.L.R. (2d) 27.

Buzan, Bert C. and George M. Dery III, "California's Resurrection of the Poor Laws: Proposition 187, Preemption, and the Peeling Back of the Hollow Onion of Immigration Law" (1996) 10 Geo. Immig. L.J. 141.

Cerrato-Blue, Margaret, "Alien Drug Offenders: *Where Do They All Belong?*" (1991) 5 Geo. Immig. L.J. 277.

Cohen, Maxwell, "The Immigration Act and Limitations Upon Judicial Power: Bail" (1936) 5 Can. Bar Rev. 405.

Craig, P.P., Book Review of *The Uses of Discretion* by Keith Hawkins, ed., (1995) 58 Modern L.R. 274.

Crawford, J., "Human Rights and the State" (Lecture of 8 January, 1997, from "The Bertha Wilson Course in Human Rights", Special Visiting Lecturer series held at Dalhousie University, Halifax, N.S., 6 – 17 January, 1997) [unpublished].

DeCoste, Frederick C., "Retrieving Positivism: Law as Bibliolatry" (1990) 35 Dalhousie L.J. 55.

Devlin, Richard F., "Mapping Legal Theory" (1994) 32 Alta. L.R. 602.

Dworkin, Ronald M., "The Model of Rules," (1967) 35 U. Chicago L.R. 14.

Emerson, Robert M. and Blair Paley, "Organizational Horizons and Complaint-Filing" in Keith Hawkins, ed., *The Uses of Discretion* (Oxford: Clarendon Press, 1992) 231.

Errera, Roger, "Dicey and French Administrative Law: A Missed Encounter?" [1985] Public Law 695.

Evans, J.M., "Controlling Administrative Discretion: A Role For Rules?" in F.E. McArdle, ed., *The Cambridge Lectures 1991* (Cowansville, Que.:Yvon Blais, 1993) 209.

Feldman, Craig H., "The Immigration Act of 1990: Congress Continues to Aggravate the Criminal Alien" (1993) 17 Seton Hall Leg. J. 201.

Feldman, David, Book Review of *The Uses of Discretion* by Keith Hawkins, ed., [1994] Public Law 279.

Feldman, Martha, "Social Limits to Discretion: An Organizational Perspective" in Keith Hawkins, ed., *The Uses of Discretion* (Oxford: Clarendon Press, 1992) 163.

Finkelman, Jacob, "Separation of Powers: A Study in Administrative Law" (1936) 1 U.T.L.J. 313.

Frug, Gerald E., "The Ideology of Bureaucracy in American Law" (1984) 97 Harvard Law Rev. 1276.

Galloway, Donald, "The Extraterritorial Application of the *Charter* to Visa Applicants" (1991) 23 Ottawa L. Rev. 335.

Goodwin-Gill, Guy S., "Asylum: The Politics of Change" (1995) 7 I.J.R.L. 1.

Greenberg, H., "Immigration Alert No. 27 – Unofficial Minutes of CBA and CIC Meeting on November 4, 1996" (Toronto: CBA, 6 November 1996) [unpublished].

Grey, Julius H., "Discretion in Administrative Law" (1979) 17 Osgoode Hall L.J. 107.

——— "The New Immigration Law: A Technical Analysis" (1978) 10 Ottawa L. Rev. 103.

Griffith, J.A.G., "Judicial Decision-Making in Public Law" [1985] Public Law 564.

Handler, Joel, "Discretion: Power, Quiescence, and Trust" in Keith Hawkins, ed., *The Uses of Discretion* (Oxford: Clarendon Press, 1992) 331.

Harakas, Andrew J., "Canadian Immigration Law and the Charter of Rights and Freedoms" (1985) 4 Det. College of Law Rev. 1089.

Harder, Peter, "Migration: A New International Dimension" (1993) 5 I.J.R.L. 101.

Hathaway, James C., "Harmonizing for Whom? The Devaluation of Refugee Protection in the Era of European Economic Integration" (1993) 26 Cornell Int'l L.J. 719.

Hawkins, Keith, "The Use of Legal Discretion: Perspectives from Law and Social Science" in Keith Hawkins, ed., *The Uses of Discretion* (Oxford: Clarendon Press, 1992) 1.

Helton, Arthur C., "Toward Harmonized Asylum Procedures in North America: The Proposed United States-Canada Memorandum of Understanding for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries" (1993) 26 Cornell Int'l L.J. 737.

Henkin, Louis, "An Immigration Policy for a Just Society?" (1994) 31 San Diego L. Rev. 1017.

Heyman, Michael G., "Judicial Review of Discretionary Immigration Decisionmaking" (1994) 31 San Diego L.R. 861.

Howse, Robert and Alissa Malkin, "Canadians Are A Sovereign People: How The Supreme Court Should Approach The Reference On Quebec Secession" (1997) 76 Can. Bar Rev. 186.

Hutchinson, Allan C., "A Postmodern's Hart: Taking Rules Sceptically" (1995) 58 Modern Law Rev. 788.

"Immigration from the Top, the Inside and Abroad: Views from a Newcomer and a Veteran" (1995) 12:3 Bout de Papier 30.

"Interview with a Minister: Talking to Sergio Marchi" (1995) 12:3 Bout de Papier 8.

Isbister, John, "Are Immigration Controls Ethical?" (1996) 23:3 Social Justice 54.

Johnson, Nevil, "Dicey and His Influence on Public Law" [1985] Public Law 717.

Joly, D., "The Porous Dam: European Harmonization On Asylum In The Nineties" (1994) 6 I.J.R.L. 159.

Kanstroom, Daniel, "Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law" (1997) 71 Tulane L.R. 703.

Kelly, N., "Guidelines for Women's Asylum Claims" (1994) 6 I.J.R.L. 517.

Kjaergaard, E., "The Concept of 'Safe Third Country' in Contemporary European Refugee Law" (1994) 6 I.J.R.L. 649.

Lacey, Nicola, "The Jurisprudence of Discretion: Escaping the Legal Paradigm" in Keith Hawkins, ed., *The Uses of Discretion* (Oxford: Clarendon Press, 1992) 361.

Lawford, H.J., "Appeals Against Administrative Decisions: I. The Function of Judicial Review" (1962) 5 Can. Public Admin. 46.

"LEGIT lobbying gets the word out" LEGIT News (Newsletter of the Lesbian and Gay Immigration Task Force), Fall 1995.

Lempert, Richard, "Discretion in a Behavioral Perspective: The Case of a Public Housing Eviction Board" in Keith Hawkins, ed., *The Uses of Discretion* (Oxford: Clarendon Press, 1992) 185.

Lessard, Hester, Bruce Ryder, David Schneiderman and Margot Young, "Developments in Constitutional Law: The 1994-95 Term" (1996), 7 S.C.L.R. 81.

Levine, Shar and Andrew Phillips, "Citizenship on sale" *Maclean's* (1 July 1996) 14.

"Looking ahead: An interview with Gerry Campbell, Director-General, International Region" (Winter 1995/Spring 1996) 11 *Entre-nous* 6.

Macdonald, Roderick A., "Socio-Legal Perspectives on Institutional Renovation" (1993) 42 U.N.B.L.J. 391.

MacLauchlan, H. Wade, "Accounting For Democracy And The Rule of Law In The Quebec Secession Reference" (1997) 76 Can. Bar Rev. 155.

MacLauchlan, Wade, "Law and Institutional Change" (1993) 42 U.N.B.L.J. 397.

-------- "Developments in Administrative Law: the 1990-91 Term" (1992) 3 Sup. Ct. L. Rev. (2d) 29.

Manning, Peter K., "'Big Bang' Decisions: Notes on a Naturalistic Approach" in Keith Hawkins, ed., *The Uses of Discretion* (Oxford: Clarendon Press, 1992) 249.

Marx, R., "*Non-Refoulement,* Access to Procedures, and Responsibility for Determining Refugee Claims" 7 I.J.R.L. 383.

Matas, David, "Refugee Claims at Canadian Visa Posts Abroad" (Paper presented to the Canadian Bar Association Immigration Law Conference, 8-9 March 1996) [unpublished].

Mautino, Kathrin S., "Entry: What Mama Never Told You About Being There" (1994) 31 San Diego Law Rev. 911.

McIntyre, Sheila, "Above and Beyond Equality Rights: *Canadian Council of Churches* v. *The Queen*" (1992), 12 Windsor Yearbook of Access to Justice 293.

McKinney, David L., "Congressional Intent, The Supreme Court and Conflict Among the Circuits Over Statutory Eligibility for Discretionary Relief Under Immigration and Naturalization Act § 212(c)" (1994) 26 U. Miami Inter-Am. L. Rev. 97.

"New Immigration Approaches" (March 1997) 25 *Backspace* [Canadian Immigration Historical Society Newsletter] 1.

Organization of Professional Immigration Consultants, "Code of Ethics & Rules of Professional Conduct" (Information pamphlet published by Organization of Professional Immigration Consultants).

Ouellette, Yves, "Les tribunaux administratifs et les restrictions au contrôle judiciare: un plaidoyer pour une autonomie contrôlée" (1983) 43 Revue du Barreau 291.

Page, Alan C., "M.P.s and the Redress of Grievances" (1985) Public Law 1.

Phillips, O. Hood, "Dicey's *Law of the Constitution*: A Personal View" (1985) Public Law 587.

Pierce, Jr., Richard J., "Judicial Review of Agency Actions in a Period of Diminishing Agency Resources" (1997) 49 Admin. L. Rev. 61.

Popper, Andrew F., "Administrative Law In The 21st Century" (1997), 49 Admin. L. Rev. 187.

Pratt, Laura, "They Joined The Foreign Service To See The World, But..." The Financial Post Magazine (November 1995) 94.

Reich, Charles A., "The New Property" (1964) 73 Yale L.J. 733.

Reid, Robert F., "Hot Buttons: An Overview of Recent Developments in Adminstrative Law", in Philip Anisman, & Robert F. Reid, eds., *Administrative Law Issues and Practice* (Scarborough, Ont.: Carswell, 1995) 1.

Reid, T.R. "The Power And The Glory Of The Roman Empire" (July 1997) 192 National Geographic 2.

-------- "The World According To Rome" (August 1997) 192 National Geographic 54.

Robbins, Ira P., "The Revitalization of the Common-Law Civil Writ of Audita Querela as a Post-Conviction Remedy in Criminal Cases: The Immigration Context and Beyond" (1992) 6 Geo. Immig. L.J. 643.

Rosenthal, Peter, "Criminal Equivalency Under The Immigration Act" (1992) 34 C.L.Q. 183.

Rosiers, Nathalie des, and Bruce Feldthusen, "Discretion in Social Assistance Legislation" (1992) 8 Journal of Law and Social Policy 204.

Ross, June M., "Applying the Charter to Discretionary Authority" (1991) 29 Alta. L.R. 382.

-------- "*Canadian Council of Churches* v. *The Queen*: Public Interest Standing Takes a Back Seat" (1992) 3 Constitutional Forum 100.

Rotenberg, C.L. & Mary Lam, "Business Immigration and Policy – A Review of Some Aspects of the Entrepreneur Program" (1995) 26 Imm.L.R.(2d) 100.

Rotenberg, Cecil L., "Medical Inadmissibility: Selection Without Standard?", Paper presented to The 1996 Immigration Law Conference (Vancouver: Canadian Bar Association, 1996).

Rotenberg, Cecil L. & Robert J. Moorhouse, "A Practice Note: Ethics and Influencing Your Client's Choice of Visa Offices" (1995) 30 Imm. L.R. (2d) 271.

Rotenberg, Cecil L. & Robert J. Moorhouse, "Practice Note to the Profession" (1995) 30 Imm. L.R. (2d) 273.

Rubinstein, Ira S. and Ester Greenfield, "Immigration Consequences of Criminal Activity" (July 1989) Washington State Bar News 11.

Ruhl, J.B., "Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-Up Call for Legal Reductionism and the Modern Administrative State" (1996) 45 Duke L.J. 849.

Sainsbury, Roy, "Administrative Justice: Discretion and Procedure in Social Security Decision-Making" in Keith Hawkins, ed., *The Uses of Discretion* (Oxford: Clarendon Press, 1992) 295.

Sassen, Saskia, "Beyond Sovereignty: Immigration Policy Making Today" (1996) 23 Social Justice 9.

Schneider, Carl E., "Discretion and Rules: A Lawyer's View" in Keith Hawkins, ed., *The Uses of Discretion* (Oxford: Clarendon Press, 1992) 47.

Scott, F.R., Comment [1936] Can. Bar Rev. 62.

Sossin, Lorne, "The Politics of Discretion: Toward a Critical Theory of Public Administration" (1993) 36 Can. Public Admin. 364.

St. Charles, Wendy R., "Recognizing Constitutional Rights of Excludable Aliens: The Ninth Circuit Goes Out on a Limb to Free the "Flying Dutchman – Dispensing With a Legal Fiction Creates an Opportunity for Reform" (1995) 4 J. Transnat'l L. & Pol'y 145.

Tilner, Mitchell C., "Ideological Exclusion of Aliens: The Evolution of a Policy" (1987) 2 Geo. Immig. L.J. 1.

Tom, Walter Chi Yan, "Equality Rights in the Federal Independent Immigrant Selection Criteria" (1990) 31 Les Cahiers de Droit 477.

Tompkins, Peter, "Immigration: Governments and Lawyers on a Collision Course" (1995) 17 Loy. L.A. Int'l & Comp. L.J. 891.

Turner-Trusca, Carol, "A Short History of Immigration to Canada 1869-1995" (1995) 12:3 Bout de Papier 11.

-------- "President's Report" *PAFSO Update (Newsletter of the Professional Association of Foreign Service Officers)* 15:1 (January 1998).

United States, House of Representatives, Committee on the Judiciary, "Grounds For Exclusion of Aliens Under the Immigration and Nationality Act: Historical Background and Analysis", 100th Congress, 2d Session, Committee Print, Ser. No. 7 (Washington: U.S. Government Printing Office, 1988).

Vincenzi, Christopher, "Extra-Statutory Ministerial Discretion in Immigration Law" [1992] Public Law 300.

Williams, Glanville, "Discretion in Prosecuting" [1956] Crim. L.R. 222.

Willis, John, "The McRuer Report: Lawyers' Values and Civil Servants' Values" (1968) 18 U.T.L.J. 351.

-------- "Three Approaches to Administrative Law: the Juridical, the Conceptual, and the Functional" (1935) 1 U.T.L.J. 53.

Young, Margaret, Legislative Summary, "Bill C-237: The Immigration Enforcement Improvement Act" (19 March, 1996) (Lib. Of Parliament - Research Branch).

-------- Legislative Summary, "Bill C-44: An Act To Amend The Immigration Act And The Citizenship Act" (rev. ed. 9 February, 1995) (Lib. Of Parliament - Research Branch).

-------- Background Paper, "Immigration: Constitutional Issues" (October, 1991) (Lib. Of Parliament - Research Branch).

-------- Background Paper, "The Immigration and Refugee Board: Proposed Changes" (March, 1995) (Lib. Of Parliament - Research Branch).

3. CASES

A.G. of Canada v. *Inuit Tapirisat et al.*, [1980] 2 S.C.R. 735 (S.C.C.).

Ahmad v. *Canada (Minister of Citizenship & Immigration)* (1998), 40 Imm. L.R. (2d) 121 (F.C.T.D.).

Ajanee v. *Canada (Minister of Citizenship & Immigration)* (1996), 33 Imm. L.R. (2d) 165, 110 F.T.R. 172 (F.C.T.D.).

Attorney General of Canada v. *Cain* [1906] A.C. 542 (J.C.P.C.).

Attorney General of Quebec v. *Irwin Toy Ltd.; Moreau et al., Interveners* (1989) 58 D.L.R. (4th) 577.

Ballantyne v. *Duplessis* (1938), 76 Que. S.C. 448 (Que. S.C.).

Baluyut v. *Canada (Min. of Employment & Immigration)*, [1992] 3 F.C. 420, 56 F.T.R. 186 (F.C.T.D.).

Bhajan v. *Canada (Minister of Citizenship & Immigration)* (1996), 34 Imm.L.R. (2d) 189 (F.C.T.D.).

Brown et al. v. *Minister of Employment & Immigration et al.* (1988) 3 Imm.L.R. (2d) 299 (Fed. T.D.).

Burke v. *Canada (Employment & Immigration Commission)* (1994), 79 F.T.R. 148 (F.C.T.D.).

Cabalfin v. *Canada (Minister of Employment and Immigration)* [1991] 2 F.C. 235, 12 Imm. L.R. (2d) 287, 40 F.T.R. 147, 49 Admin. L.R. 100 (F.C.T.D.).

Canada (Attorney General) v. *Sorkun* (1988) 34 Admin. L.R. 131 (F.C.T.D.).

Canada (Min. of Employment & Immigration) v. *Bhatnager*, [1986] 2 F.C. 3 (Fed T.D.), rev'd [1988] 1 F.C. 171 (Fed. C.A.), aff'd [1990] 2 S.C.R. 217, 44 Admin. L.R. 1, 111 N.R. 185, 71 D.L.R. (4th) 84, 43 C.P.C. (2d) 213, 12 Imm. L.R. (2d) 81.

Canadian Council of Churches v. *Canada (Minister of Employment and Immigration)* [1992] 1 S.C.R. 236, 88 D.L.R. (4th) 193.

Cardinal v. Director of Kent Institution [1985] 1 S.C.R. 643 (S.C.C.).

Castroman v. *Canada (Secretary of State)* (1994), 81 F.T.R. 227 (T.D.).

Channa v. *Canada (Minister of Citizenship and Immigration)* (12 February 1997), Federal Court File No. IMM-1980-96 (F.C.T.D.) [unreported].

Chen v. *Canada (Minister of Employment & Immigration)*, [1995] 1 S.C.R. 725, 27 Imm.L.R. (2d) 1, 179 N.R. 70, 123 D.L.R. (4th) 536, rev'g (1994), 22 Imm.L.R. (2d) 213 (Fed. C.A.), rev'g (1991), 13 Imm.L.R. (2d) 172 (F.C.T.D.).

Chi Wah Anthony Leung (14 April, 1998), Federal Court File No. IMM-1061-97 (F.C.T.D.) [unreported].

Choi v. *Canada (Min. of Employment & Immigration)* (1991), 15 Imm. L.R. (2d) 265, [1992] 1 F.C. 763 (C.A.).

Congreve v. *Home Office*, [1976] 1 Q.B. 629 at 649, [1976] 1 All E.R. 697.

Covrig v. *Canada (Minister of Citizenship & Immigration)* (1997), 35 Imm. L.R. (2d) 128 (F.C.T.D.).

Deol v. *Canada (Min. of Employment & Immigration)* (1992), 18 Imm. L.R. (2d) 1 (Fed. C.A.).

Dumbrava v. *Canada (Minister of Citizenship & Immigration)* (1995), 31 Imm.L.R. (2d) 76, 101 F.T.R. 230 (F.C.T.D.).

Gargano v. *Canada (Min. of Citizenship & Immigration)* (1994), 25 Imm. L.R.(2d) 292, 85 F.T.R. 49.

Hajariwala v. *Canada (Min. of Employment & Immigration)* (1988), 6 Imm. L.R. (2d) 222, 34 Admin. L.R. 206, 23 F.T.R. 241, [1989] 2 F.C. 79 (Fed. T.D.).

Haughton v. *Canada (Minister of Citizenship & Immigration)* (1996), 34 Imm. L.R. (2d) 284, 11 F.T.R. 226 (F.C.T.D.).

Ho v. *Canada (Min. of Employment & Immigration)* (1994), 88 F.T.R. 146 (F.C.T.D.).

Hoballahi v. *Canada (Minister of Citizenship & Immigration)* (1996), 124 F.T.R. 164, 37 Imm. L.R. (2d) 98 (F.C.T.D.).

International Union, Local No. 333 v. *Nipawin District Staff Nurses Association* [1975] 1 S.C.R. 382 (S.C.C.).

Irvine v. *Canada (Restrictive Trade Practices Commission)*, [1987] 1 S.C.R. 181 (S.C.C.).

Ismaili v. *Canada (Min. of Citizenship & Immigration)* (1995), 29 Imm. L.R. (2d) 1, 100 F.T.R. 139.

Issaeva v. *Canada (Minister of Citizenship & Immigration)* (1997), 37 Imm.L.R. (2d) 91 (F.C.T.D.).

Jaferi v. *Canada (Min. of Citizenship & Immigration)* (1995), 101 F.T.R. 142 (F.C.T.D.).

Jean v. *Nelson*, 727 F.2d 957 (11th Cir. 1984), aff'd, 472 U.S. 846 (1985).

Johl v. *Min. of Employment & Immigration* (1987), 4 Imm. L.R. (2d) 105, 15 F.T.R. 164 (F.C.T.D.).

John v. *Canada (Minister of Citizenship & Immigration)* (1997), 36 Imm. L.R. (2d) 192 (F.C.T.D.).

Kang v. *Minister of Employment & Immigration* (1981), [1981] 2 F.C. 807, 37 N.R. 55 (Fed. C.A.), leave to appeal to S.C.C. refused 39 N.R. 353n (S.C.C.).

Khalon et al. v. *Canada (Minister of Citizenship & Immigration)* (1995), 101 F.T.R. 297.

Kim Mui (20 March, 1998) Federal Court File IMM-1079-97 (F.C.T.D.) [unreported].

Lakhani v. *Canada (Min. of Citizenship & Immigration)* (1997) 36 Imm.L.R. (2d) 47 (F.C.T.D.).

Lam v. *Canada (Minister of Employment & Immigration)* (1991), 15 Imm.L.R. (2d) 275, 49 F.T.R. 200 (F.C.T.D.).

Law Society of B.C. v. *Mangat* (14 August 1997) Vancouver Docket No. C932910 (B.C.S.C.) [unreported].

Lee v. *Canada (Minister of Citizenship & Immigration)* (1995), 29 Imm. L.R. (2d) 222 (F.C.T.D.).

Ludwig v. *Canada (Minister of Citizenship & Immigration)* (1996), 33 Imm. L.R. (2d) 213, 111 F.T.R. 271 (T.D.).

Maple Lodge Farms Limited v. *Government of Canada et al.*, [1982] 2 S.C.R. 2 (S.C.C.).

Martineau v. *Matsqui Institution Disciplinary Board (No. 2)* (1979), 106 D.L.R. (3d) 385, [1980] 1 S.C.R. 602, 50 C.C.C. (2d) 353.

Minister of Employment & Immigration v. *Jiminez-Perez* (1984), [1984] 2 S.C.R. 565, [1985] 1 W.W.R. 577, 9 Admin. L.R. 280, 14 D.L.R. (4th) 609, 56 N.R. 215 (S.C.C.).
Minister of Manpower & Immigration v. *Hardayal* (1977), 75 D.L.R. (3d) 465 at 471, [1978] 1 S.C.R. 470 at 479, 15 N.R. 396.

Mundi v. *Canada (Min. of Employment & Immigration)* (1985), 63 N.R. 310, 24 D.L.R. (4th) 285 (Fed. C.A.).

Nguyen v. *Canada* (1993), 18 Imm.L.R. (2d) 165, 100 D.L.R. (4th) 151, 151 N.R. 69, 14 C.R.R. (2d) 146 (Fed. C.A.).

Nicholson v. *Haldimand-Norfolk Regional Board of Commissioners of Police* [1979] 1 S.C.R. 311 (S.C.C.).

Padfield v. *Minister of Agriculture Fisheries and Food* [1968] A.C. 997.

Pezim v. *British Columbia Securities Commission et al.*, [1994] 2 S.C.R. 557; 168 N.R. 321; 46 B.C.A.C. 1, 75 W.A.C. 1; [1994] 7 W.W.R. 1; 92 B.C.L.R. (2d) 145.

Ping v. *Canada (Minister of Citizenship & Immigration)* (1997), 37 Imm. L.R. (2d) 135 (F.C.T.D.).

Poizer v. *Ward*, [1947] 2 W.W.R. 193, 55 Man. R. 214, [1947] 4 D.L.R. 316 (Man. C.A.), reversing [1947] 1 W.W.R. 807 (*sub nom.* Pozier, Re) (Man. K.B.).

Prajapati v. *Canada (Minister of Citizenship & Immigration)* (1995), 31 Imm. L.R. (2d) 182 (F.C.T.D.).

Prata v. *Minister of Manpower and Immigration* (1975), 52 D.L.R. (3d) 383, [1976] 1 S.C.R. 376, 3 N.R. 384.

R. v. *S. (S.)* (1990), 57 C.C.C. (3d) 115 at 128, 129, 77 C.R. (3d) 273, 110 N.R. 321, [1990] 2 S.C.R. 254, 49 C.R.R. 79, 41 O.A.C. 81.

Re Brempong and Minister of Employment & Immigration (1980), 113 D.L.R. (3d) 236, [1981] 1 F.C. 211, 36 N.R. 323.

Re: Manitoba Language Rights, [1985] 1 S.C.R. 721.

Reference Concerning Certain Questions Relating to the Secession of Quebec from Canada, Supreme Court File No. 25506, initiated by Order-in-Council P.C. 1996-1497, dated September 30, 1996.

Robinson v. *Canada (Minister of Citizenship)* [1990] 1 F.C. 362, 10 Imm. L.R. (2d) 224 (F.C.T.D.).

Roncarelli v. Duplessis [1959] S.C.R. 121, 16 D.L.R. (2d) 689 (S.C.C.).
Ruparel v. *Minister of Employment and Immigration* [1990] 3 F.C. 615, 36 F.T.R. 140 (C.A.).

Sandhu v. *Canada (Min. of Employment & Immigration)* (1989), 8 Imm. L.R. (2d) 312 (Imm. R.B.).

Sashi v. *Canada (Min. of Employment & Immigration)* (1987), 3 Imm. L.R. (2d) 288 (Fed. T.D.).

Secretary of State for Educ. & Science v. *Tameside Metro. Borough Council*, [1977] A.C. 1014 at 1064.

Secretary of State for External Affairs & Minister of Employment & Immigration v. *Menghani and Canadian Human Rights Commission* (1993), 21 C.H.R.R. D/427 (F.C.T.D.), rev'g in part (1992), 17 C.H.R.R. D/236 (Cdn. H. Rts. Trib.).

Shirwa v. *Canada (Minister of Employment & Immigration)* [1994] 2 F.C. 51 (F.C.T.D.).

Shum v. *Canada (Minister of Citizenship & Immigration)* (1995), 30 Imm. L.R. (2d) 233 (F.C.T.D.).

Singh v. *Canada (Min. of Employment & Immigration)* (1986), 6 F.T.R. 15 (F.C.T.D.).

Singh (Gurmit) v. *Canada (Minister of Citizenship and Immigration)* (1995), 106 F.T.R. 66.

Singh v. *Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, 17 D.L.R. (4th) 422 (S.C.C.).

Smith v. *Vanier (Municipality)* (1972), 30 D.L.R. (3d) 386 (Ont. H.C.).

So v. Canada (Min. of Employment & Immigration) (1995), 28 Imm. L.R. (2d) 153, 93 F.T.R. 153.

Soimu v. *Canada (Secretary of State)* (1994), 83 F.T.R. 285 (F.C.T.D.).

South-West Oxford (Township) v. *Ontario (Attorney General)* (1985), 18 O.M.B.R. 21, 50 O.R. (2d) 297, 3 C.P.C. (2d) 92, 15 Admin. L.R. 1 (H.C.).

Stefan v. *Canada (Minister of Citizenship & Immigration)* (1995), 35 Imm. L.R. (2d) 21 (F.C.T.D.).

Syndicat des Employes de production du Quebec et de l'Acadie v. *Canada Labour Relations Board* [1984] 2 S.C.R. 412 (S.C.C.).

Ting v. *Canada (Minister of Citizenship & Immigration)* (1996), 36 Imm. L.R. (2d) 197, 122 F.T.R. 238 (F.C.T.D.).

Toor v. *Canada (Min. of Employment & Immigration)* (1987), 1 Imm. L.R. (2d) 104, 9 F.T.R. 292 (Fed. T.D.).

Uy v. *Canada (Minister of Employent & Immigration)* (1991), 12 Imm.L.R. (2d) 172 (Fed. C.A.).

Vaca v. *Canada (Minister of Employment & Immigration)* (1991) 15 Imm.L.R. (2d) 315 (Fed. T.D.).

Vidal and Dadwah v. *Minister of Employment and Immigration* (1991), 41 F.T.R. 118, 13 Imm. L.R. (2d) 123 (T.D.).

Williams v. *Canada (Min. of Citizenship & Immigration)* (1996), 32 Imm. L.R. (2d) 256 (F.C.T.D.).

Williams v. *Canada (Minister of Citizenship & Immigration)* (1997), 35 Imm. L.R. (2d) 286 (F.C.A.).

Winn v. *Canada (Attorney General)* (1994), 28 Admin, L.R. (2d) 254, 84 F.T.R. 115.

Yang v. *Canada (Minister of Employment & Immigration)* 17 Imm.L.R. (2d) 229.

Yhap v. *Canada (Minister of Employment and Immgration)*, [1990] F.C. 722, 9 Imm. L.R. (2d) 243, 34 F.T.R. 26 (F.C.T.D.).

Yong Qi Zhu et al. v. *Canada (Minister of Citizenship & Immigration)* (14 October 1997) Federal Court File No. IMM-2710-96 (F.C.T.D.) [unreported].

Young v. *Canada (Min. of Employment & Immigration)* (1987), 1 Imm. L.R. (2d) 77 (F.C.T.D.).

Zeng v. *Canada (Minister of Employment and Immigration)* (1989), 27 F.T.R. 56 (F.C.T.D.).

Zeng v. *Canada (Minister of Employment & Immigration)* (1991), 12 Imm. L.R. (2d) 167 (Fed. C.A.).

4. STATUTORY AUTHORITIES

Access to Information Act, c. A-1, R.S.C. 1985

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

Canadian Human Rights Act, c. H-6, R.S.C. 1985

Convention on the Status of Refugees, (1951), 189 U.N.T.S. 138; 1969 Can. T.S. No. 6 as am. by *Protocol Relating to the Status of Refugees* (1967), 606 U.N.T.S. 267; 1969 T.S. No. 29.

Criminal Code, c. C-46, R.S.C. 1985

Federal Court Act, R.S.C. 1985, c. F-7 as am., S.C. 1992, c. 49.

Financial Administration Act, c. F-11, R.S.C. 1985

Immigration Act, c. I-2, R.S.C. 1985

Immigration and Nationality Act, 8 U.S.C.

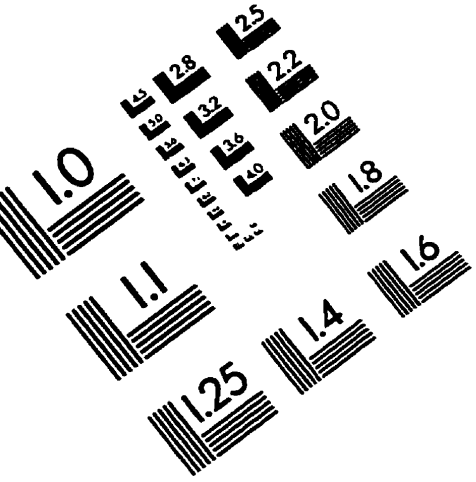
Immigration Regulations, 1978, SOR/78-172 as am.

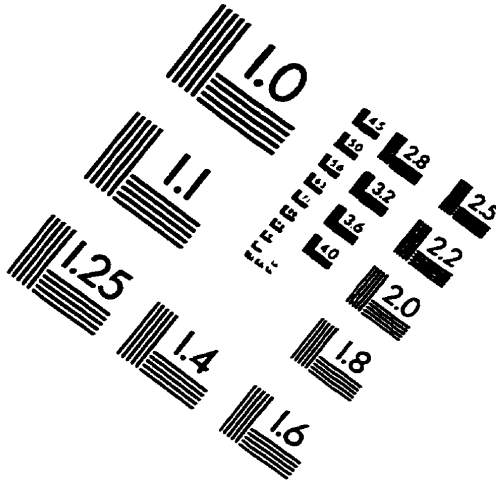
Interpretation Act, c. I-21, R.S.C. 1985

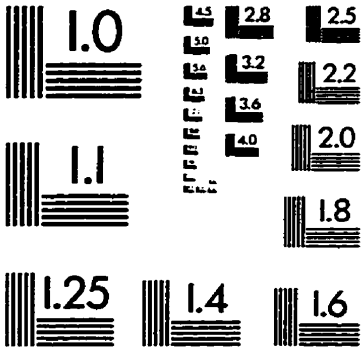
Privacy Act, c. P-21, R.S.C. 1985

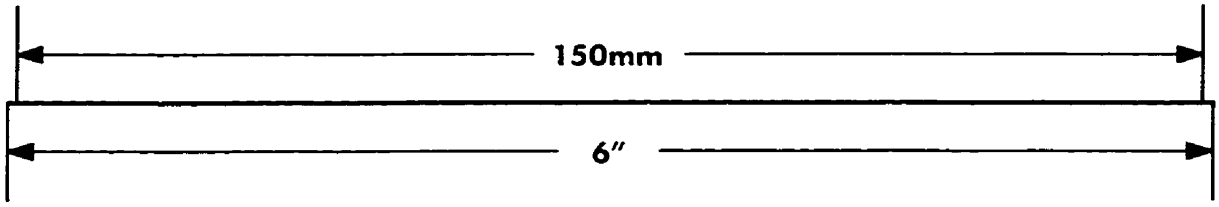
Regulatory Impact Analysis Statement SOR 92/101 (6 February 1992).

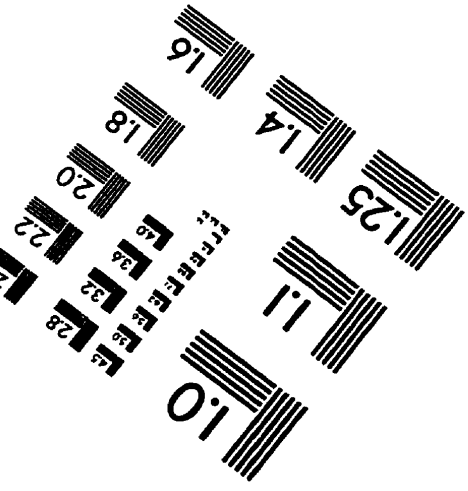
IMAGE EVALUATION
TEST TARGET (QA-3)

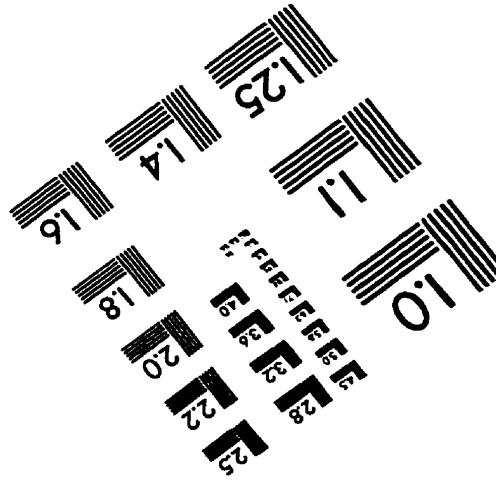












APPLIED IMAGE, Inc
1653 East Main Street
Rochester, NY 14609 USA
Phone: 716/482-0300
Fax: 716/288-5989