

**LEGAL, ECONOMIC AND POLITICAL IMPLICATIONS OF BILL C-86,
AN ACT TO AMEND THE 1976 IMMIGRATION ACT,
WITH PARTICULAR REFERENCE TO REFUGEES**

by

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1. INTRODUCTION

Immigration has historically allowed many outsiders to join their families in Canada, escape persecution elsewhere, or come in as independent immigrants in search of a better life. At present, the mass international migration of people caused by fundamental transformations in political, economic and social structures, population growth, and improved transportation and information technology poses new and difficult problems for Canada's immigration and other policy makers.

Fear of persecution, homelessness, and limited job opportunities are forcing many people to leave their countries of origin and seek a better life in highly-developed countries as immigrants or refugees. The migration of people seeking refugee protection continues unabated. For example, in 1983, 95,000 people sought asylum in Organisation for Economic Cooperation and Development (OECD) countries. In 1991, the number was 700,000, an increase of almost 800 per cent. Many refugee claimants were undoubtedly genuine, while others made claims as a way to by-pass the immigration controls of sovereign nation-states which by international law can regulate immigration into their territories.¹

The increased migration of people is also driven by the accelerated process of global economic integration. Movements of goods and capital inevitably involve increased movement of people. The proliferation of print and electronic media increases the global cultural exchange which helps make more people aware of conditions in other regions of the world. And more accessible and more affordable transportation enables migrants to reach almost any destination

¹Immigration Canada, Managing Immigration: A Framework for the 1990s, p. 4.

in the world.

Migration of people has always been part of human history. However, its scope and significance have increased since 1945, particularly with respect to involuntary migration. The two World Wars exacerbated the situation of people escaping persecution to the point where formal international organizations were deemed necessary to respond to their plight. While there were several attempts made during this century to establish international organizations to deal with people seeking refuge from persecution, no decisive action to address this problem was taken until 1951 when the Office of United Nations High Commissioner for Refugees was established and a formal definition of a refugee was introduced in the Geneva Convention Relating to the Status of Refugees.²

The pressures on immigrant-receiving countries have become more noticable since the mid-1980s. This may be attributed to several factors: growing disparities between the wealthy North and poor South have forced many people to move in search of a better life; political and demographic pressures have increased the exodus of people from their countries of origin; increasing tribal wars in Europe, Asia and Africa have lead to mass migration of people, as has already happened, for example in Yugoslavia; and the shift to a global economy has already caused some labour force dislocation.³

The increased international migration of people has caused apprehension in some immigrant-receiving countries. This runs counter to the global economic trends favouring the increased movements of capital, goods and services which will, perhaps inevitably, demand freer

²Guy S. Goodwin-Gill, The Refugee in International Law, pp. 127-29.

³Stephen Castles and Mark J. Miller, The Age of Migration, pp. 3-4.

movement of people. The fear arising from the pressures on their borders and the resulting fortress mentality will confront traditional immigrant countries like Canada with new and difficult policy decisions.

As outlined in the Immigration Act of 1976, the principal objectives of the immigration program were to reunify families, improve Canada's economic potential and meet humanitarian international commitments. By the late 1980s, the former Tory federal government was convinced that these objectives no longer sufficed. It was reasoned that circumstances affecting the immigration program have changed substantially and thus it was deemed necessary to address the increasing pressures on the program and Canada's changing immigration needs.⁴

In 1992, following extensive consultations with the provinces, municipalities, and others with vested interests in immigration, the federal government introduced Bill C-86 as an amendment to the Immigration Act of 1976. The intent of Bill C-86 seems to have been to rationalize and bureaucratize the immigration process. This would make the immigration program more responsive to policy direction, providing the federal government with the means to react more effectively to changing external and internal pressures on the program.⁵

This paper will review Bill C-86. It will be found that Canada's intentions to improve its immigration program through Bill C-86 are constrained by pressure groups with interest in immigration, such as ethnic communities who are concerned about family reunification. They are also constrained by the impact upon the program of the Charter of Rights and Freedoms, and

⁴Immigration Canada, Managing Immigration..., p. 1.

⁵Immigration Canada, Immigration Consultations 1993: The Management of Immigration, p. 3.

by Canadian commitment to the Geneva Convention Relating to the Status of Refugees and the Office of United Nations High Commissioner for Refugees. The impact of the bill also might be affected by a different policy direction adopted by the new Liberal government.

2. BILL C-86: AN ACT TO AMEND THE IMMIGRATION ACT

Since the Immigration Act was proclaimed in 1978 times have changed. Since coming into force, there had been no comprehensive revision of the Act, just tinkering addressing specific issues (for example, to take into account the Canadian Charter of Rights and Freedoms). Even Bills C-55 and C-84⁶, passed in 1988, essentially dealt only with refugee determination. Bill C-86, in contrast, would affect all areas of Canada's immigration law and administration of the program.⁷

Bill C-86, an act to amend the Immigration Act, was supposed "...to balance the compassionate values of Canadians with the pragmatic requirements of the 1990s". It was to: (1) make the refugee status determination system more efficient and cost effective while ensuring that all refugee claimants are treated fairly and humanely; (2) defend the integrity of the

⁶In response to pressures on the in-Canada refugee determination system, the federal government brought in Bill C-55. Bill C-55 introduced changes in the area of access controls. It also provided for the establishment of the Immigration and Refugee Board (IRB). In addition to Bill C-55, Bill C-84 was introduced to authorize the immigration and law enforcement officers to detain people without proper documents or those deemed to be security risks. Bill C-84 also allowed for penalties for individuals or transportation companies bringing people into Canada without proper documents. (Joyce Cavanagh-Wood. Personal interview. 22 October 1993.)

⁷Margaret Young, Bill C-86: An Act to Amend the Immigration Act, p. 1, 20 July 1992, revised 16 November 1992.

immigration system, by providing better enforcement and control; (3) manage the numbers and categories of immigrants more efficiently; (4) streamline administrative procedures and improve the quality of service provided through the immigration program; and (5) allow the immigration program to respond more effectively to the changing needs and concerns of Canadian provinces.⁸ The Bill was first introduced in June 1992. It received Royal Assent on 17 December 1992 and became operational on 1 February 1993.⁹

A. Canada's Refugee Determination System

While the Immigration Act of 1976 provided for the setting of annual immigration estimates, it did not give the federal government the means to actually stop the flow of people seeking refugee status at a certain level. For example, from 1 January 1989 to 31 December 1992, approximately 117,000 people claimed refugee status in Canada. These numbers suggest that the federal government's efforts to stem the flow of refugee claims through Bill C-55 were not sufficient.¹⁰

In the area of access to the refugee determination system operated by the Immigration and Refugee Board (IRB)¹¹, Bill C-86 reduced the opportunity for people to make fraudulent and

⁸Immigration Canada, Managing Immigration..., p. 2.

⁹Joyce Cavanagh-Wood, Employment and Immigration Canada, Refugee Affairs, Ottawa. Personal interview. 22 October 1993.

¹⁰Immigration Canada, A New Immigration Program for the 1990s: Background, p. 9.

¹¹The Immigration and Refugee Board handles all quasi-judicial immigration matters in Canada. The head office of the Board is in Ottawa, while its regional operations are located in major cities across Canada. The Board consists of three divisions: the Convention Refugee

repeated claims. In the area of enforcement and control, it addressed various aspects of national security regarding refugees. The bill also contained provisions for greater international co-operation regarding the practice of making refugee claims in several countries before coming to Canada.¹²

In an effort to streamline the system, Bill C-86 changed the hearing process from two-stages to a single stage. Other changes to the IRB occurred in the area of staff training and administrative procedures and, notably, the transfer of the Adjudication Division from Employment and Immigration to the IRB.¹³

Upon a positive decision by the IRB, new procedures arising from Bill C-86 are to allow for a faster landing and family reunification for the claimants. The bill also affects the process of issuing employment authorization to refugees. As well, when a negative decision is rendered, the bill provides for faster removal of rejected refugee claimants. And the changes to the appeal process are supposed to help reduce the case backlog before the Federal Court.¹⁴

Determination Division, the Immigration Appeal Division, and the Adjudication Division. The Refugee Determination Division hears claims submitted by refugee claimants from within Canada. The Immigration Appeal Division concerns itself with family class sponsorship appeals, appeals of deportation orders issued to permanent residents and Convention refugees, and appeals of denials of entry or landing to holders of valid visas. The adjudicators within the Adjudication Division preside over immigration inquiries. The Board is headed by a chairperson and an executive director, both appointed by Governor in Council, as are all Board members. (See Immigration and Refugee Board, Convention Refugee Determination: What It is and How It Works. MQ21-15-1993)

¹²Immigration Canada, A New Immigration..., p. 9.

¹³Ibid., p. 10.

¹⁴Ibid., pp. 10-11.

(i). Access to the Refugee Determination System

Prior to Bill C-86, the initial screening of refugee claimants was conducted by two-member panels. Each panel was headed by an adjudicator, at that time an employee of the Employment and Immigration Department, and the second member was an officer of the IRB. This two-member panel decided whether a claimant was eligible and, if the answer was positive, whether the claim had a credible basis. Both members of the panel had to be in agreement before the claim could be rejected on the grounds of eligibility and credibility.¹⁵

Bill C-86 made the credible basis test at the initial hearing redundant, although the concept of "credible basis" remains in the law. Now, the eligibility is determined by the Senior Immigration Officer (SIO) who also deals with the immigration aspect of the claim. Whereas in the past the federal government provided counsel for the refugees, now the SIO is instructed not to delay the process in order to allow for legal representation, although the presence of the claimant's counsel is still allowed.¹⁶

Claimants are not allowed to enter the refugee determination system if they (verbatim):

- * have been recognized as a Convention refugee by another country, to which they can be returned;
- * came to Canada, directly or indirectly, from a country (other than their country of nationality or habitual residence) that has been prescribed by the Governor in Council as a country that complies with Article 33 of the Convention (that is, a country that does not return people directly or indirectly to the frontiers of countries where they fear persecution on the named grounds);

¹⁵Joyce Cavanagh-Wood. Personal interview. 22 October 1993.

¹⁶Margaret Young, Canada's Refugee Status Determination System, p. 4.

- * are making a repeat claim without having been out of Canada for 90 days; and
- * have already been determined to be a Convention refugee.¹⁷

Once refugee claimants are found to be inadmissible to Canada or are denied access to the system, the SIO (or the adjudicator in criminality and security cases) issues a conditional removal order. At this point in the proceedings claimants have the option of applying to the Federal Court - Trial Division for leave to apply for judicial review of both the deportation order and the decision of the SIO regarding eligibility. They have no right to remain in Canada pending a decision, except during a seven day stay of the execution of the deportation order. All requests for leave to apply for judicial review are determined by one judge. Claimants do not appear before the judge, except when the appearance is granted for special reasons.¹⁸

The grounds for judicial review are outlined in the Federal Court Act. They are that an agency (verbatim):

- * acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
- * failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
- * erred in law in making its decision, whether or not the error appears on the face of the record;
- * based its decision on an erroneous finding of fact that it made in a reverse or capricious manner or without regard to the material before it;
- * acted or failed to act, by reason of fraud or perjured evidence; or

¹⁷Ibid., p. 4-5.

¹⁸Ibid., p. 5.

* acted in any other way that was contrary to the law.¹⁹

Applicants whose leave applications are approved can appeal the actual decision on judicial review to the Federal Court - Appeal Division only if the Trial Court judge whose decision it is agrees at the time of rendering judgement that any of the above grounds are involved. Refugee claimants whose appeals to the Federal Court - Trial Division are denied, are deported from Canada. The countries to which they can be deported will vary depending on the reason for deportation. For example, Convention refugees can be sent back to the country where they received protection prior to their arrival to Canada. Or, those deemed ineligible because the country from which they claim persecution is on the prescribed list of "safe third countries" can only be returned there.²⁰

The changes to the Act made by Bill C-86 clarified the "safe third country" provision. First, since 1 February 1993, refugee claimants are not eligible to enter the refugee determination system if they come directly or indirectly from a country determined by the Governor in Council to be one that honours Article 33 (non-refoulement or non-return) of the Convention, whereas before the ineligibility applied only if they came directly from such a country. Second, prior to the passage of Bill C-86, the SIO was required to consult with the authorities of the country on the prescribed list (if there ever was a such a list) before the claimant was determined ineligible, whereas now the SIO has no further decision to make if a claimant comes from or through a prescribed country. Third, previously port of entry claimants were affected by the "safe third country" provision. Now, all claimants, regardless of the time

¹⁹Federal Court Act, Sec. 18.1(4).

²⁰Joyce Cavanagh-Wood. Personal interview. 22 October 1993.

they have spent in Canada, are covered. Fourth, Bill C-86 now provides for the decision on returnability to be made administratively, as opposed to the previous requirement for a hearing and co-operation of the accepting country.²¹

In determining the list of countries to which claimants may be returned, the following factors must be taken into account: (1) whether the country is a party to the Convention; (2) the country's policies and practices with respect to Convention refugee claims; (3) the country's record with respect to human rights; and (4) whether the country is a party to an agreement with Canada for such returns.²²

As is evident from the last requirement, Canada can enter into international agreements with other countries for the return of claimants to other countries. However, one of the problems that has constrained the implementation of the "safe third country" provision is the absence of any mechanisms in international law to compel the countries on any such list to accept the return of refugee claimants.²³

At present, Canada does not have any international agreements regarding the return of refugee claimants, although there are some discussions under way with the United States. A satisfactory arrangement for sharing the responsibility for examining refugee claims²⁴ with the latter would be of particular importance to Canada's refugee determination system, given that over 30 per cent of those applying for refugee status in Canada come from or through the United

²¹Young, Bill C-86..., p. 7.

²²Young, Canada's Refugee..., p. 15.

²³Joyce Cavanagh-Wood. Personal interview. 22 October 1993.

²⁴Statutes of Canada 1992, Bill C-86: An Act to Amend the Immigration Act, Sec. 108, p. 102.

States.²⁵ Currently, however, the absence of agreements with other countries makes Canada's "safe third country" provision virtually meaningless.²⁶

(ii). Refugee Hearings

While the general refugee hearing procedures introduced by Bill C-55 remained intact, Bill C-86 made a number of changes, some of which are quite significant. In addition to the simplified initial hearing stage, several provisions included in the new bill point to a more active involvement on the part of the Minister in challenging the decisions made by the IRB.

Claimants who are allowed to enter the system are issued conditional removal orders (which are of significance only when all further proceedings are finished and the decision has been against the claimant) and are sent to the Refugee Division for a determination. At that time, the Minister may request that the copies of claim filed with the Board be provided to him/her. Following this, the Minister may advise the Board of his/her intention to take part in the hearing. The requirement for increased communication between the Minister and the Board regarding refugee claims is provided for in Bill C-86.²⁷

Prior to Bill C-86, all claims required a hearing, although the standard quorum of the two-member panel could be changed to one with the consent of the claimant.²⁸ Applying this

²⁵Young, Canada's Refugee..., p. 15.

²⁶Joyce Cavanagh-Wood. Personal interview. 22 October 1993.

²⁷Statutes of Canada 1992, Sec. 69.1(2), p. 68.

²⁸Frank N. Marrocco and Henry M. Goslett, 1994 Immigration Act of Canada, Sec. 69.1(7) and (8), p. 234.

provision, the Refugee Division expedited claims before one member. Bill C-86 expands on this provision by permitting, within the Board's rules, any claim in which the Minister does not intend to participate to be decided in the claimant's favour in the simplified process by a single member without a hearing. This provision does away, in clear cases, with the requirement to bring together the claimant, counsel, an interpreter, a refugee hearing officer and two members of the Refugee Division, with the potential for a considerable time and dollar saving to the system. When a hearing is required, two members constitute a quorum, unless the claimant agrees to a hearing before just one member.²⁹

Prior to 1 February 1993, the benefit of the doubt regarding the claim determination always went to the claimant, based on the requirement that both Refugee Division members must agree before rejecting the claim. However, Bill C-86 denies the claimant the benefit of the doubt when both members of the panel are satisfied of the existence of one of three conditions (verbatim):

- * that there are reasonable grounds to believe that the person, without valid reason, has destroyed or disposed of identity documents that were in the person's possession;
- * that the person has, since making the claim, visited the country that the person claims to have left, or outside of which the person claims to have remained, by reason of fear or persecution; or
- * that the country that the person claims to have left, or outside of which the person claims to have remained, by reason of persecution is a country that is prescribed under paragraph (114(1)(s.1), p. 110) to be country that respects human rights.³⁰

In instances where both members of the panel are satisfied about one or all of these

²⁹Margaret Young, Bill C-86..., p. 8.

³⁰Statutes of Canada 1992, Sec. 69.1(10.1), p. 70.

circumstances, the decision of course goes against the claimant. In addition, when there is a split decision, that decision is also against the claimant.³¹

Members of the IRB are independent decision-makers who abide by the administrative procedures issued by the Chairperson of the Board.³² Changes to the Act made by Bill C-86, gave these administrative procedures a statutory basis. Their intent is to assist the members of the Refugee Division and Appeal Division in carrying out their duties under the Act.³³

With respect to the structure of the IRB, Bill C-86 allows for more flexibility to the Governor in Council regarding the appointment of members to the Refugee Division. Prior to 1 February 1993, there had to be 65 full-time members before part-time members could be taken on. Now, full- and part-time members can be appointed as desired. Terms of appointment are also changed to up to seven years, as opposed to the previous two and five year terms.³⁴

(iii) Judicial Review

In response to the increasing backlog of refugee cases in Federal Court, Bill C-86 changed the location of judicial review, restricted grounds for appeal, and provided for faster processing.

Before Bill C-86 was passed, all appeals of Refugee Division decisions were made to the

³¹Op. cit., p. 9.

³²Statutes of Canada 1992, op. cit., Sec. 65(3), p. 66.

³³Ibid., Sec. 65(4), p. 66.

³⁴Ibid., Sec. 59(1), p. 60.

Federal Court of Appeal, in front of three judges. Bill C-86 stipulates that all appeals, now renamed "applications for judicial review", are to be heard by the Federal Court - Trial Division, with only one judge present.³⁵ There is no change to the requirement that all applications for judicial review must be granted leave (permission) by the Federal Court - Trial Division. The Trial Division judge who receives applications for judicial review is required to set a date and place for a hearing within three months from the date the application was approved.³⁶ The Federal Court - Trial Division is instructed to proceed expeditiously with both an application for judicial review and the judicial review itself.³⁷

In view of the fact that the intent of Bill C-86 was to make the judicial review process less cumbersome, unlimited appeals to the Appeals Division would defeat its efforts. Thus, the bill states that appeals of a Trial Division decision would be granted "...only if the judge certified at the time of rendering judgement that a serious question of general importance was involved and stated the question."³⁸ If the judge refuses to so certify, the appeal is denied.³⁹

(iv) Deportations

After a decision on refugee status has been rendered, written reasons for all negative

³⁵Ibid., Sec. 82.1(1), p. 79.

³⁶Ibid., Sec. 82.1(6) and (7), p. 79.

³⁷Ibid., Sec. 82.1(8), p. 80.

³⁸Ibid., Sec. 83.1, pp. 81-82.

³⁹Ibid., Sec. 83(4), p. 83.

determinations must be provided by the Refugee Division, and may also be requested for positive decisions, by either the Minister or claimant. If both members of the panel agree that the evidence provided by the claimant is insufficient for them to find him/her a Convention refugee, they must state in the decision that there was no credible basis for the claim. Upon such a finding, the conditional removal order comes into effect.⁴⁰

A conditional deportation order issued either by a SIO or an adjudicator becomes effective upon withdrawal of a refugee claim, a negative determination by the Refugee Division, and in certain other specified instances.⁴¹ Bill C-86 then provides that the deportation is to be stayed until the application for leave for judicial review and any subsequent procedure regarding the refugee claim are completed, except in certain specified situations. For example, the deportation order is stayed for only seven days in cases where claimants have been found to be ineligible to appear before the Refugee Division or have been found by the Division not to have a credible basis for their claim. This time restriction also applies to claimants who were eligible to make a claim but who are inadmissible for certain criminal and security reasons.⁴²

(v) Landing

When the Refugee Division of the IRB renders a positive decision which gives the claimant the status of a Convention refugee in Canada, the conditional deportation order becomes

⁴⁰Young, Canada's Refugee..., p. 8.

⁴¹Statutes of Canada 1992, Sec. 28.2, p. 33; Sec. 32.1(6), p. 38.

⁴²Ibid., Sec. 49(1)(d)-(f), p. 49.

null and void and the claimants are eligible to apply for permanent residence. Prior to the passage of Bill C-86, the claimants were granted permanent status, and then they were allowed to bring their families to Canada.⁴³ However, certain refugees are not eligible to apply for permanent residence. They are (verbatim):

- * those who have been recognized as Convention refugees in another country and would be allowed to return there;
- * nationals or citizens of any country other than the one in which the person fears persecution;
- * refugees who have permanently resided in another country (other than the country where they fear persecution) and who would be allowed to return to that country;
- * refugees, or any dependant for whom landing is sought, who are criminals, security risks or war criminals; or
- * applicants who do not possess a valid and subsisting passport or travel document or a satisfactory identity document.⁴⁴

The last criterion was included in the Act with the Bill C-86 amendments with the intent to deter the use of bogus documents and the destruction of bogus and bona fide documents by refugee claimants.

The Minister reserves the right to apply to the Refugee Division for a determination that a claimant has ceased to be a Convention refugee. In revoking refugee status, the Refugee Division will apply the criteria outlined in Section 2(2) of the Act if (verbatim):

- * the person voluntarily reavails himself/herself of the protection of the country of his/her nationality;
- * the person voluntarily reacquires his/her nationality;

⁴³Ibid., Sec. 46.04(1), p. 49.

⁴⁴Young, Canada's Refugee..., p. 10.

- * the person acquires new nationality and enjoys the protection of the country of that new nationality;
- * the person voluntarily re-establishes himself/herself in the country that the person left, or outside of which the person remained, by reason of fear or persecution; or
- * the reasons for the person's fear of persecution in the country that the person left, or outside of which the person remained, cease to exist.⁴⁵

The Minister may also request that the Refugee Determination Division reconsider a determination that a claimant is a Convention refugee on the ground that the refugee status was obtained by fraudulent means or misrepresentation of facts by the claimant or any other person. However, the Refugee Division may reject the Minister's request if it finds that there was other sufficient evidence on which the positive decision was or could have been based.⁴⁶

Although the rejected claimants face removal from Canada, in many instances removal does not occur. Section 114(2) of the Act states that the Governor in Council may give to the Minister the power to exempt persons from regulations made under subsection (1) or otherwise provide for the admission of any person on humanitarian or compassionate grounds.⁴⁷

The intention of the Bill C-86 amendments to Section 114(2) and Section 6(5) of the Act was to enable the Minister to prescribe classes of immigrants whose landing in Canada is justified for public policy reasons. At the present time, Section 6(5) has been utilized to define two prescribed classes, Live-in Caregivers in Canada and Post-Determination Refugee Claimants

⁴⁵Marrocco and Goslett, Sec. 2(2) p. 5.

⁴⁶Peter Braid, Immigration and Refugee Board, Ottawa. Personal interview. 31 March 1994.

⁴⁷Op. cit., p. 372.

in Canada (PDRCC).⁴⁸

The PDRCC provision was brought into being by regulation pursuant to C-86 amendments to the Act on 1 February 1993. It was instituted to provide a "safety net" for persons who do not qualify as Convention refugees, but would nonetheless be in danger if returned to their country of origin.⁴⁹

Section 114(2) of the Act and Section 2.1 of the Immigration Regulations provide the Minister with the power to admit any person on humanitarian and compassionate grounds. These two sections are an exemption to the basic character of the Act in Section 9(1), which states that immigrants apply for admission from abroad. The Minister's authority has been delegated in Canada to immigration officers at all levels of seniority as well as to program managers at visa offices abroad. Refugee claimants who have been refused under the PDRCC, along with everyone else, may apply for the review. The bill sets no limit as to how many times one may submit an application. A recovery fee of \$450.00 must accompany every application.⁵⁰

B. Immigration Enforcement and Control

An immigration program that does not have proper control mechanisms in place is

⁴⁸Susan Davis and Lorne Waldman, The Quality of Mercy: A Study of the Processes Available to Persons Who are Determined not to be Refugees and Who Seek Humanitarian and Compassionate Treatment, p. 17, March 1994.

⁴⁹Ibid., p. 5.

⁵⁰Ibid., p. 11.

susceptible to abuse by criminals, terrorists and others who might threaten the safety and welfare of the nation. The advent of new sophisticated technology has led to a proliferation of highly professional criminal networks bent on bypassing international and national law. In recent years, a trend toward greater use of false travel documents has been detected by Canada's immigration officials. The RCMP have identified the use of false travel documents used to smuggle illegal migrants into Canada as a major concern. It has also been found that at times foreign criminal elements try to take advantage of Canada's relatively unprotected borders and its system of justice and appeals. Bill C-86 amendments to the Act address these concerns.⁵¹

There are a number of provisions in the Act that make immigrants or visitors inadmissible to Canada, or if already inside its borders, subject to removal. The changes arising from Bill C-86 address in particular those provisions that deal with criminality and security matters. Before Bill C-86 took effect, Canadian and foreign criminal convictions received identical treatment, and both "had to be proven on balance of probabilities."⁵² The bill's effect on the treatment of foreign criminals was twofold. One, now only reasonable grounds to believe that a conviction has taken place satisfy the new provisions of the Act. Two, new provisions now accord foreign acts or omissions where no conviction occurred the same treatment as convictions, provided there were reasonable grounds to believe that the act or omission occurred.⁵³ An amendment formally approved by the Legislative Committee would ensure that

⁵¹Immigration Canada, Managing Immigration..., p. 7.

⁵²Young, Bill C-86..., p. 13.

⁵³Statutes of Canada 1992, Sec. 19(1)(c.1), p. 19; Sec. 19(2)(a.1), p. 22.

the foreign act would need to be criminal in that jurisdiction.⁵⁴ The most important changes to the inadmissibility provisions relating to criminality and security occurred in Section 19 of the Immigration Act (see Appendix 1).

The jurisdiction of Senior Immigration Officers (SIOs) is expanded by the bill. Prior to 1 February 1993, an SIO who was notified that a person at a port of entry may be inadmissible had no jurisdiction to issue a removal order, but had to, in instances where the person did not immediately depart from Canada, refer the person to an inquiry (a quasi-judicial proceeding, headed by an adjudicator, with the claimant guaranteed counsel). Now the bill allows the SIO to make an exclusion order in limited circumstances: (1) for a person who needs the consent of the Minister to enter but has failed to obtain it; (2) for persons who do not possess the required documentation (e.g. visa, passport, employment authorization), provided there were no other reasons for inadmissibility that would demand the presence of an adjudicator.⁵⁵ Immigration lawyers were displeased by this change, arguing that an inquiry should be available upon request, but the change stood.⁵⁶

Prior to 1 February 1993, a person who received a departure notice but did not leave Canada by the stated time had to be brought back to an inquiry and a removal order had to be issued by an adjudicator. The bill changes this, whereby the departure notices that are not obeyed are automatically deemed to be deportation orders (except if the person is in

⁵⁴Ibid., Sec 19(2)(a1)(2), pp. 22-23.

⁵⁵Ibid., Sec. 23(4), p. 25.

⁵⁶Paul Brooks, Citizenship and Immigration Canada, Control Policy, Ottawa. Personal interview. 31 March 1994.

detention).⁵⁷ For this change to be effective, persons who must leave because of the deportation order are required to appear for verification before an immigration officer at the time of their departure, and a certificate of departure is issued.⁵⁸ In the Legislative Committee, this provision was altered to allow for verification of departure abroad.⁵⁹

The Act provides that a Convention refugee may not be removed from Canada for specified reasons relating to national security unless the Minister decrees that the person poses a danger to the security of Canada; similarly, a Convention refugee cannot be removed for reasons relating to criminality unless the Minister decrees that the person poses a danger to the public in Canada.⁶⁰ As initially drafted, the bill would have removed these provisions providing protection for Convention refugees. However, at the suggestion of the government, the Legislative Committee studying the bill reinserted it, thus no changes occurred.⁶¹

A new provision states that persons who may be required to be finger printed include people who claim to be Convention refugees.⁶² This provision was modified by the Legislative Committee so that these fingerprints will be destroyed once citizenship has been granted.⁶³ New provisions now permit immigration officers to search people seeking to enter Canada if the

⁵⁷Statutes of Canada 1992, Sec. 32.02, p. 36.

⁵⁸Ibid., Sec. 32.01, p. 36.

⁵⁹Young, Bill C-86..., p. 18.

⁶⁰Statutes of Canada 1992, Sec. 53(1), p. 55.

⁶¹Peter Braid. Personal interview. 31 March 1994.

⁶²Statutes of Canada 1992, Sec. 110(2)(a), p. 102.

⁶³Ibid., Sec. 110(2.1), p. 103.

officer has reasonable grounds to assume they have not revealed their identity or have hidden or disposed of their documents. Searches can thus be conducted of persons as well as of vehicles and personal belongings.⁶⁴ Searches are also permitted where an officer believes on reasonable grounds that a person possesses documents used in smuggling people into the country, or is a person who travels with people entering the country illegally and who may be in possession of documents intended for illegal re-use.⁶⁵ All searches must be authorized by an SIO and conducted by a person of the same sex as the person being searched.⁶⁶

Before the new legislation took effect on 1 February 1993, most persons whose freedom of movement was restricted under the Act had their case reviewed after 48 hours, and weekly after that. Initially, the period between the reviews was increased from a week to thirty days. Later, the Legislative Committee added another change, a seven day review after the initial 48 hours review. These changes do not apply to those people who seek to come to Canada and whose admissibility on national security grounds is brought into question by Canada's inability to identify them.⁶⁷ Consistent with current legal practice, the bill states that most detention review be held in public, unless the adjudicator rules otherwise.⁶⁸ Bill C-86 eliminated the power of the Board to order a release of a detained person pending a hearing and disposition of

⁶⁴Ibid., Sec. 110(2)(a.1), p. 103.

⁶⁵Ibid., Sec. 110(2)(a.2), p. 103.

⁶⁶Ibid., Sec. 110.1, p. 104.

⁶⁷Ibid., Sec. 103(6), p. 99; Sec. 103(1), p. 98.

⁶⁸Ibid., Sec 103(9)-(11), pp. 100-101.

an appeal (clause 69, p. 76, repealing Sec. 78).⁶⁹

Bill C-86 clarified the requirement of transportation companies to ensure that all passengers brought to Canada are in possession of valid travel documents upon arrival.⁷⁰ The changes arising from the bill make it less difficult for the government to lay charges against transportation companies who facilitate the movement of undocumented people to Canada. The past policy of administrative fines was replaced by an administrative fee system. Under this system, fees are assessed against carriers that bring passengers who are found inadmissible to Canada, who are detained trying to elude examination, or who enter as members of the crew and then desert.⁷¹ To enforce compliance with an order, the Minister may require the transportation company to post a security deposit with the government as a guarantee that the company will pay all amounts for which it may become responsible under the Act.⁷²

Under Bill C-86 changes, the definition of a transportation company has been expanded to include a designated airport authority.⁷³ Prior to 1 February 1993, the Act stated that any company engaged in transportation of people may be required to provide properly maintained facilities for the examination and detention of people brought into Canada. Bill C-86 empowers the Minister to order the upgrading of the facilities, or to perform the work at the company's

⁶⁹Young, Bill C-86..., p. 19.

⁷⁰Paul Brooks. Personal interview. 31 March 1994.

⁷¹Statutes of Canada 1992, Sec. 91.1(1)(a)(b), p. 86.

⁷²*Ibid.*, Sec. 92(1), p. 87.

⁷³*Ibid.*, Sec. 2(1)(a)(b), p. 2.

expense.⁷⁴

Bill C-86 significantly increased the fines for the offence of bringing undocumented passengers to Canada. In the past, the only penalty was a fine of \$5,000 maximum. Now, the penalties are, on conviction on indictment, a fine of up to \$25,000 for a first offence and, for a subsequent offence, a fine of up to \$100,000 or incarceration for up to three years, or both. Summary conviction penalties can vary from fines of \$10,000 to \$50,000 and/or six months of incarceration, determined by the severity of the offence.⁷⁵

In addition to strengthening the Act through the revised and new offences affecting transportation companies, Bill C-86 made the penalties for some existing offences more severe and created new ones. For those individuals who engage in smuggling small groups of undocumented people, fines have been significantly increased. For example, for smuggling groups of under ten people, maximum fines were raised from \$10,000 to \$100,000 for conviction on indictment and from \$2,000 to \$10,000 on summary conviction.⁷⁶

Another change arising from the bill gives the government the power to seize vehicles as forfeit, and as evidence when applied to the offence of smuggling groups under ten people. Prior to 1 February 1993, these provisions applied only to the offence of smuggling groups of more than ten people.⁷⁷

Bill C-86 also expands the number of offences relating to the immigrant investor

⁷⁴Ibid., Sec 89(2)-(7), pp. 84-85.

⁷⁵Ibid., Sec. 97.1(1)(2), p. 93.

⁷⁶Ibid., Sec. 94.1, p. 90.

⁷⁷Paul Brooks. Personal interview. 31 March 1994.

program. The new offences associated with this program include: (1) submitting false information to the Minister; (2) making false or misleading representations about a business or fund, or falsely stating that a business or a fund has been approved; and (3) managing or controlling a business or fund and failing to comply with regulations regarding the approval of the business or fund.⁷⁸ Other enforcement measures affecting the investor program include the application of injunction to force compliance with terms and conditions under which a business or fund has been approved.⁷⁹ More power is given to the Minister to examine approved businesses and funds, including power of search and seizure.⁸⁰ As well, new regulatory powers relating to the approval of businesses and funds and relating to immigrant investors have been instituted.⁸¹

The changes to the Act arising from Bill C-86 point to the federal government's concern about the use of false documents and the entry of undocumented persons into Canada. In summary, Bill C-86: (1) significantly increased penalties for transportation companies that facilitate the movement of undocumented passengers to Canada; (2) imposed greater responsibility on transportation companies not to move undocumented passengers from the point of embarkation to the point of arrival in Canada; (3) raised penalties for smuggling small groups and created new forfeiture provisions; (4) instituted new powers to fingerprint refugee claimants and to search both refugees and others for travel documents; (5) denied the benefit of the doubt

⁷⁸Statutes of Canada 1992, Sec. 94.6(1), p. 91.

⁷⁹Ibid., Sec. 107.1, p. 101.

⁸⁰Ibid., Sec. 102.001, p. 94.

⁸¹Ibid., Sec. 114(1)(a.4)-(a.6), p. 105.

to refugee claimants when there were reasonable grounds to assume that they had, wilfully, destroyed or disposed of documents relating to their identity; and (6) denied landing to recognized Convention refugees until they produced valid travel documents or satisfactory identity documents.

C. Immigration Levels Management

Section 7 of the Act requires that the Minister present an annual plan outlining the number of immigrants planned for the coming year. Prior to 1 February 1993, the federal government had no mechanism in place to ensure that the number is achieved or not exceeded, or that the immigration program addressed the changing needs of Canadian society. In the past, the mechanisms applied had been primarily visa requirements selectively imposed on the refugee-producing countries and cessation of processing (the number of visas issued abroad had an annual limit). While these two measures attempted to address the problems inherent in the program, they tended to produce uncertainty and backlogs. Bill C-86 significantly expanded the substance of the immigration plan and instituted new regulatory powers which are supposed to enhance the federal government's ability to manage the program according to the plan.⁸²

Under Bill C-86, the annual immigration plan continues to give an estimate of the total number of immigrants, refugees and designated classes to be accepted to Canada.⁸³ The Bill

⁸²Pamela Cullum, Citizenship and Immigration Canada, Refugee Affairs, Ottawa. Personal interview. 31 March 1994.

⁸³Statutes of Canada 1992, Sec. 7(2)(a), p. 9.

allows the federal government to prescribe those classes of immigrants subject to numerical limitations and those that are not. The level determined for each class is either an estimate or a maximum. Immigrants given the status of Convention refugee are the only class not subject to a numerical limit. Whereas in the past Canada had to accept all applicants who qualified under the Act, the new provisions of Bill C-86 allow for discrimination among applicants, for example, only the best can be selected in the independent class.⁸⁴ In reference to the selection process regarding the classes of immigrants admitted to Canada, the present federal government continues with public consultations across Canada.⁸⁵

The bill gives power to the Minister to state the number of employment authorizations that can be issued for each class of employment and the regulatory power to formulate those classes and to specify whether the authorizations can be numerically restricted. This allows the Minister to issue only a certain number of employment authorizations in a specific period, for example, with respect to the Live-in Caregiver Program.⁸⁶

Bill C-86 gives the Minister the power to change the immigration plan for almost any reason. For example, he/she may do so in situations where he/she considers it necessary to

⁸⁴Pamela Cullum. Personal interview. 31 March 1994.

⁸⁵Based on the extensive consultations with the Canadian public, the former federal government proposed to create three streams of immigrants. Stream 1, to be processed on demand with no numerical limits, could be composed of spouses, fiance(e)s, and dependent children, Convention refugees recognized by the Immigration and Refugee Board, and investors. Stream 2, to be subject to numerical limits and processed on a first-come, first-served basis, could include parents and grandparents, sponsored refugees, skilled workers with arranged employment, the self-employed, live-in caregivers, and immigrants in special programs. Stream 3 would also be the subject to numerical limits but only the best applicants would be selected. Immigrants in this category could include skilled workers and entrepreneurs. (See M. Young, Bill C-86; An Act to Amend the Immigration Act, p. 23).

⁸⁶Marrocco and Goslett, 1994 Immigration..., Sec. 7(3), p. 41; Sec. 114(1)(j.2), p. 369.

respond to unexpected changes in the migration to Canada, or as the result of a request of a province or for any other reason he/she may consider appropriate. When the Minister initiates such an action, he/she must present the intended changes in Parliament three months before making the change.⁸⁷

A new provision introduced by the bill and specifically referred to in the Act is the right of groups to sponsor refugees and other classes.⁸⁸ This provision reflects the federal government's desire to involve groups other than government in the immigrant settlement and integration process and in refugee protection. The bill also provides for new regulations relating to the definition and selection of investors.⁸⁹ As well, the bill brings in a variety of new regulatory powers relating to selection of immigrants. The first is a power to describe criteria for landing on humanitarian and compassionate grounds.⁹⁰ Prior to the bill, general criteria regarding the right of Governor in Council to land people from within Canada by Order in Council were administrative and outlined in the Immigration Manual. M. Young says that the power previously in the hands of the Governor in Council could be given by it to the Minister to continue to exempt any person individually from the regulations or to facilitate landing on humanitarian grounds.⁹¹ The second regulatory power relating to the selection of immigrants affects classes of immigrants for which any or all dependants must be assessed along with the

⁸⁷Ibid., Sec. 7(11)-(14), pp. 43-44.

⁸⁸Ibid., Sec. 6(2)(b), p. 30.

⁸⁹Ibid., Sec. 114(1)(a.4), p. 366.

⁹⁰Ibid., Sec. 6(5), pp. 30-31; Sec. 114(1)(e), p. 367.

⁹¹Margaret Young, Bill C-86..., p. 24.

principal applicant. This gives the government the right to give points to spouses, (similar to the Quebec point system).⁹² The third new regulatory power allows the government to define what constitutes becoming successfully established in Canada.⁹³

Prior to 1 February 1993, the Act recognized the agreements relating to immigration between the federal government and the provinces. However, the Act did not address the relationship between such agreements and the annual levels plan or immigration management concerns. Bill C-86 addresses this area by referring to these agreements and their effect on the immigration plan. For instance, in its annual estimates regarding the granting of visas to immigrants, the federal government must consult with the provinces that have exclusive responsibility for selecting some classes of immigrants.⁹⁴ In the past, only Quebec had this responsibility, pursuant to the Canada-Quebec Accord.⁹⁵ As well, in reference to each class of immigrants, the mandate of the federal government to determine whether a class shall be restricted numerically is affected by provincial requirements in circumstances in which the provinces had imposed the maximum number of immigrants for each class⁹⁶, (Convention refugees excluded).

⁹²Marrocco and Goslett, op. cit., Sec. 6(8), p. 32; Sec. 114(1)(a.1), p. 366.

⁹³Ibid., Sec. 114(1)(a.2), p. 366.

⁹⁴Ibid., Sec. 7(2)(b)(ii), p. 41.

⁹⁵An agreement reached between the Government of Canada and the Government of Quebec on 5 February 1991 regarding Quebec's desire to establish "...new means to preserve its demographic importance in Canada, and to ensure the integration of immigrants in Quebec in a manner that respects the distinct identity of Quebec." (See Immigration Canada, Canada - Quebec Accord: Relating to Immigration and Temporary Admission of Aliens, p. 1. IM-110-4-91.

⁹⁶Marrocco and Goslett, op. cit., Sec. 7(5), pp. 41-42.

Prior to 1 February 1993, there was no provision in the Act compelling any permanent resident to reside in a particular province or to engage in a given profession. As a matter of fact, prior to Bill C-86, Sec. 114(4) of Immigration Regulations did not allow for restrictions on permanent residents with respect to the area in which they chose to reside.⁹⁷ Now, the Act allows for terms of residence and occupation to be prescribed for two purposes: (1) for the purpose of supplying sufficient medical services; and (2) for the purpose of promoting economic growth and prosperity in all regions in Canada.⁹⁸ The criteria affecting the variations in the terms and conditions pertaining to landing are outlined in Regulations. The provinces with agreements governing the selection of immigrants (except Ontario, British Columbia and Manitoba), not the federal government, determine such terms and conditions. In such situations, the federal government can prescribe the terms and conditions that cannot be imposed.⁹⁹

These provisions were introduced to strengthen the system of awarding extra points to applicants in possession of skills designated by the provinces. From an effectiveness of immigrant selection perspective, it defeats the purpose to accept health professionals as permanent residents, for example, based on a need in a specific province, when the person does not have to, and cannot be compelled, to establish residence in that province. However, these provisions could be challenged by immigrants on the basis of Charter mobility rights.¹⁰⁰

⁹⁷Young, Bill C-86..., p. 25.

⁹⁸Marrocco and Goslett, *op. cit.*, Sec. 114(1)(ii.3), p. 372.

⁹⁹*Ibid.*, Sec. 114(1)(ii.4), p. 372.

¹⁰⁰Paul Brooks. Personal interview. 31 March 1994.

D. Streamlining of Immigration Administration

Administration of the Immigration Act had been faulted - by external and internal critics of the system - for being too swamped in paperwork, slow and filled with unnecessary formalities. Bill C-86 aims to streamline the system. The following are important changes to the Act.

First, a permit issued by the Minister, previously valid for only one year, can now be issued for up to three years. If the permit holder wishes to leave and then re-enter Canada, the permit must specifically allow for departure and re-entry.¹⁰¹

Second, Bill C-86 eliminates the returning resident permit and introduces provision for a new permanent resident card. Subject to regulations, persons in possession of the card are considered permanent residents, unless otherwise determined. In cases where permanent resident cards are lost or stolen, a new provision allows for visa officers to issue a document to establish permanent residency. A person not in possession of either of these two cards would be considered not to be a permanent resident, unless he/she can provide proof to the contrary.¹⁰²

Third, the Legislative Committee studying the amendments to the Act made changes to the presumption in Sec. 24 of the Act which states that a person residing outside of Canada for more than 183 days in a year has abandoned Canada as his/her place of permanent residence. In place of this presumption, a provision was introduced "...stating that a person ceases to be

¹⁰¹Statutes of Canada 1992, Sec. 37(3)(4.1), p. 39.

¹⁰²Ibid., Sec. 10.3, p. 16.

a permanent resident when he or she ceases ordinarily to reside in Canada."¹⁰³

Fourth, prior to the Bill, visitor stays of more than three months required written authorization. Now, the period a visitor's visa is valid for is set in regulations at six months.¹⁰⁴

Fifth, the procedures regarding visitors who overstayed, engaged in unauthorized work or studies, or did not abide by their terms and conditions of visit were also changed by the bill. Now, a Ministerial permit is no longer required to extend the visit; the matter can be dealt with administratively.¹⁰⁵

Sixth, to facilitate a more efficient entry of persons who cross the border frequently, a new provision allows the Minister to designate classes of persons who might be examined in an appropriate manner and who, thus, would not have to be seen by an immigration officer at the port of entry.¹⁰⁶

Seventh, to facilitate the development of regional processing centres abroad for business and skilled applicants, the Minister is now able to determine where applications for visas and other immigration documents can be made.¹⁰⁷

Eighth, Paul Brooks notes that significant administrative effectiveness will be achieved by the additional removal powers given to SIOs at ports of entry in clear cases, which will result

¹⁰³Margaret Young, Bill C-86..., p. 27.

¹⁰⁴ Marrocco and Goslett, 1994 Immigration..., Sec. 114(1)(h.2), p. 368.

¹⁰⁵Statutes of Canada 1992, Sec. 27(2.1), p. 30.

¹⁰⁶Marrocco and Goslett, op. cit., Sec.114(1)(j.4), p. 369.

¹⁰⁷Statutes of Canada 1992, Sec. 10.1, p. 16.

in a corresponding reduction of the number of inquiries needed.¹⁰⁸

E. Other Provisions Pertaining to the Immigration Program

Prior to 1 February 1993, Sec. 19(1)(a) of the Act stated that persons are inadmissible to Canada if they "...are suffering from any disease, disorder, disability or other health impairment..." which would pose a danger to public health or to public safety or their admission would put or might reasonably be expected to put "...excessive demands on health or social services."¹⁰⁹

Influenced by disability rights organizations and other groups with a vested interest in the matter and supported by the argument that it violates the Charter by discriminating against disabled persons, Bill C-86 changed the section to exclude references to "disease", "disorder" and "disability". As well, the interpretation of "excessive demands" was changed so as to be "...within the meaning assigned to that expression by the regulations, on health or prescribed social services."¹¹⁰

Another change arising from the bill is intended to benefit family reunification in Convention refugee cases. Utilizing a new regulatory power, the Governor in Council may exempt classes of immigrants from application of the "excessive demand" criteria. This provision would be of benefit primarily to families of persons recognized as refugees in Canada.

¹⁰⁸Paul Brooks. Personal interview. 31 March 1994.

¹⁰⁹Frank N. Marrocco and Henry M. Goslett, 1992 Immigration..., p. 57.

¹¹⁰Statutes of Canada 1992, Sec. 19(1)(a), p. 19.

Once qualified as Convention refugees, these persons have the right to remain in the country. Full application of health criteria would seem counterproductive, given the provisions of the Act affecting family reunification. However, the criteria of public health and safety remain unchanged.¹¹¹

In the past, refugee claimants were required to undergo a medical examination after they passed the eligibility and credibility stage of the determination process and were referred to the Refugee Division of the IRB. The provisions of Bill C-86 now require that refugee claimants undergo a medical examination within 60 days of their arrival in Canada.¹¹²

The Act states that persons are inadmissible to Canada if there are reasonable grounds to believe that they are unable to provide support for themselves and their dependants, unless they can provide evidence to the contrary. In the past, some persons have successfully argued that receiving social assistance from the people of Canada was proof of having adequate means of support. The Bill defeated that argument by specifying that adequate means of support must be "...other than those that involve social assistance".¹¹³

To address the cases in the immigration system that are still not determined, Bill C-86 contains a number of transitional provisions affecting current applications. These provisions proved controversial because they apply retroactively. This puts some applicants into situations where they have entered the system under one set of rules, but might be assessed under another. In spite of strong criticism by the legal profession and others with vested interests in the matter,

¹¹¹Marrocco and Goslett, 1994 Immigration..., Sec. 114(1)(m.2), p. 369.

¹¹²Statutes of Canada 1992, Sec. 19(1)(a), p. 19.

¹¹³Ibid., Sec. 19(1)(b), p. 19.

the provisions remained in the Bill.¹¹⁴ Inquiries and hearings in progress are conducted under the old rules, however, the removal orders issued at their conclusion are carried out under Bill C-86.¹¹⁵ Federal Court applications pending are affected by the new provisions, with some exceptions, although the Chief Justice is given the overriding discretion to disregard the transitional rules if he or she deems it appropriate.¹¹⁶

One of the changes arising from the Bill C-86 was the transfer of the Adjudication Division of Employment and Immigration Canada to the Immigration and Refugee Board.¹¹⁷ In the past, legal professionals have expressed concern about the independence of adjudicators, given their position as employees of the Department.¹¹⁸ Bill C-86 also clarifies the powers of adjudicators by according them the powers and authority of a commissioner appointed under Part 1 of the Inquiries Act, including the power to call witnesses and force them to testify under oath and produce any other relevant information.¹¹⁹

The interpretation and implementation of Bill C-86 appear to be the federal government's response to pressures on the Immigration Program arising from its commitment to family reunification, the requirement to accord certain guarantees of procedural fairness to non-residents claiming refugee status in Canada, and international commitments to refugee protection grounded

¹¹⁴Paul Brooks. Personal interview. 31 March 1994.

¹¹⁵Statutes of Canada 1992, clauses 110 and 111, p. 117.

¹¹⁶Ibid., clause 117, p. 119.

¹¹⁷Ibid., Sec. 57, p. 57.

¹¹⁸Peter Braid. Personal interview. 31 March 1994.

¹¹⁹Statutes of Canada 1992, Sec. 80.1(2), pp. 77-78.

in the Geneva Convention Relating to the Status of Refugees and to the Office of United Nations Commissioner for Refugees (UNHCR). For the immigration program to be effective, difficult choices have to be made. In the fiscally constrained environment of Canada's program delivery, the federal government cannot accomodate everyone who wishes to come to Canada nor can it satisfy every group in Canada who has a special interest in immigration.¹²⁰

The federal government is faced with several fundamental questions. First, given the ethnic composition of Canadian society, what importance should be attached to the principle of family reunification, and relatedly, what is the relationship between the family class criteria of the immigration program and the influence of ethnic communities on the political process? Second, is it better to manage immigration in response to Canada's changing economic needs or on the basis of long-term social goals? Third, which classes of immigrants, and how many relative to other classes, should be managed according to the criteria established by the Bill and which classes, and how many, should be admitted on the basis of a certain right? Fourth, what is the effect of immigration on the social and cultural life of Canada? What are the benefits of cultural diversity? Conversely, what are the threats to Canada's culture and social harmony? Fifth, are the intentions of the bill too exclusive; are they sufficiently humanitarian? Sixth, are the Bill's amendments relating to the in-Canada refugee determination system in violation of the Charter of Rights and Freedoms? Seventh, do the Bill's intentions contravene the spirit of Canada's international commitments to the Convention and the UNHCR?¹²¹

¹²⁰Immigration Canada, Managing Immigration..., pp. 1-2.

¹²¹Citizenship and Immigration, Immigration Consultations 1994: Discussion Document, pp. 10-17.

The success or failure of Bill C-86 would appear to depend on how the answers to these questions emerge to influence actual operations of the immigration program.

3. CANADA'S COMMITMENT TO INTERNATIONAL AGREEMENTS AND HUMAN RIGHTS

Although Canada signed the 1951 Convention Relating to the Status of Refugees in 1969, its immigration policy really did not distinguish between refugees and other immigrants until 1976 when the Immigration Act included statutory recognition of refugee status and the protection accorded refugees under the Convention.¹²² Canada's prior involvement in refugee protection included participation in the Office of United Nations High Commissioner for Refugees (UNHCR) and admission of refugees on humanitarian and compassionate grounds from Hungary in 1956, from Czechoslovakia in 1968, from Uganda and Chile in the early 1970s, and from Indochina in the early 1980s. Whereas in the past Canada had control over who was admitted, the new refugees of the 1980s and 1990s whose numbers are not restricted pose different challenges. Responding to these challenges, the intentions of Bill C-86 to improve the immigration program in terms of efficiency, cost-effectiveness, enforcement and control appear to be in conflict with the spirit of international law and Canada's own refugee laws. This occurs in the context in which the federal government is subjected to cross pressures from those in society who insist on a greater adherence to the Convention regardless of what it takes to help refugees, and from those who are concerned about the financial costs associated with these commitments and the threats to public health and safety and who generally want less immigration

¹²²Grant Purves, Humanitarian Immigration and Canadian Immigration Policy, p. 2.

to Canada. And in this confrontation, the losers would appear to be genuine refugee claimants.

A. The 1951 United Nations Convention Relating to the Status of Refugees

The states participating in the 1951 Geneva Convention insisted on rather restrictive criteria for determining those allowed to claim refugee status. The Convention applies to refugees already on the states' territories. Globally, over one hundred states are signatories to the Convention. The Convention's two fundamental provisions are its definition of "refugee" and its prohibition against "refoulement".¹²³

Article 1, Section A of the Convention states that a refugee is a person:

who as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his normal habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.¹²⁴

Each signatory state was given a choice of which of these interpretations best applied for the purpose of its obligation under the Convention. As well, the Convention was to be renewed every three years. However, it soon became clear that the new refugee situation worldwide necessitated a change in the provisions of the Convention. The resulting 1967 Protocol Relating to the Status of Refugees removed the limitation of date and made the reference to events before

¹²³John P. Humphrey, "Rapporteur's Introduction", p. 2, in Alan E. Nash (ed.) Human Rights and the Protection of Refugees under International Law.

¹²⁴United Nations, 1951 Convention and Protocol Relating to the Status of Refugees, p. 12.

1951 obsolete.¹²⁵

The other fundamental provision of the Convention is Article 33 which outlines states' obligation to protect the human rights of refugees. Named "Prohibition of Expulsion or Return (Refoulement)", Article 33 states:

No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.¹²⁶

As defined in Article 33, the notion of "non-refoulement" raises question of application. While it is clearly designed to help refugees who have already entered a state legally or illegally, Article 33 does not specifically address the issues of admission and refusal at the border. As well, a consensus on how to interpret the words expel or return was not reached. States were not willing to include in the Convention any article on admission of refugees; to allow entry on the principle of non-refoulement may well have been too close to having to grant asylum.¹²⁷ However, since 1951, a broader interpretation of non-refoulement has established itself. States, including Canada, have periodically allowed large numbers of refugees not only to cross their borders but also to remain and be permanently resettled.¹²⁸

Even though according to the Convention the signatory states to the Convention shall not return refugees to a state where they may be persecuted, the receiving states are not required

¹²⁵Ibid., p. 2.

¹²⁶Ibid., p. 24.

¹²⁷Guy S. Goodwin-Gill, The Refugee in International Law, pp. 72-74.

¹²⁸Gerald Dirks, "Canadian Refugee Policy: Humanitarian and Political Determinants", p. 122, in Elizabeth Ferris (ed.) Refugees and World Politics.

to keep them indefinitely and they are not prohibited from sending them to a third country which may not accord them full protection under the Convention. States reserve the right to place their own security interests ahead of the rights of the refugees; they are also not required to offer refuge to those who have committed serious crimes because they would pose a threat to the receiving state.¹²⁹

The 1951 Convention was carefully designed and limited in scope. Because of the reluctance of states to cede any of their sovereign authority, no process was specified in the text for ascertaining whether a person was or was not to be accorded protection under the Convention and its subsequent 1967 Protocol. Yet Article 35 of the Convention imposes an obligation on signatory states to cooperate with the UNHCR. In October 1977, the Executive Committee of the UNHCR suggested that the signatories to the Convention satisfy certain procedural requirements in their refugee determination systems. Canada, along with others, established internal procedures to meet the requirements of the Convention,¹³⁰

In spite of its narrow scope, the Convention did consolidate previous international instruments relating to refugees and provided an international definition of the rights of refugees. It outlined the basic minimum standards for the treatment of refugees. The Convention is to be applied to people in distress without discrimination as to race, religion, or country of origin. It also contained prohibitions against expulsion of refugees and made provisions for refugee documentation, including travel documents. As well, it provided the reason for the

¹²⁹United Nations, pp. 12-14.

¹³⁰W. Gunther Plaut, Refugee Determination in Canada, p. 14, 17 April 1985.

establishment of the Office of United Nations High Commissioner for Refugees.¹³¹

B. The Office of United Nations High Commissioner for Refugees (UNHCR)

The Office of the UNHCR was established by the General Assembly in 1951 with two main objectives: (1) to provide international protection to refugees as defined in the UNHCR Statute, and (2) to seek permanent solutions to their problems. The initial intention of the General Assembly was to establish the UNHCR as a temporary institution; however, its mandate as a temporary subsidiary arm of the General Assembly is now renewed at regular intervals.¹³²

The UNHCR was given the mandate:

to provide international protection to persons who, out of fear of persecution, had fled from their own countries and who could no longer count on their national authorities for the protection of their lives, liberty and basic human rights.¹³³

In moving across international frontiers and unwilling or unable to return, refugees move outside the parameters of protection normally offered by a state to its citizens. The fundamental role of the UNHCR mandate, then, is to ensure that refugees receive that protection. This is to be achieved by providing protection against "refoulement", by assuring that their basic needs are satisfied, and by ensuring that their basic human rights are respected.¹³⁴

¹³¹United Nations, op. cit., p. 1.

¹³²Ibid., p. 1.

¹³³Fiorella Capelli, "UNHCR and the Plight of Refugees: International Protection and Solutions in a Changing World Context", pp. 30-31, in Allan E. Nash (ed.) Human Rights and the Protection of Refugees under International Law.

¹³⁴Margaret Young, Refugee Protection: The International Context, p. 3, November 1991.

In addition to the provision of protection, UNHCR is to seek permanent solutions to first repatriate refugees to regions from which they came, or to integrate them locally into the country of first asylum, and as a last resort, resettle them outside their regions.¹³⁵

The 1951 Convention and the 1967 Protocol provide the basis for the UNHCR mandate to intervene on behalf of refugees. They also oblige signatories to these documents to accord certain protection and treatment to refugees and work together with UNHCR in the fulfillment of its functions. The notion of cooperation is most evident where UNHCR takes part in the states' refugee determination process. This allows the UNHCR to fulfill its mandate of monitoring the treatment of refugees by receiving states. Regardless of the process or the degree of participation in the refugee-receiving states' refugee determination systems, the UNHCR role is to help identify those who are genuine refugees, and to ensure that the host country interprets consistently and fairly what are essentially international criteria. In theory, at least, states and the UNHCR work together to provide for the effective implementation of international obligations toward refugees.¹³⁶

The mandate of the UNHCR is to provide for refugee protection in concert with the host country. Immigration policy dealing with refugees, on the other hand, is used by the host country to regulate the flow of people entering its territories. At present, coerced and erratic movements of people challenge the ability of sovereign states, Canada included, to determine who they admit. In the international community of sovereign states, the immigration policies dealing with refugees in some situations tend to work against the needs of refugees. The

¹³⁵Ibid, pp. 3-5.

¹³⁶Joyce Cavanagh-Wood. Personal interview. 22 October 1993.

challenges confronting Canada are indicative of a situation where the elusive balance between control over territory and the interests of refugees will be increasingly more difficult to achieve.¹³⁷

C. Canada and the New Refugees of the 1980s and 1990s

The framework of modern refugee law came into being with the introduction of the Geneva Convention and the establishment of the UNHCR. Canada, along with other refugee-receiving states, responded to the plight of refugees by accepting them from refugee camps abroad from the 1950s to the early 1980s. Until the introduction of Canada's Immigration Act in 1976, refugees had no formally recognized rights in Canada. Canada considered itself a country of permanent resettlement for immigrants, with emphasis on controlling, through the point system, who entered the country. Although Canadian policy was not without humanitarian intentions during this period, Howard Adelman argues that "...the key that unlocked the door to Canada was self-interest, for labour was needed to feed a rapidly expanding and industrializing economy."¹³⁸ These arrangements functioned relatively well for Canada, until the early 1980s, even though refugee situations around the world changed considerably over this period.¹³⁹

¹³⁷Victor Malarek, Heaven's Gate: Canada's Immigration Fiasco, pp. 83-84.

¹³⁸Howard Adelman, "Canadian Refugee Policy in the Postwar Period", in Howard Adelman (ed.) Refugee Policy: Canada and United States.

¹³⁹Don Gerlitz, Immigration and Refugee Board, Ottawa. Personal interview. 22 October 1993.

In the early 1980s, however, the changes ranging from the political turmoil, famine and over-population to increased global communication and ability of people to be aware of other places in the world where life may be safer and better have introduced new dimensions to the notion of refugee protection that challenge the absorptive capacities of refugee-receiving states. Canada, along with other governments in the West, is confronted by refugee-seeking people from far away countries whose presence causes apprehension and discomfort in some segments of the population. The unannounced arrivals of these people and the resulting difficulties associated with their settlement and integration into the Canadian society force the federal government to introduce restrictive practices and deterrent measures to placate those in the society who view the refugees as a threat to their well-being and to keep the increasing costs of running a complex refugee determination system under control.¹⁴⁰ At the same time the federal government is under pressure from refugee advocates who insist on honouring Canada's commitments to the Geneva Convention and the UNHCR.¹⁴¹ David A. Martin says that in the face of the dilemmas confronting them, Canada's and other countries' policy-makers ought to fundamentally rethink the notion of refugee protection, but few are doing it.¹⁴² However, more often than not, the federal government and also other governments in the West, respond in haste with restrictive measures to the well-publicized arrival of refugees on their territories¹⁴³, compelling

¹⁴⁰Economic Council of Canada, New Faces in the Crowd, p. 25.

¹⁴¹Dianne Rinehart, "Agencies Urge Refugee Boost", Winnipeg Free Press, 15 January 1994.

¹⁴²David A. Martin, (ed.), The New Asylum Seekers: Refugee Law in the 1980s, p. 2.

¹⁴³David MacDonald, "U.S. Targets Immigrants", Winnipeg Free Press, 19 August 1993.

refugee advocates to brand the governments' response xenophobic¹⁴⁴ and disregard the genuine fear of the public - fear that the governments are attempting to deal with. This is the context in which the intentions of Bill C-86 must be understood.

Although the 1951 Convention is a narrowly defined document which does not accord a full legal right of asylum - in terms of an indefinite stay and other rights of citizenship - the non-refoulement obligation (Article 33), in practice, has evolved into an individual right of asylum. Although this may not be the case worldwide, in Canada and in most Western countries the Convention is the basis for a "de facto" right to asylum for those who manage to get into an asylum country and prove that they face persecution at home.¹⁴⁵

That the beneficiaries of non-refoulement are now almost routinely granted full asylum did not arise from any amendments to the Convention. Instead, it is a consequence, in part, of refugee-receiving states in the West almost never wanting to accept refugees from their fellow states. As well, refugees have been allowed to stay in these states, at least up until now, because of these states' humanitarian traditions. Because of these traditions, governments in the West have found warehousing refugees in camps politically unacceptable, although this is still the case in many third World countries today;¹⁴⁶ for example, Pakistan providing refuge for Afghanistans in Asia.

Thus refugee claimants who can prove entitlement to non-refoulement in Canada with

¹⁴⁴Canadian Press, "Refugee Policy Bent for Right Wing: Matas", Winnipeg Free Press, 7 October 1993.

¹⁴⁵David A. Martin, "The Refugee Concept: On Definitions, Politics, and Careful Use of a Scarce Resource", p. 32, in Howard Adelman (ed.) Refugee Policy: Canada and United States.

¹⁴⁶Ibid., p. 33.

very few exceptions receive landed immigrant status, which is well beyond what a legal obligation under Article 33 appears to imply. All that refugee claimants need to do is to appear in person in Canada and prove that they meet the Convention definition. They are then processed through the in-Canada refugee determination system. Those who are rejected after the initial application have access to various stages of appeal. And, if everything else fails, in some instances they may be admitted under humanitarian and compassionate considerations subject to the Minister's discretion.

D. Human Rights

The federal government's intentions to regulate the flow of non-residents to Canada through Bill C-86 and its predecessors would appear to be constrained by transnational concepts of human rights and procedural fairness entrenched in Canada's Constitution by the Charter of Rights and Freedoms. In view of the fact that statements of fundamental rights are written into Canada's laws and are interpreted by the courts, the enforcement of these rights, which are granted to non-residents, may in some instances result in a judicial declaration of the unconstitutionality of a particular amendment to the Act.

In contrast to Germany and France which, in their treatment of foreigners wanting to establish residence on their territories, concern themselves with conditions of residence, Canada, along with Australia and the United States, emphasizes control over entry onto its territory. H. Patrick Glenn says that "this distinction is of fundamental importance in terms of procedural guarantees, which may be far more easily enjoyed by the resident than by the person not yet

present on the national territory.¹⁴⁷ Given that refugee claimants, once they establish their presence on Canada's territory, are constitutionally guaranteed due process in Canadian courts by the Charter¹⁴⁸, the federal government's efforts to run an efficient and cost-effective immigration program are in some instances frustrated by its inability to remove those whose claims are not successful. It would thus appear that the intentions of Bill C-86 were to introduce greater measures of discretionary authority in decision-making affecting exclusion and removal of non-residents and perhaps to reassert the Parliament's legislative supremacy. Such measures may make access to the appeal and judicial review process more difficult which could be in violation of the procedural fairness (natural justice, due process) guaranteed to non-residents by the Charter of Rights and Freedoms.

E. Canadian Courts and Human Rights

The concept of "human rights" is difficult to define for it lacks a general consensus on how the expression "right" is to be understood. To have a right in a legal sense, an individual may be entitled to something society has a duty to provide. In other instances, it may mean a

¹⁴⁷H. Patrick Glenn, Procedural Fairness Accorded to Non-residents: An International Comparison, p. 7.

¹⁴⁸The Canadian Charter of Rights and Freedoms has a potentially strong influence on Canada's immigration law. The influence of the Charter was most vividly illustrated in the decision of *Singh v. Canada (Minister of Employment and Immigration)*, when three of the Justices of the Supreme Court of Canada ruled that the Charter protection applies to all persons present in Canada, and when they found that key sections of the refugee determination procedures then in effect were in conflict with the principles of fundamental justice. (See Lorne Waldman, Immigration Law and Practice, p. 2.1).

"right" for an individual to be left alone or be tolerated by others in society. To understand human rights, then, necessitates a conception of rights accorded to an individual by others "...simply by virtue of being human".¹⁴⁹ Human rights tend to manifest themselves in demands of individuals or groups for certain status and position and for mutual respect in society. Although such rights are generally accepted in principle, most rights are qualified or limited in some manner, usually arising from the need to prevent the rights accorded to one individual from infringing on the rights of others in society.

In the framework of public policy, discussions about human rights invariably focus on whether individuals' personal claims to certain rights take precedence over their duties to others. In Canada, these rights are summed up in four broad categories: (1) political rights such as freedom of association, assembly, expression, religion, and the press; (2) legal rights, which include equal treatment before the law, due process of the law, freedom from arbitrary arrest, right to a fair hearing, and access to counsel; (3) economic rights, which involve the right to own property and freedom of contract; and (4) egalitarian rights, which include the right to employment, education, accomodation without discrimination on the basis of race, origin, age or sex.¹⁵⁰

In Canada's approach to protection of human rights prior to 1982, the federal and provincial legislatures were primarily responsible for upholding the principles of human rights. Although common law principles regarding the protection of human rights had been developed over the years, Canada's judiciary and the legislatures generally treated the issues of human

¹⁴⁹Nancy Holmes, Human Rights and the Courts in Canada, p. 1.

¹⁵⁰Ibid., p. 2.

rights as matters of low importance. This changed after 17 April 1982 when the Canadian Charter of Rights and Freedoms was entrenched in Canada's Constitution. The inclusion of the Charter in the Constitution provided Canada's judiciary with a mandate to determine whether legislation, whenever challenged, is in compliance with the Rights and Freedoms given by the Charter.¹⁵¹

Canada's commitment to the concept of human rights can be traced back to its involvement in the development of the International Bill of Human Rights in the 1960s. This involvement and the emerging awareness of the need for more attention to human rights in Canada brought its domestic law into line with its international commitments. However, in the absence of a constitutional mandate, the courts were faced with the difficulty of how, in a system of legislative supremacy, an ordinary statute such as The Bill of Rights could be given greater validity over other ordinary statutes.¹⁵²

The constitutional entrenchment of the Charter reduced the courts' ambivalence about the human rights statutes in Canadian law. While most of the Charter rights were already protected by statute or common law prior to 1982, what is of significant import is the enhanced legal status which the Charter gives these rights by entrenching them. Entrenchment of the Charter reduced the tradition of parliamentary supremacy with respect to human rights, while at the same time enhancing the principle of constitutional supremacy.¹⁵³

Although the Charter achieved a degree of supremacy over the federal and provincial

¹⁵¹Marilyn Pilon, Life, Liberty and Security of the Person under the Charter, p. 1, 14 February 1992, revised 16 April 1993.

¹⁵²Holmes, op. cit., pp. 7-9.

¹⁵³Holmes, p. 12.

legislatures with respect to human rights, two sections of the Charter point to a conscious effort by the policy-makers to nevertheless limit the Canadian courts' powers and preserve to some extent traditional parliamentary supremacy. Section 1 of the Charter permits legislatures, subject to the courts' interpretation, to impose reasonable limits upon rights and freedoms, along with Section 33 which permits the legislatures expressly to declare that a statute may be given validity notwithstanding certain sections of the Charter.¹⁵⁴ Thus, Nancy Holmes states that "Section 1 involves a highly discretionary balancing test between the policy interests of the government and the interest of the Charter litigant in having his or her right upheld."¹⁵⁵

In contrast to the past, the Charter gave the courts a mandate not only to ascertain whether the federal and provincial laws are in compliance with the Charter but also to render invalid those deemed contrary to Charter principles. With respect to refugee claimants taking advantage of the Canadian Charter of Rights and Freedoms, the questions may be asked: To what extent will the courts' ruling affect the doctrine of parliamentary supremacy? Also, what ramifications will the courts' decisions have for Canada's immigration program?

¹⁵⁴Pilon, p. 2.

¹⁵⁵Holmec, op. cit., p. 14.

4. LEGAL IMPLICATIONS

A. Non-resident Status

When a state subscribes to certain internationally recognized human rights concepts and consequently grants certain procedural guarantees in its courts to non-residents, complications may arise in the status determination of those subject to national exclusionary or removal laws. With the existence of classes of individuals who, because of the Charter, are accorded different degrees of scrutiny, an environment is created in which certain classes may take advantage of rights and levels of procedural fairness previously not provided to other classes.¹⁵⁶ Thus when the Charter is invoked in the refugee determination process, the existence of complicated definitions and differing interpretations of same may lead to dispute as to the status of non-residents. The uncertainty with respect to status and differing degrees of scrutiny may play an important role in the federal government experiencing delay in the removal of refugees whose claims have been rejected.¹⁵⁷

B. Constitutional Law Guarantees Accorded to Non-Residents

In Canada, the Constitution plays both an active as well as potential role in determining

¹⁵⁶Glenn, Procedural Fairness..., p. 10.

¹⁵⁷Paul Brooks. Personal interview. 31 March 1994.

the levels of procedural fairness accorded to non-residents.¹⁵⁸

Although the Canadian Constitution does not contain guarantees of asylum, the Supreme Court of Canada, in 1985, extended constitutional procedural guarantees to refugee claimants. The primary effect of the Singh decision has been that non-residents are accorded benefits of most rights contained in the Charter. Subsequent to the decision, Canadian courts have accepted the relevance of many constitutional guarantees in claims involving non-residents. While the ruling of the Supreme Court applied to claimants already in Canada, some decisions of lower courts have interpreted the constitutionally entrenched Charter as being applicable to those seeking entry at Canadian borders and points of entry abroad. The guarantees of the Charter may also be invoked before the IRB tribunal.¹⁵⁹

C. Legality and Discretion

A degree of procedural fairness may be dependent upon the extent to which administrative procedures of the federal government are defined by law, regulation or judicial supervision. Thus the fundamental question pertaining to the status of non-residents appears to be the extent to which explicitly discretionary decision-making is entrusted to immigration officers in determining standards of exclusion and removal. H. Patrick Glenn says that "...the explicit character of the discretion is significant not in conferring liberty of decision-making,

¹⁵⁸Pilon, p. 1.

¹⁵⁹H. Patrick Glenn, Strangers at the Gate: Refugees, Illegal Entrants and Procedural Justice, p. 11.

which arguably exists in all legal decision-making, but in limiting possible challenges to the decision once made".¹⁶⁰ It would then follow that a discretionary decision of an appointed immigration officer, based on standards applied by that officer, may be resistant to challenge by refugee claimants; whereas a decision reached by an officer in application of texts of law may be challenged by referring to those texts. Thus it would appear that when there is more emphasis on discretionary decision-making, procedural fairness may be more difficult to obtain than in situations in which there is greater reliance on the legal, regulatory system, since mechanisms for disputing decisions are implicit in the system itself.¹⁶¹

In Canada, it would appear that much immigration decision-making occurs in the context of defining classes or categories of non-residents, as determined by legislation. Explicit discretion is also applied in certain circumstances.¹⁶² It is important to enquire whether the intentions of Bill C-86 will affect the balance between the "discretionary and regulatory models"¹⁶³ inherent in Canada's immigration program. The direction in which the change in balance occurs may determine the degree of procedural fairness, and whether challenges to administrative decision-making will increase or decrease.

¹⁶⁰Glenn, Procedural Fairness...., p. 17.

¹⁶¹Ibid., p. 17.

¹⁶²Pamela Cullum. Personal interview. 31 March 1994.

¹⁶³Glenn, Procedural Fairness...., p. 19.

D. Primary Adjudication of Claims

When the initial decision by SIOs at the point of entry regarding exclusion or removal is taken, the fundamental question needs to be asked as to the degree of procedural fairness guaranteed to non-residents. Guarantees at this stage of the process also demand provision of appeal and review, to make sure that such guarantees are accorded to non-residents. To ascertain whether procedural fairness is guaranteed in a certain jurisdiction, the nature of adjudicative authority and the procedure used by that authority need to be examined.¹⁶⁴

H. Patrick Glenn states that:

procedural guarantees are most fully developed in courts of law; they decline in importance insofar as the decision-maker is vested not with judicial authority but with administrative responsibility. Where primary adjudication is entrusted to individual members of an administrative department, be it a Ministry of Immigration, a Home Office, an Attorney General's Office, or a Ministry of Interior, the level of procedural fairness is likely to be at its lowest level. This will particularly be the case if the decision to be made is explicitly designated as a discretionary one.¹⁶⁵

With respect to the existence of an oral hearing of refugee claims at which counsel is present, it may be observed that in a common law jurisdiction such as Canada's the manner in which hearings are conducted is by nature adversarial. Although immigration proceedings may be less adversarial in nature than regular court trials, constitutional guarantee of the right to counsel would appear necessary in Canada's common law judicial system.¹⁶⁶

Prior to Bill C-86 amendments to the Act, access criteria of eligibility and credibility

¹⁶⁴Ibid., p. 21.

¹⁶⁵Ibid., p. 21.

¹⁶⁶Ibid., pp. 23-24.

relating to refugee claims made by non-residents were determined in the context of a two-stage hearing process with specified procedures as to guaranteed rights of counsel paid for by the Minister, adjournment to retain and instruct counsel, and the provision of the interpreter. Bill C-86 eliminated the first stage of the hearing process and replaced it with a determination of eligibility by an SIO.¹⁶⁷

Bill C-86 changes at this stage of the refugee determination process appear to be in conflict with the procedural guarantees previously conferred upon refugee claimants. They suggest a shift in immigration policy direction from reliance on legislation, regulation and due process of law to a more discretionary exercise of administrative authority by immigration officers.¹⁶⁸

That the intention of the Bill may have been to make access criteria more stringent without extensive attention given to due process accorded to refugee claimants is suggested also by the expanded jurisdiction conferred upon the SIOs by the Bill. Whereas in the past an SIO who, at the port of entry, was given notice that a refugee claimant appeared inadmissible had no jurisdiction to issue a removal order, and had to, when a person refused to leave Canada, refer him/her to an inquiry (a quasi-judicial process chaired by an adjudicator, with a guaranteed right of counsel), the Bill now grants the SIO the right to make an exclusion order in certain limited circumstances. For example, the SIO can issue a deportation order for a person who can only enter Canada on a special ministerial permit but has not obtained it; or for persons who are not in possession of required documents, provided the reasons for inadmissibility do not require

¹⁶⁷Margaret Young, Bill C-86..., p. 30.

¹⁶⁸Paul Brooks. Personal interview. 31 March 1994.

an adjudicator.¹⁶⁹ Deportation of refugee claimants by the SIO at the port of entry without providing a hearing and not making the inquiry available upon request by the claimants appears to neglect due process and procedural fairness in refugee determination proceedings.

In reference to the concept of prescribed "safe third countries" already adopted by Bill C-55, Bill C-86 reduces the federal government's concern about what happens to refugee claimants once they are removed from Canada to the countries on the prescribed list of safe third countries (to date no such list has been established). Providing there was a such a list of prescribed countries, the SIOs' scope of authority is confined to whether the refugee claimant arrived from, or through one of those countries. No longer does the federal government concern itself with whether the claimant is accorded the right to remain in that country or have access to the country's refugee determination process. Such uncertainty as to what happens to them once deported from Canada may affect directly the claimants' right to protection of life and security of person.¹⁷⁰ However, the Bill still states that a claimant who cannot be deported from Canada, will be referred to the IRB for a decision on the claim.¹⁷¹

When and if the prescribed "safe third countries" list comes into effect, the streamlining of the authority vested in the SIO will perhaps neglect important concerns regarding claimants' returnability and their right to a hearing on the merits of their claims. However, the bill provides no procedures to address these matters. The uncertainty about the fate of refugees slated for deportation is compounded by the fact that certain Citizenship and Immigration

¹⁶⁹Statutes Of Canada 1992, Sec. 23(4), p. 25.

¹⁷⁰Young, Bill C-86..., p. 31.

¹⁷¹Op. cit., Sec. 46.03(1)(a), p. 48.

Department's operations are closed to public scrutiny. For example, even if a list of safe third countries existed, it might not be known because guidelines and instructions contained in the IC component of the Immigration Manual are not available to the public.¹⁷²

It must be kept in perspective that Article 33 of the Convention dealing with non-refoulement forbids the return in any manner whatsoever to countries where a person fears persecution. Therefore, anything short of an agreement with a prescribed country regarding the claimants' right to remain in the country could jeopardize their security. In view of the fact that the Bill is silent as to the need for such agreements with prescribed countries, removing claimants to such countries could pose threats to claimants life and security of person. This perceived lack of concern as to what happens to refugee claimants once they are removed from Canada would appear to be in violation not only of the spirit of the Convention but also of the Charter.¹⁷³

E. Recourses and Enforcement

Upon a negative determination of refugee claims, enforcement of the deportation orders may be suspended during appeal or judicial review proceedings. Following these proceedings, a negative decision may be overturned or annulled. As well, where all avenues of appeal and review have been exhausted, refugee claimants may still be in a position to invoke a residual discretionary authority grounded in humanitarian and compassionate considerations and exercised

¹⁷²Paul Brooks. Personal interview. 31 March 1994.

¹⁷³Peter Braid. Personal interview. 31 March 1994.

by the Minister.¹⁷⁴

(i) Appeals and Judicial Review

The avenues of appeal and review open to refugee claimants are affected by the nature of the primary determination. When the decision by the SIO is primarily a discretionary one, appeal or review would appear limited because only the scope of the exercise of discretion may be challenged. This would appear to be the case where a primary determination of claims is delegated by the Minister. The absence or reduction of procedural guarantees at the initial stage of the determination process may make subsequent appeal or judicial review more difficult.¹⁷⁵

The other important factor affecting the right of appeal and review of refugee claimants is the structure of the refugee determination system. Where there is emphasis on discretionary decision-making no challenges may be possible; whereas appeals to the Appeal Division of the IRB are possible because the decisions made by its members are an application of texts of law. The outcome of a particular case will also be affected by the extent to which the actions of removal or exclusion of refugee claimants by the federal government are halted by submission of appeal.¹⁷⁶

Appeals to the Immigration Appeal Division of the IRB against an exclusion or deportation are possible if persons appealing are permanent residents, returning residents,

¹⁷⁴Glenn, Strangers at..., p. 65.

¹⁷⁵Peter Braid. Personal interview. 31 March 1994.

¹⁷⁶Ibid.

persons classified as Convention refugees, and persons who on arrival were in possession of an immigrant or visitor visa.¹⁷⁷ Enforcement of the exclusion or deportation order may be stayed in such cases.¹⁷⁸ In all other cases, appeal against the exclusion or deportation order is by way of judicial review, to the Federal Court - Trial Division, with leave of the Court.¹⁷⁹ Appeal may also be made from decisions of the Appeal Division of the IRB to the Federal Court - Trial Division, with leave of the Court.¹⁸⁰

The changes introduced by Bill C-86 at the primary adjudication of the refugee determination process, that is at the eligibility and credibility stage, illustrate a possible attempt by the federal government to reduce the distinction between the immigration and refugee issues. The elimination of the role of the Refugee Division altogether at this stage of the process introduces a greater degree of discretionary authority for the SIOs. It also creates an impression that questions of eligibility are exclusively immigration matters. The bestowal of more discretionary authority upon the SIOs at this stage coupled with a reduced concern for constitutionally entrenched procedural guarantees of refugee claimants would appear to violate the claimants' right to procedural fairness and due process accorded to them by the Charter.¹⁸¹

In response to the increasing backlog of refugee cases in the Federal Court, Bill C-86 amendments were to streamline the judicial review process by changing the location of judicial

¹⁷⁷Morocco and Goslett, 1994 Immigration..., Sec. 70 (1)and (2), pp. 254-55.

¹⁷⁸Ibid., Sec. 49(1), p. 230.

¹⁷⁹Ibid., Sec. 82.1, p. 328.

¹⁸⁰Ibid., Sec. 83.1, p. 344.

¹⁸¹Pamela Cullum. Personal interview. 31 March 1994.

review, tightening up grounds for appeal, and providing for speedier proceedings. In view of this intention of the Bill, unlimited appeals to the Court of Appeal from decisions of the Trial Division of the Federal Court would not make sense. Thus the bill states that appeals of a Trial Division decision would be allowed only if "the judge certified at the time of rendering judgement that a serious question of general importance was involved and stated a question".¹⁸² The judge's refusal to so certify would not be subject to appeal.¹⁸³

The intent of Bill C-86 to limit appeals in such a manner may well be subject to dispute. Questions may be raised as to whether the judge making the decision ought to also be determining the justification of an appeal. While the result of the changes to the judicial process may reduce the backlog of cases at the Federal Court and thus make the refugee determination system more efficient and cost-effective, the streamlining of the judicial review process raises issues of fairness in administrative law generally and violation of human rights under the Charter.¹⁸⁴

(ii) Enforcement and Control

Several of the new inadmissibility provisions introduced by the bill elicited concerns from civil libertarians and the legal community. For example, the addition of new Sec. 19(1)(c.2) to the Act would deny a person admission, or make him/her subject to deportation, on the grounds

¹⁸²Statutes of Canada 1992, Sec. 83, p. 81.

¹⁸³Ibid., Sec. 83 (4), p. 81.

¹⁸⁴Margaret Young, Bill C-86..., p. 11.

of belonging to a group that is or was taking part in the commission of any indictable offence¹⁸⁵, using Canadian standards (unless the person proved to the Minister that admission would not harm the national interest). For the inadmissibility to take effect, the suspicion that the applicant or any other member of the group he/she belongs to was involved in criminal activity will suffice, even if the crimes occurred in Canada. It would thus appear that only one alleged transgression by the group would render any group member inadmissible. The criticism invoked here was that the inadmissibility provision is too all-encompassing. One may enquire as to the nature of offences contemplated here. Similarly, questions may be asked about how group membership implicates an individual in cases in which the commission of indictable offence has not even been proven.¹⁸⁶

It would appear that the provision is aimed at broadly defined and diverse political and criminal groups; for example, certain groups in countries such as Ireland, or teenage members of a city gang. It could be possible that the intent of the provision is to address difficulties public authorities experience with some youth gangs in major Canadian cities.¹⁸⁷ However, if this was the intention of the provision, concerns about unfairly singling out members of a particular ethnic group may in some instances lead to accusation of discrimination, which could

¹⁸⁵(Verbatim) As initially proposed, the provision covered any indictable offence. In legislative Committee this was reduced to indictable offences under the Criminal Code, the Narcotic Control Act and Part III or IV of the Food and Drug Act. In reference to group activity, the provision specified that "the activity had to be part of a pattern of criminal activity planned and organized by a number of people acting together. (See M. Young, Bill C-86: An Act to Amend the Immigration Act, p. 33.

¹⁸⁶Paul Brooks. Personal interview. 31 March 1994.

¹⁸⁷Margaret Young, Bill C-86..., p. 33.

be perceived as a violation of human rights under the Charter.¹⁸⁸

Bill C-86 changes to the Act also affect the removal of permanent residents. In the past the Act provided in Sec. 27(1)(a)¹⁸⁹ that permanent residents could be removed on the basis of their taking part in criminal and security acts contrary to the public interest, but only upon conviction. Now, however, the bill changed that section and included the amended Sec. 19(1)(e).¹⁹⁰ The result is to allow the removal of permanent residents on the basis of mere suspicion that they might commit certain acts in the future (where there were reasonable grounds to so assume). The intention of this provision is perhaps indicative of an attempt by the federal government to broaden the parameters of discretionary decision-making.

The changes instituted by Sec. 19(1)(k) of the Bill -- which deals with persons who constitute a threat to the security of Canada but are not members of a class of people described in paragraphs (e), (f) and (g)¹⁹¹ -- appear to be even more problematic. It might be difficult to ascertain how someone might be in position to constitute a threat to Canada without committing violent, subversive, or terrorist acts. The Bill is silent as to who this provision is aimed against. Moreover, the notion of "security of Canada" is open to a broad interpretation. M. Young states that "...a provision so vague and subjective could be found to violate the principles of fundamental justice guaranteed by Sec. 7 of the Charter."¹⁹² Again, the intention

¹⁸⁸Peter Braid. Personal interview. 31 March 1994.

¹⁸⁹Marrocco and Goslett, 1992 Immigration..., p. 97.

¹⁹⁰Statutes of Canada 1992, Bill C-86:..., p. 28.

¹⁹¹Ibid., pp. 28-29.

¹⁹²Margaret Young, Bill C-86..., p. 34.

to increase discretionary authority of the immigration officials appears to come to the fore.

The trend toward more discretionary authority given to the SIOs at the points of entry is evident in the Bill's changes regarding fingerprinting (Sec. 110(2)(a), and Sec. 110(2.1)), and search and seizure (Sec. 110(2)(a.1), and Sec. 110(2)(a.1)).¹⁹³

It may be possible that these provisions are in violation of Section 8 of the Charter (the right to be secure against unreasonable search or seizure) and section 7 of the Charter (in breach of the principles of fundamental justice). First, the conflict between these provisions and the Charter may lie in the meaning of the phrase "reasonable" which implies discretionary decision-making. The fact that these decisions occur at the level of primary adjudication reinforces their discretionary nature. Second, in view of the fact that every person entering Canada is not required to submit to fingerprinting, discretionary selection of those who must appears to contravene the principles of fundamental justice whose meaning was articulated by Wilson J. in Singh, [1985] 1 SCR 177, at 212:¹⁹⁴

... 'Fundamental justice' as it appears in s. 7 of the Charter includes the notion of procedural fairness articulated by Fauteux C. J....: 'Without attempting to formulate any final definition of those words I would take them to mean generally that a tribunal which adjudicates upon [one's] rights must act fairly, in good faith, without bias and in a judicial temper, and must give... the opportunity to adequately state [one's] case.'

¹⁹³Statutes of Canada 1992, pp. 102-103.

¹⁹⁴James Hathaway, Rebuilding Trust: Report of the Review of Fundamental Justice in Information Gathering and Dissemination at the Immigration and Refugee Board, p. 2.

F. Place of Residence and Occupation

Prior to 1 February 1993, the Immigration Act did not stipulate that immigrants be required to live in a particular area of the country. With Bill C-86, requirements affecting immigrants relative to both residence and occupation were introduced. While these changes may make sense from the management point of view, they appear to contravene Section 6(2) of the Charter which states that:

every citizen of Canada and every person who has the status of a permanent resident of Canada has the right: (1) to move to and take up residence in any province; and (2) to pursue the gaining of a livelihood in any province.¹⁹⁵

The Charter, by Section 33, allows the federal government or a provincial legislature to exempt a statute from compliance with certain provisions of the Charter.¹⁹⁶ However, short of the political will to use the override of Section 33, the government is forced to rely on the "demonstrably justified" provision of Section 1.¹⁹⁷

While it is entirely speculative as to how the courts will interpret such restrictions on mobility rights, the possibility of the restrictions constituting a reasonable limit would rise if they were of a temporary nature and had certain qualifications attached to them. As well, the importance of the federal government's purpose would have to be such as to allow for the

¹⁹⁵Kristen Douglas and Mollie Dunsmuir, Charter of Rights and Freedoms: Mobility Rights, p. 2.

¹⁹⁶Pilon, p. 2.

¹⁹⁷Section 1 provides: The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. (See D. Cheifetz and Philip Rosen, Some Comments on the Charter of Rights and Freedoms, p. 6.)

courts' acquiescence in interfering with permanent residents' mobility rights.¹⁹⁸

G. Post-Determination Refugee Claimants in Canada (PDRCC)

The introduction of PDRCC appears to be another example of the federal government's attempt, through Bill C-86, to increase the level of discretionary decision-making regarding those persons whose refugee claims have been refused. In view of the high degree of discretionary decision-making involved in PDRCC, which can have a significant impact on the right accorded to non-residents in Canada, the issues surrounding it are discussed in a more detailed fashion.

Prior to 1 February 1993, humanitarian and compassionate jurisdiction was entirely within the authority of the Governor in Council. The authority vested in the Governor in Council illustrated the exceptional nature of discretion. It was portrayed as a mechanism for discretion which addresses exceptional situations that need attention outside the normal processing standards outlined by the Act. Since the passage of the bill, the distinction is now made between PDRCC and the humanitarian or compassionate review. Thus the former is understood to address the concerns of persons at risk if they are returned to their countries of origin, whereas the latter deals with their ties to Canada (for example, family, length of stay, etc).¹⁹⁹

Bill C-86 amendments to Section 114(2) of the Act in a way instituted a more direct role for the Minister. In the past when discretion was used to admit persons outside of the normal

¹⁹⁸Pamela Cullum. Personal interview. 31 March 1994.

¹⁹⁹Ibid.

immigration procedures, the decision was made by the Governor in Council with the exceptional nature of intervention by the Minister emphasized. Now, the new section, 114(2), and regulation 2.1, provides for a diffuse delegation of discretionary authority by the Minister to immigration officers throughout the country. It may be argued that, as ministerial authority regarding exclusion and deportation is delegated downward to the level of primary adjudication, in the absence of clearly articulated guidelines the consistency of discretionary decision-making will be difficult to maintain. This and the very meaning of the term "discretionary" appear to automatically create potential for inconsistency in decision-making.²⁰⁰ Davies and Waldman cite the low acceptance rate of .3 per cent for the period between February and October of 1993 (13 persons accepted of 3,691 reviews undertaken through the PDRCC) as the consequence of the increased role of the Minister.²⁰¹

While humanitarian or compassionate reviews of cases can be made at any time, in contrast to the past they now appear to be made and considered most seriously by the immigration officers at the time prior to removal from Canada. This can result in some cases not receiving humanitarian or compassionate consideration at the time of the initial application. Instead, the humanitarian or compassionate aspect of the cases is considered often at the end of a costly refugee determination process.²⁰²

In light of the fact that the humanitarian or compassionate review conducted through the PDRCC occurs within the enforcement stream of the immigration program and at the level of

²⁰⁰Peter Braid. Personal interview. 31 March 1994.

²⁰¹Davies and Waldman, p. 6.

²⁰²Ibid., p. 14.

primary adjudication, the procedural fairness accorded to non-residents by the Charter could be perhaps subjected to the "enforcement culture" prevalent within the Citizenship and Immigration Department.²⁰³

In view of the fact that enforcement productivity is measured by regions in numerical targets and the departmental resources are allocated on the basis of productivity, the application of humanitarian or compassionate review appears to conflict with the immigration officers' fulfillment of the enforcement authority mandate. This "enforcement mindset" appears to begin at the port of entry where primary adjudication officers, overwhelmed by volumes, make value-laden discretionary decisions which in some instances result in claimants, who were initially refused on humanitarian or compassionate grounds, entering the refugee determination process.²⁰⁴

The practice of not allowing for humanitarian and compassionate consideration of claims at the time of the initial application increases the tendency of immigration officers to "dump" applicants into the refugee determination system.²⁰⁵ This in turn reflects on the number of claimants referred to PDRCC. One may wonder whether the federal government's intent to improve the immigration program at one end of the process through emphasizing increased discretionary decision-making at the level of primary adjudication of claims will not result in an undesired consequence at the other end (e.g. higher caseload in the refugee determination system and the PDRCC).

²⁰³Peter Braid. Personal interview. 31 March 1994.

²⁰⁴Davis and Waldman, p. 15.

²⁰⁵Ibid., p. 15.

While the cost recovery fee of \$450.00 may be consistent with Bill C-86 intentions to improve the efficiency and cost-effectiveness of the immigration program, its requirement has been criticized by refugee advocates as being inhumane and discriminatory. Their argument is in effect that humanitarian or compassionate considerations ought to take precedence over the monetary costs associated with the process.²⁰⁶

The Immigration Act and Immigration Regulations do not provide clear guidelines for the immigration officers delegated to apply discretion in admission of persons accepted on humanitarian or compassionate grounds. Davis and Waldman state that "...there are court decisions which have said that in the absence of legislative authority the Minister cannot fetter the discretion of those officials to whom the discretion has been delegated."²⁰⁷ Thus, lack of guidelines would have the tendency to increase the level of discretionary decision-making, make those decisions more inconsistent, and result in general disregard for procedural fairness. This inattention to procedural fairness appears to be in violation of the spirit if not the letter of the Charter.

That the PDRCC is fraught with complexity is evident from Davis and Waldman's observations coming from their report submitted to the present Minister. They propose that Canada's policy-makers eliminate the discretionary nature of the process by defining in regulations under Section 6(5) who is worthy of humanitarian or compassionate considerations.²⁰⁸ However, the federal government's answers to the difficulties identified in

²⁰⁶Peter Braid. Personal interview. 31 March 1994.

²⁰⁷Davis and Waldman, p. 18.

²⁰⁸Ibid., p. 20.

the PDRCC may not satisfy many people. If the federal government opts for a broad definition of classes of persons who would meet the standards of humanitarian or compassionate considerations, then the existence of these classes may create more pressure on its immigration program, which is something that may not be desirable at the present time. According to Art Hanger, a Reform Party of Canada M.P., it is safe to say that at present making application for landing from within Canada less cumbersome than doing it from abroad would not be politically and economically acceptable to the Canadian public.²⁰⁹ On the other hand, if the federal government decides on a narrow interpretation, it may draw the ire of refugee advocates such as Ladan Affi, a Toronto advisor to refugees and immigrants; and at the same time find its policy decisions to be in conflict with the Charter.²¹⁰ Davis and Waldman propose that the persons who are deemed worthy of humanitarian considerations be those who do not qualify to be admitted under the standard immigration procedures, but are the persons whom Canada intends to protect by virtue of its commitment to the Charter and the Convention.²¹¹

5. ETHNIC, ECONOMIC AND POLITICAL IMPLICATIONS

In the late 1980s, the former Tory government was convinced that immigration flows had come to be dominated by people who were essentially self-selected. This move away from immigrants who traditionally were admitted on the basis of skills in demand in the Canadian

²⁰⁹CBC News, Prime Time, Queuing Up for Canada, p. 2, Transcripts for 29 March 1994.

²¹⁰*Ibid.*, p. 6.

²¹¹Davis and Waldman, p. 21.

labour market brought with it a concern that the educational and skill advantages which in the past enhanced the country's economic potential were no longer the primary attributes of the new breed of immigrant. Faced with the prospect of eroding control over the composition and volume of immigration, the former federal government felt it had to act and make choices.²¹²

However, the intentions of Bill C-86 to better manage the immigration program, are constrained by the proportions of immigrants admitted in each category or class.²¹³ The former government's concern about the composition of immigration was heightened by the fact that in 1992 only a small percentage (11 per cent or 24,000 principal applicants) of the immigrants admitted to Canada were accepted solely on the basis of economic criteria.²¹⁴ It is possible that the government concern arose from the argument put forward by Don Devoretz who stated that, with respect to the proportion of immigrants admitted in each class, 50 per cent or more ought to be in the independent class. He based his assessment on academic research showing that unless approximately two thirds of immigrants are selected under the point system, their economic performance in the labour market means that insufficient tax revenues will be collected by the government to pay for the services used.²¹⁵

In his 1994 Immigration Plan, the present Immigration Minister has indicated that for this

²¹²Immigration Canada, Immigration Consultations..., pp. 1-2.

²¹³The main features of 1976 immigration Act included the formal introduction of the three immigrant categories (family class, refugees, and independents); an attempt to relate immigration levels to demographic and labour market conditions; a change to the point system; and an attempt to better plan the intake of immigrants. (See Economic Council of Canada, New Faces in the Crowd, p. 2.)

²¹⁴Op. cit., p. 2.

²¹⁵CBC News, Prime Time, p. 3.

year the independent class will account for 44 per cent, family class for 45 per cent, and refugees will fill in the remaining 11 per cent.²¹⁶ The 1994 figures suggest that the percentages needed to keep the effects of immigration neutral or shown as a positive contribution to Canada fall short of what Devoretz advocates. This can be attributed to Canada's commitment to family reunification. It is important to note here also that in addition to immigrants' family reunification efforts, refugees, who themselves are not subject to the point system criteria, also bring in their families upon a positive determination of their claims.

The commitment to reunite immigrant families is strengthened by the increased involvement of ethnic communities in the political process.²¹⁷ With the advent of so-called "ethnic politics", the intention of the federal government to better manage and perhaps increase the proportion of the independent class at the expense of the family class, although desirable from purely economic considerations, will perhaps not be as successful as originally envisioned by the bill.

A. Ethnic Implications

(i) Immigration Policy and Multiculturalism

Recent Canadian history shows that immigration and multiculturalism are inextricably

²¹⁶Immigration Canada, Annual Report to Parliament: Immigration Plan 1994, p. 1.

²¹⁷Daiva K. Stasiulis and Yasmeen Abu-Laban, "The House that the Parties Built: (Re)constructing Ethnic Representation in Canadian Politics", p. 3, in Kathy Megyery (ed.) Ethnocultural Groups and Visible Minorities in Canadian Politics: The Question of Access.

linked. Over the years, varied approaches to immigration policy contributed to Canada's ethnic, religious, and racial diversity as we know it today.

The idea of having a multitude of cultures coexist within a concept of one nation evolved from a variety of social and political pressures during the 1960s and early 1970s. During that period in Canada's history, international pressures for ethnic tolerance and human rights and a decline in European immigration to Canada were a defining factor in the changes made to Canada's immigration laws. Consequently, the easing of the old racial biases facilitated admission of significant numbers of people from diverse cultures and regions of the world.²¹⁸

The influx of a growing number of people whose origin was other than French or English has led to increased awareness of the value of cultural diversity. The official confirmation of French and English as the two founding nations, which had arisen from the Royal Commission on Bilingualism and Biculturalism, awakened those not of French and British origin to the need for some clarification in their status as "other" Canadians. In this context, multiculturalism, notwithstanding the desire to retain ethnic group identity, is supposed to provide societal acceptance of other Canadians. In view of Canada's continuing desire to use immigration to prevent a decline in population levels, immigration and multiculturalism will probably figure prominently in Canada's future.²¹⁹

Although diversity of cultures in Canada was a well established reality as early as 1940,

²¹⁸Howard Palmer, "Reluctant Hosts: Anglo-Canadian Views of Multiculturalism in the Twentieth Century", p. 101, in Saul Hayes (ed.) Multiculturalism as State Policy: Second Canadian Conference on Multiculturalism, Government Conference Centre, Ottawa, February 13-15, 1976.

²¹⁹Gilles Paquet, "Political Philosophy of Multiculturalism", p. 61, in J. W. Berry and J. A. Laponce (eds.) Ethnicity and Culture in Canada: The Research Landscape.

when the proportion of British-only population fell below the 50 per cent level, the acceptance of multiculturalism as a government policy or even as a term in public discourse was slow in coming. The myth of numerical predominance of Canada's founding nations has only been challenged in recent years. The failure to change public perception about demographic reality may be attributed to simple inertia or to some broader misconceptions of what it means to be Canadian.²²⁰

Even though the notion of multiculturalism is associated with supposed equality, a certain sameness of all cultures, the introduction into Canadian society of people whose skin colour, behaviour, customs and beliefs are significantly different from the traditional European cultures would perhaps reinforce the tendency to continue to consider multiculturalism as pertaining to "other" groups in society.²²¹ As well, even though official government policy accepts multiculturalism as a characteristic particular to Canadian society in general, some literature about multiculturalism and immigration continues to discuss the country's capacity to adjust to others.²²²

Influenced by external migratory pressures and domestic economic conditions, the immigration flows of the 1980s and early 1990s have been marked by pronounced fluctuations, with levels of intake reaching postwar lows in the early 1980s.²²³ In addition to changing

²²⁰Elliot L. Tepper, "Immigration Policy and Multiculturalism", pp. 101-2, in J. W. Berry and J. A. Lapointe (eds.) Ethnicity and Culture in Canada: The Research Landscape.

²²¹Ibid., p. 103.

²²²Derrick Thomas, "The Social Integration of Immigrants in Canada", pp. 212-13, in Steven Globerman (ed.) The Immigration Dilemma.

²²³Economic Council of Canada, Economic and Social Impacts of Immigration, p. 17.

levels of immigration, the policy changes have been accompanied by sometimes controversial regulatory practices, (for example Bill C-55 with its changes affecting access criteria to the refugee determination system).²²⁴

Thus it may be postulated that the former federal government, although officially committed to immigration policy grounded in the 1976 Immigration Act and to the concept of multiculturalism, introduced its changes to the Act not only to address the difficulties identified by Bill C-86 and its predecessors but also to take into account the growing cultural uncertainties associated with the current immigration trends.²²⁵ Given the scope of the Bill, it remains to be seen how the size and political awareness of the "other" or ethnic communities encouraged by multiculturalism to participate in the political process will affect the overt or covert intentions of the policy-makers.

(ii) The Rising Involvement of Ethnic Communities in the Political Process

In Canada, access to political power and the attendant ability to control the socio-economic and cultural affairs of the nation have been historically a domain of one or more ethnocultural groups. Given the change in proportion of size and number of ethnic communities since 1967, it would seem almost inevitable that over time the superior status of the two founding nations would be challenged by the emerging political awareness of ethnic groups.²²⁶

²²⁴Adelman, p. 207.

²²⁵Murray Campbell, "Too Many Immigrants, Many Say", The Globe and Mail, 10 March 1994.

²²⁶Jorgen Dahlie and Tissa Fernando, (eds.), Ethnicity, Power and Politics in Canada, p. 1.

While in the past major political parties have confined their interest in ethnic communities primarily as a source of potential voters, more recently they have become aware of the importance of placing individuals from ethnic communities as candidates and in positions of leadership. This change in attitude and practice may be largely attributable to a greater assertiveness of ethnic communities within the parties.²²⁷ Consequently, their concerns and interests receive considerable attention which can have an impact on party platforms regarding a particular issue, for example, immigration.

The increased involvement of ethnic communities in the political process has been noticed since the 1984 federal election. During the subsequent federal elections a significant number of ethnic community members participated as candidates and back-room organizers. This has been particularly noticeable in major metropolitan centres which are the location of choice for a large proportion of ethnic communities.²²⁸ Their growing numbers and regional concentration all have important implications for political party strategists seeking to increase their party's support.²²⁹

That the ethnic communities' numbers and political awareness are taken into account by Canada's politicians is evident from the Progressive Conservative Party's ability to persuade a sizable proportion of ethnic voters to abandon the Liberal Party and vote for the PCs who

²²⁷Stasiulis and Abu-Laban, p. 2.

²²⁸Roderic Beaujot, "The Socio-Demographic Impact of Immigration", p. 50, in Steven Globerman (ed.) The Immigration Dilemma.

²²⁹Op. cit., pp. 18-19.

acknowledged their importance and expressed support for multiculturalism.²³⁰ Another example of the Progressive Conservatives' demonstration of support for multiculturalism was the Mulroney government's increase of immigration levels from those of the previous administration after the 1984 federal election.²³¹ Such an expression of attention to issues high on the ethnic communities' agenda invariably increases their sense of importance and perhaps makes them even more assertive.

Another, relatively important factor in the interpretation of Bill C-86 amendments to the Immigration Act is the degree of political representation of ethnic communities in the House of Commons. In view of the fact that political support given to major political parties by ethnic communities differs from one party to another, their influence over policy-making would tend to vary. In the context of Canada's ethnic politics, it can be postulated that there is a greater congregation of ethnic groups in the Liberal Party than in any other party. While Bill C-86 was initiated and introduced in November of 1992 by the Progressive Conservative government, the Liberal Party is now in control of the federal government. Thus the intentions of Bill C-86 to make the immigration program more efficient and cost effective may be constrained by the present government's commitment to the International Year of the Family²³² and the ethnic communities' high priority to keep the family class of the immigration program as large as

²³⁰Mike Trickey, "Ethnic Support No Sure Thing for Liberals", Calgary Herald, 24 October 1988.

²³¹Stasiulis and Abu-Laban, p. 42.

²³²Immigration Canada, Annual Report..., p. iv.

possible.²³³ This point will be returned to in a later section.

(iii) Family Class

One of the objectives of the Act is to allow Canadian citizens and permanent residents to be reunited with their families. Sponsors must be 18 years and older, either Canadian citizens or permanent residents, and resident in Canada. They must commit themselves to provide financial support for their relatives for up to ten years, and must show that they possess sufficient resources to fulfill their obligations by meeting the minimum income requirements established by Immigration Regulations.²³⁴

Members of the family class are:²³⁵

- * spouses;
- * sons and daughters under 19 years of age, or 19 years of age or more who are dependent on their parents;²³⁶
- * grandparents over 60, or under 60 and widowed or unable to work;

²³³Citizenship and Immigration Canada, Immigration Consultations 1994. A Submission by the Indian Community Representative, 27 June, Winnipeg, Manitoba.

²³⁴Young, Canada's Immigration ..., p. 7.

²³⁵Immigration Canada, Evolution of Canada's Immigration Policy, p. 21.

²³⁶(Verbatim) Prior to July 1988, children were required to be under 21 at the time of application for a visa. In July 1988, all unmarried sons and daughters (and their children) qualified; in October 1990, the Minister announced regulation changes to limit the age to under 19 and introduced a dependency test in order to reduce the unexpectedly high demand created by the change in July 1988. (See M. Young, Canada's Immigration Program, p. 7.)

- * parents;²³⁷
- * brothers, sisters, nephews, nieces or grandchildren if they are: orphaned, unmarried and under 18;
- * fiances(e)s;
- * children under 13 intended for adoption;²³⁸
- * any relative if the sponsor is alone in Canada and has none of the above family members to sponsor.

Upon arrival in Canada, a relative described above will be granted the status of permanent resident providing that he/she meets the statutory requirement criteria outlined in Section 6. (1) of the Act.²³⁹

Following Bill C-86 changes, applications submitted by immediate family of Canadian citizens and permanent residents, including spouses, fiances and dependent children will be processed on demand within a published time standard. Whereas there is no limit in this category of family members, the admission of parents and grandparents is subject to an annual limit. For example, the 1994 Immigration Plan has a projected limit of 43,000 parents and grandparents to be admitted to Canada.²⁴⁰ Those parents and grandparents not able to enter

²³⁷(Verbatim) Prior to November 1988, no permanent resident could sponsor parents under 60 unless the parents were infirm or widowed. An exception was made for infirm or widowed parents over 60 if the sponsor had been in Canada for more than three years (although that provision was deemed unenforceable in view of the Charter). (See M. Young, Canada's Immigration Program, p. 7.)

²³⁸(Verbatim) The Minister has announced that the regulation will be changed to eliminate the arbitrary age of 13 years. (See M. Young, Canada's Immigration Program, p. 7.)

²³⁹Marrocco and Goslett, 1994 Immigration..., p. 30.

²⁴⁰Immigration Canada, Annual Report..., p. xi.

in a given year are then first in line in the following year. The same criteria apply to refugees whose claims received a positive determination from the IRB and who then sponsor their families.²⁴¹

One of the intentions of Bill C-86 was to "...expand the proportion of immigrants who are subject to selection criteria and to enhance the selectiveness of the system so as to choose immigrants who are able to make a greater economic contribution."²⁴² These intentions of the bill would appear to be undermined by the proportions of immigrants admitted to Canada in classes other than the independent class. Given the annual levels of immigrants slated for admission, the insistence on a large family class along with a refugee class limits the federal government's ability to respond to labour market demands, control costs associated with the resettlement and integration programs, and allay fears of economic and cultural uncertainties expressed by mainstream Canada. That the "family class" for 1994 is in reality larger than the 45 per cent outlined in the Minister's Immigration Plan is supported by the fact that, in terms of professional skills, language proficiency and age requirements, there is basically little difference between the family and refugee classes. Thus it would appear that the federal government can effectively manage and plan for only 44 per cent of the immigration program.²⁴³

²⁴¹Immigration Canada, Immigration Consultations ..., pp. 1-3.

²⁴²Ibid. p. 4.

²⁴³Immigration Canada, Annual Report..., p. 1.

B. Economic Implications

In contrast to the independent class of immigrants, family class immigrants and refugees who also sponsor their families once their claims receive positive determination do not have to meet the point system criteria (see Appendix 2). In view of the fact that these classes of immigrants do not have to meet these criteria, their professional and language skills generally lag behind those of independent immigrants. This in turn puts greater pressure on the settlement and integration programs available to all immigrants.²⁴⁴

The 1967 changes to immigration policy significantly affected the composition of immigrants coming to Canada. Whereas in the pre-1967 years the majority of immigrants were from English-speaking countries and Europe, now large and growing proportions of newcomers arrive from the Third World countries and some speak neither English nor French.²⁴⁵

The immigrants' proficiency in one or both of the official languages is an important indicator of the ability to successfully integrate into Canadian society. Research studies have shown that immigrants' poor command of both English or French acts as a barrier to labour force participation, causes longer periods of unemployment and constrains their ability to earn higher incomes.²⁴⁶

Statistics show that approximately 40 to 50 per cent of immigrants who entered Canada during the 1980s lacked the ability to speak either official language. Whereas independent

²⁴⁴Ibid., p. 2.

²⁴⁵Economic Council of Canada, Economic and Social Impacts of Immigration, p. 14.

²⁴⁶Ravi Pendahur and Michel Ledoux, Immigrants Unable to Speak English or French: A Graphic Overview, pp. 35-39, Multiculturalism and Citizenship Canada, 1991.

immigrants to Canada must qualify on the basis of the point system which includes a certain level of language proficiency, family class immigrants and refugees and their families are not assessed on these criteria and frequently do not speak English or French. Thomas states that "...the proportion of immigrants unable to speak an official language has grown over the past decade."²⁴⁷ He attributes this to the expansion of the family and refugee classes.

Even though most persons born outside of Canada eventually acquire a degree of proficiency in either or both official languages, some newcomers are still not able to converse in an official language after three or even eight years in the country. Research studies reveal instances in which immigrants and refugees from Third World countries, who possess limited formal education and whose primary language is not a Western European language, have greater difficulty learning either English or French.²⁴⁸

While about 44 per cent of immigrants (the independent class) are subject to age criteria, the age of family class members and refugees has no bearing on their admission. This is important, because immigrants who are already older when they arrive in Canada would seem, as might be expected, to have a more difficult time learning a new language.²⁴⁹

Upon their arrival in Canada, immigrant children are placed in mainstream provincial school systems. Since a majority of recent immigrants tend to settle in large metropolitan

²⁴⁷Thomas, p. 224.

²⁴⁸Gertrud Neuwirth, "Immigrant Settlement Indicators: A Conceptual Framework", p. 11, Employment and Immigration Canada, March 1987.

²⁴⁹Pendakur and Ledoux, p. 24.

centres such as Montreal, Toronto and Vancouver²⁵⁰, high concentration of immigrant and refugee children in the classrooms may cause a burden to the school systems in some cities.²⁵¹

Prior to the 1976 Immigration Act, immigration generally contributed to an increase in the socio-economic profile of the Canadian population. This was especially noticeable with respect to education, where immigrants were primarily selected on the basis of higher levels of education and professional skills. However, after the Immigration Act expanded the family and refugee classes in 1976, the more recent immigrants, especially those admitted in the early 1980s when the independent class was virtually shut down because of the economic recession, on the average have less education than the Canadian-born population. For example, Thomas says that "...in the 1980-84 cohort, 17.0 percent of immigrants at ages 25-64 had less than nine years of education compared to 14.8 per cent of the Canadian-born."²⁵² With respect to labour force participation, Roderic Beaujot argues that, for example, among immigrants who came to Canada in 1975-79 and who in 1986 were 25-34 years old, 74.2 per cent of men and 54.9 per cent of women were fully employed. This was higher than the comparable figures for the Canadian-born population who at these ages were 71.8 and 52.7 for men and women respectively. It is important to note, however, that the 1980-84 cohort is a significant exception to the general pattern, with lower proportions participating in the labour force full time. Thus it can be argued that the lower employability of this group is attributable to the smaller relative size of the

²⁵⁰Eric G. Moore, Brian K. Ray and Mark W. Rosenberg, The Redistribution of Immigrants in Canada, p. 52, May 1990. A Report Prepared for Employment and Immigration Canada.

²⁵¹Immigration Canada, Immigration to Canada: Issues for Discussion, p. 1.

²⁵²Roderic Beaujot, p. 54.

independent class.²⁵³

In analysing the income-earning potential of immigrants, Anthony Richmond notes that European immigrants, while not ascending to the level of power elites, have generally become economically successful and have moved upward in the social strata in the post-Second World War period. However, Richmond's initial observations with respect to the economic performance regarding immigrants from the Third World countries, especially visible minorities, are less optimistic.²⁵⁴

Comparing the income-earning potential of the different immigration cohorts, it is revealed that immigrants who came to Canada before 1975 have higher average incomes than the Canadian-born of the same age group. Immigrants who came later, particularly the 1980-84 cohort, tend to have average incomes that are lower than those of the Canadian-born.²⁵⁵

Following age and education, the number of years spent in the receiving country generally determines immigrants' level of economic integration. It has been observed that the time required for integration is longer for more recent immigrants, particularly those from the Third World countries. The level of economic integration of immigrants is also to an extent dependent upon the receiving country's economic situation at the time of their arrival.²⁵⁶

In light of the fact that persons selected on the basis of family reunification and humanitarian and compassionate considerations are not required to meet the point system criteria,

²⁵³Ibid., p. 55.

²⁵⁴Anthony H. Richmond, Immigration and Ethnic Conflict, p. 122.

²⁵⁵Beaujot, p. 60.

²⁵⁶Ibid., p. 60. (See also Statistics Canada report Canada's Changing Population, pp. 47-53. Catalogue No. 96-311E)

it would be difficult to expect that on the average they will necessarily achieve levels of economic performance comparable to those of the independent class and receiving society. However, the fact that their needs during the initial period of settlement and integration are the responsibility of the federal government poses serious implications for the management of the immigration program and their eventual adaptation to Canadian society. First, as members of the family and refugee classes, these persons put a greater demand on the settlement and integration services available to them, and on income and social support services.²⁵⁷ And second, in the advent of significant changes in the global economy which demand an educated and highly-skilled labour force, their lower employability may swell the ranks of the unemployed and add to the number of workers already in need of retraining because of the rapidly changing economy.²⁵⁸

While the level of unemployment is relatively high at present, many positions that demand highly skilled workers go unfilled because of the inflexible work force. Given that Canada has historically looked to immigration as a means to correct imbalances in its labour force, the size and composition of immigration is important. However, the annual limit imposed on immigration levels and the relatively small independent class make it difficult for Canada to achieve a match between immigrants and the changing needs of the economy.²⁵⁹

The sizable family and refugee classes would tend to increase the level of unskilled and semi-skilled workers in the Canadian economy. This could have several consequences. First,

²⁵⁷Craig McInnes, "Recession Carves Holes in the System", The Globe and Mail, 27 November 1993.

²⁵⁸Leon F. Bouvier, Peaceful Invasions: Immigration and Changing America, p. 63.

²⁵⁹Immigration Canada, Managing Immigration..., pp. 5-6.

the oversupply of workers in a soft economy could lead to wages being depressed. Thus it is possible that some segments of Canadian industry would tend to support the imbalance between supply and demand in the labour market. Second, the attitudes toward taking low-paying jobs tend to differ between immigrants and Canadians. For example, many immigrants are not averse to taking low-paying and menial jobs because for them it means to be employed in spite of language difficulties and other barriers usually encountered upon arrival in the new environment. Some Canadians, on the other hand, are likely to be dissatisfied with the low pay and the lack of advancement opportunities. Thus it may follow that in some instances employers would prefer to hire immigrants at the expense of Canadian workers. This could then result in Canadians remaining unemployed or going on welfare assistance and this in turn may foster greater intolerance toward immigrants.

The competition for scarce jobs could be reduced in the event of smaller numbers of people entering the labour market through family and refugee classes. If this was possible, then Canadians who choose to remain unemployed and collect Unemployment Insurance benefits or depend on welfare support would probably have a difficult time justifying their aversion to low-paying jobs. However, the availability of immigrants eager to take almost any job provides a justification for some Canadians' continuous reliance on the income and social support systems. That the efforts of Bill C-86 to "manage the numbers and categories of immigrants who come to Canada more effectively" are constrained by the size of the family class and indirectly by the refugee class is evident from the situation in which the federal government finds itself responding to vocal ethnic communities. While the intention of the Bill was to help prepare Canada to meet the challenges of a new knowledge-based economy by selecting more skilled

immigrants²⁶⁰, the size of the family and refugee classes and the pressures from the ethnic communities to increase them even more²⁶¹ may leave Canada with a disadvantaged labour force. At the same time, the future labour market needs are difficult to predict.

C. Political Implications

In recent years, immigration has been one of the frequently debated issues in Canada. In many ways, immigration has an impact on all Canadians and as such it often provokes emotional and at times ambiguous reactions. It is to be expected that, given the pluralist nature of their society, Canadians would hold fairly divergent points of view regarding immigration policy. It appears that now apprehension about immigration is growing.²⁶²

Influenced to a significant extent by the 1967 changes to immigration policy which eliminated the racial bias and the expansion of the family and refugee classes with the Immigration Act of 1976, the nature of immigration to Canada has changed fundamentally. Whereas in the pre-1967 period the majority of immigrants came from the English-speaking and European countries and up until 1976 they were admitted primarily under the point system²⁶³, the period from 1967 to 1994 has been marked by a significant increase in immigration from Asia, Africa and Latin America, with an attendant rise in immigrants who are admitted without

²⁶⁰*Ibid.*, p. 5.

²⁶¹Citizenship and Immigration, Immigration Consultations 1994. A Submission by the Ukrainian Community Representative, 27 June 1994.

²⁶²Immigration Canada, Immigration to..., pp. 1-2.

²⁶³Immigration Canada, Evolution of..., pp. 12-16.

having to satisfy the rigours of the point system.²⁶⁴

These changes have brought about a situation in which 70 per cent of immigrants now come from Asia, Africa, and Latin America, with 43 per cent coming from Asia alone. While this to some extent has been the natural result of economic developments occurring in Europe and the Third world, the primary reason would appear to be introduction of the non-discriminatory immigration program in 1967 which allows for admission of persons regardless of their race, ethnicity, or country of origin.²⁶⁵

Over the years, Canada has become an increasingly pluralistic society which in the views of many has added value to Canadian life and made many Canadians more open and tolerant. The emergence of varied cultures has brought with it commercial benefits. As Canada is increasingly commercially linked with the Asia-Pacific region, immigration from that region can be seen as a positive development.²⁶⁶

Along with the positive impact that immigration has on the Canadian society, the changing cultural and ethnic composition resulting from immigration presents new challenges for the federal government, which is also under pressure to guide Canadians in the new global economy. Uncertain about their economic future, many Canadians fear that the country is in danger of losing its sense of national identity. The fast pace of societal changes around them, makes many Canadians uneasy.²⁶⁷ "Immigration policy is one area where Canadians feel they

²⁶⁴Immigration Canada, Annual Report..., p. 32.

²⁶⁵Immigration Canada, Immigraton to..., p. 8.

²⁶⁶Ibid., pp. 8-9.

²⁶⁷Campbell, op. cit.

can exercise some control and it often becomes the lightning rod for many different concerns and fears."²⁶⁸ However, having a situation in which about 56 per cent of the total annual immigration intake is not subject to the point system criteria²⁶⁹ could lead to the perception of loss of control over immigration policy.²⁷⁰

Undoubtedly, some of the displeasure expressed against immigration is grounded in racism. Yet, it may be foolhardy to dismiss the fears and concerns of Canadians as being based on racism alone. Many Canadians who have traditionally espoused Canada's tolerant and humanitarian traditions have taken note of the changes around them. In the poll commissioned by the federal government and conducted in February 1994 by Ecos Research Associates Inc., 53 per cent of Canadians expressed reservations about immigration levels, compared with 44 per cent in 1992 and just 31 per cent in February of 1989. Ecos president Frank Graves attributes the pressures on Canada's open society to a variety of factors, one of them being the shift to non-European immigration in the post-1967 period.²⁷¹

As differences between many diverse groups in Canadian society are accentuated by the officially sanctioned policy of multiculturalism, the perceived threat to an ill-defined Canadian way of life is articulated by some groups and political parties opposed to immigration. Tom Flanagan, former director of research for the Reform Party, argues that, while he believes in the concept of family reunification, the emphasis on family reunification after the Immigration

²⁶⁸Immigration Canada, Immigration to..., p. 9.

²⁶⁹Immigration Canada, Annual Report..., p. 1.

²⁷⁰Campbell, op. cit.

²⁷¹Ibid.

Act of 1976 and the interpretation of what constitutes a "family" has created a situation in which the breadth of the family class undermines the intentions of immigration policy. He calls for a return to immigration policy as it was 20 years ago when the point system was the "predominant paradigm".²⁷² Displaying a different view about the concept of family, Ladan Affi, a Somali immigrant, argues that family reunification is supposed to be "the cornerstone of Canada's immigration policy", reasoning that in her culture the concept of family is much broader. She also attempts to dispel assertions that family members brought to Canada by immigrant sponsors end up being a burden to society by saying that this is a wrong image because sponsors are required to make a financial commitment to support them.²⁷³

That social tensions are on the rise, particularly in large metropolitan centres, is evident from the the Ecos survey which found that in Toronto, which absorbs 20 to 30 per cent of all immigrants to Canada, about 67 per cent of respondents believed there were too many immigrants coming to Canada. This was a 21 per cent rise, in just two years, of people who believed this.²⁷⁴

The rising displeasures recorded against immigrants in Toronto may be attributable to the recent sponsorship defaults disclosed in Ontario. In November of 1993 there were approximately 16,000 welfare cases involving immigrants whose sponsors for one reason or another did not live up to their commitments. The situations involving sponsorship breakdown are exacerbated by jurisdictional difficulties between the federal, provincial and municipal

²⁷²CBC, Prime News, p. 6.

²⁷³Ibid., p. 6.

²⁷⁴Campbell, op. cit.

governments. Although immigration lies in federal jurisdiction, it is the provinces and municipalities that end up providing the bulk of welfare and other social services.²⁷⁵

In the absence of any mechanisms to enforce agreements between the sponsors and the federal government, the provinces are also not able to go after the sponsors who default. Mildred Morton, acting director of immigration policy, has said that even with a mechanism to enforce the agreements, the issue is one of "collection of support" and as such it is difficult to enforce. Nevertheless, the sponsorship breakdowns are creating resentment among Canadians whose tax revenues are used to provide support for the newcomers to Canada.²⁷⁶

It is important to note that these difficulties with the family class are occurring in areas in which there is strong concentration of ethnic communities. Any attempt to alter the family class category of the immigration program tends to run contrary to the interests of these communities. It would thus follow that the federal government's intentions to manage the numbers and categories of the immigration program more effectively through Bill C-86 are constrained by the size of the family and refugee classes. While the difficulties associated with the management of family class are most evident in large metropolitan centres such as Toronto, these are also the centres in which the support for a large family class would tend to be most pronounced. In view of the ethnic communities' strong involvement in the political process and their influence on the present federal government, it may be postulated that efforts to reduce the family or refugee class of the immigration program will not materialize.

²⁷⁵Craig McInnes, "Recession Carves Holes in the System", The Globe and Mail, 27 November 1993.

²⁷⁶*Ibid.*, p. 7.

In the 1980s, the political reality of refugee protection in Canada was such that those who proved entitlement to non-refoulement ended up with an entitlement which went well beyond what Article 33 of the Convention implied. Cognizant of the fact that the Convention was being interpreted well beyond its legal parameters and unable to stem the rise in refugee claims, the federal government, in an effort to minimize this entitlement conferred on refugees, reacted. It is important to note that while the federal government may not have complied with the spirit of the international refugee law, its actions appear legitimate within the narrow definition of the Convention.

If protection from persecution is an entitlement to confer certain rights otherwise enjoyed by Canadian citizens on outsiders, then its application is imbued with its own "special fragility".²⁷⁷ In times of sudden increase of claims, this entitlement can easily generate a public backlash. It must not be forgotten that the application of this entitlement occurs in the context of two different impulses somewhat paradoxically prevalent in much of the Western world. On the one hand, these societies, Canada inclusive, genuinely feel compassion for the persecuted refugees. However, on the other hand, these same societies feel uneasy when their national sovereignty appears threatened by an increase in refugee claims.²⁷⁸

Public concerns about refugee claims become evident when the refugee determination system is perceived as ineffective and fraught with complexities as has been the case in Canada during the 1980s and 1990s. The system is slow, and even when it reaches a decision it is in many instances unable to remove those deemed ineligible. Apprehensions are heightened when

²⁷⁷Martin, "The Refugee Concept...", p. 32.

²⁷⁸Ibid., p. 32.

a perception is created that refugee rights are accorded not only to those who genuinely deserve them but also to others who may be attempting to bypass the regular immigration procedures. As well, a system that is perceived ineffective to some extent becomes more attractive to a broader spectrum of asylum seekers who are forced to flee their countries of origin or may simply want to move to countries such as Canada. When the influx of asylum seekers is increased and proportionally fewer are returned, the public apprehension is compounded.²⁷⁹ Furthermore, the fact that protection of refugees has in effect become an entitlement increases the sense of threat to immigration control for some people in Canada.²⁸⁰ An entitlement to come to Canada and claim refugee status here and not be subject to a numerical limit²⁸¹, as opposed to being selected by Canadian immigration officials abroad, effectively prevents the federal government from setting quantitative limits on entry into Canada.

Prior to the early 1980s when most of refugees were taken in by Canada from abroad, with only a relatively low number coming to Canada and claiming refugee status here, certain "natural barriers to movement" prevented the refugee protection from becoming a contentious political issue. However, the advent of a new kind of asylum seekers who appear on Canada's borders and claim refugee protection has led to a situation in which the guarantee of refugee protection to broadening categories of people deemed refugees conflicts with the widely accepted notion that sovereign governments must preserve control, in the national interest, over the entry

²⁷⁹Lila Sarick and Virginia Galt, "Critics Doubt Marchi Will Succeed: May Lead to New Influx of Claimants, MP says", The Globe and Mail, 9 July 1994.

²⁸⁰Jim Hawkes, "Panel of Canadian Parliamentarians", p. 255, in Allan E. Nash (ed.) Human Rights and the Protection of Refugees under International Law.

²⁸¹Statutes of Canada 1992, Sec. 114(1)(b), p. 105.

of outsiders.²⁸²

In light of the fact that the Convention definition is silent on admission of refugees, that is, it does not specifically address the issues of admission and refusal at the border, the federal government is technically within its right to change admission criteria. This was evident in its imposition of visa requirements on Bangladesh and Sri Lanka in 1983, on Guatemala, Peru and Guyana in 1984, and shortly thereafter on Chile, Haiti and India.²⁸³ The imposition of visa requirements on these countries was harshly criticized by refugee advocates who argued that these measures affect both genuine and "bogus" refugee claimants indiscriminately.²⁸⁴

Interpretation of the Convention Article 33 appears to create a conceptual void as to what the federal government's options are when the numbers increase substantially. The actions of the federal government arising from Bill C-86 reflect this conundrum. While commitment to the Convention restricts its ability to remove people once they have entered its territories, the federal government attempted to reduce its obligations by resorting to restriction of the claimants' presence on its territory and imposition of changes to procedural requirements for satisfying the Convention definition.²⁸⁵

Prior to the early 1980s, the fact that a claim to refugee status overrode most of the other criteria for control did not appear to be an issue because the refugee-receiving countries retained relative control over the entry of outsiders, and the refugee inflow was maintained at manageable

²⁸²Martin (ed.), The New Asylum..., p. 8.

²⁸³Howard Adelman, p. 208.

²⁸⁴David Matas, Closing the Doors, pp. 73-76.

²⁸⁵Pamela Cullum. Personal interview. 31 March 1994.

levels. At the same time, many refugee-producing countries restricted exit of their nationals through internal exit controls, (for example Eastern Europe before the end of the Cold War).²⁸⁶

These factors cumulatively fostered a climate in which Canada (and other Western refugee-receiving countries) did not have to confront a profound contradiction that had remained dormant in its refugee law's response to spontaneous refugee claimants. That is, the willingness of some Canadians to help not only those determined to be Convention refugees but to embrace a wider definition of people in distress is contradicted by awakened fears of political, cultural and economic uncertainties of others in our society. In the early 1980s, as the definitional parameters of refugee categories widened, that contradiction pitted the guarantee of refugee protection against the notion of national sovereignty. The events surrounding Canada's immigration program during the 1980s and early 1990s have brought that contradiction to the forefront of the political debate in Canada.²⁸⁷

When Canada's involvement in refugee protection was primarily restricted to participation in the UNHCR and an occasional admission of refugees on humanitarian and compassionate grounds, guarantees of refugee status grounded in the Convention were generally accepted by the Canadian public. There also was no need for a complex and time consuming determination process of individual claims to refugee status. As well, intense philosophical debates as to what distinguishes refugees from other kinds of immigrants appeared to be absent from political discourse of that time.²⁸⁸

²⁸⁶Ibid.

²⁸⁷Peter Braid. Personal interview. 31 March 1994.

²⁸⁸Ibid.

In search of the factors affecting the change in attitudes toward refugees of part of the Canadian public, it may be necessary to focus on who precisely is a refugee. The prevailing notion of refugees is that they are persons persecuted by their governments, uprooted from their homes, and forced to seek protection outside the country of their birth. As such, they deserve special protection and assistance, which in fact has been accorded to them by refugee-receiving countries since the Geneva Convention and the establishment of the UNHCR in 1951. Although to be a refugee today is to be in a position of great disadvantage, it is, paradoxically, also to assume a position of privilege bestowed upon such a person by those in the world community who are more fortunate and willing to help. Past history of refugee protection shows that the term "refugee" evokes strong emotional and humanitarian responses from the people of Canada and other Western states. The willingness and the commitment to find ways to help has permeated the national culture to the point where they, Canada included, are allowing the interests of refugees to override the regular immigration laws, providing the criminality and security provisions of the host countries are not affected. However, the privileged position accorded to refugees by Canada and other states may be in jeopardy if the public whose tax revenues maintain the elaborate systems of refugee integration and settlement are no longer satisfied that those who claim to be refugees are deserving of that special status.²⁸⁹

The traditional approach to refugee protection worldwide has been to initially house the refugees in refugee camps and then facilitate their support either through a prolonged stay in the camps in the country of first asylum or resettle them to other areas of the world. The duration of stay in the refugee camps under austere conditions, especially in the Third World, may vary

²⁸⁹Martin, The New Asylum..., pp. 9-10.

from a few months to many years, depending on the nature of persecution or displacement from the country of origin.²⁹⁰ Furthermore, the very notions of uncertainty and displacement in a foreign country away from their countries of origin create an impression that persons in refugee camps have a strong legitimacy to their claim to refugee status. Their desperation and willingness to put up with the discomfort and uncertainties has by and large convinced the world community that they are deserving of the special treatment accorded to them under the Convention and as humanitarian refugees where applicable.²⁹¹

During the period following World War II when most European refugees crossing the countries' borders ended up in the refugee camps and were then processed from there, the elusive equilibrium between the privileges of protection, assistance, or relocation which are accorded to refugees but not to other migrants and the right to these privileges legitimized by the harsh conditions and the uncertainty of the refugee camp life was not upset. However, David A. Martin says that with persons seeking refugee protection by moving directly to refugee-receiving Western countries, this equilibrium is brought into question.²⁹²

Many persons coming to Canada today and declaring themselves refugees find themselves in a situation where the benefits and entitlements such as social assistance, legal assistance and work authorizations are available to them even before their claims have reached a positive decision. In contrast to the harsh conditions and the prospect of indefinite stay in refugee camps, the privileges provided to these persons may entice a much larger number of potential

²⁹⁰Peter Braid. Personal interview. 31 March 1994.

²⁹¹Pamela Cullum. Personal interview. 31 March 1994.

²⁹²Martin, The New Asylum..., p. 10.

refugee claimants who otherwise would not be willing to endure the harsh conditions prevalent in the most Third World countries' refugee camps. Thus, the former federal government felt justified in its efforts to identify and remove claimants not worthy of the privileges Canada's refugee determination system confers upon genuine refugees.²⁹³

While it is certainly improper to generalize and assume that all persons who appear on Canada's borders have no valid reasons to leave their country of origin, one may argue that at least some probably would not leave home if their only choice was a refugee camp, in Somalia or Rwanda, for example. As well, whatever the reasons of those persons claiming the status in Canada, whether political or economic, their actions do not appear to evoke the same degree of urgency and do not appear to have the same legitimacy that is derived from prolonged stay in refugee camps, at least in the opinions of some in Canada. Benoit Bouchard, the former Progressive Conservative Immigration Minister, attributes this ambivalence in public attitudes to the changes in international migration, arguing that now more often people are on the move in search of better economic conditions. Thus he states that "...while all of us are sympathetic to the desire for people to improve their economic status; (sic) economic migrants who seek to use the channels we provide for Convention refugees threaten the refugee process."²⁹⁴

Non-governmental organizations active in refugee protection, certain elements in the legal community, and others concerned with the plight of refugees disagree with this expression of

²⁹³Immigration Canada, Managing immigration:...., pp. 19-21.

²⁹⁴The Honourable Benoit Bouchard, P.C., M.P., then Minister of Employment and Immigration Canada, "The Refugee Challenge: Time for a World Response", p. 20, in Alan E. Nash (ed.) Human Rights and the Protection of Refugees under International Law.

doubt regarding the legitimacy of some refugee claims and denounce these doubts as a consequence of xenophobia and racism.²⁹⁵ It is also true that right of centre political groups, such as the Reform Party of Canada²⁹⁶, are not averse to using the new uncertainty on the part of the Canadian public about the refugee situation for their own purposes. However, in the climate of an increased migration of people worldwide and rising government deficits, it also may not be prudent to argue for an expanded definition of a refugee. Those who advocate tighter immigration controls in the face of uncontrolled arrivals of refugee claimants find a receptive audience among many Canadians who are concerned about the federal government's ability to regulate the entry of outsiders.²⁹⁷ Thus, on the one hand, the federal government is torn between its commitment to refugees grounded in the Convention, the UNHCR and refugee advocates who demand a greater involvement in refugee protection. On the other hand, it has to deal with budgetary pressures to improve the efficiency and cost-effectiveness of the immigration program through the amendments to the Act and with the fears of those who are concerned about the threat to public health and safety, and who are generally opposed to increased immigration.

In the new climate of heightened awareness about the circumstances surrounding the integration and settlement of persons who come to Canada and declare themselves refugees, all the players involved may have to fundamentally restructure their approach to refugee protection. While the refugee advocacy groups remind the government about its commitment to refugees as

²⁹⁵Gillian Creese, "The Politics of Refugees in Canada", p. 137, in Vic Satzewich (ed.) Deconstructing a Nation: Immigration, Multiculturalism and Racism in '90s Canada.

²⁹⁶CBC, Prime News, p. 3.

²⁹⁷W. Harding le Riche, "Crisis Looms", The Globe and Mail, Toronto, 11 March 1994.

a signatory to the Convention and argue for a greater involvement in refugee protection and the federal government counters with increased restrictive measures and deterrent practices, what ultimately may decide the approach to these changed circumstances involving the new kind of refugee will be the Canadian public's willingness to allow refugee considerations to override normal immigration procedures.

In order to gain support for a wider conceptual legitimacy of refugee protection, refugee advocacy groups may have to ensure that their policy initiatives, which may impose costs and difficulties on Canadians, achieve widespread public acceptance of the need for that policy.

Perhaps this inability to clarify the laws and regulations whose relative parameters would be satisfactory to a broad spectrum of Canada's population can be attributed to Canada's ambivalence about the nature of refugee claimants coming to Canada. When the concerns regarding refugee claimants are generally put into perspective, the public pressure to correct the difficulties affecting the system may be strong. However, when the time comes to actually remove an identifiable family from Canada, as was the case recently in Winnipeg²⁹⁸, the attitudes toward that particular family may change. Refugee advocates often engage media in their questioning of the federal government's judgement denying a refugee claim. The removals of rejected refugee applicants frequently become highly publicized affairs. Although the removals may not be questioned by a broad cross-section of Canadians, their silent acceptance does not appear to carry as much weight politically as the vocal objections of those who oppose such actions. Usually, the government's political assessment of refugee deportation favours the

²⁹⁸Treena Khan and John Douglas, "Immigration Minister Moved by Outpouring of Public Support", Winnipeg Free Press, 28 April 1994.

refugee.²⁹⁹ Although the present federal government has been under pressure from the Reform Party of Canada to tighten the immigration procedures³⁰⁰, it nonetheless appears more acutely affected by those who favour less restrictions.

Bill C-86 amendments to the Act to make the entry into Canada more difficult also reveal the former federal government's desire to achieve certain political advantages. A reduction in the number of refugee claimants diminishes the federal government's need to respond to the segments of the public that feel threatened by outsiders coming in at will and those individuals and groups eager to facilitate their entry. Lower numbers of refugee claimants are easier to manage, for they put less stress on the government's settlement and integration programs.³⁰¹ Fewer refugee claimants mean less social friction and uncertainties arising from perhaps culturally incompatible newcomers.³⁰²

However, any criticism of Canada's commitment to the refugee cause must be viewed in the context of Canada's involvement in the UNHCR. Although often criticized by refugee advocates as not doing enough, Canada's efforts compare favourably with other refugee-receiving states. For example, in 1994 Canada intends to admit about one-fifth of the 58,860 refugees who, according to the UNHCR, will require resettlement this year.³⁰³

While Bill C-86 may increase the efficiency and cost-effectiveness of the in-Canada

²⁹⁹Daniel Stoffman, Toward a More Realistic Immigration Policy for Canada, p. 10.

³⁰⁰CBC News, Prime Time, p. 8.

³⁰¹Paul Brooks. Personal interview. 31 March 1994.

³⁰²Campbell, op. cit.

³⁰³Immigration Canada, Annual Report..., p. iv.

refugee determination system, its changes could affect both genuine and "bogus" refugee claimants indiscriminately. A decision at the port of entry by SIOs may, for lack of evidence, result in genuine refugees being turned away. Also, visa requirements imposed on refugee-producing countries can, in instances in which visa request is denied, prevent both bogus and genuine refugees from entering Canada.³⁰⁴

It appears that both the federal government and refugee advocates may have contributed to the heightened concern about the pressures on Canada's borders. The former federal government, under pressure from those to the right on the political spectrum, reacted to political difficulties by instituting measures which affect every refugee claimant whether genuine or bogus indiscriminately. And refugee advocates, in their zeal, demand unrealistically broad categories of protection. Also, periodically they are wont to exert maximum pressure on the federal government whenever a deportation is deemed necessary by its officials, (for example, the family facing deportation in Winnipeg). Although undertaken with the best of intentions, pushing the government to the limit, sometimes involving media sensationalism to achieve their aims, the actions of refugee advocates make it difficult for the federal government to implement refugee determination standards which would be accepted by a broad cross-section of the Canadian public. That kind of confrontational approach in which political negotiations are conducted in the public forum makes consensus on realistic standards almost impossible; negotiations between the federal government and an aggressive interest group become a tug-of-war, with genuine refugees being the loser in the long run.

If the difficulties besetting the current refugee determination process in Canada are to be

³⁰⁴Peter Braid. Personal interview. 31 March 1994.

resolved, perhaps all the players will have to scale back their agendas. Refugee advocates may have to rein in their unconstrained commitments in order to create a climate conducive to implementation of fair and less cumbersome refugee determination procedures accompanied by speedy removal of those who do not qualify. For this to become feasible, refugee advocates may have to adopt a less all-encompassing conception of people who are legally entitled to refugee protection. This change in attitudes may be necessary to allay public apprehensions about unmanageable levels of claims and thus retain the political will to offer protection to those who are most severely endangered. It is evident that in addition to the public ambivalence about refugees, budgetary difficulties experienced by the federal government at present may force all the players involved in refugee protection to consider refugee protection as a "scarce resource", reserved for some situations of human rights violations and abuse. A realistic assessment of the overall situation precludes the use of refugee protection in the resolution of all the consequences of war, poverty, and violence in the trouble spots of the world.

It will also be important for the federal government to work in concert with the refugee advocate community in development of a fair and effective refugee determination system. A restrained and sensible approach taking into account the federal government's limited capacity to expend resources on costly programs while still retaining a fair and effective system coupled with the removal of those whose claims are ineligible would serve well to calm the public's uncertainty about refugees. To effect a substantive change, it may not be enough to assess the applicants by SIOs at the point of entry nor will the expertise of inadequately-trained functionaries of the IRB suffice, (as was evident from the recent incident involving a person in

Toronto whose deportation was stayed by an IRB member).³⁰⁵ As well, simplified avenues of review and appeal may become a necessity, because multiple stages of the review and appeal process are not conducive to prompt removal of rejected applicants. It is also important that the federal government continues to work toward international solutions regarding the protection of refugees within the framework of the UNHCR. An active participation on the part of government could ensure that the Canadian public does not end up carrying a disproportionate share of the burden. More international cooperation on refugee protection may be necessary because when one refugee-receiving country tightens up its admission requirements, the flow of refugees inevitably is directed toward those countries in the West whose borders are still relatively open.

6. BILL C-86 AND THE NEW LIBERAL GOVERNMENT

The relatively short period of time elapsed since since 1 February 1993 when Bill C-86 amendments to the Immigration Act became operational precludes any detailed evaluation of its actual effects. Moreover, the change in the federal government from the Progressive Conservative Party to the Liberal Party could further affect the Bill's original intentions. To understand how the Bill's amendments to the Immigration Act will be interpreted, a court challenge to one or more of its provisions will probably be necessary in the future. Further, the approach taken by the new Immigration Minister Sergio Marchi will undoubtedly affect the Bill's

³⁰⁵Lila Sarick, "Criminals Escaping Deportation", The Globe and Mail, Toronto, p. A1, 19 May 1994.

future interpretation and implementation.

So far, the new Minister has implemented changes regarding immigration enforcement and control and changes attempting to streamline the immigration program's administration. With respect to the immigrant selection process, he has set out on an extensive Canada-wide consultation process to seek input from Canadians as to what kind and how many immigrants should be admitted in the three classes of immigrants, what age they should be, and what kind of skills they should possess.³⁰⁶

The new federal government, while following the five-year plan which ends in 1995, has set out to develop a coherent, long-term policy framework for immigration. In the introduction to the 1994 Immigration Plan, the Minister outlined his long-term policy directions based on the following principles. First, although it is the intention of the government "...to prevent abuse of the program, protect the interests of Canadians, and to control costs...", the Minister does not intend to introduce restrictive policies reminiscent of the past periods of economic recessions during which immigration levels were reduced significantly. Second, the Minister is convinced that attention to short-term difficulties should not take precedence over the long-term perspective on immigration. Third, in view of the all-encompassing effect that immigration has on the lives of Canadians, the Minister intends to increase the level of consultation with Canadians. Fourth, it is the Minister's desire to increase cooperation with all levels of government and private sector organizations involved in the immigration program.³⁰⁷

³⁰⁶Mildred Morton, Citizenship and Immigration Canada, Immigration Policy, Telephone interview. 24 March 1994.

³⁰⁷Immigration Canada, Annual Report..., pp. ii-iii.

While the direction of immigration policy espoused by the new Minister appears to address abuse of the program as well as enforcement and control concerns, its emphasis on the long-term objectives of the program may occur at the expense of correcting the current shortcomings identified by Bill C-86. The Minister's intention to consult widely with Canadians is a politically correct goal. However, immigration consultations conducted by the Minister in the large metropolitan centres and by his assistants in places such as Winnipeg are dominated by ethnic communities' representatives. Concern may be raised as to how representative these special interest groups are of Canadian society. On the one hand, it is possible that immigration may still be a special interest area of public policy-making only³⁰⁸; whereas on the other hand, one cannot help but be concerned about how these consultations are publicized in advance. When queried about how representative was the audience of the whole Canadian society, Mary Clancy, the chairperson of Winnipeg Immigration Consultations replied "...well, we invite everybody, however, if 'they' do not want to come..."³⁰⁹ However, given the increased awareness of Canadians about immigration matters³¹⁰, one would expect that "they" would probably come and make submissions to the Minister, if they were notified sufficiently in advance.

Thus it would appear that a partial shift in immigration policy away from the intention of Bill C-86 may be under way. While Bill C-86 enforcement and control and other administrative changes to the immigration program are already in effect, the Minister's emphasis

³⁰⁸Lyle Moffat, Citizenship and Immigration Canada, Winnipeg, Manitoba. Personal interview. 27 June 1994.

³⁰⁹Mary Clancy, M.P. Halifax, Nova Scotia. Personal interview. 27 June 1994.

³¹⁰Campbell, op. cit.

on the long-term program objectives and his commitment to family reunification and refugee protection may prevent him from increasing the independent class and controlling the monetary and social costs associated with immigration.

Probably in response to Canadians' changing attitudes about immigration, the Minister appears firm in his pronouncements regarding the need to stem abuse in the program. However, "...his policy reforms are winning praise in Canada's ethnic-minority communities."³¹¹ Furthermore, the Minister has put "liberal-leaning" immigration advocates onto the Immigration and Refugee Board, has allowed refugee claimants to get work permits, and is reluctant to facilitate a speedy removal of failed refugee claimants.³¹² Another example of the possible shift away from Bill C-86 intentions is the Minister's low priority accorded to the safe third country concept regarding the removal of failed refugee claimants.³¹³

While George Frajkor, national secretary of the Canadian Ethnocultural Council praised the Minister's approach to immigration policy, Art Hanger, the Reform Party M.P., has accused the Minister of "...playing into the hands of immigration lawyers and special interest groups."³¹⁴ The apparent shift away from the intentions of Bill C-86 would signal that the present government is to some extent beholden to special interests when it comes to immigration. Ethnic communities' increased participation in the political process undoubtedly influences the Minister's decisions on immigration.

³¹¹Geoffrey York, "Talking Tough, Acting Soft", The Globe and Mail, 27 June 1994.

³¹²Ibid.

³¹³Pamela Cullum. Personal interview. 31 March 1994.

³¹⁴York, op. cit.

7. SUMMARY AND CONCLUSION

Immigration has figured prominently in Canada's evolution as a state. In light of the rights accorded to non-residents by the Charter, control over the entry to Canada was deemed important by the former federal government when pressures on its borders were increased by international migration. Faced with the prospect of eroding control over the volume and composition of immigration to Canada, the former government introduced Bill C-86 as an amendment to the Immigration Act. The intent of the bill was to make the Immigration program more responsive to policy direction, allowing the government to react to international migration pressures as well as to take into account the changing needs of Canadian society.

While in the past the Immigration Act provided the authority to establish the levels of immigration considered appropriate, it did not allow the federal government to actually set annual limits of immigrants accepted in any category. Bill C-86 contains provisions to create classes of immigrants for the purposes of managing the Immigration Program and, where deemed necessary, restricting the number of immigrant visas allotted to those classes.

The cumbersome nature of the in-Canada refugee determination system led to serious backlogs which imposed hardships on refugees as well as invited abuse from those who used the system as a means to remain in Canada. Bill C-86 introduced measures that addressed the need for better control over access to the system, while allowing those who have genuine claims to protection to state their case. The bill also aimed to improve the claim evaluation process, providing for faster and more consistent decisions. As well, the bill's intent was to ensure that the Immigration and Refugee Board decisions will result in a faster process for landing a refugee

whose claim is approved, and for removing failed claimants.

In addition, Bill C-86 brought in changes to streamline the administration of the Program. Measures were introduced to improve the administration of the IRB. The Bill also aimed to reduce meaningless formalities and unnecessary paperwork. Changes were made in the area of issuing visas and ministerial permits. Procedures regarding family reunification in Convention refugee cases were also simplified.

As the paper has suggested, the overall intent of Bill C-86 was to achieve these policy objectives. However, it has been argued here that its intentions to improve the Immigration Program are constrained by ethnic communities whose desire is to keep the family class category of the Program as large as possible. They are also constrained by the impact upon the Program of the Charter of Rights and Freedoms, and by Canadian commitment to the Geneva Convention and the UNHCR. As well, an analysis of the policy direction taken by the new federal government suggests that the present Immigration Minister has opted to focus on the long-term policy framework for immigration, rather than to attend to the short- and medium-term policy and operational goals proposed by the Bill. Thus the intent to rationalize and bureaucratize the immigration program operations is constrained by these factors.

Canada's commitment to family reunification is fostered by the increased size and involvement of ethnic communities in the political process. Given the natural propensity of ethnic communities to gravitate to political parties that are receptive to their concerns, it may be argued that the recent change in government at the federal level can have a considerable impact on the way in which the intent of Bill C-86 will be followed through. Thus, a different political philosophy and a changing ethnic composition suggest that the intent of Bill C-86 to better

manage and perhaps increase the proportion of the independent class at the expense of the family class, although desirable from purely economic considerations, will perhaps not be as successful as initially envisioned by the Bill.

This insistence on a large family class and indirectly refugee class can have significant economic and social implications. Pressures on the federal government to maintain a large family class along with a refugee class thus limit its ability to respond to labour market demands, control costs associated with the resettlement and integration programs, and allay fears of economic and cultural uncertainties expressed by mainstream Canada. Although the intent of the Bill was to help prepare Canada to meet the challenges of a new knowledge-based economy by selecting more skilled immigrants, the insistence by ethnic communities on large family and refugee classes may leave Canada with a disadvantaged labour force. Similarly, the fast pace of changing cultural and ethnic composition of immigration makes many Canadians apprehensive about their sense of national identity. The perception that the federal government is not in control of immigration can lead to social tensions in society. Maintaining large family and refugee classes, over which the government has limited control, can only exacerbate these tensions.

Refugee claimants, once on Canadian territory, are guaranteed due process in Canadian courts by the Charter. This in some instances frustrates the government's efforts to run an efficient and cost-effective immigration program because the elaborate avenues of appeal frustrate its ability to remove failed claimants, thus the need for greater control at the port of entry. In addressing this, the Bill's intent was to increase discretionary decision-making at the level of primary adjudication of claims and at the appeal process. Confronted with the Charter

presence, the former government acted in this manner probably for two reasons. One, it might have reached a conceptual void, that is, it had no other alternative. Or two, it might have considered it politically expedient to distance itself from what are generally controversial and disputed decisions of immigration enforcement and control.

The new refugees of the 1980s and 1990s are forcing Canada to rethink its commitment to refugee protection. Granting certain rights enjoyed by Canadians to outsiders occurs in the context of two different impulses. On the one hand, many Canadians genuinely are willing to help those in distress. On the other hand, however, many in Canada fear that their sovereignty is threatened by an increase in refugee claims. The ambiguity of feelings is compounded by economic implications of admitting large number of immigrants. While not violating the letter - but only the spirit - of international and domestic refugee laws, the former federal government attempted to reduce its obligations by resorting to restriction of the claimants' presence on its territory and imposition of changes to procedural requirements for satisfying the Convention definition.

While the intent of Bill C-86 was to an extent to distance the politicians from the issues of immigration by increased rationalization and bureaucratization of the immigration program, the new Immigration Minister appears to have made it more politicized and personalized. While he has implemented Bill C-86 changes dealing with enforcement and control and streamlining administration, his insistence on focussing on the long-term perspective of immigration suggests a shift away from the short- and medium-term objectives of the bill. It appears that the present federal government is to some extent beholden to special interests when it comes to immigration. Thus it follows that the Minister's commitment to family reunification and refugee protection

may prevent him from increasing the independent class and controlling the economic and social costs associated with immigration. Furthermore, the Minister's recent pronouncements regarding the need to prevent abuse of the immigration program on the one hand, and his continuously generous treatment of failed refugee claimants on the other, appears to confirm his reputation as a skilled player of ethnic politics.

APPENDIX 1

Paragraphs 19(1)(a) to (c) of the Immigration Act were repealed and then substituted with the following provisions (verbatim):³¹⁵

- (a) persons who, in the opinion of a medical officer concurred in by at least one other medical officer, are persons
 - (i) who, for medical reasons, are or are likely to be a danger to public health or to public safety, or
 - (ii) whose admission would cause or might reasonably be expected to cause excessive demands, within the meaning assigned to that expression by the regulations, on health or prescribed social services;
- (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 involve social assistance, have been made for their care and support;
- (c) persons who have been convicted in Canada of an offence that may be punishable under any Act of Parliament by a maximum term of imprisonment of ten years or more;
- (c.1) persons who there are reasonable grounds to believe
 - (i) have been convicted outside Canada of an offence 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, or
 - (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, except persons who have satisfied the Governor in Council that they have rehabilitated themselves and that at least five years have elapsed since the expiration of any sentence imposed for the offence or since the commission of the act or omission, as the case may be.
- (c.2) persons who there are reasonable grounds to believe are or were members of an organization that there are reasonable grounds to believe is or was engaged in

³¹⁵Statutes of Canada 1992, pp. 19-20.

activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of any offence under the Criminal Code, the Narcotics Control Act or Part III or IV of the Food and Drugs Act that may be punishable by way of indictment or in the commission outside Canada of an act or omission that, if committed in Canada, would constitute such an offence, except persons who have satisfied the Minister that their admission would not be detrimental to the national interest.

Paragraphs 19(1)(e) and (f) of the Immigration Act were repealed and then substituted with the following provisions:³¹⁶

- (e) persons who there are reasonable grounds to believe
 - (i) will engage in acts of espionage or subversion against democratic government, institutions or processes, as they are understood in Canada,
 - (ii) will, while in Canada, engage in or instigate the subversion by force of any government,
 - (iii) will engage in terrorism, or
 - (iv) are members of an organization that there are reasonable grounds to believe will
 - (A) engage in acts of espionage or subversion against democratic government, institutions or processes, as they are understood in Canada,
 - (B) engage in or instigate the subversion by force of any government, or
 - (C) engage in terrorism;
- (f) persons who there are reasonable grounds to believe
 - (i) have engaged in acts of espionage or subversion against democratic government, institutions or processes, as they are understood in Canada,
 - (ii) have engaged in terrorism, or
 - (iii) are or were members of any organization that there are reasonable grounds to believe is or was engaged in
 - (A) acts of espionage or subversion against democratic government, institutions or processes, as they are understood in Canada, or
 - (B) terrorism,

except persons who have satisfied the Minister that their admission would not be detrimental to the national interest.

Subsection 19(1) of the Act was further amended by striking out the word "or" at the end of

³¹⁶Ibid., pp. 20-21.

paragraph (i) and by adding the following paragraphs (verbatim):³¹⁷

- (k) persons who constitute a danger to the security of Canada and are not members of a class described in paragraph (e), (f) or (g); or
- (l) persons who are or were senior members of or senior officials in the service of a government that is or was, in the opinion of the Minister, engaged in terrorism, systematic or gross human rights violations or war crimes or crimes against humanity within the meaning of subsection 7(3.76) of the Criminal Code, except persons who have satisfied the Minister that their admission would not be detrimental to the national interest.

³¹⁷Ibid., p. 21.

APPENDIX 2

The Point System

The point system, first established in 1967, and ascribed statutory form in the Immigration Act, regulates the admission of independent immigrants. It is basically a mechanism which enables Canada to predict whether an immigrant has the ability to adapt successfully to his/her new environment and to become a contributing member of Canadian society. This system is an attempt to improve the rationality and objectivity aspects of the selection process.³¹⁸

The point system consists of nine criteria, eight of which relate to the applicant as an individual. These criteria are:³¹⁹

Age - Individuals from 21-44 years of age are given the full 10 points in this category. Two points are deducted for each year under 21 or over 44. Thus applicants over 49 receive no points.

Education - One point is given for each year of primary and secondary education successfully completed, to a maximum of 18.

Specific Vocational Training - Points are awarded on a sliding scale reflecting the nature of the formal training required for the applicant's occupation. Thus, the more complex the training required, the higher the number of points. The full 18 points can only be achieved if more than 10 years of training are required.

Experience - Points are given for job-related experience (to a maximum of 8). Thus, a high number of years spent in a low skill profession may yield only 2 points, whereas completion of certain vocational training may merit the maximum

³¹⁸Rocky Gushulak, Citizenship and Immigration Canada, Winnipeg, Manitoba. Personal interview. 27 June 1994.

³¹⁹Ibid.

number of points awarded.

Occupation - Here, points are awarded to immigrants who possess skills in occupations that are in demand in Canada. Applicants must receive some points in this category or have arranged employment for their application to be considered. A maximum of 10 points is awarded in this category.

Arranged Employment - Ten points are awarded to an applicant who has arranged employment in an area of Canada in which there is a shortage of people with the applicant's skills.

Knowledge of English or French - Up to 15 points are given to an applicant for fluency in official languages.

Personal Suitability - Up to 10 points are awarded for personal suitability based on the visa officer's perception of an applicant's adaptability, initiative, motivation and other similar attributes. This is the only subjective criterion in the system.

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