

IMMIGRANT SELECTION AND SECTION 15 OF THE *CHARTER*

**A Study of the Equality Rights of Applicants
for Admission to Canada**

by

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ABSTRACT

This paper argues that non-white applicants for immigration to Canada are a historically disadvantaged group entitled to protection under Section 15 of *The Canadian Charter of Rights and Freedoms*. It is argued that this group has been discriminated against on the basis of colour, race, ethnic and national origin, in that they were historically denied the advantages of admission to Canada. As a direct consequence of changing immigration patterns worldwide, and the introduction of the point system in Canada in the 1960's, the current immigrant profile reveals that these historically disadvantaged groups now make up the majority of new immigrants to Canada.

This paper argues, however, that when these new immigrants have sought to use equality legislation to challenge immigration selection decisions, that the legislation and the Courts have perpetuated the historic discrimination against them by declining jurisdiction, thereby denying new immigrants the protections of equality legislation. It is proposed that a proper application of basic human rights and *Charter* principles should provide equality rights and Section 15 protection to applicants for immigration.

In order to support this argument the paper takes a historic look at Canadian immigration policy and practice, to illustrate that non-white immigrants to Canada are a historically disadvantaged and powerless group. As such they are an analogous group to those enumerated in the *Charter* and entitled to *Charter* protection. The legislation and cases under *The Bill of Rights*, *The Canadian Human Rights Act* and *The Charter* are examined to demonstrate the lack of equality rights protection for new Immigrants.

It is argued that this failure to provide redress, by both the legislature and the courts, is a violation of new immigrants' Section 15 rights under the *Charter*.

The paper concludes with comments on the proper role of the judiciary in cases which house *Charter* issues and observation on the implications of a failure by the courts to provide redress.

The paper concludes with comments on the possible reasons for the Courts' failure to protect immigrant rights under the *Canadian Human Rights Act* and the *Charter*.

CHAPTER ONE

INTRODUCTION

A series of recent Federal Court decisions has held that applicants for immigration to Canada cannot rely upon the *Canadian Charter of Rights and Freedoms*¹, or the *Canadian Human Rights Act*². The courts have determined that the *Charter* does not apply to visa officer decisions, and that the remedies under the *CHRA* are not available to applicants for admission to Canada.³ These Court decisions have highlighted the legislative limitations of the *CHRA* which, coupled with the Courts' judicial interpretations, have left immigration applicants unprotected by equality legislation, and visa officer decisions immune from any meaningful human rights review. The implications of this result are obvious: if discrimination on the basis of any prohibited ground⁴ is being practiced by the Department of Immigration, then no mechanism exists to challenge that discrimination.

This paper argues that non-white applicants for immigration to Canada are a historically disadvantaged group entitled to *Charter* protection under Section 15. It is argued that this group has been discriminated against on the basis of colour, race, ethnic and national origin, in that they were historically denied admission to Canada. To support this claim chapter one examines how the exclusion of the Chinese, Japanese, Blacks, East-Indians and later the Jews was achieved in Canada. Each group is examined separately, and then compared to the treatment afforded the British immigrant who was openly courted by the Canadian government.

¹ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982* being Schedule B of the *Canada Act, 1982* (U.K.), 1982, c 11. [hereinafter *The Charter*]

² *Canadian Human Rights Act*, 1976-77, c. 33, s. 2. [hereinafter *CHRA*]

³ see *Canadian Council of Churches v. Canada*, [1989] 3 F.C. 3, *Ruparel v. Canada (Minister of Employment and Immigration)* [1990] F.C.J. No 701 (QL), *Canada (Secretary of State for External Affairs) v. Menghani* [1993] F.C.J. No. 1287. (QL)

⁴ Under the *Charter* this means on the basis of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability and under the *CHRA* race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability and conviction for which a pardon has been granted.

Chapter one concludes by looking at the major changes that occurred in Immigration legislation and policy in the 1960's and the effect that those changes had upon the identity of Canadian immigrants, and concludes that these new immigrants are for the most part from the historically disadvantaged groups. Because of the identity of these new immigrants, it is argued that new immigrants as a class satisfy the test set by the Supreme Court for determining a non-enumerated group's entitlement to Section 15 protection as articulated in both *Andrews v. Law Society of British Columbia* and *R. v. Turpin*.⁵

Chapter two examines the extent to which applicants for immigration have actually enjoyed equality rights protection in human rights legislation and under the *Charter*. The legislation and important cases under the *Bill of Rights*, the *Charter* and the *Canadian Human Rights Act* are examined and criticized, particularly where they are shown to limit or deny jurisdiction in immigrant selection cases. The chapter demonstrates that through a combination of legislative limitations and judicial interpretation, applicants for immigration are unprotected by human rights and equality statutes.

Chapter three then considers the definition of equality advanced in *Andrews v Law Society of British Columbia* and *R v. Turpin* and argues that the failure of the legislature and the Courts to provide *Charter* and *CHRA* protection to applicants for immigration violates Section 15 of the *Charter*, by denying the equal benefit and protection of the law to immigrants.

Chapter three concludes this paper with a discussion of the role that the courts play in ensuring *Charter* compliance and the role that judicial bias may have played in the denial of equality rights to applicants for immigration.

⁵*R. v. Turpin* [1989] 1 S.C.R. 1296
Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143.

CHAPTER TWO: IMMIGRANT SELECTION

Introduction

Our courts have recognized the evidentiary burden that complainants bear when they seek to advance claims under Section 15 of the *Charter*. Madame Justice Wilson in *Turpin* acknowledges that "the complainant probably must adduce a considerable amount of evidence concerning the place of that person's group in the entire social, political and legal fabric of our society".⁶ This chapter seeks to satisfy this evidentiary burden by illustrating that non-white immigrants to Canada were a historically powerless and disadvantaged group. This chapter illustrates that until the 1960's the non-white applicant for immigration operated under severe social, legal and political disadvantage in their attempts to come to Canada and that discrimination was practised by the Canadian government in its immigration policies based on race, religion, national or ethnic origin and colour.

This chapter does not address why these particular groups were singled out, but instead attempts to survey the extent of the exclusion and the mechanisms, be they legislative, administrative or structural, which were used. It is acknowledged that other ethnic and religious groups were also historically discriminated against, and at different times have been the shifting targets of racism and immigration exclusion: the Italians, who came in large numbers as sponsored family class immigrants;⁷ the Dukhaboors who sought to escape religious persecution, the Irish seeking to flee the potato famine, to name only a few. However the treatment extended to the groups used as example in this paper, represents the most consistent and long standing examples of discrimination, using the full range of powers available to the Canadian government.

In reality, the world's population does not divide itself neatly into immutable categories called "races". This fact makes a discussion of racism in immigration

⁶*R. v. Turpin*, [1989] S.C.R. 1296 at 1332.

⁷House of Commons Debates, (1959) Vol 3 at 2711-12 and 2936.

particularly difficult because to engage in the discussion, one has to not only use the vocabulary associated with racial categorization, but actually apply the theory by dividing people into these categories. The discussion is further complicated by the lack of accurate statistics. In the early years of Canadian immigration, the Department of Immigration kept statistics on the number of "Blacks", "Chinese", "Japanese", "East-Indians", "Hindu", or Jews admitted to Canada. In later years statistics have been relied upon which are based upon assumptions made about a person's "race", colour or ethnic origin, based upon their country of origin. Such assumptions create obvious difficulties of statistical accuracy, however no system which seeks to divide people along lines which are more ideological than biological could ever be accurate. The categories used historically have also created significant problems of vocabulary. Many of the labels used to describe the different groups are now considered offensive or unacceptable. Such terms as "coolies", "chinks", "japs" and "Negroes" are no longer in use. The nature of the study, however means that such categorizations have been used, although an attempt has been made to use the least pejorative and offensive.

The Ideological Basis for Racism and Exclusion

When the historian Agnes C. Laut described minorities in Canada in 1915 as "Jappy-Chappies, Chinks and Little Brown Men" she was expressing the sentiments of many of Canadians.⁸ Her description formed part of a warning to white Canadians that these groups, together with the "Jews, Pollacks and Galicians" would corrupt Canada and could not be assimilated. These people represented "dangers of dilution and contamination of national blood, national grit, national government, national ideas". While others may have couched their prejudices less crudely, using such jargon as "assimilation" or "adaptability" the politicians, the public and the press agreed at the turn of the century that Canada would be a better place if these groups were not permitted to come here. Success in immigration meant assimilation, in referring to the Chinese, Sir John A. McDonald is reported to have declared:

⁸ Agnes C. Laut as quoted in Robin W. Winks, *The Blacks in Canada: A History* (Montreal: McGill-Queen's University Press: 1971) at 299.

"an alien race in every sense that would not and could not be expected to assimilate with our Aryan population"⁹

In the past 100 years of Canada's history the Chinese, Japanese, Indians, Blacks and Jews were systematically excluded from entry to Canada. The rationales advanced for their exclusion varied, including that they were: incapable of assimilation; created unfair competition in the market place; or threatened the "British" way of life.

Historians Peter Li and Singh Bolaria argue that the oppression of different racial groups is "by no means a historic accident, but is rooted in the social and economic development of Canadian society."¹⁰ Concepts of racism, or the idea that people can be divided into categories called races, evolved around the 19th century. Individuals, definable by different physical characteristics including skin colour, "ceased to be the child of Man, and became the child of one's race, nation or ethnic group,"¹¹ each race supposedly possessing different hereditary, sociological and psychological characteristics.¹² Scholars and historians posit different reasons for the emergence of the concept of race, and for the practice of racism. Peter Li, cited above, ties racism against the Chinese in British Columbia to the economic hard times that began in 1866,¹³ and argues that the immigrants were mere tools in the hands of the industrialists. By forming a pool of marginalized workers, with no civil or political rights, reviled by all, industrialists could use the Chinese as a "labour reserve capable of responding to uneven capitalist development."¹⁴ The consistently anti-immigration stance of the early Canadian labour movement bears out this hypothesis, as they saw the immigrants

⁹Sir John A. McDonald as reported in Pierre Berton, *The Last Spike: The Great Railway 1881-1885*, (Toronto: McLelland and Stewart, 1971) at 195.

¹⁰B. Singh Bolaria and Peter S. Li, *Racial Oppression in Canada*, 2d ed. (Toronto: Garamond Press, 1988) at 14.

¹¹Ester Delisle, *The Traitor and the Jew*, (Montreal: Robert Davis Publishing, 1993) at 56

¹²Ester Delisle, *The Traitor and the Jew*, (Montreal: Robert Davis Publishing, 1993) at 56.

¹³Peter S. Li, *The Chinese in Canada*, (Toronto: Oxford University Press, 1988) at 2.

¹⁴Peter S. Li, *The Chinese in Canada*, (Toronto: Oxford University Press, 1988) at 34.

"undercutting wages and weakening working-class solidarity"¹⁵. Peter Li argues that:

"The Oriental became the scapegoat.... and the blame for every malady was at one time or another placed upon them". Much of the success of the Trades and Labour Congress of Canada in promoting a national union between 1880 and 1900 can be attributed to its anti-oriental policy, which tended to unify otherwise dissenting groups"¹⁶

Dorothy Williams articulates the commonly held view that racism functions for the benefit of the elite, and is used a tool to divide and conquer.

"Canada was not created for the equality of all its citizens. As a colony its existence was maintained for the wealth of its owners and as a nation it continues to maintain this goal. Class and race, like language and religion, are issues used by different elite groups at different times to keep people divided; divisions maintain the status quo."¹⁷

William Ward argues that racism against the Chinese in British Columbia was fundamentally a problem of social psychology, and while economic factors were important sources of conflict and prejudice, they were subordinate to the psychological tensions that "form the central locus of racial animosity".¹⁸

Ester Delisle links the development of a "national identity", with the emergence of racism and anti-semitism in Quebec. She argues powerfully in *The Traitor and the Jew* that the anti-semitism of the extreme right-wing nationalists in Quebec stemmed from their efforts to "create" a national identity for French Canadians. The creation of the mythical Jew, one who was universally feared and reviled, and who could be blamed for the shortcomings of the French Canadian population, played an essential part in the development of the French Canadian identity.¹⁹ In the same vein, others have linked the construction of the

¹⁵Peter S. Li, *The Chinese In Canada*, (Toronto: Oxford University Press, 1988) at 26.

¹⁶Peter S. Li, *The Chinese In Canada*, (Toronto: Oxford University Press, 1988) at 39.

¹⁷Dorothy W. Williams, *Blacks in Montreal 1628-1986: An Urban Demography*, (Cowansville, Que.: Les Editions Yvon Blais Inc., 1989) at 4.

¹⁸William Peter Ward, *White Canada Forever: Some Aspects of the Canadian Response to Orientals, 1853-1914*, (Montreal: McGill-Queen's University Press, 1990) at ix

¹⁹Ester Delisle, *The Traitor and the Jew*, (Montreal: Robert Davis Publishing, 1993)

Canadian national identity to the treatment of the visible minorities during the process of nation-building for Canada itself at the turn of the century.²⁰

While there is no unanimity amongst scholars and historians as to why racism flourished in Canada or elsewhere, all agree that it has played an essential role in Canadian history. Canadian immigration policies and practices from Confederation until at least the 1960's were a clear reflection of the xenophobia and racism which permeated Canadian society.

At the turn of the century Canada was not alone in its desire to exclude non-white immigrants, and the actions taken here parallel initiatives taken in both the United States and Australia during the same period. While Canada undoubtedly tried to exclude non-whites, this was never a clearly stated public policy. Australia, during the same period possessed a publicly articulated and accepted policy of "white Australia". One of the first acts of the new Australian commonwealth government was to enact laws, that prohibited non-whites from entering, settling, working or living either temporarily or permanently in Australia.²¹ The development of restrictive legislation, at first aimed almost exclusively at the Chinese gold prospectors began in the 1850's and 1860's. With the passage of the *Immigration Restriction Act* in 1901, the "White Australia" policy was to remain in force for seventy-two years, until 1973.²²

The United States passed their first restrictive immigration legislation against the Chinese in 1882 after the entry of 13,100 Chinese in 1881.²³ When the massive demand for railway labour began to decline, the Americans passed the *Chinese Restriction Act*, prohibiting the entry of Chinese labourers into the United States.²⁴

²⁰ Freda Hawkins, *Critical Years in Immigration*, 2d ed. (Montreal: McGill University Press, 1991) at 8.

²¹ Freda Hawkins, *Critical Years in Immigration: Canada and Australia Compared*, 2d ed. (Montreal: McGill-Queen's University Press, 1991) at 14.

²² Freda Hawkins, *Critical Years in Immigration: Canada and Australia Compared*, 2d ed. (Montreal: McGill-Queen's University Press, 1991) at 11.

²³ Helen F. Eckerson, "Immigration and National Origins" (1966) 367 *Annals of the American Academy of Political and Social Science* at 4.

²⁴ John P.S. McLaren, "The Early British Columbia Supreme Court and the "Chinese Question": Echoes of the Rule of Law" (1991) 20 *Man L.J.* 114.

With the arrival of many other non-white immigrants at the turn of the century, the *Immigration Act, 1917* sought to exclude more than just the Chinese. The act set up an Asiatic Barred Zone that excluded all immigrants from the countries of south-eastern Asia.²⁵ In 1929 the *Quota Act* was passed, introducing a national origins quota system that institutionalized the existing ethnic composition of the United States. From the 1930's until 1965, national origin was the controlling factor in American immigration. The United States finally abandoned race as the primary basis of their immigration policies with the passage of the *Immigration Act 1965*.

²⁵ Freda Hawkins, *Immigration Policy and Management in Selected Countries* (Ottawa: Information Canada, 1974) at 6.

Chinese Immigration

With the discovery of gold in the Fraser River Valley in April 1858, Chinese prospectors began arriving in Canada in large numbers. Records show that approximately 2,000 Chinese came overland into Canada from the United States in 1858-59. In the next year 4,000 Chinese arrived directly from China, giving an estimated Chinese population in British Columbia of 6-7,000 by the early 1860's.²⁶

Historian Peter Li claims that these early Chinese immigrants were received without overt hostility.²⁷ This quickly changed however, as a powerful and active anti-Chinese lobby developed in British Columbia which presaged an institutionalized racism against the Chinese in which their citizenship rights were denied, and opportunities to compete in the labour market were denied and they were subject to penalizing taxes.

The *Royal Commission on Chinese Immigration* in 1885²⁸ provides us with evidence of the ambivalent attitude of white Canadians to the Chinese. The Chinese were regarded as "racially undesirable, but useful to the economy".²⁹ The major task for the Royal Commission was to determine if Canada could afford to exclude the Chinese. Once the Chinese labourers had finished the railway, the answer became yes, and the first restrictive federal laws were introduced in the year after the Royal Commission Report.

Section 95 of the *British North America Act* gives concurrent jurisdiction to the provinces and the federal parliament over immigration, but specifies that no provincial law can be repugnant to any Act of the Parliament of Canada.³⁰ When British Columbia became part of Canada she had no independent laws regulating

²⁶ Harry Con et al., *From China to Canada: A History of the Chinese Communities in Canada* (Toronto: McClelland and Stewart Ltd., 1982) at 13-14.

²⁷ Peter S. Li, *The Chinese in Canada* (Toronto: Oxford University Press, 1988) at 2.

²⁸ *Report of the Royal Commission on Chinese Immigration* (Ottawa: Queen's Printer, 1885).

²⁹ B. Singh Bolaria and Peter S. Li, *Racial Oppression in Canada*, 2d ed. (Toronto: Garamond Press, 1988) at 111.

³⁰ *Constitution Act, 1867* (U.K.), 30 & 31 Vict. c.3 s. 95.

immigration but soon passed anti-Chinese immigration laws in an effort to "drive the Chinese from the country"³¹. The province enacted various laws to tax, control and disenfranchise Orientals. All Orientals were required to register and pay a tax,³² prohibited from working in positions of trust or below ground in the coal mines,³³ prohibited from voting³⁴, required to pay for free miner's certificates³⁵ and prohibited from working on government-assisted projects, such as bridge and railway construction.³⁶

The preamble to the British Columbia *Act to Regulate the Chinese Population of British Columbia* passed in 1885 sheds some light on the underlying fears of the white residents

"Whereas the incoming of Chinese to British Columbia largely exceeds that of any other class of immigrant, and the population so introduced are fast becoming superior in number to our own race, are not disposed to be governed by our laws, are dissimilar in habits, are useless in cases of emergency, habitually desecrate graveyards, by the removal of bodies therefrom and generally the laws governing the whites are found to be inapplicable to the Chinese, and such Chinese are inclined to habits subversive of the comfort and well-being of the community.

And whereas it is expedient to pass special laws for the government of Chinese.³⁷

More than 20 laws passed by the British Columbia legislature against the Chinese were held to be *ultra vires* when challenged.³⁸ For the most they were found to be beyond the power of the provincial government to enact, treading on federal jurisdiction. While British Columbia was not the only province to enact

³¹ *Tai Sing v. Maguire*, [1878], 1 B.C.R.(Pt.I) at 113.

³² *Chinese Regulation Act*, S.B.C.(cons.) 1888, c.18. and *Chinese Tax Act*, S.B.C.(cons.) 1878, c.34. s.1

³³ *Coal Mines Regulation Amendment Act*, 1890, S.B.C. 1877, c.84, s.4. as am. S.B.C. 1890, c.33, s.1. and *Coal Mines Regulation Act*, S.B.C. 1903, c.17, s.2.

³⁴ *Provincial Voters' Act*, S.B.C. (Cons.) 1888, c.38, s.3. and *An Act to further amend the "New Westminster Act, 1888"* S.B.C.1895, c.65, s.3 and *An Act to consolidate and amend the law relating to Electors and Elections in Municipalities*, D.B.C. 1896, c.38, s.7.

³⁵ *Chinese Regulation Act*, S.B.C. (Cons.) 1888, c.18, s.14.

³⁶ *Labour Regulation Act*, 1898, S.B.C. 1898, c.28.

³⁷ *An Act to Regulate the Chinese Population of British Columbia*, S.B.C. 1884, c.4.

³⁸ Canada, Department of Justice, *Disallowance and Reservation of Provincial Legislation* by G.V. La Forest, (Ottawa: Queen's Printer, 1955) at 86-101.

anti-Oriental legislation during this period it was the most active because it had the largest Chinese Population. Saskatchewan and Manitoba had similar laws.³⁹

When British Columbia entered Confederation, it did so on the understanding that a rail link would be completed to unite the country from coast to coast. There was insufficient white labour in western Canada to do the work, and Andrew Onderdonk, the railway contractor who was to build the link between Port Moody and Savona's Ferry on Kamloops Lake hired Chinese contract labour. The Chinese worked for \$1.00 per day when whites earned \$1.50 to \$1.75, and took care of himself, not requiring a camp, cooks and other services. It is small wonder that contractors seeking to cut costs were anxious to hire Chinese and did so despite public protests.⁴⁰

Already at this time there was strong anti-Chinese feeling, but the Chinese labourers were indispensable to the completion of the rail link which would be used to bring the British settlers to Western Canada. Premier Walkem of British Columbia tried to have the federal parliament force contractors to adopt anti-Chinese clauses in the contracts,⁴¹ but Sir John A. McDonald himself put it bluntly, "Either you must have this labour or you can't have the railway". McDonald was not acting out of pro-Chinese feeling, but for purely practical reasons. There were not enough skilled white workers available to do the work.⁴²

The work was extremely dangerous, the food bad and living conditions primitive. The Canadian Chinese today say that "a Chinese worker died for every foot of railroad built through the canyons."⁴³ This may be an exaggeration, but

³⁹V. Lee, "The Laws of Gold Mountain: A Sampling of Early Canadian Laws and Cases that Affected People of Chinese Ancestry" (1992) 21 Man. L.J. at 301-324.

⁴⁰Pierre Berton, *The Last Spike: The Great Railway 1881-1885* (Toronto: McLelland and Stewart, 1971) at 197.

⁴¹Harry Con et al, *From China to Canada: A History of the Chinese Communities in Canada* (Toronto: McClelland and Stewart Ltd., 1982) at 20.

⁴²Pierre Berton, *The Last Spike: The Great Railway 1881-1885* (Toronto: McLelland and Stewart, 1971) at 196.

⁴³Harry Con et al *From China to Canada: A history of the Chinese Community in Canada*, (Toronto: McClelland and Stewart Ltd., 1982) at 24.

accurate statistics are not available as Chinese deaths which, unlike white deaths, were not officially recorded.⁴⁴

Once the railway was complete the unemployed Chinese contract labourers failed to return to China. Anti-Chinese public pressure intensified and became focused on ensuring that no more Chinese entered the country. The government passed the first *Chinese Immigration Act* in 1885 with the express purpose of restricting Chinese immigration and instituting a system of registration and control over Chinese immigrants already living in Canada.⁴⁵ Thereafter, until 1947, the Chinese would be subject to a special restrictive immigration regime which did not apply to any other immigrants.

The purpose of the *Act* was to reduce or eliminate Chinese immigration through regulating the shipping companies and imposing a series of financial disincentives on the Chinese themselves. Boat passenger to tonnage minimums were set twenty-five times higher for Chinese than for other immigrants. For every 50 tons of boat, only one Chinese could be transported.⁴⁶ The passenger to tonnage minimum for European immigrants at the same time was two tons per passenger. While the boat passenger tonnage ratios for the Europeans were originally set out of concern for the overcrowding and unsanitary conditions on the boats bringing the immigrants, in contract, the *Chinese Immigration Act* ratios were set to reduce the number of Chinese immigrants that could come to Canada.

Probably the most effective measure introduced by the government was the financial disincentive known as the Chinese head tax, or capitation, introduced in the same *Act*. Every Chinese immigrant had to pay \$50.00 to land.⁴⁷ The head tax only temporarily reduced the numbers of Chinese immigrants and it was increased to \$100.00 in 1901 and \$500.00 in 1904. Only merchants, tourists,

⁴⁴ Pierre Berton, *The Last Spike: The Great Railway 1881-1885* (Toronto: McLelland and Stewart, 1971) at 202.

⁴⁵ *An Act to Restrict and Regulate Chinese Immigration into Canada*, 48-49 Vict. c.71.

⁴⁶ *An Act to Restrict and Regulate Chinese Immigration into Canada*, 48-49 Vict. c.71, s.5.

⁴⁷ *An Act to Restrict and Regulate Chinese Immigration into Canada*, 48-49 Vict., c.71, s.4.

teachers, students, members of the diplomatic corp and their families and servants were exempt from the head tax.⁴⁸

In 1885 a Chinese labourer could realistically expect to earn \$40.00 a year working for the railway. The head tax, therefore, represented more than an entire year's wages for the average Chinese worker.⁴⁹ The total amount collected from the Chinese as a head tax has been estimated at 23 million dollars for the federal and provincial governments between 1886 and 1943.⁵⁰ While the Chinese historically referred to Canada as "Guam Sann" or "golden mountain", the Chinese for the Canadians were surely a "gold mine", providing the federal and provincial coffers with millions of dollars in revenue, which more than offset the assisted passage and bonus schemes devised to lure British and European immigrants for decades.

Once the 1902 amendments to the *Immigration Act* were passed there was a general prohibition against landings for the infirm, feeble-minded, insane, epileptic or blind, unless they were dependants in an otherwise admissible family. No such exemption existed for the Chinese. The entire family was inadmissible if one of the accompanying dependants was inadmissible.⁵¹ If European immigrants arrived diseased or infected, they were permitted to land for the purpose of medical treatment.⁵² The Chinese were excluded *ab initio*, no matter how treatable or curable the disease or infection might have been.⁵³

The preferential treatment afforded the Europeans is clearly evident in the contrast between the two Acts. The concern for the moral, financial and physical

⁴⁸ *An Act to Restrict and Regulate Chinese Immigration into Canada*, 48-49 Vict., c.71, s.4.

⁴⁹ Pierre Berton, *The Last Spike: The Great Railway 1881-1885* (Toronto: McLelland and Stewart, 1971) at 204.

⁵⁰ Peter S. Li, *The Chinese in Canada* (Toronto: Oxford University Press, 1988) at 38.

⁵¹ *An Act to Restrict and Regulate Chinese Immigration into Canada*, 48-49 Vict., c.71, s.10.

⁵² *The Immigration Act*, Con. Stat. Can 1869, c.19.6 Edw. 7 (1906) s.11 and 12.

⁵³ *An Act to Restrict and Regulate Chinese Immigration into Canada*, 48-49 Vict., c.71, s.11

well-being of the European immigrant is found nowhere in the *Chinese Immigration Act*. The Minister was responsible for the well-being of the European immigrant from the time of their arrival on a vessel until securely housed, and arrangements could be made to have them remain on the vessel until such time as other accommodation was provided. No Chinese immigrant received this type of consideration. Indeed, no Chinese immigrant would be permitted to land who was in need of housing or medical assistance.

Not only were the Chinese subject to different legislative and regulatory standards, they could also expect a more thorough inspection on arrival for physical and medical fitness. Chinese were only permitted to disembark at Victoria and Vancouver, concentrating the immigration assessment of Chinese immigrants in two port offices.

The B.C. Supreme Court case of *Wong Hoy Woon v. Duncan*, may provide us with a typical immigration screening of the time:

"Disregarding the white men, who had come at the same time from the same place and in the same ship and presumably subject to some of the same unsanitary influences, though not to the same extent as the Chinese, without any reason for special suspicion, without inspecting or attempting to inspect a single man, (that had already been done individually by the Dominion Quarantine Officers) he orders them into the custody of his constables to be taken out to the suspect station at Ross Bay, there to be washed and disinfected and scrubbed. They, with their goods and chattels, were bundled into a common truck like so many cattle.⁵⁴

While financial disincentives may have kept Chinese immigration at a minimum when they were first imposed, they were not entirely successful. The tax only temporarily reduced Chinese immigration, which rose again once employment opportunities increased.⁵⁵ Under considerable public pressure, particularly from unionized workers and the provincial government of British

⁵⁴ *Wong Hoy Woon v. Duncan*, [1894], 3 B.C.R. 318 at 319.

⁵⁵ Jin Tan and Patricia E. Roy, *The Chinese in Canada* (Ottawa: The Canadian Historical Association, 1895) at 8.

Columbia, a new *Chinese Immigration Act* that effectively prohibited any Chinese immigration from 1923 until it was repealed in 1947.⁵⁶

The Chinese Immigration Act permitted the admission of only four classes of Chinese; members of the diplomatic corps; Canadian born Chinese who were studying abroad; merchants and students.⁵⁷ The *Act* not only prohibited Chinese who were citizens of China seeking entry to Canada, but all people "of Chinese origin or descent" irrespective of nationality, so that Chinese seeking to enter from the United States or any other country were also excluded.⁵⁸

The Department of Immigration even sought to have Section 5 of the *Act* interpreted so as to exclude Canadian citizens of Chinese origin who sought to re-enter Canada if they did not fall into one of the four classes of admissible Chinese. The Supreme Court, in rejecting this interpretation stated that

"It was not the intention of the Parliament of Canada, in enacting the *Chinese Immigration Act* to prevent Canadian citizens of Chinese origin or descent generally from entering Canada"⁵⁹

The *Act* also required the registration of all Chinese immigrants, as they arrived as well as those present in Canada within 12 months of the passage of the *Act*. Each Chinese was granted a certificate, containing his or her description and photograph and the date of arrival.⁶⁰ All who wished to re-enter Canada were required to obtain the certificate before they left, and could only be absent for two years. If they did not have their certificate, or were out of the country for more than two years, they were not permitted to re-enter, unless they qualified as immigrants under Section 5 as either returning students or merchants.⁶¹

⁵⁶ *Chinese Immigration Act, 1923*, 13-14 Geo. 5 c. 38.

⁵⁷ *Chinese Immigration Act, 1923*, 13-14 Geo.5 c. 38. s.5.

⁵⁸ *Chinese Immigration Act, 1923*, 13-14 Geo. 5 c. 38. s.2(e).

⁵⁹ *Shih Shim v. His Majesty the King*, [1938] S.C.R. 378.

⁶⁰ *Chinese Immigration Act, 1923*, 13-14 Geo. 5 c. 38. s.17.

⁶¹ *Chinese Immigration Act, 1923*, 13-14 Geo. 5 c. 38. s.24.

Section 5(c) also made it mandatory for all immigrants, (categories limited by the *Act* to merchants and students) to have their passport endorsed (visa) by a Canadian Immigration Officer **at the place** where the passport was granted or at the port or place of departure. The immigration office in Hong Kong was opened ostensibly to provide these visas, but in reality to ensure that no Chinese presented themselves for admission at Canadian ports of entry. Sampat-Mehta reviews the first few years of operation of the office under J.E. Featherson, the first Commissioner of Immigration in Hong Kong. It is clear that Featherson possessed enormous discretionary powers which he used to ensure that no immigrants came to Canada from China.⁶² Sampat-Mehta makes the important point that a Chinese refused a visa in China had no access to Canadian courts.

"All the ugliness surrounding deportation no longer existed, and a citizen in China refused entry to Canada while still in his own country could not claim this to be a denial of human rights."⁶³

In its first year of operation there were 395 applications for visa, none were granted.⁶⁴ In the ensuing years to 1939 very few Chinese were able to immigrate to Canada and the Hong Kong office ensured that Chinese citizens did not arrive on Canadian shores seeking admission or appealing their exclusion in the Canadian courts.

Between 1881 and 1884, at the height of the demand for construction labour on the railways, 15,701 Chinese labourers arrived from China and other Pacific coast ports to work.⁶⁵ Between 1881 and 1891 the total population of British Columbia doubled from 49,000 to 98,000.⁶⁶ At approximately 17,000, the Chinese made up almost 20% of the population.

⁶²Sampat-Mehta, *International Barriers*, (Ottawa: Harpell's Press, 1973) at 113.

⁶³Sampat-Mehta, *International Barriers*, (Ottawa: Harpell's Press, 1973) at 113.

⁶⁴Sampat-Mehta, *International Barriers*, (Ottawa: Harpell's Press, 1973) at 113.

⁶⁵*Report of the Royal Commission on Chinese Immigration* (Ottawa: Queen's Printer, 1885) at v.

⁶⁶Canada, *Immigration and Population Statistics*, (Ottawa: Information Canada, 1974) at 5.

For the most part the Chinese had come to Canada, not as settlers intending to remain, but as temporary workers intent upon returning to China. Some did return, but many others were unable to save enough money to afford the return passage to China, and after the railway contracts were finished thousands stayed in Canada. By 1901 there were 17,312 Chinese still here, most of whom had arrived in the preceding 15 years.⁶⁷ The vast majority of these Chinese were single men and The *Chinese Immigration Act* denied these men the right to bring their families to Canada.

There is no doubt that the measures taken against the Chinese in 1923 put an end to Chinese immigration until the mid-1940's. Only seven Chinese, six men and one woman were admitted to Canada as immigrants in the 22 years between 1924 and 1946.⁶⁸

Pressure began to mount for the repeal of Chinese exclusion in the late 1940's. In a brief submitted to the Minister of Mines and Resources (at that time Minister responsible for Immigration) the Committee for the Repeal of the Chinese Immigration Act gave nine reasons for repeal which succinctly set out some of the national and international pressures that the government was then under.

1. The Act was in conflict with the UN Charter, of which Canada was a signatory.
2. The Act was the "greatest single" cause of disturbance of the friendly relations between Canada and China.
3. The Act was a "major barrier" to the development of trade between the two countries.
4. The Act was against "all principles of humanity, morality and social welfare, by preventing normal family life for the majority of Chinese in Canada.
5. The Act was contrary to the principles of Canadian democracy.
6. Canada was the only North American country with a special Chinese Immigration Act.

⁶⁷F.H. Leacy, *Historical Statistics of Canada*, 2d ed. (Ottawa: Statistics Canada, 1983) Series A125-163.

⁶⁸B. Singh Bolaria and Peter S. Li, *Racial Oppression in Canada*, 2d ed. (Toronto: Garamond Press, 1988) at 112.

7. The Act was "counter to the recommendations of the Senate Standing Committee on Immigration and Labour in its report of August 13, 1946."
8. The CCF and the Progressive Conservatives supported its repeal.
9. Prime Minister King had already admitted in October, 1943, that it was a mistake.⁶⁹

Diplomatic difficulties with China over the Chinese immigration issue did not surface for the first time in 1946. Under Article V of the Peking Convention, signed in 1860 between Great Britain and China to end the Opium wars, Chinese subjects could work in British colonies "without leave or licence".⁷⁰ China naturally protested the discriminatory treatment of its citizens, particularly in the early years when British Columbia was legislating against the Chinese. These diplomatic protests were directed at Great Britain, who in turn put pressure on the Canadian Parliament to disallow the British Columbia anti-Chinese acts.⁷¹

By the 1940's competing interests helped to shape the compromise that the government enacted. Trade and humanitarian considerations were balanced against British Columbia, which was still opposed to Chinese immigration and would not support placing the Chinese on an equal footing with other immigrants.⁷² The compromise was that the 1923 *Chinese Immigration Act* was repealed in May, 1947, and those Chinese who were citizens could bring their families to Canada under PC 2115⁷³. The inequities continued however until 1956⁷⁴, as other non-Asian immigrants could sponsor their families even if they were not citizens.⁷⁵

⁶⁹As reproduced in Harry Con et al *From China to Canada: A History of the Chinese Communities in Canada*, (Toronto: McClelland and Stewart Ltd., 1982) at 206.

⁷⁰Sampat-Mehla, *International Barriers*, (Ottawa: Harpell's Press, 1973) at 23.

⁷¹Sampat-Mehla, *International Barriers*, (Ottawa: Harpell's Press, 1973) at 31.

⁷²Harry Con et al *From China to Canada: A History of the Chinese Communities in Canada*, (Toronto: McClelland and Stewart Ltd., 1982) at 207.

⁷³P.C. 1930-2115 provided that Asians could bring members of their immediate family to Canada if they were citizens. In contrast P.C. 695 permitted other immigrants resident in Canada for five years to bring over their immediate family. Pursuant to P.C. 1930-1378, to obtain citizenship Chinese and Japanese had to secure the permission of their home governments, and place advertisements in Canadian newspapers before being allowed to apply.

⁷⁴SOR/56-180.

⁷⁵P.C. 1930 - 2115. (P.C. 1378 was repealed at the time of the repeal of the 1923 Act)

The blatant discrimination against the Chinese was in marked contrast to the often covert treatment of other minority groups. Probably the most significant reason for the ease with which the Canadians dealt with the Chinese, was their lack of political power. While the government had to consider the effects of Chinese exclusion on trade, commerce and international relations, they never had to worry about domestic political consequences, because the Chinese did not have the vote until 1947.⁷⁶ Despite the fact that they represented as much as 20% of the population of British Columbia, they were not a political force. The only political force which spoke in favour of Chinese immigration were the large, private, labour intensive industries like the railways, who needed their labour. Once the labour requirements disappeared at the turn of the century, so did the sympathetic political voice.

⁷⁶Peter S. Li, *The Chinese In Canada*, (Toronto: Oxford University Press, 1988) at 86.

Japanese Immigration

Although the British Columbians viewed the Chinese and Japanese in the same light, and sought to legislate against them both as "Asiatic", the controlling influences which have shaped Canadian immigration policy towards both groups have been quite different. In the critical restrictionist years at the turn of the century, the government of Japan was stable, in control of its country, and had an obvious concern for its overseas citizens. These factors played an important part in the development of Canadian policies. The stability of the Japanese Imperial Government enabled it to exercise considerable control over its nationals, limiting the number of passports and travel permits issued. This ability to control was coupled with a corresponding desire to ensure that emigrants would prosper in their new lands. When economic conditions were bad, the Japanese restricted the emigration of their own labourers, in an effort to protect them.

There were not significant numbers of Japanese in Canada until approximately 1899, when contract labourers in Hawaii were diverted from Honolulu because of a bubonic plague. Entry was prohibited into the United States under the *American Alien Act* so large numbers of labourers found their way to Canada.⁷⁷ It is estimated that approximately 14-15,000 Japanese labourers arrived between 1898 and 1902. Many of them continued on to the United States, or returned to Japan, leaving only about 5,000 in Canada by 1902, most of them in British Columbia.⁷⁸

Anti-Chinese feeling in British Columbia quickly broadened into a general anti-oriental feeling as the Japanese arrived, and much of the early B.C. legislation was directed as much against the Japanese as against the Chinese. The response from Japan, however, was quite different from that of China. On August 2, 1900, in response to anti-Japanese agitation in British Columbia, and high unemployment among recently arrived Japanese workers,⁷⁹ the Japanese

⁷⁷ Letter of Claude M. McDonald, Canadian Ambassador to Tokyo to The Right Honourable Sir Edward Grey. (National Archives of Canada, Laurier Papers. Doc # 217981).

⁷⁸ Canada, "Report of the Royal Commission on Chinese and Japanese Immigration" in Sessional Paper (1902), 2 Edw. 7, (New York: Arno Press, 1978) at 389.

⁷⁹ Sampal-Mehta, *International Barriers*, (Ottawa: Harpell's Press, 1973) at 200.

Government unilaterally prohibited the emigration of Japanese labourers by ceasing to issue passports for labourers intent on emigrating to Canada. The Japanese Consul in Vancouver explained,

"The principal reason for the measure thus taken was to avoid any friction that might occur by allowing them to come into British Columbia where their immigration was not desired by a certain element of that province"⁸⁰

As early as 1898 the Government of Japan was making official diplomatic protests to Britain over anti-Japanese labour legislation in B.C. The Japanese protests were forwarded to the British Columbia legislature by the Colonial Office, with the threat that the powers in the *British North America Act* to cancel legislation which was not in the interests of the Empire, would be used if the legislation was not changed.⁸¹ In making this threat, however, J. Chamberlain at the Colonial Office made it quite clear that the Colonial Office supported the objectives of the law which was to ensure a "thoroughly British population rather than by one in which the number of aliens largely predominates" but that objection was taken to the method employed as it could give offence to Japan by stamping the whole nation as "undesirable persons".⁸²

What Chamberlain recommended was the passage of an act similar to the *Natal Immigration Law* in Australia, an act which would exclude Japanese from the province or from employment by the operation of an educational test. With such legislation Chamberlain felt confident that the aims of Japanese exclusion could be achieved, without repercussions from Japan.⁸³ It is clear that the differences between British Columbia and the Canadian government were ones of form, and not substance. The Colonial office determined that international

⁸⁰ *Report of the Royal Commission on Chinese and Japanese Immigration*, Sessional Paper No. 54, 2 Edw. 7, A. 1902 (New York: Arno Press, 1978) at 399.

⁸¹ *Report of the Royal Commission on Chinese and Japanese Immigration*, Sessional Paper No. 54, 2 Edw. 7, A. 1902 (New York: Arno Press, 1978) at 399.

⁸² *Report of the Royal Commission on Chinese and Japanese Immigration*, Sessional Paper No. 54, 2 Edw. 7, A. 1902 (New York: Arno Press, 1978) at 399.

⁸³ *Report of the Royal Commission on Chinese and Japanese Immigration*, Sessional Paper No. 54, 2 Edw. 7, A. 1902 (New York: Arno Press, 1978) at 399.

considerations dictated that exclusion would have to be achieved without direct legislation.

Simultaneously, Canada was negotiating with Japan to ratify the *Treaty of Commerce and Navigation* originally signed between Great Britain and Japan in London on July 16, 1894. Article I of the Treaty guaranteed the parties to the agreement "full liberty to enter, travel or reside in any part of the Dominions and possessions of the Contracting Party."⁸⁴ Canada adhered to the Treaty by signing the *Convention between the United Kingdom and Japan respecting Commercial Relations between Canada and Japan*, on January 31, 1906, in Tokyo without any guarantees on the limitation of Japanese immigration. Following the signing of the treaty, 7,601 Japanese entered Canada in 1907⁸⁵ sparking major anti-Oriental protests and petitions which called for a complete Oriental exclusion. Anti-Oriental riots directed primarily against the Chinese and Japanese merchants occurred in Vancouver, with stores attacked, windows smashed and acts of arson committed. Because Chinese immigration was already limited by the \$500.00 head tax, the major focus of the white citizens' anger was the Japanese, who could still enter freely.⁸⁶

In the wake of the 1907 riots, Rodolphe Lemieux, Post Master General and the Minister of Labour, was sent by the Privy Council to Japan to try to obtain an agreement with the Japanese government to limit immigration. Lemieux was to try "by friendly means, of preventing the recurrence of such causes as might disturb the happy relations which have, existed".⁸⁷ By December 12, the Ambassador in Tokyo, Claude McDonald, reported by cable that the Japanese were willing to take five specific steps to limit Japanese immigration. These were

1. Limit contract labour by providing that the sanction of the Canadian government must be obtained for all contracts made.

⁸⁴ Sampat-Mehta, *International Barriers* (Ottawa: Harpell's Press, 1973) at 202.

⁸⁵ House of Commons Debates, (November 30, 1911) at 610.

⁸⁶ Sampat-Mehta, *International Barriers*, (Ottawa: Harpell's Press, 1973) at 206.

⁸⁷ Memo from the Privy Council (October 11, 1907) (National Archives of Canada, Laurier Papers Doc. # 217938.).

2. Limit Japanese domestic labourers by providing that the Japanese consul must certify that the domestics are required by bona fide Japanese residents.
3. Limit immigration of Japanese agricultural labourers to a maximum of ten per one hundred acre farm owned by a Japanese.
4. They would have no objection to the application of the Alien Labour Law to exclude Japanese originating in Honolulu.
5. Japan will sanction Canada to appoint officers at Vancouver and Victoria to turn back labourers who have no permits.⁸⁸

The most important feature however, was that the Japanese were willing to limit the total number of permits issued to emigrants to 400 per year. Ambassador McDonald strongly recommended the acceptance of the agreement. He argued that the terms Canada had obtained were similar to those obtained by the United States and, short of outright exclusion, he failed to see that they could do any better.⁸⁹ On December 23, 1907, by diplomatic note, Count Hayashi for Japan and Lemieux entered into the secret "Lemieux" agreement that was to limit Japanese immigration until 1925. One of the conditions of the agreement was that it was to be kept secret. Wilfred Laurier, when asked to provide a copy to the British Secretary of State for the Colonies who wished to forward it to the United States, responded: "your excellency's Ministers are of the opinion that it is in the public interest that its confidential character should be maintained".⁹⁰

The implementation of the agreement was not without its problems. In early February, 1908 the steamship KangaMaru, arrived in Vancouver with 150 Japanese immigrants.⁹¹ All were detained, as they were in possession of old permits, issued prior to the negotiation of the Lemieux Agreement. Canada

⁸⁸ Cable from Charles McDonald Canadian Ambassador in Tokyo to Lord Grey, (12 December, 1907) (National Archives of Canada, Laurier Papers, Doc. #215913).

⁸⁹ Cable from Charles McDonald, Canadian Ambassador in Tokyo to Lord Grey, (12 December, 1907), (National Archives of Canada, Laurier Papers Doc. #215913).

⁹⁰ P.C. 1910-296.

⁹¹ Dispatch from Claude McDonald, Canadian Ambassador to Tokyo to Lord Grey, (26 February, 1908) (National Archives of Canada, Laurier Papers. Doc. # 215967).

insisted that these immigrants were included in the 400 for the 1907 year, Japan argued that they were not.⁹² In the end it appears that Japan won as 495 Japanese entered Canada in 1908, 95 more than the quota.⁹³

Japan's willingness to enter into the agreement at the time appears to stem from two considerations. First, that there was severe unemployment among Japanese labour in British Columbia; and second, that Japan herself, had imposed labour restrictions on Chinese workers seeking to enter to work on Japanese railways. As long as the exclusion was on its face, a labour exclusion, it was acceptable to Japan.⁹⁴

To obtain an almost complete exclusion it remained for Canada to ensure that Japanese arriving from other countries could be refused entry. This was achieved with the implementation of the "continuous journey" Order in Council. On March 27, 1908 the Privy Council passed PC 662, which provided that:

"All immigrants who do not come from the country of their birth, or citizenship, by a continuous journey and on through tickets purchased before leaving the country of their birth, or citizenship, shall be and the same are hereby prohibited from landing or coming into Canada."⁹⁵

By prohibiting the landing of immigrants unless they arrived from their country of birth or citizenship, the government ensured that all Japanese immigration fell within the terms of the secret agreement. In 1908, 495 Japanese entered, in 1909, 271 and in 1910, 437.⁹⁶

The situation remained the same until 1928 when the Lemieux Agreement was reopened, and the maximum number of Japanese immigrants was reduced

⁹² Dispatches from Claude McDonald, Canadian Ambassador in Tokyo, to Lord Grey. (February 1907) (National Archives of Canada, Laurier Papers Doc. Numbers 216000, 2160001, 216035, 216064).

⁹³ House of Commons Debates, (November 30, 1911) at 610.

⁹⁴ Letter from Claude McDonald, Canadian Ambassador in Tokyo, (October 1st, 1907) (National Archives of Canada, Laurier Papers. Doc. # 217988).

⁹⁵ PC 1908-662.

⁹⁶ House of Commons Debates (November 30, 1911) at 610.

from 400 to 150 per year.⁹⁷ During the Second World War, Japanese were excluded as enemy aliens⁹⁸ and thereafter until 1962, by Order which prohibited the admission of immigrants of any Asiatic race, except the wife and unmarried child under 18 years of age of a Canadian Citizen.⁹⁹

⁹⁷ Sampat-Mehta, *International Barriers*, (Ottawa: Harpell's Press, 1973) at 240.

⁹⁸ PC 1947-4850.

⁹⁹ PC 1930-2115.

Black Immigration

The first recorded Black resident of Canada arrived, presumably against his will, as a slave to New France in 1628. Oliver Lejeune was a six year old child owned by a David Kirke, born in either Guinea or Madagascar.¹⁰⁰ While some argue that he was neither the first slave, nor the first Black in New France, he was certainly the first of whom there is any record.¹⁰¹

In 1685, Louis XIV decreed by edict the "Code Noir" for the West Indies. While it did not apply in New France, many reasoned that the Code, and slavery should be adopted.¹⁰² Historians argue that the "Code Noir" gave customary legal recognition to slavery in New France, at a time when the practice of slavery was flourishing.¹⁰³ The "Code Noir" set out minimal protections to be afforded slaves and described punishments for offenses.

"le maitre est tenu de nourir l'esclave, de ne pas le faire travailler entre le coucher et le lever du soleil, de ne pas vendre les enfants separement de leurs parents. Mais il autorise des mesures rigoureuse contre l'evasion. Si le Noir s'evade, on lui coupe les oreilles et on le marque au fer rouge d'une fleur de lys a l'epaule; s'il recidive, on lui coupe les jarrets. S'il ose recommencer une troisieme fois, c'est la mort."¹⁰⁴

In 1689 Louis XIV, under pressure from Governor Denonville of New France, gave permission to the inhabitants to import African slaves to work in agriculture¹⁰⁵ even though slave ownership was illegal in France itself.¹⁰⁶ Despite this "open door" for residents of New France to import slaves, it appears that while slavery was a part of life in New France among the merchants and the clergy, the importation of Black slaves did not become widespread.

¹⁰⁰Daniel G. Hill, *The Freedom Seekers: Blacks in Early Canada*, (Agincourt: The Book Society of Canada Ltd, 1981) at 3.

¹⁰¹Robin W. Winks, *The Blacks in Canada: A History* (Montreal: McGill-Queen's University Press, 1971) at 1.

¹⁰²Robin W. Winks, *The Blacks in Canada: A History* (Montreal: McGill-Queen's University Press, 1971) at 5.

¹⁰³Robin W. Winks, *The Blacks in Canada: A History* (Montreal: McGill-Queen's University Press, 1971) at 7.

¹⁰⁴Claude Marcil, "Les Communautés Noires au Québec" (1981) 11, No. 6 *Education Québec* at 19.

¹⁰⁵Robin W. Winks, *The Blacks in Canada: A History* (Montreal: McGill-Queen's University Press, 1971) at 5.

¹⁰⁶Daniel G. Hill, *The Freedom Seekers: Blacks in Early Canada*, (Agincourt: The Book Society of Canada Ltd., 1981) at 3.

On April 13, 1709, by edict of the Intendant Jacques Raudot the institution of slavery received legal recognition.

"tous les Panis et Noirs qui ont ete achetes et qui le seront dans la suite seront en pleine propriete a ceux qui les ont achetes et il est fait defense aux esclaves de quitter leurs maitres"¹⁰⁷

Robin Winks and Dorothy Williams both argue that slavery never became widespread in New France because, unlike the mass production and gang labour economy of the southern United States, New France's economy was based on the fur trade where there was little demand for manual labourer or domestic servants.¹⁰⁸

By 1759 there were 1,132 Black slaves recorded in New France, mostly living in and around Montreal.¹⁰⁹ With the conquest of New France in 1760, the British guaranteed the continuation of slavery under the *Quebec Act*¹¹⁰ and slavery continued until the passage of the *Imperial Act* in 1834.¹¹¹ Ironically, given Canada's later reputation as a haven for escaping slaves, more Blacks may have been lost than gained through the first underground railroad established between the United States and Canada, with slaves in Canada fleeing to the slave-free northern states.¹¹²

The legalization of slavery and guarantees made to settlers that they could keep their slaves in the British Colonies, did not mean that free Blacks were welcome as settlers in their own right in Upper or Lower Canada. While Britain

¹⁰⁷ Claude Marcil, "Les Communautés Noires au Québec" (1981) 11, No. 6 *Education Québec* at 20.

¹⁰⁸ Dorothy W. Williams, *Blacks in Montreal 1628-1986: An Urban Demography*, (Cowansville: Les Éditions Yvon Blais Inc., 1989) at 10 and see Robin W. Winks, *The Blacks in Canada: A History* (Montreal: McGill-Queen's University Press, 1971) at 3.

¹⁰⁹ Robin W. Winks, *The Blacks in Canada: A History* (Montreal: McGill-Queen's University Press, 1971) at 9-10.

¹¹⁰ *The Quebec Act 1760*, 14 Geo. 3, c.lxxxiii.

¹¹¹ Daniel G. Hill, *The Freedom Seekers: Blacks in Early Canada*, (Agincourt: The Book Society of Canada Ltd., 1981) at 6.

¹¹² Dorothy W. Williams, *Blacks in Montreal 1628-1986: An Urban Demography*, (Cowansville: Les Éditions Yvon Blais Inc., 1989.) at 13.

was doing everything it could to encourage immigration to British North America, free Blacks were not encouraged until after 1780.¹¹³

The first major movement of free Black settlers to Canada arrived as part of the fallout from the American Revolution. The British offered to free any slaves who joined the British forces, and following the formation of the United States in 1783, approximately 10% of United Empire Loyalists who settled in Nova Scotia were Black.¹¹⁴ The white loyalists arrived with many other Blacks who were their slaves.

Following the passage of the *Imperial Act* in 1834 and the end of slavery in British Colonies, Canada slowly became the final destination for the famous underground railway. Between 1830 and the middle 1850's thousands of Blacks made their way to freedom in Canada, with no official government interference.¹¹⁵

While early census figures are notoriously inaccurate, the official figures show that the Black population of Canada rose steadily throughout the late 1800's. Between 1850 and 1871 the recorded Black population rose dramatically from around 2,000¹¹⁶ to more than 21,000 in 1871.¹¹⁷

This substantial Black population, representing about six percent of the total population, was concentrated principally in Eastern Canada. They were later to prove an important political force against the implementation of any anti-Black immigration policy. Most of the public and political pressure to exclude Blacks came from the Western provinces, where Blacks sought to establish homesteads. In reacting to public pressure from the West to ban Black

¹¹³ Robin W. Winks, *The Blacks in Canada: A History* (Montreal: McGill-Queen's University Press, 1971) at 26.

¹¹⁴ Daniel G. Hill, *The Freedom Seekers: Blacks in Early Canada*, (Agincourt: The Book Society of Canada Ltd., 1981) at 10.

¹¹⁵ No accurate statistics exist for the actual number of Blacks who came to Canada. Official census statistics show only 18 in Lower Canada and 2,095 in Upper Canada for 1851, while various historians estimate that up to 4,000 were actually in here, see Daniel G. Hill, *The Freedom Seekers: Blacks in Early Canada*, (Agincourt: The Book Society of Canada Ltd., 1981) at 39.

¹¹⁶ *Recensement Des Canadas 1851-52*, vol. 1. (Quebec, 1853) at 106-107.

¹¹⁷ *Census of Canada, 1870-71*, Vol 1 (Ottawa, 1873) Table III at 332-33.

immigration, the Department had to keep in mind the political power of the eastern Canadian Black voters.

In 1909 the Canadian inspector of United States Agencies, William J. White summarized the situation as follows:

"Notwithstanding our best efforts to guard carefully the class of people, who go to Central Canada, we find the case of the Negro probably the most difficult to deal with. If given a free hand and the privilege to absolutely refuse to give a certificate entitling him to [reduced railway] settlers' rates, we could meet it. Whether it is advisable to refuse the coloured man this certificate is a question that bothers us considerably. There is a fairly large coloured vote in Eastern Canada, most of which is Liberal and if it comes to their notice that their people were discriminated against, it might lead to their opposition. On the other hand I know that the people in the West do not care to have them in their neighbourhood."¹¹⁸

In 1910 a Quebec conservative member admitted that despite his desire for an all-white west, politically,

"Negro immigration.... is a question that no man in politics desires to touch".¹¹⁹

In addition there was always the delicate question of Canada-U.S. relations. Throughout the early years of the 1900's, Black Americans knew that they were being discriminated against and were not loath to seek diplomatic assistance from their government. The American Consul-General at Winnipeg, John E. Jones, intervened personally on behalf of many of the settlers, not the least of whom were a hundred Black settlers from Weletka, Oklahoma. Jones frequently corresponded with Canadian officials to determine if Black immigrants were to be treated differently from other Americans. Jones made it clear that "any measures taken to prevent Negro entrance would be an unfriendly act".¹²⁰

The government at the time was, therefore, faced with unrelenting pressure from Western Canada to restrict Black immigration, and countervailing pressures

¹¹⁸ Harold Troper, *Only Farmers Need Apply* (Toronto: Griffin House, 1972) at 131.

¹¹⁹ House of Commons Debates, (1910-11) at 8125-28, 4470-71, 5711-13, 5941-48.

¹²⁰ Robin W. Winks, *The Blacks in Canada: A History* (Montreal: McGill-Queen's University Press, 1971) at 310.

from the American government and liberal Eastern Black voters not to restrict it. The resulting policy reflects these competing interests, as the government officially denied any restrictions on Black immigration, thereby satisfying the Americans and Black Canadian voters, but covertly ensuring that no Blacks were recruited, subsidized or permitted to enter.

In 1896, Clifford Sifton, Minister of the Interior responsible for Immigration, embarked upon a vigorous and expensive campaign of active recruitment of immigrant farmers. He brought over thousands of Eastern European migrants, often known as "Sifton's Sheepskins" and over half a million Americans to populate the prairies and work the farms.¹²¹ While Sifton presided over the largest ever movement of immigrants to Canada, he also introduced for the first time an immigration process that was highly selective.

"None but agriculturalists, we do not recognize the labourers at all. In fact all of our agents are notified that labourers will not be permitted to come in, that is to say, that we keep them out under the *Alien Labour Law*."¹²²

The exclusion of all but farmers was achieved by interpreting the new *Alien Labour Act*¹²³ as strictly as possible. The *Act* permitted the exclusion of immigrants, unless they had skilled labour "not obtainable in Canada".¹²⁴

Free land, free rail passes to western Canada and reduced rail rates for settlers were offered as inducements. Private immigration agents were hired to promote immigration to Canada and they distributed the transportation subsidies and special settler's certificates in the United States.¹²⁵ Fourteen salaried agents were working in the United States and 255 immigration agents were paid on a commission basis of \$3.00 per adult male and \$2.00 per adult female.¹²⁶

¹²¹Harold Troper, *Only Farmers Need Apply* (Toronto: Griffin House, 1972) at 1.

¹²²House of Commons Debates, (July 26, 1899) at 8501.

¹²³*Alien Labour Act*, R.S.C. 1906, c. 97.

¹²⁴*Alien Labour Act*, R.S.C. 1906, c 97 s.12.

¹²⁵Harold Troper, *Only Farmers Need Apply* (Toronto: Griffin House, 1972) at 45.

¹²⁶House of Commons Debates (July 26, 1899) at 8501.

Clifford Sifton had a relatively open immigration policy, restricted to farmers, but open to any who were willing to work on the land.¹²⁷ In 1904 Sifton lost his seat to Frank Oliver, who also took his job as Minister of the Interior. Frank Oliver owned the Edmonton paper *The Bulletin*, a vociferous critic of unrestricted immigration. To him the Galacians (Siftons sheepskins) were "a servile, shiftless people... the scum of other lands... not a people who are wanted in this country at any price."¹²⁸ Under Frank Oliver unrestricted immigration ceased.

When the Creek Indians were granted land entitlement in Oklahoma, many of their emancipated Black slaves also received land and became farmers. With increasingly segregationist policies in Oklahoma many of these Black farmers, possessing both experience and money, were looking for a new home. Canada, with its available land and active program of recruiting farmers, was a logical destination.

The first group of ten families of Oklahoma Blacks arrived in Saskatchewan in October 1909 where they staked claims, settled, cleared land and farmed.¹²⁹ Their arrival and the establishment of other settlements at Maidstone, Wilkie, Junkins, Breton, Clyde and Amber Valley soon sparked considerable controversy.¹³⁰ In response to the public outcry, and the feared arrival of thousands of Blacks, the government sent J.W. White to investigate in 1910. His report indicated that Blacks were lazy, had loose morals and lacked individual ambition, and on the whole would make most undesirable immigrants.¹³¹ White's report did little to allay the fears of the Western Canadians that there was to be a flood of unwanted Black immigrants.

¹²⁷ His openness however, did not extend to Orientals. He is reputed as saying: "I am unequivocally opposed to the allowing of Asiatics to settle in Canada. They are not adapted to our country." Chong, Denise "speech delivered at the First Annual Clifford Sifton Lecture. April 19, 1995, Canada Place, Vancouver, B.C. pg. 2.

¹²⁸ Pierre Berton, *The Promised Land: Settling the West 1896-1914* (Toronto: McLelland and Stewart, 1984) at 54.

¹²⁹ Robin W. Winks, *The Blacks in Canada: A History* (Montreal: McGill-Queen's University Press, 1971) at 303.

¹³⁰ Robin W. Winks, *The Blacks in Canada: A History* (Montreal: McGill-Queen's University Press, 1971) at 303-06.

¹³¹ Harold Troper, *Only Farmers Need Apply* (Toronto: Griffin House, 1972) at 134-35.

Canadian propaganda did not state outright that Blacks were not welcome, as there was no official policy limiting or controlling Black immigration. By this time, however, there was an assumption that Canada would be better off without Black settlement in the West and the government proceeded to ensure that it did not occur.

The measures adopted to exclude Blacks were many and varied. First, it was communicated to immigration agents working in the United States that Black settlers were not welcome, and they were required to justify any settlers' certificates issued to Blacks. The Department of Immigration began to actively discourage Black immigration, with agents refusing to answer queries or provide information to Blacks who appeared interested.¹³²

Later, they circulated stories of a hostile climate and reception in Canada in an attempt to influence Blacks against immigrating. While the Canadian government had a thriving program of advertising subsidies and land grants for white American farmers, they discouraged the Black farmers with equal vigour. When American businessmen and civil and religious leaders made enquiries about Black immigration, they were discouraged by the Department of Immigration.¹³³ A special Canadian Immigration agent was sent to Oklahoma to try to persuade Blacks that Canada was too cold for them, and that they would encounter widespread and unpleasant racial prejudice.¹³⁴

"... In some cases where we have thought it safe, we have absolutely refused to give certificates; in other cases we have advised them of special rates which can be secured on special days and which they can take advantage of. This, however is only a makeshift and is likely to be resented... I wish you to bear in mind that the refusal of the Department to help them secure a rate will not keep them from coming"¹³⁵

The second phase of the exclusion involved the rigorous enforcement of existing immigration regulations. All Black immigrants were closely screened at

¹³²Harold Troper, *Only Farmers Need Apply* (Toronto: Griffin House, 1972) at 129.

¹³³Harold Troper, *Only Farmers Need Apply* (Toronto: Griffin House, 1972) at 126.

¹³⁴Robin W. Winks, *The Blacks in Canada: A History* (Montreal: McGill-Queen's University Press, 1971) at 311.

¹³⁵Harold Troper, *Only Farmers Need Apply* (Toronto: Griffin House, 1972) at 131.

the port of entry for compliance with existing health, literacy and financial regulations. When a group of 200 Black settlers were admitted following the most rigorous examinations possible, in which all were found to meet every regulation, there was increasing pressure for direct legislative exclusion.¹³⁶

The government sent special medical inspectors from Ottawa to inspect Blacks, and the Commissioner of Immigration for Western Canada offered a fee to the medical inspector at Emerson border post for every Black he rejected.¹³⁷ When Henry Sneed, a Black Oklahoma preacher, led more than 160 Blacks from Weleetka, Oklahoma to the Canadian border, his train was held up at the border awaiting a definite decision from the Canadian authorities. No one was willing to state outright that Black settlers were not admissible and the government sent out an eleven man team, including doctors to examine the Blacks,

"the Blacks were held up for two days while the doctors examined them from scalp to ankle and other officials questioned them about their finances"¹³⁸

The private railway companies were also engaged to prevent the feared flood of Black farmers. In 1910 the Canadian Pacific Railway, pursuant to an agreement with the government, issued restrictive regulations denying Black settlers the free organized tours of Western Canada and reduced rail rates available to white American settlers. They also agreed to report any immigration agent found to be encouraging Black immigrants.¹³⁹ All other rail companies were advised that immigration regulations would be strictly enforced against Black settlers, and that the railways would have to bear the cost of returning rejected immigrants.¹⁴⁰ By 1912 the exclusion had become so apparent that the Great Northern Railway sent notices to its employees that Blacks were not to be

¹³⁶ Robin W. Winks, *The Blacks in Canada: A History* (Montreal: McGill-Queen's University Press, 1971) at 308.

¹³⁷ Robin W. Winks, *The Blacks in Canada: A History* (Montreal: McGill-Queen's University Press, 1971) at 310.

¹³⁸ Pierre Berton, *The Promised Land: Settling the West 1896-1914* (Toronto: McLelland and Stewart, 1984) at 185.

¹³⁹ Harold Troper, *Only Farmers Need Apply* (Toronto: Griffin House, 1972) at 144.

¹⁴⁰ Harold Troper, *Only Farmers Need Apply* (Toronto: Griffin House, 1972) at 144.

admitted to Canada under any circumstances.¹⁴¹ When asked in the House of Commons if, "anything has been done to stop Black immigration from the southern states into our Canadian northwest", Frank Oliver was happy to advise the House that "Perhaps it will serve the Honourable gentleman's purpose if I inform him that the immigration has, to all intents and purposes, ceased."¹⁴²

The records of the Privy Council for 1911, show that on August 12, Frank Oliver, Minister of the Interior recommended by letter that Black immigration be prohibited and an Order in Council was passed which provided that:

"For a period of one year from and after the date hereof the landing in Canada shall be and the same is prohibited of any immigrants belonging to the Negro race, which race is deemed unsuitable to the climate and requirements of Canada."¹⁴³

Two months later, in PC 2378 the Order-in-Council was cancelled, with a notation that it had been passed "inadvertently in the absence of the Minister of the Interior". No record exists of the reason for the Order's passage or its revocation, although a marginal notation indicates the original Order was never acted upon.¹⁴⁴ It would be accurate to say that the government realized that direct legislation against Black immigration would have proven too controversial, particularly in an election year. In any event it was hardly necessary. The strict enforcement of regulations enacted for completely different purposes served the government just as well, without the necessity of clearly stating that they had a policy of "no Black settlers".

While reluctant to admit openly that there was a discriminatory policy in place, the Government was not adverse to hinting at it. Speaking in the House of Commons in December of 1911, Frank Oliver was candid about the

¹⁴¹Robin W. Winks, *The Blacks in Canada: A History* (Montreal: McGill-Queen's University Press, 1971) at 312.

¹⁴²House of Commons Debates (November 30, 1911) at 606.

¹⁴³P.C. 1911-1324.

¹⁴⁴PC 1911-2378.

exclusionary policy against the less desirable classes of immigrants, which included Blacks:

"The immigration policy of Canada today is restrictive, exclusive and selective as compared with the former policy of indiscriminate immigration... there are many cases where the admission or exclusion of an immigrant depends on a strict or lax interpretation of law, so that if the immigrant is of what we would call the desirable class they [sic] are administered laxly and if he is presumably less desirable class then they [sic] were administered more restrictively. Beyond that they are expected to act according to the instructions they have"¹⁴⁵

Black leaders in the United States were not fooled. Repeated requests from them for official clarification of Canadian policy were met with denials that there was any outright discrimination. L.M Fortier, the Departmental Secretary in Charge of Immigration wrote to W.E.B DuBois, then editor of *Crisis* :

"There is nothing in the Canadian Immigration Law which disbars any person on the ground of colour, but since coloured people are not considered as a class likely to do well in this country, all other regulations respecting health, money, etc. are strictly enforced and it is quite possible that a number of your fellow countrymen may be rejected on such grounds."¹⁴⁶

Census figures, although inaccurate, suggest strongly that the measures taken against Black settlers were very successful. Between 1900 and the 1950's the Black population of Canada remained constant around 21,000, representing a steady diminution in Blacks as a percentage of the total Canadian population.¹⁴⁷ Many of the original Black settlements complained bitterly that the refusal to allow reinforcements into Canada seriously limited their success as viable communities.

Although there are no accurate or reliable statistics available on how many Black settlers were turned away at the border or refused settlers' certificates, it is safe to say that the policy of aggressively discouraging Black settlement, and the strict interpretation of existing regulations at the ports of entry was responsible for the static Black population in Canada through to the 1950's.

¹⁴⁵ House of Commons Debates (December 10, 1911) at 100 & 5915.

¹⁴⁶ *Crisis*, 1 (April, 1911), 11, as cited in Harold Troper, *Only Farmers Need Apply* (Toronto: Griffin House, 1972) at 143.

¹⁴⁷ Canada, *Historical Statistics of Canada*, 2d ed. ed by F.H. Leacy (Ottawa: Supply and Services Canada, 1983) series A125-165.

East-Indian Immigration

The government's position on East-Indian immigration was made clear in 1908 in the sessional papers where it is stated:

"It was clearly recognized in regard to emigration from India to Canada that the native of India is not a person suited to this country, that accustomed as many of them are to the conditions of a tropical climate, and possessing manners and customs so unlike our own people, their inability to readily adapt themselves to surroundings entirely different could not do other than entail an amount of privation and suffering which renders a discontinuance of such immigration most desirable in the interests of the Indians themselves."¹⁴⁸

Assimilation, or more particularly, the alleged inability of particular ethnic groups to assimilate, has been at the heart of the justifications for the restriction of their immigration. Successive spokesmen for the government have stated that certain groups are incapable of assimilation. Wilfred Laurier, in a speech clearly stated the position of the Government:

"Nor should we allow too many Asiatic to enter. Nature has apparently prohibited their ready assimilation with us, and we see in the United States what grave problems may arise from the presence of a race unable to become full members of the same social family as ourselves."¹⁴⁹

What Laurier was referring to were major anti-Oriental riots in San Francisco and incidents in Bellingham, Washington, where a mob of whites drove 800 Indian mill-workers out of town, 400 of whom came across the border into Canada.¹⁵⁰ The term "Asiatic" was used broadly to include not only the Chinese and Japanese, but also the East Indians.

The restriction of East Indian immigration presented particular difficulties for the Canadians, difficulties which were also faced in other parts of the white commonwealth. Rhetorically, Great Britain was committed to the fiction that the

¹⁴⁸ House of Commons, Sessional Papers (1908) no. 360 at 7-8.

¹⁴⁹ Sir Wilfred Laurier notes for an Immigration Speech, (National Archives of Canada, Laurier Papers, Doc. 217894).

¹⁵⁰ Hugh Johnston, *The East Indians in Canada* (Ottawa: Canadian Historical Association, 1984) at 7.

Empire "makes no distinction in favour of, or against any race or colour"¹⁵¹ In practice, there was long standing and significant discriminatory treatment of the non-white within the Empire, but it was of necessity, discrimination in substance, but not in form. The challenge for Canada was to find a method of reducing Indian immigration without appearing to do so, and without admitting to it.

The first recorded Indian immigrants arrived in 1905 when 45 were reported.¹⁵² In the succeeding three years Indian immigration reached levels which were not to be exceeded until the early 1960's. In 1906 there were 387 arrivals, in 1907 there were 2,124, and in 1908 there were 2,623. By 1909 efforts to prevent Indian immigration were so successful that only six arrived, a level which showed only minor increases for the next 50 years.¹⁵³

Successive Canadian Governments have been well aware of the balancing act that had to be performed in order to exclude Indians from Canada. Indians were British subjects, and as such entitled by right to certain privileges of residence and travel throughout the British Dominions. MacKenzie King was always cognizant of the fact that discrimination had to be covert. In responding to questions in the House of Commons on exclusion, he explained that Australia, New Zealand and the United States had laws whose effect was exclusion, but they are not exclusionary on their face. His goal was to create similar laws which would guarantee exclusion, without admitting that he was doing so.¹⁵⁴

Several events occurred simultaneously in 1907 which served to direct anti-Oriental feelings against the Indians. Riots in Bellingham and Seattle Washington in 1907 happened almost simultaneously with the major anti-Oriental riots in Vancouver. In Vancouver the white residents' hostile feelings were fuelled by the arrival of the 400 Bellingham Sikhs, looking for protection from the British Crown,

¹⁵¹ B. Singh Bolaria and Peter S. Li, *Racial Oppression in Canada*, 2d ed (Toronto: Garamond Press, 1988) at 169.

¹⁵² B. Singh Bolaria and Peter S. Li, *Racial Oppression in Canada*, 2d ed. (Toronto: Garamond Press, 1988) at 169.

¹⁵³ House of Commons Debates (November 30, 1911) at 610.

¹⁵⁴ House of Commons Debates, (April 30, 1923) at 2312.

and 900 more who arrived in Vancouver a few days later aboard the "Monteagle". The large numbers in a relatively short period of time sparked public cries to halt Indian immigration. By 1908 the British Columbia Legislature and citizens were clamouring for total exclusion. A petition from the white citizens of British Columbia sent to the Governor General in that year stated:

"That the province of British Columbia has in the past and will, until restricted, continue to be a dumping ground of oriental labourers-notably the Hindu, Japanese and Chinese"

"Canada Orientals have usurped white labour in fishing, produce, supply and lumbering industries and usurped the places amongst unskilled labourers that would otherwise be filled by white men"

"The national existence of Canada is threatened by the introduction of non-assimilable races and the consequent driving out of the white man"

"We ask for the absolute exclusion of Orientals from the Dominion."¹⁵⁵

In March, 1908 the Privy Council sent MacKenzie King to the United Kingdom to confer with the British authorities about immigration from India. The sole purpose of the mission was to impress upon the British Government in India the necessity of limiting Indian emigration.¹⁵⁶ In the Order-in-Council authorizing his mission, the government clearly set out its position.

"That an effective restriction of immigration from India is desirable, therefore, not less in the interests of the East Indians themselves, than in the interest of the Canadian people.

That moreover, the whole subject of Oriental immigration is one of first concern to Canada, and affecting, as it does, the relations of the Dominion with foreign powers, and the relations of our people with fellow British subjects in India, involves considerations of the highest importance, not only to Canada, but to the British Empire as a whole."¹⁵⁷

The Canadian dilemma of how to exclude Indians was not unique, and appears to have been shared by other white parts of the Empire. The Colonial office had been wrestling with the same problem in Natal:

¹⁵⁵Petition from the Residents of B.C. (1908) (National Archives of Canada, Laurier Papers. Doc. # 217988).

¹⁵⁶R. Sampat-Mehta, *International Barriers* (Ottawa: Harpell's Press, 1973) at 133.

¹⁵⁷PC 1908-458.

"The whole subject is perhaps the most difficult we have had to deal with. The colonies wish to exclude the Indians from spreading themselves all over the Empire. If we agree, we are liable to forfeit the loyalty of the Indians. If we do not agree we forfeit the loyalty of the Colonists."¹⁵⁸

And in 1908, John Morely, Secretary for India, told Lord Minto:

"The great topic of the hour is the question of Asiatic in the Transvaal-only a part, however, of one of the largest questions concerning the Empire as a whole and indeed not only the Empire but all white governments against all yellow, brown and black immigrants. It is and will grow to be more and more a World question, if ever there was one."¹⁵⁹

In his report, Mackenzie King makes it clear that he wished to negotiate an agreement similar to the Lemieux Agreement with Japan. The proposed agreement would have prohibited immigrants without passports from immigrating to Canada, and the number of passports issued was to be limited to a number agreed to by the Indian Government. Unfortunately for MacKenzie King, the Indian Government was not in a position to voluntarily restrict emigration. The widespread political agitation for home rule precluded such an agreement, as it was feared that rebellion would result.¹⁶⁰ From MacKenzie King's perspective, clearly Canada had to act unilaterally.

The first measure taken was the passage of an Order-in-Council in 1907 which required all Asiatic, except Chinese and Japanese to have in their possession \$200.00 on landing.¹⁶¹ The second was the "continuous passage" requirement. The money requirement was found to be an insufficient deterrent, as "Asiatics" who arrived from third countries could not be returned to those countries because they would not be accepted. On January 8, 1908 the Privy Council passed PC 27 which stipulated that:

"Where the exclusion of immigrants whose presence in Canada is for various reasons undesirable"

¹⁵⁸ As cited in B. Singh Bolaria and Peter S. Li, *Racial Oppression in Canada*, 2d ed. (Toronto: Garamond Press, 1988) at 168.

¹⁵⁹ As cited in B. Singh Bolaria and Peter S. Li, *Racial Oppression in Canada*, 2d ed. (Toronto: Garamond Press, 1988) at 168.

¹⁶⁰ R. Sampat-Mehta, *International Barriers* (Ottawa: Harpell's Press, 1973) at 132.

¹⁶¹ House of Commons Debates, (November 30, 1911) at 614.

"Immigrants may be prohibited from landing or coming into Canada unless they come from the country of their birth, or citizenship, or by continuous journey and on through tickets purchased before leaving the country of their birth, or citizenship"¹⁶²

The only company selling continuous journey tickets from India to Canada was the Canadian Pacific Railway. Prime Minister Mackenzie King reported that on March 26, 1908, a directive was sent to the C.P.R. in India, "disallowing the sale of any more through tickets a stop, we believe, has been put to emigration."¹⁶³

Lest anyone believe that these two regulations were merely labour regulations applied universally, and not aimed at the Japanese and Indians, Mackenzie King made it clear in his report in 1908:

"To the immigration of Orientals the regulations of the Canadian Government requiring a continuous journey from the country of which they are natives or citizens and upon through tickets should prove an effective bar.. and the greater care which it may reasonably be expected the steamship companies will exercise in the future, should prove a real deterrent."¹⁶⁴

It is also clear that the regulations were used almost exclusively against the Indians and the Japanese. The Order-in-Council specified that it was to be invoked only if the immigrants were "undesirable". By definition non-whites were undesirable, but there was also a hierarchy of desirable whites, as confirmed by the Minister of the Interior, Frank Oliver in 1909:

"In order that there may be as little misunderstanding as possible as to the enforcement of the Act I beg to say that we propose to give special consideration to the English speaking immigrants. Next to those, the immigrants from the European countries adjoining the North Sea, namely, France, Belgium, Holland, Germany, Denmark, Norway, and Sweden. In regard to immigrants from other European countries the terms of the Act and regulations are to be applied stringently in all cases."¹⁶⁵

¹⁶²PC 1908-27.

¹⁶³As cited in Sampat-Mehta, *International Barriers* (Ottawa: Harpell's Press, 1973) at 135.

¹⁶⁴House of Commons, Mackenzie King Report, (1908) Edw. 7-8, 7 A.

¹⁶⁵As cited in R. Sampat-Mehta, *International Barriers* (Ottawa: Harpell's Press, 1973) at 142.

Prior to the passage of the Order-in-Council 27, the C.P.R. sold a number of continuous journey passages to Indians aboard the steamer *Monteagle*. The steamer arrived in Vancouver and hurried dispatches were sent to the Privy Council keeping the Prime Minister advised. The ship contained 182 Hindus; 12 were rejected for health reasons, 23 for failing to have the necessary \$200.00 money qualifications. The remaining 142 were held in detention for violation of the continuous journey Order-in-Council, and for violating a B.C. Immigration Act.¹⁶⁶ The government was aware that the tickets had been purchased as a continuous journey, but they argued that the purchasers were not the same people who had arrived on the boat.¹⁶⁷ Mr. Justice Morrison held that the British Columbia Act was *ultra-vires* and the Indians were set at liberty and awarded costs of the Appeal.¹⁶⁸ During the course of the Appeal, the Federal government was alerted to the fact that there was no statutory basis in *The Immigration Act* for the "continuous journey" Order-in-Council. If it had been challenged by the Indians, there was a good possibility that it would not have survived. On April 10, 1908, *An Act to amend the Immigration Act* was passed giving the Governor in Council the power to prohibit landing of any specified class of immigrants who entered other than by a continuous journey.¹⁶⁹

Having successfully stopped almost all immigration from India, the government turned its attention to the few thousand who were already in the country. Economic conditions were bad in 1908 and many of the recently arrived Indians were out of work. Section 28 of the 1906 *Immigration Act* gave the government the power to deport anyone who became destitute within two years of landing.¹⁷⁰ Indeed, the fear of deportation was very real. Deportations between 1908 and 1910 increased significantly, with 37% in 1908; 61% in 1909 and 47% in 1910. These deportations were carried out under Section 28, on the grounds

¹⁶⁶ PC 1908-828.

¹⁶⁷ R. Sampat-Mehta, *International Barriers* (Ottawa: Harpell's Press, 1973) at 138.

¹⁶⁸ *In Re Narain Singh et al.* [1908] B.C.R. 477.

¹⁶⁹ *An Act to amend the Immigration Act*, (1908) 7-8 Edw. 3, c.33.

¹⁷⁰ *Immigration Act*, 6 Edw. 7 (1906), s. 28.

that the immigrant had become a public charge.¹⁷¹ In this climate of feared deportation, the government proposed sending East Indians to British Honduras at government expense as an alternative to deportation. Two Indian delegates were sent to investigate but the plan was plagued with scandal when an immigration informer was accused of trying to bribe the delegates. The delegates returned and publicly recommended against the plan, citing mosquitos and low wages. The proposal was dropped by the government with the Indian's refusal to cooperate and an improvement in the labour conditions in B.C.¹⁷²

The first direct legal challenge to the "continuing journey" Orders-in-Council did not come until 1913. In that year the steamship *Panama Maru* arrived with 56 Indian passengers on board who claimed to be returning Canadian residents. When challenged, some admitted that they had obtained false documents in Japan and were not returning residents at all. They were charged and found inadmissible by a Board of Inquiry under the *Immigration Act 1906*. The Indians then challenged the Board's findings indirectly by way of *Habeas Corpus*, arguing that the Orders were invalid. The Orders used the word "*origin*", instead of the words "*native*" or "*citizen*" used in the *Act* to define the classes of prohibited immigrants. The money qualification Order-in-Council required merely, "*actual personal possession of \$200.00*" not "*possession in one's own right*". Chief Justice Hunter found that the Orders-in-Council were invalid in that they went beyond the *Act*. The term "*Asiatic origin*" went beyond the *Act*, as it could cover Europeans born in Asia as well as Indians. Similarly, "*possession in one's own right*", was not the same as "*actual personal possession*", and "*natives or citizens*" could not be substituted for "*native or naturalized citizen*" because "*native*" was a much broader term.¹⁷³

¹⁷¹Barbara Roberts, *Whence They Came: Deportations from Canada 1900-1935* (Ottawa: University of Ottawa Press, 1988) at 48.

¹⁷²Canada, *The East Indians in British Columbia: A Report Regarding the Proposal to Provide Work in British Honduras for the Indigent Unemployed among them*. (Ottawa: Queen's Printer, 1908).

¹⁷³Hugh Johnston, *The Voyage of the Komagata Maru: The Sikh Challenge to Canada's Colour Bar* (Vancouver: University of British Columbia Press, 1989) at 20-21.

The Indians clearly recognized the significance of Justice Hunters' decision and saw it as a major victory in their battle to break the bar on immigration for Indians. They organized quickly to bring other Indians to Canada before any further Orders-in-Council could be passed. The result was the doomed voyage of the Komagata Maru, described in detail by Hugh Johnston in *The Voyage of the Komagata Maru*.¹⁷⁴ Before the Komagata Maru could dock with its 400 Sikhs, the government passed two new Orders-in-Council on January 7, 1914, PC 23 and PC 24.¹⁷⁵ Those Orders revoked PC 920 and 926 which Justice Hunter had struck down, and conformed exactly to the required wording in the *Immigration Act*. The Sikhs were never permitted to land, and after two months in Vancouver harbour, and extensive legal action which upheld the new Orders-in-Council, they were returned to India.

The "continuous journey" Order-in-Council remained in force until the major revision of the *Immigration Act* under Mackenzie King in the 1950's, and effectively precluded any Indian immigration. Not only was there no immigration, but the natural population of Indians in Canada also declined. Between the 1911 and 1921 census, the Hindu population diminished from 2,342 in 1911 to 1,016 in 1921 going from .03% of the population to .01%.¹⁷⁶ Most of the Indians already in Canada had arrived as single male workers prior to 1908. As with all Asian immigrants they were unable to sponsor either their families or fiancées so that, not only was it impossible for the population to increase naturally, but there was an understandable tendency for Indians to return to India, where they were able to marry and have families.

With the granting of self-government to India, Pakistan and Ceylon, Canada was free to negotiate restrictive immigration agreements similar to the Lemieux Agreement which covered Japanese immigration. In 1951, India agreed to limit

¹⁷⁴ Hugh Johnston, *The Voyage of the Komagata Maru: The Sikh Challenge to Canada's Colour Bar* (Vancouver: University of British Columbia Press, 1989).

¹⁷⁵ P.C. 1914-23, P.C. 1914-24, C. Gaz. 1914.2335.

¹⁷⁶ Canada, *Sixth Census of Canada 1921 Vol. 1* (Ottawa: F.A. Ackland, 1924) Table 22 at 353.

immigration to 150 per year, Pakistan to 100, and Ceylon to 50.¹⁷⁷ These agreements established a quota system for Indians, which was strictly adhered to. Ironically, the department opened a new immigration office in India to process the applications to fill the 150 quota spaces. When questioned in the House as to why a full time staff of 12 was required to process such a small number of immigrants, the Minister explained that careful consideration had to be given to all the applications, lest there be some allegations of discrimination. The overall discriminatory practice of limiting Indian immigration in the first place appears to have escaped the notice of the Minister.¹⁷⁸

¹⁷⁷David Corbett, *Canada's Immigration Policy: A Critique* (Toronto: University of Toronto Press, 1957) at 29.

¹⁷⁸David Corbett, *Canada's Immigration Policy: A Critique* (Toronto: University of Toronto Press, 1957) at 1981.

Jewish Immigration

The approach taken by the government to Jewish immigration bears little resemblance to the overt discrimination against the Chinese but is similar to that applied to East-Indians and Blacks. As Gerald Dirks summarized:

"we do not want too many Jews, but in the present circumstances we do not want to say so. We do not want to legitimize the Aryan mythology by introducing any formal distinction of immigration purposes between Jews and non-Jews. The practical distinction, however, has to be made and should be drawn with discretion and sympathy by the competent authorities, without the need to lay down a formal minute of policy."¹⁷⁹

The first large wave of Jewish immigration to Canada occurred in response to the persecution and massacre of Jews in Russia which occurred around 1881. The Canadian Jewish population rose significantly from 667 to 16,131 people in ten years. By 1911 the Jewish population had risen sharply again, to around 75,000, this increase largely the result of renewed Jewish persecution in Russia and Rumania. By 1931 Jews numbered 156,726 and represented 1.51% of the Canadian population.¹⁸⁰

After the early 1920's Jewish immigration began to decrease, both in absolute numbers and as a percentage of total immigration, going from approximately 5,800 per year prior to 1915, to 3,600 per year between 1919 and 1931.¹⁸¹ This decrease took place precisely when we should have expected to see a dramatic increase in immigration, in response to the renewed persecution of Jews in Germany and other European countries.

The decrease was a direct result of an unofficial government policy opposed to Jewish immigration, a policy which was carried out amidst government denials that such a policy existed. For the most part, the exclusion of Jews was achieved through the rigid interpretation of existing regulations, and through the exercise of the discretion that formed part of the personal power of the Director

¹⁷⁹ Gerald E. Dirks, *Canada's Refugee Policy* (Montreal: McGill-Queen's University Press, 1992) at 58.

¹⁸⁰ Louis Rosenberg, *Canada's Jews: A Social and Economic Study of Jews in Canada*, (Montreal: Canadian Jewish Congress, 1939) p. 11.

¹⁸¹ Louis Rosenberg, *Canada's Jews: A Social and Economic Study of Jews in Canada* (Montreal: Canadian Jewish Congress, 1939) p. 131.

of Immigration. As such, the story of Jewish immigration to Canada from the 1920's through the late 1940's, represents one of the best examples of the use, or abuse, of the extensive discretionary powers held by the Director of Immigration. All measures to exclude Jews were unofficial, but this is not to suggest that they did not have official sanction. Historians agree that the employees of the Immigration Department were at all times carrying out the wishes of their political masters. As Irving Abella comments:

"after all, he was, although powerful, only a civil servant whose actions reflected the wishes and values of his superiors. Not to accept refugees was a political decision, not a bureaucratic one. It was Mackenzie King....and his cabinet ministers who, in the final analysis, were responsible for keeping Jews out of Canada."¹⁸²

In 1920 the American Hebrew Sheltering and Immigrant Aid Society conducted an inquiry into Jewish immigration in Canada. They summarized the immigration requirements at the time, and reported on the difficulties that Jewish immigrants faced:

"Canadian immigration officials interpret these regulations as they think fit. They have become so rigorous that even immigrants who have made a continuous journey, possess the necessary sum of money, and in every way have complied with the regulations, are held up on the ground that they are likely to become public charges, the reason being given that there is a surplus of labour in their particular trade. Not even farmers and servants are permitted to enter freely."¹⁸³

By 1921, the Canadian Jewish community was well aware of the anti-Jewish bias in the Department of Immigration. Jewish member of Parliament, S.W. Jacobs, commented that he was:

"satisfied that everyone in the Department is strongly and bitterly opposed to our people, and that the intention of the Meighen Government is practically to prevent immigration of our people from the Ukraine, and generally from Eastern Europe, without regard to the eligibility of individual immigrants."¹⁸⁴

¹⁸² Irving Abella, *None Is Too Many* (Toronto: Lester & Orpen Dennys, 1982) at 9.

¹⁸³ David Rome, *Clouds in the Thirties: On Anti-Semitism in Canada 1929-1939* (Montreal: Canadian Jewish Congress, 1980) Section 8, at 221.

¹⁸⁴ David Rome, *Clouds in the Thirties: On Anti-Semitism in Canada 1929-1939* (Montreal: Canadian Jewish Congress, 1980) Section 8, at 206.

The mechanisms used by the Department to exclude the Jews included the continuous passage requirement, health and medical checks, passport requirements and an unofficial requirement that all Jews be issued with "special permits", which meant that all applications had to be approved at the highest levels, where they were inevitably refused.

Between 1910 and 1927 the *Immigration Act* was thoroughly overhauled and more inadmissible classes were introduced, including political classes. The Cabinet was granted specific powers to pass laws discriminating against immigrants on the basis of their race, religion, culture, climate or habits. Numerous new inadmissible classes were created: charity immigrants who had been given or loaned money enabling them to qualify for landing; people who do not fulfil, meet or comply with any conditions and requirements of any regulations; people likely to become a public charge; people of "constitutional psychopathic inferiority"; chronic alcoholics; and mentally or physically defective people who were unable to earn a living.¹⁸⁵ For the first time political opinion and belief became a ground for exclusion with the introduction of six new inadmissible categories.¹⁸⁶ A literacy test, reminiscent of Lord Chamberlain's *Natal Immigration Act*, was added for all immigrants over 15 who were admitted after 1919. Immigrants were required to read in English or French "or some other language or dialect" a select list of between 30 and 40 words.¹⁸⁷

These changes were to prove particularly useful for the Canadian authorities, because with greatly expanded medical and character assessments for immigrants, immigration officers could screen out other "undesirable classes" of immigrants. The subjective assessment by immigration officers of immigrants for these "soft", inadmissible classes, of character and medical grounds, left ample room for the selection of certain "classes" of immigrants. Both Harold

¹⁸⁵ *Immigration Act 1910* c. 27 s.3.

¹⁸⁶ *Immigration Act 1910*, c. 27 s.3 (n) to (s).

¹⁸⁷ *Immigration Act 1910*, c. 27 s.3 (l), s.2.

Troper¹⁸⁸ and Reg Whitaker¹⁸⁹ confirm that this is exactly what was done, particularly for the Black settlers who tried to immigrate from the United States, and for the Jews.

The "continuous passage" Order-in-Council, aimed at excluding the Japanese and the Indians, was extended to "undesirable" European immigrants in 1908.¹⁹⁰ The determination of who was "undesirable" was entirely in the hands of the Department, and the Department decided that Jews were "undesirable". Many Jews were unable to arrive directly from their country of nationality, as they had been driven from their homes and were applying from outside their countries, or as in the case of Germany, had had their citizenship unilaterally revoked. The fact that they were applying from outside their country effectively precluded their admission to Canada. This indirect effect was pointed out to the government on March 31, 1911, but they refused to make any changes in the regulations for the Jews.¹⁹¹

In July 1921, by Order-in-Council, the Canadian government made it compulsory for all immigrants to have in their possession valid passports issued within one year of their approval. The Order did not apply to immigrants from Great Britain, Ireland, Newfoundland, New Zealand, Australia, the Union of South Africa and the United States. For many Jews, the passport requirement was impossible to fulfil, because they could not obtain travel documents. The Order came on the heels of a large movement of Jews out of the Ukraine and Rumania. These Jews had passed through Poland and other countries, but the Bolshevik Government would not grant them passports, and the travel orders permitting them to pass through other countries were not recognized by Canadian authorities. More than 600 Jews arrived in Halifax on four ships; the Saxonia, Megantic, Canada and Corsican, with passages booked prior to the Order-in-

¹⁸⁸ Harold Troper, *Only Farmers Need Apply* (Toronto: Griffin House, 1972).

¹⁸⁹ R. Whitaker, *Canadian Immigration Policy since Confederation* (Ottawa: Canadian Historical Association, 1991) at 11.

¹⁹⁰ Sampat-Mehla, *International Barriers* (Ottawa: Harpell's Press, 1973) at 136.

¹⁹¹ Sampat-Mehla, *International Barriers* (Ottawa: Harpell's Press, 1973) at 148.

Council being made. They were detained for deportation back to Russia and Rumania because they had no passports, and on other pretexts; their release was only obtained after extensive public pressure.¹⁹²

Examples of the identification and exclusion of Jews on medical grounds first appear around the turn of the century. British immigrants were given the most cursory medical examinations as they walked in single file past the doctors on arrival in Canada. No eyelids were raised. No one had to strip. Foreigners, however, boarding the same boats at the same ports, were treated entirely differently, and Jews were always considered to be foreigners. All foreign emigrants were examined thoroughly at the companies' boarding house before the boats left England. Jews in particular were examined with special care, the excuse being that they carried trachoma.¹⁹³

In 1923, the government passed PC 183, limiting all immigration to Canada to farmers, farm labourers, domestic servants and the wife and children under age 18 of Canadian residents.¹⁹⁴ Immigrants from Great Britain and the United States did not have to be farmers, but everyone else did. Administrative regulations were drawn up for the railway and steamship transportation companies which formed the legal basis for the exclusion of the Jews. The regulations divided non-British and American immigration into three groups: "preferred immigrants", "non-preferred immigrants" and the "special permit" groups.

The "preferred immigrants" were citizens of Iceland, Denmark, Sweden, Norway, Finland, Germany, France, Holland, Belgium, Luxembourg and Switzerland. These immigrants were given the same treatment as British immigrants, but were not entitled to any transportation loans or reduced passage fares.

¹⁹²David Rome, *Clouds in the Thirties: On Anti-Semitism in Canada 1929-1939* (Montreal: Canadian Jewish Congress, 1980) Section 8, at 228.

¹⁹³House of Commons, *Canadian Immigration* (1908) 8 Edw. Appendix No. 2 A, at 393.

¹⁹⁴P.C. 1923-183.

The "non-preferred" were citizens of Austria, Hungary, Czech-Slovakia, Yugo-Slavia, Poland, Rumania, Lithuania, Latvia, and Estonia. The members of this group were restricted to the classes enumerated in P.C. 183, namely farmers, farm labourers, domestic servants or wife and children under 18 years. To carry out the recruitment of these farmers, an agreement was struck with the CPR and CNR, called the Railway Agreement. This Agreement permitted the companies to select immigrants from among the "non-preferred" group in numbers that the companies themselves believed could be absorbed by Canada.

The third category of immigrants required a "special permit" from the Department of Immigration to land. This group included all immigrants from Greece, Italy, Bulgaria, Armenia, Syria and Turkey, and all Jews no matter what their citizenship or country of birth. The categories were particularly discriminatory, as Jews required special permits regardless of their nationality, but Greeks, Italians, Bulgarians, Armenians, Syrians and Turks born in "non-preferred" countries were eligible under the Railway Agreement, notwithstanding their ethnic group.

Jewish historian, Louis Rosenberg argues strongly that the "special permit" classification was aimed specifically at excluding the Jews, and represents the only example of a 20th Century British Empire country "officially" discriminating against Jews. He argues:

"The number of Greek, Bulgarian, Armenian, Syrian, Turkish and Arab immigrants to Canada has always been negligibly small. The number of Italian immigrants to Canada, which was quite large prior to the World War, has decreased greatly after the War even before any restrictive legislation was adopted in Canada,It would appear therefore that the restrictions involved in the classification of immigrants within the "special permit" group were really aimed at the Jews..."¹⁹⁵

The Railway Agreement left the determination of who were "bona fide agriculturalists" entirely in the hands of the railways themselves. The federal

¹⁹⁵ Louis Rosenberg, *Canada's Jews: A Social and Economic Study of Jews in Canada* (Montreal: Canadian Jewish Congress, 1939) at 129.

government merely ran the medical checks and issued the visas. Under the Agreement, more than 185,000 eastern Europeans were brought to Canada.¹⁹⁶

Probably more important than any other factor in the immigration of Jews to Canada, was the personality and the prejudices of the Director of the Department of Immigration, Frederick Charles Blair. Irving Abella describes him as:

"The intransigent and morally obtuse Blair, as director of the Immigration Branch, gave vent to his anti-semitism by placing every possible bureaucratic obstacle in the path of the refugees"¹⁹⁷

Blair rose from the ranks to become Assistant Deputy Minister by 1924, and Director of Immigration by 1936.¹⁹⁸ While the Minister in charge of Immigration at the time was Thomas Crerar, he took little interest in, or cared about the Immigration Department and Blair made all of the decisions. Blair has been characterized as a narrow-minded anti-semitic bureaucrat, who made all of the rules, and ensured that they were enforced.¹⁹⁹

His power derived directly from the *Immigration Act*, which gave the Minister sweeping discretionary powers. These powers came with little control or right of review for the immigrant, so that curbs on arbitrary decisions were non-existent. The privative clause in Section 23 of the *Immigration Act*, 1910, provided that:

"No court, and no judge or officer thereof, shall have jurisdiction to review, quash, reverse, restrain or otherwise interfere with any proceeding, decision or order of the minister or of any Board of Inquiry, or officer in charge, had made or given under the authority and in accordance with the provision of this Act relating to the detention or deportation of any rejected immigrant, passenger or other person, upon any ground whatsoever, unless such person is a Canadian citizen or has Canadian domicile."²⁰⁰

¹⁹⁶ Reg Whitaker, *Canadian Immigration Policy since Confederation* (Ottawa: Canadian Historical Society, 1991) at 12.

¹⁹⁷ Irving Abella, *None Is Too Many* (Toronto: Lester & Orpen Dennys, 1982) at 50.

¹⁹⁸ Irving Abella, *None Is Too Many* (Toronto: Lester & Orphen Dennys, 1982) at 7.

¹⁹⁹ Irving Abella, *None Is Too Many* (Toronto: Lester & Orphen Dennys, 1982) at 7.

²⁰⁰ *Immigration Act 1910*, c. 27 s.23.

Blair had the power to personally review and reject any "class" of immigrant application, and he did so, rejecting almost all Jewish applications which came before him. Irving Abella comments:

"Blair made almost all of the decisions about who got into Canada; and nothing that touched his department escaped his personal scrutiny, whether it was authorizing the purchase of stationery or approving a routine application for admission to Canada"²⁰¹

Blair was unquestionably an anti-Semite, in his own words:

"I often think that instead of persecution it would be far better if we more often told them frankly why many of them are unpopular. If they could divest themselves of certain of their habits I am sure they could be just as popular in Canada as our Scandinavians."²⁰²

Blair drafted the general rules that limited Jewish immigration, but lest any Jews still qualify he used his extensive discretionary powers to exclude them. In Irving Abella and Harold Troper's work, *None is Too Many*, they set out in detail how Blair, with his power and prejudice combined, was able to reject legitimate applications for admission from Jews, who qualified in all respects. Case histories, many of them compiled from the Department of Immigration's own records, clearly show how immigrants with the skills and financial backing that Canada professed to desire, were turned away.

Blair required that all Jewish "special permit" applications be forwarded to him, to be refused. Occasionally, sympathetic visa officers advised Jews to reapply as Christians and they were subsequently accepted. Others did not have that option as their passports listed their religion. Even bona-fides farmers, with proven track records and money to invest were turned away because as Blair knew, Jews "are not farmers, but professionals and industrialists".²⁰³

²⁰¹ Irving Abella, *None is Too Many* (Toronto: Lester & Orphen Dennys, 1982) at 7.

²⁰² Irving Abella, *None is Too Many* (Toronto: Lester & Orphen Dennys, 1982) at 9.

²⁰³ Sampat-Mehta, *International Barriers* (Ottawa: Harpell's Press, 1973) at 123.

Probably the most graphic symbol of Canadian callousness towards Jews occurred in 1937, when 907 German Jews sought refuge from Nazi Germany. When they were refused entry to Cuba they tried to enter Canada. Despite compassionate entreaties from some influential Canadians, their pleas fell on deaf ears. The St. Louis was turned away, taking many of its passengers to perish at the hands of the Nazis in gas chambers and crematoria. When Blair was consulted by Prime Minister Mackenzie King, he responded that the refugees did not qualify under the immigration laws and that no country could:

"open its doors wide enough to take in the hundreds of thousands of Jewish people who want to leave Europe: the line must be drawn somewhere"²⁰⁴

Immigration policy is as much about who is admitted to a country as it is about who is not admitted. As the horrors of the gas chambers and concentration camps in Europe became public knowledge and the flow of displaced persons and refugees increased, Canada was called upon to accept refugees. In the early years, despite the overwhelming numbers of Jewish refugees, Canada chose to open her doors only to non-Jews.

One of the first humanitarian overtures made by Canada during the war was to admit the "Sudenten Germans". These were German anti-Nazis from Sudeten, who were displaced by the Munich agreement. The Sudeten were hailed as agriculturalists, but more importantly for Canada the Sudeten were not Jewish. Canada could refuse to admit Jews while at the same time claim to be assisting refugees.²⁰⁵ What made the decision so difficult to accept for the Canadian Jewish community was that it was made on the heels of a Cabinet decision to keep Jewish refugees out of Canada.²⁰⁶ In the end, the Sudeten Germans turned out to be far from the agriculturalists. In fact, the railways, who had brought them to Canada had to spend large sums instructing them on the most elementary farming techniques, much to their disappointment.²⁰⁷

²⁰⁴Irving Abella, *None Is Too Many* (Toronto: Lester & Orpen Dennys, 1982) at 64.

²⁰⁵Irving Abella, *None Is Too Many* (Toronto: Lester & Orphen Dennys, 1982) at 49.

²⁰⁶Irving Abella, *None Is Too Many* (Toronto: Lester & Orphen Dennys, 1982) at 47.

²⁰⁷David Rome, *Clouds in the Thirties: On Anti-Semitism in Canada 1929-1939* section 8 (Montreal: Canadian Jewish Congress, 1980) at 218.

No where was Canadian anti-Semitism more apparent than in the acceptance of child refugees. In early 1940, there were thousands of child refugees in England, many of them Jewish from continental Europe. A proposal from the British Movement for the Care of Children was made for the resettlement of 9,000 children, 90% of whom were Jewish. The government rejected the proposal out of hand as totally unacceptable, but only a few months later, agreed to accept 10,000 British, French, Belgian or Dutch children who were to be evacuated, and 4,500 children were accepted under the scheme. However, the scheme was designed not to include Jewish children as it applied only to Allied boys and girls, not to German-Jewish Refugees.²⁰⁸

Following the war, at a time when Jews were desperately trying to rescue relatives from the camps in Europe, Canada embarked on a number of refugee schemes which were actually bulk-labour programs, most of which were engineered to exclude Jews. There was a Polish war veterans plan whereby 4,000 Poles were admitted in 1946 to replace the German prisoners of war, and to harvest the turnip crop. Jewish members of the Polish army were advised not to bother applying and Immigration undertook the screening of applicants to ensure that they were not admitted.²⁰⁹

By 1946 various other "bulk-labour" programs had been approved which brought over workers in the logging, lumbering and mining industries, where there were guaranteed jobs. This was later expanded to include domestic servants and agricultural workers with specialized training. Under the domestic program, the government specified that the women should be Protestant, and when some Jewish applicants were accepted in Europe by mistake, instructions were cabled from Canada specifying that no Jews were to be accepted.²¹⁰ In the selection of woodworkers, the selection teams were instructed to choose Balts and Estonians, and not Jews. When confronted by Saul Hayes of the Canadian Jewish

²⁰⁸Irving Abella, *None Is Too Many* (Toronto: Lester & Orphen Dennys, 1982) at 103.

²⁰⁹Irving Abella, *None Is Too Many* (Toronto: Lester & Orphen Dennys, 1982) at 218.

²¹⁰Irving Abella, *None Is Too Many* (Toronto: Lester & Orphen Dennys, 1982) at 250.

Congress, with the fact that Jews who claimed to be Balts or Ukrainians were accepted, while those who listed Jewish as their religion were refused, the Government did not respond.²¹¹ Cables were sent from the Government with instructions that the selection of textile workers should be "non-Jewish".²¹² In all of these programs there was a definite anti-Jewish bias which immigration authorities privately acknowledged, but publicly denied²¹³

Indeed, Canadian discriminatory practices were well known at the International Refugee Organization (IRO), and many of its officials participated in the Canadian anti-Jewish screenings that took place, although both Canada and the IRO publicly denied the existence of any anti-Jewish bias.²¹⁴ Canadian M.P. Joe Salsberg reported from Europe in 1947 to the Canadian Jewish Congress:

"There is a very definite anti-Jewish bias in the Canadian Immigration policies and in their application on the spot in Germany. This opinion is practically universal. Top IRO people share it with Jewish organizational representatives. While in some cases it is concealed, discrimination is brazen and unashamed in others"²¹⁵

In the face of the anti-Jewish nature of most of the bulk labour plans, a scheme was financed and organized by Canadian Jews in 1947 to try and bring Jewish needle trade workers out of the camps to work in Canada. While ostensibly a bulk-labour program, everyone involved agreed that it was an attempt to rescue Jews and Jewish Canadian businesses were called upon to guarantee employment to the immigrants. Once the selection team arrived in Europe, they were cabled by the Department of Immigration that not more than 50% of the workers were to be of one racial group, the government intent being to limit the number of Jews accepted under the program. The quota was completely unacceptable to the needle trade industry, and the selection team protested the imposition of the quota. In the end the quota had to be revised upwards because

²¹¹ Irving Abella, *None Is Too Many* (Toronto: Lester & Orpen Dennys, 1982) at 254.

²¹² Irving Abella, *None Is Too Many* (Toronto: Lester & Orphen Dennys, 1982) at 253.

²¹³ Irving Abella, *None Is Too Many* (Toronto: Lester & Orphen Dennys, 1982) at 257.

²¹⁴ Irving Abella, *None Is Too Many* (Toronto: Lester & Orphen Dennys, 1982) at 253.

²¹⁵ Irving Abella, *None Is Too Many* (Toronto: Lester & Orphen Dennys, 1982) at 254.

there were insufficient refugees left in the camps who qualified to fill the non-Jewish quota spots. The quota was finally raised to 60%, but even at that level the program was forced to take on unskilled non-Jews as apprentices, who would be trained at industry expense, instead of bringing the skilled Jews who remained behind in the refugee camps.²¹⁶

In addition to other roadblocks put in the way of Jewish Refugees, Canada imposed a family unit rule that required that only whole families, consisting of mother, father and children under eighteen, could be admitted. Saul Hayes, Chairman of the Canadian Jewish Congress summarized the Canadian government's Family Unit Rule "that if you cannot save two people then it is better that both perish than one be saved"²¹⁷

Countless Jewish refugees were refused admission to Canada during and after the war because they could not account for their entire families, as their members had been scattered during the Holocaust, or interned separately. Canada was inflexible in applying the "Family Unit Rule", and used it successfully to limit the number of refugees actually received in Canada. Official announcements to accept refugees were subverted when only a few of the families qualified. In one refugee scheme approved for two hundred families in Portugal, Cormier, the immigration official, made it his duty to ensure that as few families as possible were selected. He used the family unit rule to exclude almost all of the eligible families. When it became clear that the quota would not be filled the government relaxed the rule to include grandparents. But Cormier used the relaxation to exclude even more families, reasoning that because all of the children of the grandparents were not together that the families were not a unit and could not be accepted.²¹⁸

²¹⁶ Irving Abella, *None Is Too Many* (Toronto: Lester & Orpen Dennys, 1982) at 268.

²¹⁷ Irving Abella, *None Is Too Many* (Toronto: Lester & Orphen Dennys Ltd., 1982) at 133.

²¹⁸ Irving Abella, *None Is Too Many* (Toronto: Lester & Orpen Dennys, 1982) at 165.

The Portuguese refugee scheme, designed to resettle Jewish refugees represents an excellent example of Canada making a public commitment to accept refugees, which was subverted in the execution of the program, with the acquiescence of the political masters. The government made a commitment to accept 200 refugee families, in the end far less than that were finally accepted, because so few could pass the tests or meet the requirements of the regulations.²¹⁹

By 1958 Canada had accepted a total of 223,299 refugees from the Second World War, of these only 12.82%, or 17,406 were Jewish.²²⁰

Not only was Canada hostile to the entry of Jews during and immediately after the war, the anti-semitism continued long afterwards. Reg Whitaker argues that the post-war security screening apparatus was used to screen out Jews who sought to enter Canada through the state of Israel.

"The application of security screening to immigration could be used for other purposes as well: as a cloak for anti-Semitism in immigration policy"²²¹

Security screening is, by its nature, highly secretive and not subject to outside review or accountability. As such it is uniquely suited to serve other than stated purposes. In the case of the Jews, it was to exclude them. Starting in 1949 the Immigration Branch was instructed that all applicants from former enemy countries, Iron Curtain countries and Israel, would require full security clearances, in addition to those of "Hebrew Race" applying from visa offices in Shanghai, Belgrade and Stockholm.²²²

Coincidentally, no full security screening apparatus was available in Israel. In addition, applicants for visas had to reside for two years in the country of application, making it impossible for Jews in Israel to apply from any other

²¹⁹Irving Abella, *None Is Too Many* (Toronto: Lester & Orphen Dennys, 1982) at 168.

²²⁰Canada, Department of Manpower and Immigration, *Immigration and Population Statistics* (Ottawa: Manpower and Immigration, 1974) at 44-45.

²²¹Reg Whitaker, *Double Standard: The Secret History of Canadian Immigration* (Toronto: Lester & Orphen Dennys Ltd, 1987) at 63.

²²²Reg Whitaker, *Double Standard: The Secret History of Canadian Immigration* (Toronto: Lester & Orphen Dennys Ltd, 1987) at 64.

country. When the combined effect of these two rules was realized by Laval Fortier, Chairman of the Security Panel, he advised Norman Robertson, Minister of Immigration. Robertson, realizing full well the impact of the regulations, refused to alter either of the rules. The rules discriminated against the Jews, not by accident, but by design.²²³

²²³Reg Whitaker, *Double Standard: The Secret History of Canadian Immigration* (Toronto: Lester & Orphen Dennys Ltd, 1987) at 65.

British Immigration

In marked contrast to the treatment that the non-white immigrant received, the white immigrant to Canada possessed significant advantages. Because of the history of the creation of Canada, and in particular its origins as a British Colony, the treatment afforded the British immigrant provides us with the best example of the preferential treatment of white immigrants. While the British are used here as an example and for contrast, it must be borne in mind that European, American and white colonial immigrants also received more favourable treatment than non-white immigrants.

"The most flourishing commerce a nation can enjoy, its most prosperous manufactures, in fact all moveable property of whatever kind, may be deteriorated or lost in a day; the soil always remains to renew and repair all, and infuse new life.

If then the people of Canada are desirous of becoming a nation, strong, rich, independent, they should hasten with all diligence to take possession of their wild lands and to render them productive at once, before other hands anticipate them and reap the fruit of an inalienable inheritance which has descended to them from their ancestors."

General Annual Report of the Minister of Agriculture and Statistics, Evanturel, Min of Ag. 1863, Quebec.

The goal of much of early Canadian immigration policy was to fulfil this promise, to populate as thoroughly and as quickly as possible the wild lands, to lay claim to them once and for all for the Crown. Until the early 1780's Canada was a British colony, with a French and indigenous native population. It was sparsely populated and entry was unrestricted. Between 1783 and 1790 thousands of United Empire Loyalists fleeing the American civil war found refuge and a permanent home in Canada. They were encouraged by the British, who offered them military commissions, administrative positions, and generous grants of land which exceeded 3,200,000 acres in Upper Canada alone before 1787.²²⁴ The Loyalists were fed, clothed and housed by the British until they were able to provide for themselves, and the basic infrastructures of surveying, saw-mills and

²²⁴ W. Stewart Wallace, *The United Empire Loyalists: A Chronicle of the Great Migration* (Toronto: Glasgow, Brook & Company, 1914) at 117.

grist-mills were built for them.²²⁵ The Loyalists were wooed, bribed or paid to come and settle in Canada, and so began a long tradition of enticing British stock settlers to Canada.

While at the time, the British were concerned with the compensation of the American Loyalists for their war losses,²²⁶ there can be no doubt that their concern stemmed also from their own strategic interests. With the success of the American Revolution, the British undoubtedly felt the need to develop and maintain a colony of loyal British subjects in North America.

In 1791 the province of Upper Canada was formed after strong lobbying from Loyalist settlers for their own province.²²⁷ One of the major priorities of the new Lieutenant-Governor, Colonel John Graves Simcoe was to increase the population of the province and he embarked on a vigorous immigration campaign offering free land grants aimed at Americans who were willing to take an oath of allegiance to the King.²²⁸ During the next hundred years the bulk of immigration to Canada originated in the British Isles and there were no restrictions on immigrant entry.

The early legislative initiatives to regulate immigration were almost exclusively concerned with passenger health and quarantine regulations, and represented attempts to protect both the immigrants and the established settlers from disease.²²⁹

In 1851 the conditions of arriving immigrants were the subject of a Royal Commission Inquiry. The Inquiry found an appalling state of affairs, with diseased and criminal immigrants flooding into Canada unrestricted. The flotsam and

²²⁵W. Stewart Wallace, *The United Empire Loyalists: A Chronicle of the Great Migration* (Toronto: Glasgow, Brook & Company, 1914) at 116-117.

²²⁶W. Stewart Wallace, *The United Empire Loyalists: A Chronicle of the Great Migration* (Toronto: Glasgow, Brook & Company, 1914) at 113.

²²⁷W. Stewart Wallace, *The United Empire Loyalists: A Chronicle of the Great Migration* (Toronto: Glasgow, Brook & Company, 1914) at 121.

²²⁸W. Stewart Wallace, *The United Empire Loyalists: A Chronicle of the Great Migration* (Toronto: Glasgow, Brook & Company, 1914) at 123.

²²⁹*An Act Respecting Emigrants and Quarantine*, Con. Stat. Can. c.40, *An Act to Amend the Act Respecting Emigrants and Quarantine*, 25 Vic. c. 8; *An Act to Amend the Act respecting Emigrants and Quarantine*, Con. Stat. Can. 27, 2S. *An Act relating to Passengers arriving within this Province*, N.B 24 Vic. c. 18.

jetsam of England and Europe, the contents of the poor houses and the jails were being shipped to Canada in overcrowded, unsafe and unsanitary boats where large numbers of them died during the passage. To remedy this state of affairs, the first immigration legislation was passed in 1859. *An Act Respecting Emigrants and Quarantine* applied exclusively to immigrants arriving from the United Kingdom and ports in Europe²³⁰. The bulk of immigration was from these ports and the Act sought to remedy the two problems highlighted in the Royal Commission: the conditions of the arriving immigrants; and the protection from disease of the established population.

To protect the immigrants, vessel tonnage to passenger ratios of two tons per travelling passenger were set to reduce overcrowding. Minimum space requirements guaranteed every passenger at least twelve clear feet on the passenger deck.²³¹ Every vessel was required to provide shelter for passengers for 48 hours after arrival²³² and an attempt was made to control the exploitation of the immigrants once on shore by requiring tavern, hotel and boarding-house owners to post rates, and by limiting their power to distrain goods for rent.²³³ Similarly, to control unscrupulous entrepreneurs, the influencing of immigrants in favour of any particular service or facility was controlled by licence.²³⁴ Legal protection for passengers was guaranteed under the laws of the port of departure and the Master or any of the crew could be tried and fined for offenses.²³⁵

To protect the local population, quarantine facilities were established at Grosse-Isle,²³⁶ and the first inadmissible classes were introduced. If the immigrant was a "lunatic, idiotic, deaf and dumb, blind or infirm" and "likely to

²³⁰ *An Act Respecting Emigrants and Quarantine*, Con. Stat. Can c.40, 22 Vic., (1859) c.39-40, s.1.

²³¹ *An Act Respecting Emigrants and Quarantine*, Con. Stat. Can c.40, 22 Vic., (1859) c.39-40, s.2.

²³² *An Act Respecting Emigrants and Quarantine*, Con. Stat. Can c.40, 22 Vic., (1859) c.39-40 s.15.

²³³ *An Act Respecting Emigrants and Quarantine*, Con. Stat. Can c.40, 22 Vic., (1859) c.39-40, s.21.

²³⁴ *An Act Respecting Emigrants and Quarantine*, Con. Stat. Can c.40, 22 Vic., (1859) c.39-40, s.20.

²³⁵ *An Act Respecting Emigrants and Quarantine*, Con. Stat. Can c.40, 22 Vic., (1859) c.39-40, s.17.

²³⁶ *An Act Respecting Emigrants and Quarantine*, Con. Stat. Can c.40, 22 Vic., (1859) c.39-40, s. 22.3.

become permanently a public charge" they could be denied entry.²³⁷ Bonds valid for three years could be required of the vessel owners, to indemnify the Province or municipality if the immigrant sought parochial relief.²³⁸

It appears that some of the protective measures were effective because by 1862 immigrant deaths and quarantine figures were reduced to about .05%, an acceptable level in the opinion of the Minister of Agriculture.²³⁹ In 1906 the inadmissible classes were expanded to include paupers and beggars, persons convicted of a crime involving moral turpitude and prostitutes or pimps.²⁴⁰ Ten specific sections providing for the protection of immigrants were included.

In tone, all of the Acts were paternal towards the immigrant and protective of the health of the settled, seeking to remedy some of the worst abuses committed by the shipping companies. What is clear from the Act and its amendments, is the overriding concern for the immigrants themselves, their health, safety and legal protection, and the genuine attempt made to try and control the shipping companies and other entrepreneurs which were exploiting them.

Because Canada was an ex-British colony, Britons felt that they had a right to be admitted freely and they were not disappointed. Britain itself tied emigration to the "unity of the Empire" and at the Imperial Conference of 1907 passed a resolution:

"that it was desirable to encourage British emigrants to proceed to British colonies rather than to foreign countries."²⁴¹

²³⁷ *An Act Respecting Emigrants and Quarantine*, Con. Stat. Can c.40, 22 Vic., (1859) c.39-40, s. 10.2 .

²³⁸ *An Act Respecting Emigrants and Quarantine*, Con. Stat. Can c.40, 22 Vic., (1859) c.39-40, s. 10.4.

²³⁹ *Quebec, Report of the Department of Agriculture and Statistics 1862* (1863) at vii.

²⁴⁰ *The Immigration Act*, Con. Stat. Can. c. 19, 6 Edw. 7 (1906) s. 28 and 29.

²⁴¹ as cited in W.A. Carrothers, *Emigration From the British Isles* (London: P.S. King & Son. Ltd., 1929) at 243.

When restrictions were placed on the admission of convicts and paupers, Prime Minister Wilfred Laurier felt the need to publicly apologize to the British, and to explain the necessity for the restrictions:

"But our plain duty, as I think you will agree, is to see that all such are excluded, much as we may deplore the necessity for excluding some of them, in the interests of the Canada of today and of tomorrow."²⁴²

In the early years following Confederation, Canada was in direct competition for British settlers with Australia, South Africa and the United States. The government unsuccessfully sought to settle the prairies, as many settlers preferred to continue on to the United States and emigration exceeded immigration. The emigration included large scale movements of French Canadians out of Quebec. This net loss gave rise to nativist feelings in both Quebec and in English Canada. The government responded with several schemes to "retain the "British" character of Canada".²⁴³

One of the first initiatives to attract British settlers was the payment of bonuses started in the 1800's. By 1890, \$50.00 was provided to the settler, \$5.00 to the booking agent, and \$10.00 for homesteaders, with an additional \$5.00 for each child over 18. If a settler also had a settlers certificate for British Columbia, Manitoba or the Northwest Territories they received an additional \$5.00.²⁴⁴ In 1911, Frank Oliver the Minister responsible for immigration, answering questions in the House explained that bonuses were available for immigrants from England, France and Belgium but,

"It appeared to me that the time had come for paying a greater amount of attention to securing British immigration than had hitherto been paid. In line with that idea and with the view of spending our money in Great Britain rather than on the continent, and of encouraging British rather than continental immigration, we cancelled the contract with the North Atlantic Trading Company and increased the bonus on British immigrants to five dollars per head"²⁴⁵

²⁴² Prime Minister Wilfred Laurier, (National Archives of Canada, Laurier Papers.#217894).

²⁴³ Reg Whitaker, *Canadian Immigration Policy since Confederation* (Ottawa: Canadian Historical Society, 1991) at 4.

²⁴⁴ Canada, *House of Commons Canada*, Edw. 7, Appendix No.2. A.1908, at 328.

²⁴⁵ House of Commons Debates (Nov. 30, 1911) at 606.

The action apparently caused major emigration activity in Great Britain. Between 1904 and 1908 alone \$433,159.00²⁴⁶ was paid out in transportation bonuses and in the three years between 1905 and 1908, 41,230 British bonuses were paid out.²⁴⁷

Canada instituted a juvenile immigration movement that brought young British children to work on farms for low wages. The children earned money which was held in trust for them until they reached 18, and were provided with room and board. At that time they were free to take their earnings and leave the farms.²⁴⁸

In January, 1921 a conference was held with representatives of the British, Canadian, Australian and New Zealand governments concerned with British overseas emigration. The conference delegates agreed that emigration from Great Britain was a means of advancing the interests of the Empire and that overall, the Dominions required larger populations. It was agreed that the Governments of Great Britain and the Dominions would co-operate financially and otherwise, in a plan of assisted settlement.²⁴⁹ Pursuant to the conference, the United Kingdom enacted the *Empire Settlement Act* in 1922, which formalized funding for government assisted emigration schemes to the colonies. Under the Act the British government paid half of the costs of emigration and settlement, the other half was paid by the Colony, in this case Canada.²⁵⁰ Under the agreement more than 100,000 British immigrants came to Canada during the 1920's.²⁵¹

One of the most ambitious schemes brought 3,000 British families to Canada to farm in 1924. The families had to be "in good health, good character

²⁴⁶Canada, *Appendix Journal House of Commons Canada*, Edw. 7, Appendix No.2, A. 1908 at 323.

²⁴⁷National Archives of Canada, Laurier Papers. Document # 217904.

²⁴⁸Canada, *Report of the Department of Immigration and Colonization for the fiscal year ended March 31, 1927* (Ottawa: Queens Printer, 1928) at 68.

²⁴⁹W.A. Carrothers, *Emigration from the British Isles*, (Westminster, U.K.: P.S. King & Son, Ltd., 1929) at 261.

²⁵⁰Verax and Bruno Lasker, *Immigration Policies: Canadian and American* (Toronto: The Ryerson Press, 1944) at 8.

²⁵¹Reg Whitaker, *Canadian Immigration Policy since Confederation* (Ottawa: Canadian Historical Society, 1991) at 12.

and literate, belonging to the agricultural or houseworker classes"²⁵² The requirement for agricultural labourers was not strict, however, as the British Legion agreed to provide training to ex-servicemen and their wives if the settlers had no farming background. The settlers were to be provided with previously occupied farms and with government guaranteed loans for stock and equipment. Problems developed, however, with the 3,000 families scheme because there were few competent British farmers who were prepared to migrate. As a result, many of the people recruited were unsuited to agriculture and soon left the farms for the cities, employment or welfare, or returned to Britain.²⁵³ By 1928 there were 2,997 British families settled in Canada for a total of 16,804 immigrants. At that time it was anticipated that an additional 360 families would be added in 1929.²⁵⁴

Between 1917 and 1922, under a program financed by the British Overseas Settlement Committee, 26,560 ex-servicemen from Britain were resettled in Canada. Free third class passages were provided to the men if they had assured employment, or were emigrating under any of the colonial land schemes.²⁵⁵

In 1925 the government introduced an assisted passage agreement whereby grants were given to British settlers to assist them directly with their passage to Canada. The assistance was renewed in 1927 for a further two years. In the first two years of the agreement more than \$300,000 was spent to subsidize British settlers to come to Canada.²⁵⁶

In 1926 a small scheme was arranged with the Canadian Pacific Railway for the settlement of 100 Scottish families in the Vermilion district of Alberta.²⁵⁷ Agreements took place with New Brunswick in 1928 for the settlement of 500

²⁵² Canada, *Report of the Department of Immigration and Colonization for the fiscal year ended March 31, 1927* (Ottawa: Queen's Printer, 1928) at 44.

²⁵³ Reg Whitaker, *Canadian Immigration Policy since Confederation* (Ottawa: Canadian Historical Society, 1991) at 12.

²⁵⁴ W.A. Carrothers, *Emigration from the British Isles* (Westminster, U.K.: P.S. King & Son, Ltd., 1929) at 267.

²⁵⁵ W.A. Carrothers, *Emigration from the British Isles* (Westminster, U.K.: P.S. King & Son, Ltd., 1929) at 259.

²⁵⁶ Canada, *Report of the Department of Immigration and Colonization for the fiscal year ended March 31, 1927* (Ottawa: Queen's Printer, 1928) at 41.

²⁵⁷ W.A. Carrothers, *Emigration from the British Isles* (Westminster, U.K.: P.S. King & Son, Ltd., 1929) at 267.

families on farms, and a similar agreement with Nova Scotia was signed in 1929. In the same year 2,500 ex-servicemen who had been trained at the Ministry of Labour training centre in Great Britain were placed with Canadian farmers. Both the Canadian Pacific Railway and the Hudson's Bay Company also had private agreements to place 200 settlers on farms.²⁵⁸ In 1928, 8,499 single British men were bought to Canada to work in the harvest, most of them miners.²⁵⁹ Starting in the spring of 1923 a special program of women's immigration was introduced that provided direct loans to British women houseworkers who were willing to come to Canada to enter domestic service.

In addition to the financial assistance provided to the subsidized immigrant, the government continually sought to attract the independent British immigrant. By 1927 all of the entry restrictions concerning continuous passage, passport control, medical admissibility and the *Chinese Immigration Act* were firmly in place to control the entry of non-white immigration. The rationale for these measures was always publicly given as "labour considerations" and the use of the *Alien Labour Act* to exclude immigrants was highly symbolic. At the same time the Canadian government placed no restrictions on the immigration of the British, and was in fact engaged in an active campaign of recruitment. The Immigration Department summarized the position of the British immigrant of 1927 in this way:

"The regulations applicable to British immigrants who pay their own fare and are coming from the British Isles, are simplicity itself....The migrant from the British Isles does not require a passport and is not called upon to pass any occupational or money test."²⁶⁰

Continuous passage, passport requirements, only agriculturalists, and money qualifications did not apply to British Immigrants. As the bulk of Canadian immigration originated in the United Kingdom, the exemption of British subjects from the strict, supposedly labour based immigration restrictions made a mockery

²⁵⁸ W.A. Carrothers, *Emigration from the British Isles* (Westminster, U.K.: P.S. King & Son, Ltd., 1929) at 268.

²⁵⁹ W.A. Carrothers, *Emigration from the British Isles* (Westminster, U.K.: P.S. King & Son, Ltd., 1929) at 269.

²⁶⁰ Canada, *Report of the Department of Immigration and Colonization for the fiscal year ended March 31, 1927* (Ottawa: Queen's Printer, 1928) at 6.

of the restrictions themselves. At the time that Canada was pleading a labour surplus, and closing her doors to immigration, she carried on an active and expensive campaign of recruitment and assistance for the British. If there was a serious surplus of tradesmen in Canada, then British carpenters or tailors should surely have been excluded as well.

In 1927 Canada operated active immigration offices in Britain, the United States and western Europe. Those offices spent considerable resources extolling the virtues of Canada to prospective immigrants. In 1927 alone Canadian Immigration officers in Britain visited 108 agricultural shows, distributed 209,267 pieces of literature, maintained two travelling vans which visited 554 towns and retained a private advertising company to place ads in 453 newspapers and journals encouraging settlement to Canada.²⁶¹

There is no doubt that the efforts were successful, with immigration to Canada between 1927 and 1929 reaching levels not seen since the boom immigration years prior to the World War I, and not to be topped again until the 1950's.²⁶² Total immigration to Canada in 1927 was 158,886, and 65,686 of those immigrants originated in the British Isles.²⁶³ In the 1927 Annual Report of the Department of Immigration, the Director lamented that despite the incentives and assistance offered to British immigrants, the Department and the two railway companies might not be able to fill their quota of immigrants in the 3,000 families scheme:

"while this is fairly satisfactory, as indicating that the tide is turning in our favour, it is still a long way short of the results obtained prior to the war."²⁶⁴

²⁶¹Canada, *Report of the Department of Immigration and Colonization for the fiscal year ended March 31, 1927* (Ottawa: Queen's Printer, 1928) at 47.

²⁶²Reg Whitaker, *Canadian Immigration Policy since Confederation* (Ottawa: Canadian Historical Society, 1991) Table 1.

²⁶³M.C. Urquhart ed. *Historical Statistics of Canada* (Toronto: MacMillan Company of Canada Ltd., 1965) at 27.

²⁶⁴Canada, *Report of the Department of Immigration and Colonization for the fiscal year ended March 31, 1927* (Ottawa: Queen's Printer, 1928) at 45.

The four largest offices were London, Paris, Cologne and Rome, and they consumed 60% of the immigration budget, or \$861,580.00 of the \$2,321,418.00 allocated to the Department.²⁶⁵ The structure of the entire immigration delivery system overseas evolved in a manner which was a direct reflection of the stated priorities of the policy makers. The active recruitment of immigrants from some countries, contrasted starkly with the lack of facilities to handle even the most willing and determined immigrants from other countries. The distribution of immigration offices abroad, their staffing, mandate and resources were an important instrument in carrying out the priorities of the government, be they recruitment or exclusion.

Overall, the British have been afforded the most favourable immigration treatment of all groups seeking to come to Canada. Their treatment represents however, not just a contrast to non-white immigration, but the other extreme on the spectrum or hierarchy of preference. Canada both officially and unofficially maintained a hierarchy of desirable immigrants, which eventually became official policy in Orders-in-Council in 1931 and 1956.

In 1931 four broad classes set out the favoured British position. The categories of admissible immigrants were:

1. British subjects who possessed sufficient means to maintain themselves until employed.
2. U.S. citizens who could maintain themselves until employed.
3. Wives and unmarried children or fiancées of men resident in Canada.
4. Agriculturalists with sufficient means to farm in Canada.²⁶⁶

In 1956 new regulations were enacted which embraced western European immigrants and specified that landing in Canada was prohibited unless the immigrant was an:

²⁶⁵ Freda Hawkins, *Critical Years in Immigration: Canada and Australia Compared*, 2nd Ed. (Montreal: McGill-Queen's University Press, 1991) Appendix 6 at 383-4.

²⁶⁶ P.C. 1931-695 as reported in House of Commons Debates (May 1, 1947) at 2644.

1. Un-sponsored British subject from the United Kingdom and the white commonwealth, United States and France.
2. Un-sponsored immigrants from western European countries.
3. Sponsored relatives from Europe, some Middle Eastern countries and the United States.
4. Sponsored close relatives from Asia.²⁶⁷

Again the categories were arranged in a hierarchy, from the most to the least desirable immigrants by national origin, and maintained the ban on independent Asian immigration.

By the late 1950's Canada was spending more than \$2 million a year on its foreign service operations, money which was spent on staff, advertising, facilities and recruitment. As the allocation of these services and facilities was in accordance with the government's priorities for immigration it is no surprise that we find an immigration service delivery system which is almost exclusively oriented towards American, European and particularly British immigration.

In 1960 there were six Canadian immigration posts open in the United Kingdom and one in Ireland, seventeen in the rest of Europe and four in the United States. The only other posts open in the world were the one in Israel, which could not process immigrant visas for "lack of security screening capabilities", the one in Hong Kong, established to ensure that the *Chinese Immigration Act* was enforced, and the one in New Delhi, opened to process the 150 Indian immigrants permitted under the quota agreement.²⁶⁸

Passage of the *Canadian Bill of Rights*²⁶⁹ in 1960 coincided with significant changes in Immigration law. Whether it caused the changes, or merely signified a change in public attitude is unclear. Prior to its introduction immigration policies

²⁶⁷ P.C. 1956-785.

²⁶⁸ Freda Hawkins, *Critical Years in Immigration: Canada and Australia Compared*, 2nd ed. (Montreal: McGill-Queen's University Press, 1991) Appendix 5 at 380-81.

²⁶⁹ *Canadian Bill of Rights*, 8-9 Elizabeth II, c. 44 (Canada).

had already started to change. In 1954 the government passed new Immigration Regulations which introduced for the first time education, training and skills qualifications for prospective immigrants, although preference was still given to European sponsored immigrants.²⁷⁰ Shortly after the introduction of the *Bill of Rights*, Canada officially abandoned its race based immigration selection policy, and the point system was introduced in 1967 to assess immigrants in a more objective, racially neutral manner.²⁷¹

Royal assent was given to the *Canadian Bill of Rights* on August 10, 1960.

Section 1 declared that:

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

...
(b) the right of the individual to equality before the law and the protection of the law;"

Section 2 mandated that all laws be construed and applied so as not to "abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared".²⁷²

In the early 1970's the Liberals undertook a major review of immigration policy which included extensive consultations and resulted in a Green Paper²⁷³, the main recommendations of which were included in the new *Immigration Act* in 1976.²⁷⁴ This Act with amendments, remains in force today. The central features of the Act include family class sponsored immigration and an employment driven immigration selection process, administered through a point system which selects

²⁷⁰ P.C. 1962-86, C.Gaz. 1962 II 126

²⁷¹ Reg Whitaker, "Canadian Immigration Policy Since Confederation" (Ottawa: Canadian Historical Association, 1991) at 19.

²⁷² *Canadian Bill of Rights*, 8-9 Elizabeth II, c. 44 (Canada) s.2.

²⁷³ Canada, *A Report of the Canadian Immigration and Population Study: volume 2-The Immigration Program*, 1-38 (Canada: Department of Manpower and Immigration, 1974)

²⁷⁴ *Immigration Act*, 1976-77, c.52

immigrants on the basis of certain objective criteria. Applicants were awarded points for skills, resources and education. Although some argue that the point system continues to discriminate against poor third world immigrants, it is a system which is in principle "colour blind". Only those with a set number of points are accepted. The traditional legislative preference for British immigration was abandoned with the introduction of the point system, and the new act contained a positive statement to the effect that admission standards were to be non-discriminatory among immigrants on the grounds of race, national or ethnic origin, colour, religion and sex. The new Act was seen as both positive and more liberal in its approach than its predecessor.²⁷⁵

A comparison of immigration statistics illustrates the dramatic change that the introduction of the point system had on Canadian immigrant profiles. In 1956 Canada admitted 168,514 new immigrants, 164,857 of whom were from Britain and Europe and the United States, representing 97.8% of the immigrants.²⁷⁶ The other 2.2% included 504 people classed as "Negro", 543 from Africa and the Middle East, 23 from Mexico, 2,543 from Asia and the Pacific, and 64 "others".

By 1992 European, British and American immigration accounted for only 49,229 of the 252,842 immigrants or 19%, the remaining 81% consisted of 20,113 came from Africa; 141,816 from Asia; 15,142 from the Caribbean; and 10,240 from South America.²⁷⁷

What has happened in the last 25 years is a major shift in immigration source countries. Now, members of previously excluded visible minorities make up the vast majority of Canadian immigrants or 81 %. These new immigrants are from precisely those groups which Canadians had historically discriminated against on the basis of their race, national or ethnic origin, and colour.

²⁷⁵ Reg Whitaker, *Canadian Immigration Policy Since Confederation* (Ottawa: Canadian Historical Association, 1991) at 20.

²⁷⁶ Canada, *1956 Immigration Statistics* (Ottawa: Department of Citizenship and Immigration, Statistics Section, 1957) Table 2, page 7.

²⁷⁷ Canada, *Immigration Statistics 1992* (Ottawa: Citizenship and Immigration, Public Works and Government Services Canada, 1994) Table 1M1 at 22. Note: It is difficult to compare immigration statistics. Until the 1950's the "ethnic origin" of immigrants was recorded, after the 1960's only country of last permanent residence was recorded, making comparisons unreliable. Many immigrants also arrive, who are ethnic minorities, but have resided in the United States, Great Britain etc. This phenomena probably means that the immigrants from these countries also include significant numbers of visible minorities.

CHAPTER THREE: HUMAN RIGHTS AND EQUALITY PROTECTION FOR IMMIGRANTS

Introduction

The documentation of the historic discrimination practiced against non-white immigrants to Canada is not merely an academic exercise, it has important implications generally for the analysis of immigrants *Charter* rights, and specifically in the context of this paper for determining whether legislation and recent Court interpretations of the law are in accordance with Section 15 of the *Charter*. Historic discrimination against non-whites is part of what Madame Justice Wilson in *Andrews* has referred to as "the context of the place of the group in the entire social, political and legal fabric of our society".²⁷⁸ She explains the importance of this evidence in *Turpin* in determining if a group has been treated differently, with discrimination:

"If the larger context is not examined, the s.15 analysis may become a mechanical and sterile categorization process conducted entirely within the four corners of the impugned legislation. A determination as to whether or not discrimination is taking place, if based exclusively on an analysis of the law under challenge is likely, in my view, to result in the same kind of circularity which characterized the similarly situated similarly treated test clearly rejected by this Court in *Andrews*."²⁷⁹

The evidence of historic discrimination on prohibited grounds presented in this Chapter, is therefore not relied upon as an indicator of present discrimination on the same grounds, but because it identifies non-white immigrants as an analogous category to those specifically enumerated in s.15 of the *Charter* and because it provides the backdrop of historic discrimination against which we measure present unequal treatment.

²⁷⁸ *Andrews v The Law Society of British Columbia* [1989] 1 S.C.R. 142 at 152.

²⁷⁹ *R. v. Turpin* [1989] 1 S.C.R. 1296 at 1332

Officially the legislative basis for racial or religious discrimination was removed with the introduction of the point system in the 1967 *Immigration Act*. It is clear, however, as we have seen in Chapter one, that much of the discrimination which was practised was not done with specific legislative underpinnings, but through the selective enforcement of regulations, and the discriminatory exercise of discretion. It is also clear that the government was aware of the overt discrimination, and sought to deny or mask it behind rules and regulations which were neutral on their face. The removal, therefore, of the overt legislative basis for discrimination, without more, is hardly sufficient to ensure that discriminatory practices do not continue.

If we are to be assured that non-white immigrants are not being discriminated against and are being evaluated solely upon their "own personal merits and capabilities", as Mr. Justice McIntyre has suggested in *Andrews*²⁸⁰, then immigrants must have recourse to both the *Charter* and the *CHRA*. The clear shift in immigrant source countries in no way eliminates the need for immigrants to have access to equality legislation to protect their interests. The numbers of immigrants from the previously discriminated against groups coming to Canada, does not necessarily mean that prejudice and discrimination have ceased to exist in immigrant selection. Indeed, if white immigrants still possess hidden advantages which do not relate to their own personal merits and capabilities, then discrimination continues.

In order to achieve an evenhanded immigration policy, immigration policies and practices must be measured against an agreed upon non-discriminatory standard. These standards are contained in human rights legislation and the *Charter*, and provide us with both the theoretical framework and the tools for investigating discrimination. Human rights law has evolved from an emphasis on individual human rights, to the assessment of collective rights.²⁸¹ Discrimination is no longer defined as prejudice by an individual, against another individual. The

²⁸⁰ *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143 at 174-5.

²⁸¹ Rainer Knopff, *Human Rights and Social Technology, The New War on Discrimination* (Ottawa: Carleton University Press, 1989).

development of an understanding of "systemic discrimination" and "indirect discrimination", permit us to focus on the activities of entire systems, and to concentrate on the effect of a systems' operations.²⁸² What this should mean in the immigration context is that the "effect" of the legislation, program or its delivery system, and not the intentions of the government are important. An examination of systemic discrimination means that all of the discretionary and structural biases of the Immigration Department can be examined. As illustrated in Chapter One, non-white immigrant groups have long been aware of the "effect" of different immigration policies on their own people, but have been stymied because the "effect" was never considered key. The ability to critically examine immigration practices and procedures for their "effects" is crucial if we are to be assured that prejudice and discrimination have been eliminated in immigrant selection. The important questions for us today, are whether our present immigration system can withstand an analysis where "effect" is paramount.

Equally important however, and of primary interest in this paper, is if we are to be permitted to conduct this type of review at all. Despite the importance of a human rights review of immigrant selection, the courts have so far denied jurisdiction or severely limited the application of *The Canadian Bill of Rights*, *The Charter* and *The Canadian Human Rights Act* in immigration selection cases. This chapter looks at the potential for protection contained in these Acts, and discusses whether the courts have realized this potential, or limited it. The important cases under all three statutes are reviewed.

The Bill of Rights

While the principles which underlie the *Bill of Rights* were implemented on the legislative level in 1960, and no doubt contributed to the radical reorientation of immigration policy in Canada, immigrants did not fare as well when they tried to use the *Bill of Rights* to challenge immigration decisions. The leading case, which significantly narrowed the scope of the *Bill of Rights* in all areas of the law,

²⁸² *Action Travail des Femmes v. Canadian National Railway Company* [1987] 1 S.C.R. 114.

including immigration, was the Judgment of Martland, J. in *Mitchell v. The Queen*.²⁸³

The appellant also relies upon s.2(e) of the *Bill of Rights*, which provides that no law of Canada shall be construed or applied so as to deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations. In the *McCaud* case [1965] 1 C.C.C. 168] Spence, J., whose view was adopted unanimously on appeal, held that the provisions of s. 2(e) do not apply to the question of the revocation of parole under the provisions of the *Parole Act*.

The appellant had no right to parole. He was granted parole as a matter of discretion by the Parole Board. He had no right to remain on parole. His parole was subject to revocation at the absolute discretion of the Board.²⁸⁴

In focusing on the narrow issue of the classification of parole as either a "right" or a "privilege", the court ignored the consequences of the parole decision for the liberty of the individual concerned, or any discussion of a rationale for failure to grant *Bill of Rights* protection to parole decisions which deny a person their liberty.

Unfortunately, immigration, like parole, had been classified at common-law as a "privilege" granted in the absolute discretion of the Minister.²⁸⁵ Not surprisingly, in the same year as *Mitchell*, the Supreme Court of Canada in *Prata*,²⁸⁶ applied the "rights" vs. "privileges" dichotomy to immigration. Mr. Prata was denied a humanitarian and compassionate review before the Immigration Appeal Board because the Minister had certified that it would be contrary to the national interest for the Board to exercise any discretion to permit him to remain in Canada. In deciding whether Prata's rights had been violated under the *Bill of Rights*, Martland, J. held that:

²⁸³ *Mitchell v. The Queen*, [1976] 2 S.C.R. 570.

²⁸⁴ *Mitchell v. The Queen*, [1976] 2 S.C.R. 570 at 588.

²⁸⁵ This principle was first laid out in *Attorney-General for Canada v. Cain*, [1906] A.C. 542 however Lord Alkinson speaking for the Privy Council relied upon Vattel for propositions which Vattel's work did not support. In fact Vattel did not claim that aliens had no rights, and that states could act with absolute impunity against even friendly aliens. Vattel saw a balancing of rights between the state and the alien, where aliens had a right to enter, work and travel through a country unless they violated a state's law. See M. Vattel, *The Law of Nations; or, Principles of the Law of Nature, Applied to the Conduct of Affairs of Nations and Sovereigns*, trans. J. Chitty (Philadelphia: T. & J.W. Johnson, 1852).

²⁸⁶ *Prata v. Minister of Manpower and Immigration*, [1976] 1 S.C.R. 376.

"In considering whether the *audi alteram partem*²⁸⁷ rule can be invoked in the present case it is necessary to consider the following circumstances. The appellant is seeking to remain in Canada, but the deportation order, which is not now challenged, establishes that, in the absence of some special privilege existing, he has no right whatever to remain in Canada. He does not, therefore, attempt to assert a right, but, rather, attempts to obtain a discretionary privilege."²⁸⁸

Martland reasoned that only "rights" or "freedoms" under the *Bill of Rights* were protected, and as immigration was a privilege not a right, "there had been no conflict with the requirements of Section 2 of the *Canadian Bill of Rights*..."²⁸⁹ Further, Parliament had a valid federal objective in limiting the Immigration Appeal Board's discretionary power to grant humanitarian and compassionate landings in cases of national security, and that "[l]egislation dealing with a particular class of people is valid if it is enacted for the purpose of achieving a valid federal objective (*R. v. Burnshine*)."²⁹⁰ Thus, through a process of statutory interpretation immigrants were denied protection under the *Bill of Rights*.

The Canadian Human Rights Act

The Canadian Human Rights Act, enacted in 1976, seeks to ensure that individuals have access to equal opportunities in Canadian society, without regard to race, national or ethnic origin, colour, religion and disability.²⁹¹ Equality of opportunity is ensured by prohibiting discrimination in the provision of goods, services, accommodation and facilities that are within federal jurisdiction.

Section 5 of the *Canadian Human Rights Act* provides that:

It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public,

²⁸⁷ Hear the other side: Hear both sides: No man should be condemned unheard.

²⁸⁸ *Prata v. Minister of Manpower and Immigration*, [1976] 1 S.C.R. 376 at 380.

²⁸⁹ *Prata v. Minister of Manpower and Immigration*, [1976] 1 S.C.R. 376 at 383.

²⁹⁰ *Prata v. Minister of Manpower and Immigration*, [1976] 1 S.C.R. 376 at 382.

²⁹¹ *Canadian Human Rights Act*, 1976-77, c. 33, s. 2.

(a) to deny, or to deny access to, any such goods, service, facility or accommodation to any individual, or,

(b) to differentiate adversely in relation to any individual, on a prohibitive ground of discrimination.

The prohibited grounds of discrimination are enumerated in section 3.(1)

For all purposes of this Act, race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability and conviction for which a pardon has been granted are prohibited grounds of discrimination.

Immigration clearly comes under the federal parliamentary jurisdiction. Section 95 of the *British North American Act* grants concurrent federal and provincial jurisdiction over immigration, so that the activities of the Department should be subject to review under the *Canadian Human Rights Act*.²⁹²

Section 40(5)(a) and (c) of the Act, however, imposes important restrictions on the Commission's jurisdiction; restrictions which relate to the character of the complainant and the locus of the discriminatory practice. These restrictions have operated to severely limit jurisdiction in many immigration cases.

(5) No complaint in relation to a discriminatory practice may be dealt with by the Commission under this Part unless the act or omission that constitutes the practice

(a) occurred in Canada and the victim of the practice was at the time of the act or omission either lawfully present in Canada or, if temporarily absent from Canada, entitled to return to Canada;

....

(c) occurred outside Canada and the victim of the practice was at the time of the act or omission a Canadian citizen or an individual lawfully admitted to Canada for permanent residence.

By their very nature, the bulk of immigration services are services delivered outside Canada, to people who are not citizens and who may have no connection to Canada other than their application for admission. By Section 40(5), the

²⁹² Constitution Act 30 & 31 Victoria, C.3 (U.K.) s.95.

government has insulated from review by the Commission the Immigration Department's main activity of immigrant selection. Indeed, this is the position that the Department itself has systematically adopted, casting the Section 40 exclusions in the widest possible terms.

The Act provides that any individual or group of individuals may file a complaint with the Commission if they have reasonable grounds for believing that a person is engaging in a discriminatory practice.²⁹³ The Commission also has the jurisdiction to investigate on its own initiative if they have reasonable grounds to believe that a discriminatory practice is being engaged in.²⁹⁴

Once a complaint has been made, the Commission has the power to appoint an "investigator" with the powers of search and seizure under Section 43. If the investigator's report indicates that the complaint is founded, and no grounds for dismissal exist pursuant to Section 41(c) to (e), the Commission refers the case for the appointment of a Human Rights Tribunal which will enquire into the complaint.²⁹⁵ The process therefore involves two-steps: complaint, investigation and assessment and; the possibility of a tribunal hearing itself.

From the onset, the Department of Immigration has taken the position that in addition to the exclusionary provisions of Section 40(5)(a) and (c), the Commission's jurisdiction was further limited by the wording of Section 5. The Department argued that it was not engaged in the "provision of ...services....customarily available to the general public" within the meaning of Section 5.

In 1977, a group of Jamaican women initiated human rights complaints alleging that they were being discriminated against because of their race and national origin. They claimed that Black women admitted as domestic workers

²⁹³ Canadian Human Rights Act. 1976-77, c. 33, s. 40(1).

²⁹⁴ Canadian Human Rights Act. 1976-77, c. 33, s. 40.(3).

²⁹⁵ Canadian Human Rights Act. 1976-77, c. 33, s. 44 (1)(a).

from Jamaica had been singled out for deportation when they failed to disclose dependant children on admission to Canada. Part of their evidence included internal Departmental memorandums which purportedly illustrated the discrimination. The complainants brought an Application for an injunction in the Trial Division of the Federal Court, in an attempt to restrain the Minister of Immigration from executing deportation orders against them until the Human Rights complaints had been dealt with. The Application was dismissed and on appeal to the Court of Appeal, Le Dain J., speaking for the Court, said:

"Having concluded for these reasons that an injunction will not lie for a purpose such as that invoked in the present case, I do not find it necessary to express an opinion as to whether the application of the inquiry and deportation provisions of the Immigration Act is a service customarily available to the general public within the meaning of Section 5 of the Canadian Human Rights Act. The question as to the extent, if any, to which the administration and application of federal statutes, whether regulatory in purpose or not, fall under the Canadian Human Rights Act is, of course, a serious one. There may be important distinctions to be drawn between different aspects of the public service, based on the facts established in each case. It is preferable, I think, that these questions should be determined in the first instance by the Commission, as Section 33 would appear to intend, before a court is called upon to pronounce upon them."²⁹⁶

Despite these *obiter* comments on Commission jurisdiction by Le Dain J, the failure to grant the injunction left the Department free to deport the applicants.²⁹⁷

Lodge clearly did not resolve the jurisdictional dilemma, but the statement by the Court that some services could conceivably be subject to review while others might not be, resulted in further ambiguity about the Commission's powers over immigration. However, despite what appeared to be a clear directive from the Court as to who determines jurisdiction in the first instance, Immigration took the position that the Commission did not have the power to embark on even the investigative stage of the process, let alone to proceed to determine its own jurisdiction.

²⁹⁶ *Lodge v. Minister of Employment and Immigration*, [1979] 1 F.C. 775 at 785 and 786.

²⁹⁷ The Canadian Human Rights Commission continued to investigate the claims, however six months later the seven women were allowed to reenter Canada on permits. see Anne Bayefsky, "The Jamaican Women case and the Canadian Human Rights Act: Is Government Subject to the Principle of Equal Opportunity?" (1980) 18 U.W.O.L. Rev. 461 at 467.

In the ensuing ten years, Immigration prevented the Human Rights Commission from investigating immigration complaints by refusing to cooperate. By 1988, there were ten outstanding complaints concerning immigration practices, brought by five different complainants. The Department stymied all investigations and all ten cases were referred to the Federal Court (Trial Division) by way of a reference, *Re Singh*, in an attempt to settle the question of the Commission's jurisdiction over the initial investigative stage of immigration complaints.²⁹⁸

In *Re Singh* the Department of Immigration continued to argue the Section 40(1) exclusions, and that Section 5 limited the scope of the Commission's jurisdiction because Immigration was not engaged in providing services customarily available to the general public. Further, they argued that the Commission was not competent to determine its own jurisdiction because the complaints were clearly outside the Commission's jurisdiction, barring the Commission from embarking on even preliminary investigations of complaints.²⁹⁹

In all ten of the cases the complainants were either Canadian citizens or permanent residents of Canada.³⁰⁰ The harm alleged was the failure to grant visitor visas to close family relatives and discrimination on prohibited grounds resulting from the refusal by the Department to permit sponsorship for an immigrant visa to close relatives under the "family class".³⁰¹

In determining the questions in the *Singh*³⁰² reference, the Court found as a preliminary matter that the Commission clearly had the jurisdiction to enquire into the limits of its own jurisdiction.

"An examination of the Canadian Human Rights Act makes it clear that the Commission is a body whose jurisdiction to enquire includes the jurisdiction to

²⁹⁸ *Re Singh*, [1989] 1 F.C. 430 (F.C.A.).

²⁹⁹ *Re Singh*, [1989] 1 F.C. 430 (F.C.A.).

³⁰⁰ *Re Singh*, [1989] F.C.J. No. 414 (Q.L.).

³⁰¹ *Immigration Act*, 1976-77, c.52, s.1.(1).

³⁰² *Re Singh*, [1989] 1 F.C. 430 (F.C.A.).

enquire into the limits of its own jurisdiction. The initial jurisdiction of the Commission is triggered by the filing of a complaint; once that happens, the Commission is required by the mandatory words of Section 33 to deal with it ("the Commission shall deal"). The question of jurisdiction is specifically dealt with in subparagraph 33(b)(ii), in a manner that makes evident Parliament's intent that the Commission itself should in the first instance decide if a matter is within its jurisdiction."

Having established this preliminary point, the Court went on to phrase the question of the reference very simply as,

"whether the complaints cannot possibly relate to discriminatory practices in the provision of services customarily available to the general public and whether the complainants could not possibly be described as victims of the alleged discriminatory practices."

The Federal Court considered the broad scope and intent of the *Act* to determine how liberally it should be interpreted. After reviewing Section 2 of the *Act* which sets out its purpose, the Court found that the *Act* is:

"cast in wide terms and that both its subject and its stated purpose suggest that it is not to be interpreted narrowly or restrictively"³⁰³

Having established the broad terms of reference, the Court proceeded to deal with the two arguments raised by Immigration to determine if the facts could conceivably lead to a finding of discrimination. The first threshold issue was that immigration services, those concerned with the granting of landed immigrant and visitor's visas could not be "services .. customarily available to the general public". In deciding this question, the Court stated:

"that, by definition, services rendered by public servants at public expense are services to the public and therefore fall within the ambit of Section 5."³⁰⁴

While Hugessen, J. made it clear that he was not making a final determination on the question of services rendered in Canada and abroad by Immigration, it is clear that he was not convinced that such services were not "services customarily available to the general public".

³⁰³ *Attorney General of Canada v. Cummings*, [1980] 2 F.C. 122 at 131.

³⁰⁴ *Re Shgh*, [1989] F.C.J. No. 414 (Q.L.) at 23.

The second argument was that the complainants, who were all Canadian citizens or permanent residents, were not the true "victims" of the alleged discriminatory practice. The true "victims" were those who had applied for visas and been refused, and all of these people were excluded by Section 32(5)(b) (now Section 40(5)(c)) because the refusal occurred outside Canada and they were neither Canadian citizens nor people who had been lawfully admitted to Canada for permanent residence.

In rejecting this argument, the Court found that there could conceivably be several "victims" of a discriminatory practice, even extending to those who are unintended victims. Relying heavily on the stated objectives of the *Immigration Act*,³⁰⁵ including the reunification of families and the facilitation of the entry of visitors, the Court found that the Canadian family members denied the company of their relatives as either visitors or landed immigrants could have standing as "victims", and could therefore initiate complaints. The Court in *Singh* did not make any specific findings of fact in the ten cases on reference, but only stated that there could conceivably be discrimination, the determination being left to the Commission after a full review of the facts.

Having cleared the preliminary hurdle of Commission jurisdiction to investigate, the Court opened the door to the determination of substantive immigration issues by the Commission 12 years after its formation. With the referral by the Commission of a number of cases to the Human Rights Tribunal following the *Singh* reference, the important issues in immigration complaints are now emerging. Unfortunately, the question of the jurisdiction of the Commission continues to pose the single most important obstacle to a comprehensive and effective anti-discrimination review.

In 1988, a complainant alleged discrimination on the basis of physical disability in his application for "landing" under the RAN programme. The Immigration Department took the position that the RAN programme was a special,

³⁰⁵ *The Immigration Act* 1976-77, c.52, s.3.

one-time policy created by Order-in-Council for the purpose of landing Iranians who had established themselves in Canada. Immigration argued that because only Iranians, a specific and special group were eligible to apply under the RAN program, that the service was not one which was available to members of the general public because it was an "individualistic service".

This narrow interpretation of "public" was a position which received some currency during the late 1980's, and its application to deny jurisdiction to the Commission was not limited to the area of Immigration law.³⁰⁶ At first instance, the Human Rights Tribunal found that immigration officials carried out duties as agents of the Crown, providing a service to the public.³⁰⁷

On review at the Human Rights Review Tribunal this interpretation was upheld:

"The present Tribunal is of the opinion that the Canada Employment and Immigration Commission derives its authority from an Act passed by the Parliament of Canada. The Scope of this Act is general and whenever the Government of Canada applies an Act of general scope, it is providing a service to the public. The Canada Employment and Immigration Commission was carrying out its official duty as an agent of the Crown and thus was providing a service to the public."³⁰⁸

This very broad interpretation of "public", which appears to encompass almost any public activity was finally accepted by the Federal Court in a non-immigration context in *Rosin* in 1991:

"In order for a service or facility to be publicly available, it is not required that all the members of the public have access to it. It is enough for a segment of the public to be able to avail themselves of the service or facility. Requiring that certain qualifications or conditions be met does not rob an activity of its public character. The cases have shown that "public" means "that which is not private", leaving outside the scope of the legislation very few activities indeed."³⁰⁹

³⁰⁶ See *Saskatchewan Human Rights Commission and Chambers v. Gov't of Sask., Department of Social Services* (15 July, 1987) Saskatoon 1573 (Sask. Q.B.) and Greschner, Donna "Why Chambers is Wrong: A Purposive Interpretation of "Offered to the Public" [1986] Sask. L. Rev. 161.

³⁰⁷ *Mehran Anvari v. Canada Employment and Immigration Commission*, (1988), T.D. 18/88 (C.H.R.C.) 13.

³⁰⁸ *Canada (Employment and Immigration Commission) v. Anvari*, [1991] C.H.R.D. No.2.

³⁰⁹ *Canada (Attorney General) v. Rosin* [1991] F.C. 391 at 398.

The narrow quantitative approach to "public" was finally laid to rest by the Supreme Court in 1993 when Lamer, C.J., speaking for the Court, held that:

"It appears to me that attention in prior cases to the quantitative characteristics of the group to whom the service or facility is available does not focus adequately on other relevant factors. If the focus is purely quantitative, it is indeed hard to see how anything less than all citizens can be said to be the "public" of a given municipality, province or country."³¹⁰

"Every service has its own public and once that "public" has been defined through the use of eligibility criteria the Act prohibits discrimination within that public."³¹¹

The activities involved in providing immigrant and visitor visas are for the most part activities which are conducted outside Canada at overseas visa offices, and the recipients of the services are exclusively people who have no independent right to enter Canada. The argument has been made by Immigration that in order not to give extraterritorial application to the *Canadian Human Rights Act*, that "the public" in Section 5 of the Act, must be limited to the Canadian "public" only. Such an interpretation would have excluded from review all of the activities of visa officers overseas.³¹² In adopting a broad, objective based interpretation of the Act in *Naqvi*, a case involving the denial of a visitor's visa to a single Pakistani woman, the Tribunal did not specifically deal with the "extraterritorial" argument, but found that:

"Foreign service officers posted in other countries are representatives of Canada. There is no reason why the principles of the CHRA should not apply to their activities."³¹³

It is not clear why the "extraterritorial" argument was rejected, but the issue does raise some important questions that should have been addressed, if for no other reason than to discredit them once and for all. In *Naqvi* the Department argued that the territorial principle of International law assumes that statutes have

³¹⁰ *University of British Columbia v. Berg* [1993] 2 S.C.R. 353. (QL) at 57.

³¹¹ *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353 (QL) at 59.

³¹² *Naqvi v. Canada (Employment and Immigration Commission)*, [1993] C.H.R.D. No.2 (QL).

³¹³ *Naqvi v. Canada (Employment and Immigration Commission)* [1993] C.H.R.D. No.2 (QL) at 67.

no extraterritorial application.³¹⁴ Support for the extraterritorial principle is set out in *The People v. Tyler*:

"...It is well settled, as a general principle, that the laws of no nation can have extraterritorial force -that criminal laws especially can not operate beyond the territorial limits of the government by which they are enacted."³¹⁵

The analogy, however contains numerous difficulties when applied in Canada, and perhaps for that reason did not merit more than a passing reference in the decision. The *Canadian Human Rights Act* is remedial, not punitive legislation, whose object is the elimination of discrimination within the legislative authority of the Federal parliament.³¹⁶ The investigation of human rights complaints involves an examination of the policies and practices of the Canadian Immigration Department, and their employees. Any remedial action ordered would be against the Canadian government or its agents, not against the non-national complainants. Nobody argues that Canadian visa officers operating abroad are operating without jurisdiction because of extraterritorial considerations when applying Canadian Immigration Laws. Why then, should extraterritorial considerations arise when we seek to review their decisions under human rights legislation?

If we make an analogy with the Criminal law, the "accused" would be the Federal Immigration Department, and the "victims" would be the non-national complainants. Principles of territorial jurisdiction in international law hold that states can exercise jurisdiction if either the crime is committed or the criminal resident is within the national territory.³¹⁷ A strong argument can be made that the "crime" of discrimination under the *Canadian Human Rights Act* is one which is committed by the Canadian government, which is by definition resident within Canada.

³¹⁴ *Naqvi v. Canada (Employment and Immigration Commission)* [1993] C.H.R.D. No.2 (Q.L.) at 66.

³¹⁵ *The People vs Tyler* (1857), 7 Mich. 166, at 220.

³¹⁶ *Canadian Human Rights Act*, 1976-77, c. 33 s. 2.

³¹⁷ *R. v. Godfrey*, [1923] 1 K.B. 24 (K.B.).

Further, given the remedial not punitive purposes of the legislation, there are no public policy reasons preventing the application of the *Canadian Human Rights Act* in situations that involve non-nationals residing outside Canada. The only conceivable results of any Commission inquiry would be to either preserve the *status quo* for the complainant, or to place them in a better position. As the objects of scrutiny are exclusively Canadian government practices, policies and personnel and any remedial orders are made exclusively against them, it is hard to imagine that any sovereign state could object to jurisdiction as an infringement of **their** territorial sovereignty.

In areas of law related to immigration there are examples of the extraterritorial application of statutes. In the *Criminal Law Amendment Act*,³¹⁸ Canada has jurisdiction over people outside Canada in cases of passport fraud, and proceedings can be commenced in any jurisdiction in Canada. The *Deterrents and Detention Bill*³¹⁹ gives Canada the power to turn away vessels transporting illegal immigrants, when they are in the internal waters of Canada, the territorial seas, or twelve miles **beyond** the outer limit of the territorial waters. Similarly, we have the power under the *Citizenship Act* to prosecute offenses which are committed outside Canada, once the offender is within Canada.³²⁰

No question of extra-territoriality arises with regard to the Judicial review of visa officer decisions, and there is no rationale to colour applications merely because they invoke the *CHRA* in aid of the review.³²¹ To exclude *CHRA* review on the basis of extraterritoriality, while permitting judicial review would be patently illogical.

When *Menghani*, one of the cases involved in the *Singh* Reference reached the Tribunal level in 1991, the Department again argued that the

³¹⁸ *Criminal Law Amendment Act* 1985, c.19, s.9.

³¹⁹ *An Act to amend the Immigration Act, 1976 and the Criminal Code in consequence thereof*, Bill c-84, 1987.

³²⁰ *Citizenship Act* RSC 1974-75-76, c. 108, s.30.

³²¹ Visa officer decisions are arguably more easily reviewed than other immigration decisions because the statutory review of these decisions does not require leave of the Federal Court see *Immigration Act*, R.S.C. 1985, C. I-2, s. 82.1(2).

complainant was not a victim, despite the strong wording in *Singh*. Because the reasoning in *Singh* was based on an analysis of the interests and obligations of sponsors, the Department sought to distinguish *Menghani* by arguing that the complainant was not a true "sponsor" under the *Immigration Act*.³²²

The complainant had completed a job offer for his brother, who was seeking admission under the "Family Business-Job Offer to Relatives" category. This class is part of the Independent Class of Applicants, but unlike family class applications, does not require a formal sponsorship. The requirements of the category, however, were such that the relative had to be destined to work in the family business in a position of trust for which he or she was qualified.

The Immigration Department took the position that the complainant must be a "direct" victim of discrimination, and that the only direct victim in the case was the applicant, who was not a Canadian citizen or Permanent Resident, and therefore excluded from making a complaint under Section 40. In rejecting this argument the Tribunal cast the test in broader terms.

"It would include anyone in Canada who suffers consequences which are sufficiently direct and immediate."

The Tribunal then set out guidelines for determining whether consequences are sufficiently direct and immediate to warrant inclusion as follows.

1. Degree of consanguinity of the Canadian relative to the prospective immigrant;
2. The dependency (financial, emotional) of the Canadian relative on the prospective immigrant;
3. Deprivation of significant commercial or cultural opportunities to the Canadian relative by the absence of the prospective immigrant;
4. The historical closeness of the relationship between the two persons;

³²² During the hearing in *Singh*, *Menghani* had been classified as a sponsorship case based on allegations contained in the original complaint form, despite the fact that no actual sponsorship under Section 79 of the *Immigration Act* had been required.

5. The degree of involvement of the Canadian relative in supporting the application for immigration under the Immigration Act and Regulations.³²³

Using the test set out, the Tribunal found on the facts that there was a long standing and close financial and economic relationship between the brothers sufficient to qualify the complainant as a victim.

What is interesting about these guidelines is that despite the broad wording of the preliminary statement, they appear to assume that only relatives can qualify as victims. It remains to be seen if the list will be invoked only in cases where the relatives are victims, or as a rationale for excluding other categories of victims, such as potential employers who have made job offers to prospective independent immigrants.

The Federal Court, on a Judicial Review of the Review Tribunal decision in *Menghani*, approved the Review Tribunal decision, and found that third parties can be injured parties and therefore "victims" with standing to bring complaints. The Court appeared to adopt the list developed by the Tribunal, going as far as to state that on the facts of *Menghani* the status of "victim" was established.³²⁴

The reasoning in *Menghani* was adopted by the Tribunal in *Naqvi*, with the added observation that when assessing direct and immediate injury, one can take into account characteristics of the complainant which would lead them to identify with the other victim.

"The affront to the dignity of the Complainants must be regarded as more severe where many of the personal characteristics which comprise the grounds of the discriminatory practice are shared by the Complainants- i.e. race, national and ethnic origin and gender (Mrs. Naqvi)."³²⁵

Since the decisions in *Naqvi* and *Menghani*, this broad definition of Complainant appears to have been generally accepted by the Courts. In one of

³²³ *Menghani v. Canada Employment and Immigration Commission*, [1992] C.H.R.D. No.4 (QL) at 42.

³²⁴ *Canada (Secretary of State for External Affairs) v. Menghani*, [1993] F.C.J. No. 1287 (QL) at 41.

³²⁵ *Naqvi v. Canada (Employment and Immigration Commission)*, [1993] C.H.R.D. No.2 (QL) at 83. (Judicial Review Application to Federal Court commenced but not yet determined).

the several cases involving allegations of anti-Semitic behaviour against New Brunswick school teacher Malcolm Ross, Stratton, C.J.N.B of the New Brunswick Court of Appeal found that the parent of a Jewish child in the same school district, who had had no direct contact with Malcolm Ross, had the status of complainant under the *New Brunswick Human Rights Act*. Stratton, C.J.N.B. quoted with approval from *Singh*:

"The question as to who is the 'victim' of an alleged discriminatory practice is almost wholly one of fact. Human rights legislation does not look so much to the intent of discriminatory practices as to their effect... That effect is by no means limited to the alleged 'target' of the discrimination and it is entirely conceivable that a discriminatory practice may have consequences which are sufficiently direct and immediate to justify qualifying as a 'victim' thereof persons who were never within the contemplation or intent of its author."³²⁶

Where visas are denied based on assumptions made about characteristics or tendencies of people on any of the prohibited grounds, such as "single women of Pakistani origin" this has been held to constitute *prima facie* evidence of discrimination. Ms. Naqvi applied for a visitor's visa in order to visit her sister in Canada. She was refused because she had not applied in her home country and the visa officer found that she "would stay illegally in the country and get married there".³²⁷ This justification for the visa refusal could only have been based on generalizations made by the visa officer concerning Ms Naqvi's race, sex and national origin, because Ms Naqvi herself was never interviewed. The Tribunal found that in order to justify the discrimination the following factors had to be considered:

"bona fide justification requires consideration of both subjective and objective factors. We have no doubt that at least some immigration authorities hold an honest and sincere belief that the marital status of young persons, particularly women from Pakistan, are relevant factors in determining the bona fides of intention to be a visitor. However, this must be true from an objective standpoint as well in order to justify refusal of a visa. It is the finding of this Tribunal that there has been no objective evidence of bona fide justification."³²⁸

³²⁶ *Board of Education of District No. 15 v. Human Rights Board of Inquiry (N.B.)*, [1989] N.B.J. No. 844 at 33.

³²⁷ *Naqvi v. Canada (Employment and Immigration Commission)*, [1993] C.H.R.D. No.2 (QL) at 38.

³²⁸ *Naqvi v. Canada (Employment and Immigration Commission)*, [1993] C.H.R.D. No.2 (QL) at 78.

Clearly, without an interview, the visa officer could not have assessed what Ms Naqvi's true intentions were in coming to Canada, and the Tribunal found that the subjective belief of the visa officer concerning her intentions, was unsupported by the required objective evidence.

Until recent amendments are proclaimed, the *Immigration Act* discriminates directly against applicants for admission on the basis of disability in Section 19(1)(a)(ii)³²⁹. Applicants "suffering from any disease, disorder, disability or other health impairment" are treated differently and more harshly than other applicants. People who fall into these categories are required to satisfy Immigration that "their admission would not cause or might reasonably be expected to cause excessive demands on health or social services,"³³⁰

In 1983, Mehran Anvari was refused landing in Canada pursuant to this Section on the basis of his physical disability. Anvari was born in Iran, where he contracted poliomyelitis as a young child. His disability was later compounded by scoliosis, which together left him with only one partially functional leg, and curvature of the spine. In 1983 a special program was announced in the wake of the Iranian revolution which permitted Iranians to apply for landing from within Canada. Anvari was employed full time and was self-supporting when he applied under the program. Despite this, he was refused admission by reason of 19(1)(a)(ii) of the *Immigration Act* which read at the time, as follows,

19.(1) No person shall be granted admission if he is a member of any of the following classes;

(a) persons who are suffering from any disease, disorder, disability or other health impairment as a result of the nature, severity or probable duration of which, in the opinion of a medical officer concurred in by at least one other medical officer,

...

³²⁹ Recent amendments removed the direct reference to persons suffering from disease, disorder, disability or other health impairment. The new section, which is not in force at date of publication reads

(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; [1992], c.49, s.10.

³³⁰ ARCH (Advocacy Resource Centre for the Handicapped) has commenced a *Charter* challenge to sections 19(1)(a) and (c) by way of Statement of Claim for damages in *Mohamed Mussa et al. v. Canada* (Minister of Employment and Immigration) Ontario Court (General Division) Court File No. 93-00-45153 and anticipates challenging the amended section 19(1)(a) under the *Charter* when it is proclaimed.

(ii) their admission would cause or might reasonably be expected to cause excessive demands on health or social services;...

Anvari argued that 19(1)(a) discriminated against him on the basis of his disability, and he succeeded at both the Tribunal and the Review Tribunal. Immigration successfully sought Judicial Review in the Federal Court where Anvari was unrepresented.

Both the Tribunal and the Review Tribunal found as a fact that there was direct discrimination against the Complainant on the basis of his disability. Both tribunals then proceeded to determine if the discrimination was justified under Section 15(g) of the code which reads as follows,

15. It is not a discriminatory practice if

(g) in the circumstances described in Section 5 or 6, an individual is denied any goods, services,.... or is a victim of any adverse differentiation and there is bona fide justification for that denial or differentiation.³³¹

Both tribunals found that Section 19(1)(a) justified the discrimination it created because of the anticipated drain on health or social services. However, they also found that the Section had to be applied in a reasonable fashion, and they found as a fact that it had not been.

On Judicial Review in the Federal Court, Mahoney, J. overturned the Review Tribunal decision.³³² The Court reasoned that in cases of direct discrimination there was no requirement to enquire into the reasonableness of the classification of the complainant. Once the reasonableness of the discriminatory category itself had been established, the Commission does not have jurisdiction to inquire into the reasonableness of the complainant's inclusion in that category.

"With respect, it was wrong in law in finding that there was jurisdiction under the CHRA to decide that the discriminatory practice mandated by the provision is not

³³¹ *Canadian Human Rights Act*, 1976-77, c. 33 s.15.

³³² *Canada (Attorney General) v. Anvari*, [1993] F.C.J. No. 317 (Q.L.).

bona fide justified unless it is demonstrated that it has been applied in a reasonable fashion or that its application is justified in the particular case."³³³

The Court adopted the Immigration position that

"For jurisdiction to arise under the CHRA, the provision must have been applied in a discriminatory fashion. Unless a prima facie case of a discriminatory practice on the part of the medical officers in reaching their opinion were established, there was no onus on them to show that their opinion was bona fide justified."³³⁴

The Court hinted that this question is more appropriately posed in a different forum, supposedly a judicial review of the decision that the complainant falls within 19(1)(a)(ii).

It may have been reached wrongly as a matter of law or it may have been reached in the teeth of the evidence and, if it was, a remedy exists elsewhere but, unless a discriminatory practice is established in the application of subsection 19(1)(a), no remedy exists under the CHRA."³³⁵

While Mahoney, J's decision has other analytical problems, the rationale for his decision is not well articulated, nor is it obvious. The principal difficulty is that there was no evidence of any *bona fide* justification before it, save and except for the Section itself. What is perhaps most startling about the *Anvari* decision however, is its complete failure to properly challenge the *bona fides* of the Section 19(1) discrimination in the *Immigration Act*. Mahoney, J.A. dealt with the issue in the most cursory manner possible, merely accepting the finding of justification, without examining the evidence or the rationale that was before the Tribunal:

"While counsel for the Commission was disposed to cavil at the proposition, it seems clear to me that the Tribunal and Review Tribunal accepted that subpara. 19(1)(a)(ii) mandates an otherwise discriminatory practice which is bona fide justified. That was correct in law."³³⁶

³³³ *Canada (Attorney General) v. Anvari*, [1993] F.C.J. No. 317 (Q.L.) at 15.

³³⁴ *Canada (Attorney General) v. Anvari*, [1993] F.C.J. No. 317 (Q.L.) at 16.

³³⁵ *Canada (Attorney General) v. Anvari*, [1993] F.C.J. No. 317 (Q.L.) at 15.

³³⁶ *Anvari v. Canada*, [1993] 19 Imm.L.R. (2d) 192 at 198.

The Supreme Court has set out a procedure for analyzing discrimination which essentially involves a two step process. The complainant has to establish a *prima facie* case of discrimination. The burden then shifts to the Respondent to show that the discrimination is justified under Section 40 (g). This procedure was outlined in detail in *Etobicoke*:

"Once a complainant has established before a board of inquiry a *prima facie* case of discrimination, in this case proof of a mandatory retirement at age sixty as a condition of employment, he is entitled to relief in the absence of justification by the employer. The only justification which can avail the employer in the case at bar, is the proof, the burden of which lies upon him, that such compulsory retirement is a bona fide occupational qualification and requirement for the employment concerned. The proof, in my view, must be made according to the ordinary civil standard of proof, that is upon a balance of probabilities."³³⁷

The term "bona fide" is used frequently in human rights legislation and has been the subject of considerable judicial comment. The Federal Court of Appeal has said that "bona fide justification" conveys the same meaning as the words "bona fide occupational requirement" and "bona fide occupational qualification", both of which are used in other parts of the *Act*. The only difference is that "bona fide justification" is used in contexts other than employment.³³⁸

The Supreme Court of Canada has held that where the "bona fide occupational requirement" defence is raised, the interpretation of the exception must be restrictive so as not to frustrate the overall objects of the Canadian Human Rights Act.

"One of the reasons such legislation has been so described [as being of a special nature] is that it is often the final refuge of the disadvantaged and the disenfranchised. As the last protection of the most vulnerable members of society, exceptions to such legislation should be narrowly construed."³³⁹

The Court in *Anvari*, once it found direct discrimination, should have embarked upon an examination of the bona fides of any justification put forward by the Department. In the labour context, this has meant that an employer must

³³⁷ *Ontario Human Rights Commission et al v. The Borough of Etobicoke*, [1982] 3 C.H.R.R. Decision 164, at D/783.

³³⁸ *A. G.(Canada) v Rosin*, [1991] 1 F.C. 391

³³⁹ *Ontario Human Rights Commission v. Zurich Insurance Company*, (1992) 16 C.H.R.R. D/255 at 263.

not only show that the qualification is imposed in good faith, but that it is also reasonably necessary to the performance of the job.³⁴⁰ To succeed, the Immigration Department would have to show good faith in enacting Section 19(1)(a), and a clear connection between the discrimination practised and some immigration objective, arguably one which is included in Section 3 of the *Immigration Act*.

The record in *Anvari* indicates that no evidence was introduced at the Tribunal upon which the Tribunal, the Review Tribunal or Maloney, J., in the Federal Court could have based their finding that the blanket discrimination was justified. It appears that all levels accepted that because Parliament had legislated the discrimination, this created a presumption of *bona fides*. One is led to the inescapable conclusion that the failure to challenge the Section directly arises from the decision maker's own "impressions" of what constitutes a *bona fides* justification.

In *Etobicoke*, Mr. Justice McIntyre specifically rejected the "impressionistic" evidence of witnesses that fire fighting is a "young man's game", which was advanced to justify mandatory retirement at age 60.

"In dealing with the question of a mandatory retirement age it would seem that evidence as to the duties to be performed and the relationship between the aging process and the safe, efficient performance of those duties would be imperative. ...Where a limitation upon continued employment must depend for its validity on proof of a danger to public safety by the continuation in employment of people over a certain age, it would appear to be necessary in order to discharge the burden of proof resting upon the employer to adduce evidence upon this subject. ... It seems to me, however, that in cases such as this statistical and medical evidence based upon observation and research on the question of aging, if not in all cases, absolutely necessary, will certainly be more persuasive..."³⁴¹

The Court in *Anvari*, in relying upon its own impressions, in the absence of any evidence before it, employed an analytical method which leaves disabled people in a most vulnerable position, as decisions are liable to influence from

³⁴⁰ *Saskatchewan (Human Rights Comm.) v. Saskatoon (City)*, [1990] C.H.R.R. Volume 11, Decision 22.

³⁴¹ *Ontario Human Rights Commission et al v. The Borough of Etobicoke*, [1982] 3 C.H.R.R. D781, at D784.(S.C.C.)

unchallenged myths and stereotypes about the lifestyles and social contributions of persons with disabilities.

In light of the fact that no evidence was tendered by the Immigration Department to justify the overall discriminatory practice, it is hard to see how it could have discharged the burden of proving "bona fide justification". The mere expectation that a disabled person might cause demands on health or social services can hardly be a justification for discrimination, particularly when no other applicants are screened in the same way, and when no balancing of an applicant's potential contribution to Canadian society is weighed against those medical or social costs. Had the law been properly applied by the Federal Court in *Anvari*, the result would have been quite different.

By concentrating exclusively on **how** Section 19(1)(a) was applied to Mr. Anvari, the Court failed to question the legitimacy of Section 19(1)(a) itself. The Supreme Court of Canada has repeatedly emphasized the special nature of human rights legislation, casting it as "quasi-constitutional"³⁴² and granting it clear paramountcy when in conflict with other legislation. The Supreme Court has said:

"Indeed the Human Rights Code, when in conflict with "particular or specific legislation" is not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law."³⁴³

Section 19(1)(a) is clearly discriminatory and the Department and the Court's reliance upon the statutory enactment itself cannot provide a *bona fide* justification. The mere fact that the legislature has authorized a discriminatory practice does not isolate that practice from a Human Rights review because of the paramountcy of the *Code*. Nowhere in the *Immigration Act* are any other groups singled out for possible exclusion on these grounds. For instance, other risky lifestyle or occupational choices which have been shown to increase the risks of injury or debilitating disease are not screened for. Immigration does not screen for smokers, fire fighters, hockey players, boxers or accident prone drivers, and

³⁴² *Singh v M.E.I.*, [1985] 1 S.C.R. 177 at 224.

³⁴³ *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145 at 158.

require them to prove that they will not place excessive demands on health or social services in the future. Neither do they screen other applicants, for instance the intellectually gifted, who might well take advantage of special "gifted" programs, loans, bursaries or subsidized academic studies at universities during their lifetime. Arguably, all of these applicants could well place additional demands on Canadian services, either as a result of their unique abilities, or because they are engaged in some risky behaviour or occupation.

Immigration discriminates against disabled people **simply by applying** Section 19(1)(a), irrespective of the manner in which it is applied. By singling out people with disabilities and then narrowly focusing on the health and social services aspect of government expenditures without any assessment of an applicant's potential contribution to Canadian society, disabled applicants, have been discriminated against as a class contrary to the *Canadian Human Rights Act*.

While the *Immigration Act* discriminates directly against people with disabilities, it does not on its face discriminate against people on the basis of race, religion or national origin. Any complaints in these areas would predictably be of "adverse effects" discrimination. The Supreme Court in *O'Malley v. Simpson-Sears* has outlined the difference.

"A distinction must be made between what I would describe as direct discrimination and the concept already referred to as adverse effect discrimination in connection with employment. Direct discrimination occurs in this connection where an employer adopts a practice or rule which on its face discriminates on a prohibited ground. For example, "No Catholics or no women or no blacks employed here." ... On the other hand, there is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force."³⁴⁴

In *Menghani*, an applicant for an immigrant visa was required to produce specific papers to prove a fraternal relationship. No other documentation was

³⁴⁴ *Ontario Human Rights Commission and Theresa O'Malley v. Simpsons-Sears* [1985] 2 S.C.R. 536 at 551.

acceptable to the Department. The complainant successfully argued that this amounted to discrimination where it was shown that such papers were not available in his country of origin. On Judicial Review, Immigration argued that the Applicant had been refused admission on the basis of insufficient documentation, and that to succeed he had to show that he had been treated differently as a result of particular characteristics attributed to him because of his national origin.³⁴⁵

In rejecting such a restricted interpretation, the Court approved of the *O'Malley* case to find that discrimination:

"may be described as the imposition of obligations, penalties or restrictive conditions that result from a policy or practice which is on its face neutral but which has a disproportionately negative effect on an individual or group because of a special characteristic of that individual or group"³⁴⁶

The question of available remedies is obviously of paramount importance for immigration complainants, and could raise some of the most difficult problems. In *Menghani* the Federal Court accepted that the Canadian brother could qualify as a victim with status to bring a complaint under the *Act*. There was also a finding that Immigration had engaged in a discriminatory practice which had an adverse effect upon the complainant, by the insistence on specific high school papers unavailable in India, to prove the fraternal relationship. The Court, however, found that the remedy ordered, that of processing the complainant's brother for landing in Canada, was beyond its jurisdiction.³⁴⁷

Section 53(2) permits an order which "makes available to the victim of the discriminatory practice" certain opportunities or privileges. Mr. Justice MacKay reasoned that since the introductory words of Section 53 speak of "the complaint", that any orders under Section 53(2) can only relate to the complainant.

"While the tribunal found that his brother was discriminated against by the adverse effect discrimination of the practice followed in New York by the visa officer, no

³⁴⁵ *Canada (Secretary of State for External Affairs) v. Menghani*, [1993] F.C.J. No. 1287 (Q.L.) at 53.

³⁴⁶ *Canada (Secretary of State for External Affairs) v. Menghani*, [1993] F.C.J. No. 1287 (Q.L.) at 55.

³⁴⁷ *Canada (Secretary of State for External Affairs) v. Menghani*, [1993] F.C.J. No. 1287 (Q.L.) at 60.

complaint in relation to that discriminatory practice could be dealt with by the Commission, or by the tribunal, by virtue of Section 40(5)(c). Thus, in my view, there is a statutory bar to an order of the sort here issued. In my view there is also a general objection to an award of specific relief to one who is not a complainant under the Act."

One might equally well argue that the use of the word "victim" in Section 53(2), as opposed to "complainant" is indicative of an intention to permit the Commission broad latitude in making orders, particularly in situations where there might be multiple victims. It is certainly puzzling that the Court would refuse to apply the same broad definition of "victim" in the remedies section of the *Act*.

The difficulty for the Commission appears to be to find an order which will redress the harm done to the complainant, without ordering specific relief to one who is not a complainant, and who could not be. Arguably the problem is insoluble as it is hard to conceive of a remedy which would redress the harm done to Mr. Menghani without also remedying the discrimination against his brother. Unfortunately, the Federal Court has been of no assistance in resolving the dilemma that they have created, and has merely referred the matter back for an:

"appropriate order which would make available to Jawahar Menghani the right or opportunity which was found to be denied to him as a result of the discriminatory practice."³⁴⁸

Absent some very creative thinking about an alternative order at the Tribunal level, the implications of the *Menghani* decision will be profound if it stands. The narrow interpretation of who can be a "victim" for the purposes of remedies would obviously render meaningless any complaints initiated on issues related to visa or immigrant applications, even if permitted to proceed. By this process of statutory interpretation, the Federal Court has effectively emasculated the Federal Human Rights Commission when it seeks to redress wrongs in immigrant selection.

³⁴⁸ *Canada (Secretary of State for External Affairs) v. Menghani*, [1993] F.C.J. No. 1287 (QL) para 63.

Given the present state of the law, it would indeed be futile in most cases to even consider commencing an Immigration selection case under the *Canadian Human Rights Act*. Despite the promise of Section 2 of the *Act* and the parliamentary assurances about its purpose and intent, it has become completely incapable of redressing wrongs in the immigration context. The exclusionary clauses in section 40(a) of *CHRA* serve to exclude the bulk of immigrant selection from the jurisdiction of the Commission, and the Federal Court has further restricted the utility of the *Act* by limiting remedies in *Menghani*.

Despite the obviously creative and progressive decisions of the Canadian Human Rights Tribunal to expand its mandate, until the exclusionary clauses in Section 40(a) are challenged on constitutional grounds and until *Menghani* is overruled and remedies become available, immigrants can expect little or no protection from the *CHRA*.

Further, it is clear that the Department of Immigration itself is bound and determined to fight the Commission at every step of the way in any investigation. Their initial refusal to cooperate in investigations and the repeated challenges to jurisdiction at the inquiry level and on review continue to frustrate any attempts to honestly scrutinize departmental policies and practices. Martha Jackman has argued that where government departments consistently maintain untenable positions in *Charter* litigation, they breach their affirmative *Charter* obligations. She argues that "...they have an independent affirmative obligation to respect both the *Charter's* language and its spirit"³⁴⁹, an obligation which they have clearly not met in the immigration context. Observers are left with the clear impression that the real extent of discriminatory practices at the Department of Immigration has yet to be determined, but that regardless of what those discriminatory practices might be, the legislature by statute, by judiciary, and by a process of statutory interpretation, has granted the Immigration Department the ability to discriminate with impunity in immigrant selection.

³⁴⁹ Martha Jackman, "Rights and Participation: The Use of the *Charter* to Supervise the Regulatory Process" (1991) 4 C.J.A.P.L. 23 at 54.;

The Canadian Charter of Rights and Freedoms

The jurisdiction of the *Charter* is spelled out clearly in Section 1, and focuses directly on the control of government action within the federal authority, giving the *Charter* a broad and inclusive mandate. The wording is plain and straight forward:

The *Canadian Charter of Rights and Freedoms* applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament...³⁵⁰

Section 3 of the *Immigration Act* directly incorporates the *Charter* equality guarantees by stating that one of the objectives of Canadian immigration policy is to ensure that admission standards do not discriminate contrary to the *Charter*, as follows:

3. It is hereby declared that Canadian immigration policy and the rules and regulations made under this Act shall be designed and administered in such a manner as to promote the domestic and international interests of Canada recognizing the need

.....

(f) to ensure that any person who seeks admission to Canada on either a permanent or temporary basis is subject to standards of admission that do not discriminate in a manner inconsistent with the *Canadian Charter of Rights and Freedoms*,³⁵¹

There are no limitations placed on *Charter* jurisdiction in the words of the *Charter* itself, nor in *The Immigration Act*. Unfortunately, *Charter* jurisdiction may be more apparent than real where immigrant selection is concerned. The courts have said that the *Charter* does apply to inland refugee determinations,³⁵² to the conduct of immigration inquiries in Canada,³⁵³ and to deportation proceedings.³⁵⁴

³⁵⁰ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982* being Schedule B of the *Canada Act, 1982* (U.K.), 1982, c 11, s.32. (1) (a).

³⁵¹ *Immigration Act*, 1976-77, c. 52, s.3.

³⁵² *Singh et al. v. M.E.I.* [1985] 1 S.C.R. 177.

³⁵³ *Armedale Communications Ltd. v. Moffatt and Canada (Minister of Employment and Immigration)* (4 July 1991), Action No. A-452-91 (Fed. C.A.).

In contrast, however, recent Federal Court decisions suggest that *Charter* jurisdiction is not assured where immigrant selection is concerned.

The issue of jurisdiction was first raised in the Supreme Court in *Singh*, where the Immigration Department sought to distinguish between refugee claimants, permanent residents and citizens, in order to deny refugee claimants *Charter* protection. In *Singh*, the Supreme Court rejected this "hierarchy of rights" approach and applied the *Charter* to refugee claimants.³⁵⁵ Madame Justice Wilson (as she was then) directly refocussed the discussion back on government action, and away from the status of the aggrieved person:

"Since immigration is clearly a matter falling within the authority of Parliament under s. 91 (25) of the *Constitution Act, 1867*, the *Immigration Act, 1976* itself and the administration of it by the Canadian government are subject to the provisions of the *Charter*."³⁵⁶

Madame Justice Wilson in *Singh* went some way towards determining who can rely on *Charter* guarantees when she held that the *Charter* is applicable to foreigners, physically present in Canada. The appellants in *Singh* challenged the procedures for determining refugee status as violations of Section 7 guarantees. Immigration attempted to argue that *Charter* protection could only extend to permanent residents and Canadian citizens. Writing for half of the majority of the Supreme Court, Madam Justice Wilson stated:

"Counsel for the Minister concedes that "everyone" is sufficiently broad to include the appellants in its compass and I am prepared to accept that the term includes every human being who is physically present in Canada and by virtue of such presence amenable to Canadian law."³⁵⁷

While her decision clearly laid to rest assertions that aliens in Canada did not have *Charter* protection, it was arguably an inclusive, not exclusive

³⁵⁴ *Chiarelli v. Canada (Minister of Employment & Immigration)* (1990) 10 Imm.L.R. (2d) 137.

³⁵⁵ for a detailed analysis of the "hierarchy of rights" theory of equality in Canada see Donald Galloway, "Strangers and Members: Equality in an Immigration Setting" (1994) 7 Can. J.Law. & Jur. 149, and Donald Galloway, "Three Models of (in)Equality" (1993) 38 McGill L.J. 64.

³⁵⁶ *Singh et al. v. M.E.I.* [1985] 1 S.C.R. 177 at 201.

³⁵⁷ *Singh et al. v. M.E.I.* [1985] 1 S.C.R. 177 at 202.

definition.³⁵⁸ Despite the fact that she clearly **included** all those present in Canada in the term "everyone", a careful reading of *Singh* does not limit "everyone" to only this group. Indeed, Madame Justice Wilson herself suggests that the *Charter* might also apply to refugee claimants not yet within the country. She wrote:

.....it is perhaps unnecessary to address Mr. Scott's line of argument in detail. I must, however, acknowledge some reluctance to adopt his analogy from American law that persons who are inside the country are entitled to the protection of the *Charter* while those who are merely seeking entry to the country are not... as Ms. Jackman pointed out, a rule which provided *Charter* protection to refugees who succeeded in entering the country but not to those who were seeking admission at a port of entry would be to reward those who sought to evade the operation of our immigration laws over those who presented their cases openly at the first available opportunity."³⁵⁹

It appears that Madame Justice Wilson might well have extended *Charter* protection to aliens applying for admission at our borders, had she been asked to do so. As it was not necessary for the Court to decide the question, it should have remained an open issue.

Unfortunately, Mr. Justice MacGuigan, speaking for the Federal Court of Appeal in *Canadian Council of Churches* did not follow her lead, nor did he refer to her judgment when he dismissed claims made by the Canadian Council of Churches. In response to major changes made to the refugee determination system introduced in 1989 and as a direct result of the decision in *Singh*, the Canadian Council of Churches brought an action in the Federal Court, Trial Division seeking a declaration that certain Sections of the *Immigration Act* violated the fundamental rights and freedoms guaranteed by the *Charter of Rights and Freedoms* and the *Bill of Rights*. The Department of Immigration brought a motion to strike out the Plaintiff's Statement of Claim on the grounds that the Canadian Council of Churches lacked standing to bring the action, and that the Statement of Claim disclosed no reasonable cause of action. The Council

³⁵⁸ In the United States the judiciary has not been as protective of alien rights, consular officer decisions are not reviewable on either statutory or constitutional grounds, see "Judicial Review of Visa denials: Reexamining Consular Non reviewability" (1977) 52 N.Y.U.L. Rev. 1137 at 1138-39.

³⁵⁹ *Singh et al. v. M.E.I.* [1985] 1 S.C.R. 177 at 210.

succeeded on both issues in the Trial Division,³⁶⁰ but on appeal to the Court of Appeal, Mr. Justice MacGuigan, in granting the government appeal, found that part of the claim could not constitute a cause of action:

"This could found a right of standing, but cannot constitute a reasonable cause of action since the claimants affected would all be non-citizens outside Canada with no claim to admission, and therefore beyond the scope of the Charter."³⁶¹

Justice MacGuigan did not provide us with any reason why non-citizens outside Canada do not have any *Charter* protection, nor does he provide any authority for his conclusion.

More recently, the Federal Court, Trial Division, in a decision by Muldoon J, has relied on both *Singh* and *Canadian Council of Churches* to dismiss a claim of discrimination on the basis of age under Section 15 of the *Charter*, made by a prospective immigrant from England. The applicant had a criminal record which rendered him inadmissible to Canada, whereas had he been younger he would have been admissible. Muldoon, J. made it quite clear that his sympathies lay with the Applicant, but he felt bound to "follow" both *Singh* and *Canadian Council of Churches*, despite his compassion for the applicant.

"It would be tempting to say that because, when the applicant disclosed his conviction he was in the Canadian High Commission in London, and because the respondent's letter invoking paragraph 19(2) (a) issued from that place, and because the High Commission is if not de facto, it is in any event de jure Canada, that therefore the applicant circumvents the disability pronounced to apply in his circumstances. That would surely be a legal fiction in the tradition of the Common Law. The pronouncements, of the two appellate Courts are however too clear, and in the case of this Court's unanimous Appeal Division, too recent, to be diluted by a legal fiction no matter how worthy the cause."³⁶²

It is arguable, however, that Madame Justice Wilson's decision in *Singh* was far from determinative of the issue, and that *Canadian Council of Churches* was unreasoned and lacking in authority. While the legal fiction proposed and

³⁶⁰ *Canadian Council of Churches v. Canada*, [1989] 3 F.C. 3.

³⁶¹ *Canadian Council of Churches v. Canada*, [1990] F.C.J. No. 224 (Q.L.) at 52.

³⁶² *Ruparel v. Canada (Minister of Employment and Immigration)* [1990] F.C.J. No. 701 (Q.L.) at 27.

rejected by Muldoon, J. in *Ruparel* may not be an adequate legal analysis, it certainly merits a less dismissive treatment. In the event that this analysis proves inadequate, its rejection does not necessarily leave us without a coherent legal theory for *Charter* jurisdiction in immigration selection cases.

Unfortunately, the lack of authority or argument for the decision in *Canadian Council of Churches* and its uncritical adoption in *Ruparel*, has left us with no inkling of the reason for *Charter* exclusion in this important area, and almost precludes an intelligent debate on the merits of any underlying rationale. Mr. Justice MacGuigan in *Canadian Council of Churches* speaks of "non-citizens outside of Canada with no claim to admission"³⁶³ and Mr. Justice Muldoon in *Ruparel* appears to speculate that if the same case were brought before him by someone present in Canada, it might succeed.

One is left with the distinct impression that it is the location of the applicant which has determined the jurisdiction of the *Charter* in these cases, but we are not entirely sure. The fact that in all cases, it is Canadian officials exercising powers granted to them by the Government of Canada, applying Canadian laws to determine the admissibility to Canada of foreigners, does not appear to have been given any recognition. It seems almost trite to point out that the judicial control sought to be exercised is over the Canadian Government employee, not the applicant, a control which is clearly consistent with the purpose of the *Charter* itself.

What is significant is that the current Federal Court decisions deny any type of *Charter* protection to visa applicants abroad, rendering the bulk of the work of the Department of Immigration immune from *Charter* review, despite the clear mandate of Section 3 of the *Immigration Act* and the *Charter* itself. Such sweeping consequences have resulted without the articulation of any particular rationale by the judiciary, and without any concern for the possible implications. These decisions contrast sharply with the Supreme Court decision in *Operation*

³⁶³ *Canadian Council of Churches v. Canada*, [1990] F.C.J. No. 224 (Q.L.) at 52

Dismantle which held that Canadian Cabinet decisions are reviewable even when they relate to sensitive security issues which affect foreign policies, leaving it unclear why mere visa officer decisions should be immune.

Interestingly enough, Canadian courts are not the only ones which have taken a "hands off" position when confronted with immigrant selection cases. Other jurisdictions have also wrestled with the degree of judicial supervision and intervention in immigration. Steven Legomsky in his detailed work *Immigration and the Judiciary: Law and Politics in Britain and America*³⁶⁴ has analyzed British and American immigration decisions. What Legomsky found was a striking deference to the government and a judicial reluctance to interfere in immigration decisions in both the United States and Great Britain. His work shows that not only have the two jurisdictions arrived at almost the same "conservative"³⁶⁵ results in immigration cases, but that the rationale for those decisions is neither persuasive, nor in line with judicial reasoning in other branches of their domestic law. Legomsky sees this result as an indication that extra-legal considerations have influenced the Courts.

The United States judiciary has adopted the most deferential and hence the most "conservative" stance regarding review of immigrant visa decisions. Despite strong academic criticism, visa decisions are simply not reviewable, on constitutional or on any other grounds.³⁶⁶ Donald Galloway, in his comprehensive review of the extra-territorial application of the American *Bill of Rights*³⁶⁷, has outlined the recurrent themes which United States courts have used to limit review of visa decisions. He also notes that these rationales often "contradict or are

³⁶⁴ Legomsky, Stephen H. *Immigration and the Judiciary: Law and Politics in Britain and America* (Oxford: Clarendon Press, 1987).

³⁶⁵ "conservative" is used by Legomsky to describe a decision which is favourable to the government, and not to the alien.

³⁶⁶ see Note "Judicial Review of Visa Denials: Reexamining Consular Non reviewability" (1977) 52 NYULR 1137 and Hart, Henry M. "The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic" (1953) 68 Harvard Law Review 1362 and Motomura, Hiroshi "The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights" (1992) 92 Columbia Law Review 1625 and Legomsky, Stephen "Judicial Review and Immigration Law: The US" in Legomsky, Stephen H. *Immigration and the Judiciary: Law and Politics in Britain and America* (Oxford: Clarendon Press, 1987). 143. and Hahn, Richard F "Constitutional Limits on the Power to Exclude Aliens" (1982) 82 Columbia Law Review 957.

³⁶⁷ Galloway, Donald, "The Extraterritorial Application of The Charter of Rights to Visa Applicants" (1991) 23 Ottawa L. Rev. 335.

otherwise incompatible with each other"³⁶⁸ and American courts have failed to agree on any one rationale for granting, or not granting, constitutional rights to different people in different places and circumstances.

What we do learn from the United States experience is that non-reviewability is rooted in the concept of executive and legislative sovereignty. The seminal United States case on non reviewability is the *Chinese Exclusion Case*³⁶⁹ heard in 1889 by the United States Supreme Court. Chief Justice Marshall found that the independence of the United States is threatened if Congress does not have unreviewable powers over immigration,³⁷⁰ and the Court sanctioned the classification of aliens along racial lines, a category that is constitutionally suspect when applied to citizens. In the same case Mr. Justice Field declared that if Congress:

"considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to peace and security, it could act to exclude those aliens as an incident of national sovereignty."³⁷¹

Thus, *The Chinese Exclusion Case* contained the two basic legal theories which were relied on in a series of subsequent cases to prevent the judicial review of immigration visa decisions: the plenary power doctrine; and the political questions doctrine.³⁷² Stephen Legomsky summarized the United States position as at 1987 as follows:

"The Congressional powers to exclude and to deport aliens have been held to be "plenary". When Congress exercises those powers, its decisions are final. "Over no conceivable subject", The Supreme Court has repeatedly said, "is the legislative power of Congress more complete." When regulating immigration, Congress may discriminate on the basis of race. It may discriminate on the bases of gender and legitimacy. It may restrict aliens' political speech without having to

³⁶⁸ Galloway, Donald, "The Extraterritorial Application of The Charter of Rights to Visa Applicants" (1991) 23 Ottawa L. Rev. 335, at (QL) at 15.

³⁶⁹ *Chae Chan Ping v. United States* 130 U.S. 581 (1889) (*Chinese Exclusion Case*).

³⁷⁰ *Chae Chan Ping v. United States* 130 U.S. 581 (1889) (*Chinese Exclusion Case*), 603-4.

³⁷¹ *Chae Chan Ping v. United States* 130 U.S. 581 (1889) (*Chinese Exclusion Case*), 603-609

³⁷² see *Lem Moon Sing v. United States*, 158 U.S. 538 (1895), 547 where the courts went even further to find that Congress's power to exclude aliens meant that it could enforce the policy exclusively through executive officers, without judicial intervention; *Nishimura Ekiu v. United States*, 142 U.S. 651 (1891); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893). *Shaughnessy v. United States ex rel. Mezel*, 345 U.S. 206 (1953), *United States ex rel. Knauff v. Shaughnessy* 338 U.S. 537 (1950) 543 which found that it is not within the province of any court to review the political decision to exclude a given alien. *United States ex rel. Ulrich v. Kellogg* 30 F.2d 984 (D.C. Cir.) 986 no provision in immigration laws provides for a review of actions of consular officers.

establish a clear and present danger. With some qualifications, Congress may disregard procedural due process when excluding aliens". [footnotes omitted] ³⁷³

More importantly, the "plenary powers doctrine", "executive and legislative sovereignty" and the "political questions" doctrine, do not argue that equality rights have not been violated, but that the government **should** have non-reviewable power to determine the issues for various political and foreign policy reasons. When viewed in this light the American cases are actually putting forward theories for the justification of the non-reviewability of visa decisions.

At the heart of the American decisions lies the commitment to executive and legislative sovereignty. Unlike the United States, however, the Supreme Court of Canada has rejected the argument that executive or legislative sovereignty exists in matters of foreign policy which requires absolute or near absolute judicial deference. After *Operation Dismantle*, ³⁷⁴ it is clear that even sensitive defence decisions of the Canadian Cabinet are subject to *Charter* scrutiny. Immigration might traditionally be associated with Crown or Royal Prerogative, but this association cannot prevent review "even if the disputes are of a political or foreign policy nature". ³⁷⁵

The Federal Court's failure to undertake any analysis for its denial of *Charter* protection to applicants for immigration does not stem from any lack of legal principles upon which they could have drawn. ³⁷⁶ The American experience

³⁷³ Legomsky, Stephen H. *Immigration and the Judiciary: Law and Politics in Britain and America* (Oxford: Clarendon Press, 1987). 178

³⁷⁴ *Operation Dismantle Inc. et al. v. The Queen et al.*, 18 D.L.R. (4th) 481.

³⁷⁵ See the discussion in *Operation Dismantle* at the Federal Court of Appeal on the *Charter* and the Royal Prerogative. This part of the decision is not overturned in the appeal and the rationale must be presumed to stand.

³⁷⁶ see Donald Galloway, "The Extraterritorial Application of The Charter of Rights to Visa Applicants" (1991) 23 *Ottawa L. Rev.* 335, where he lists the American theories as

- a) executive and legislative sovereignty, which requires absolute or near absolute judicial deference in immigration matters;
- b) territoriality, which stipulates that the Constitution's ambit is circumscribed by the borders of the United States;
- c) "levels of membership", which holds that the measure of protection provided by the Constitution varies according to the level of a person's participation in the community;
- d) universal application, according to which every person is protected by the Constitution, regardless of their citizenship, place of residence or physical location on the globe; and finally
- e) authority, according to which a person is protected by the Constitution when subject to the authority of the government.

has given us a variety of theories, and these theories have been tested by academics for their relevance to the Canadian experience. Donald Galloway has written a comprehensive series of articles exploring different theories of equality, and their implications for Canadian visa decisions.³⁷⁷ The American experience and the Canadian academic writings show us a number of different legal theories could support the Federal Court's position, while others could not. Each theory is premised on a different concept of equality, a different definition of human dignity or of who are members of our "society".

According to Donald Galloway, the only theory of equality which is consistent with Canadian case law and the *Charter* is one based upon concepts of human dignity. Galloway examines and rejects all theories but the "authority argument" which:

"is one which recognizes that the responsibility of its government is unbounded by international borders and driven by concern for people, not just "the people", and that a "foreigner's experience of the Canadian legal system, wherever it may occur, should be blanketed in protection."³⁷⁸

If Donald Galloway is right, not only did the Federal Court betray immigrants by failing to analyze the issues, but they also came to the wrong conclusion. If we accept Donald Galloway's "authority argument" for *Charter* jurisdiction, visa applicant's would be protected by the *Charter*, because they are subject to the authority of the Canadian government.

Even without a comprehensive academic review of the issues, it is clear that had the Federal Court in *Canadian Council of Churches* and *Ruparel* looked to Supreme Court *Charter* decisions to determine standing, it would have come to the same result. In *Findlay*, the applicant sought to challenge social assistance legislation which authorized overpayments to be deducted from a recipient's welfare cheque. The Court found that to determine standing the court must ask "does the plaintiff have sufficient personal interest in the legality of the action or

³⁷⁷ see Donald Galloway, "The Extraterritorial Application of The Charter of Rights to Visa Applicants" (1991) 23 Ottawa L. Rev. 335,

³⁷⁸ Donald Galloway, "The Extraterritorial Application of The Charter of Rights to Visa Applicants" (1991) 23 Ottawa L. Rev. 335 (QL) at 127.

has suffered special damage."³⁷⁹ This test for standing is very close to Donald Galloway's "authority argument", according to which a person is protected by the Constitution when subject to the authority of the government.³⁸⁰ This protection is granted irrespective of their status or their physical location.

In summary, as this chapter demonstrates, applicants for admission to Canada enjoy little if any access to equality legislation to protect them from discrimination. The Federal Court has said that the *Charter* does not apply and the *CHRA* has limited jurisdiction, failing to provide any protection to the independent applicant for admission because of the exclusionary sections.

³⁷⁹*Findlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607.

³⁸⁰Galloway, Donald, "The Extraterritorial Application of The Charter of Rights to Visa Applicants" (1991) 23 *Ottawa L. Rev.* 335. (QL version) at 16.

CHAPTER FOUR: REDRESS AND SECTION 15 OF THE *CHARTER*

The Charter

The *Charter* is the supreme law of Canada, and the common law and statutes must be interpreted and applied in conformity with the fundamental values it contains.³⁸¹ The Supreme Court has said that one of these fundamental values is equality, against which the objects of all legislation must be measured:

"Section 15(1) guarantee is the broadest of all guarantees [in the Charter]. It applies to and supports all other rights guaranteed by the *Charter*³⁸²

Courts, as they interpret the law have an obligation to do so in a manner consistent with the *Charter*, and in particular the equality standards articulated by the Court. Where a statute can reasonably bear a meaning that is in accord with *Charter* values, such an interpretation must be given "preference over an interpretation which would run contrary to them".³⁸³

The *Charter* sets out the right to equality in the following terms

"15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

The *Charter* gives the groups enumerated in Section 15 the right to advance equality claims, but immigrants, or more specifically non-white immigrants, are not identified as a group which enjoys constitutional protection against discrimination. The Courts, however, have held that other "analogous" groups which have suffered "social, political and legal

³⁸¹ *RDSU v. Dolphin Delivery Ltd.* [1986] 2 S.C.R. 573 at 592-3 and 603. *Hills et al. v. Canada (Attorney-general)*. [1988] 1 S.C.R. 513 at 558. *R. v. Thompson*, [1990] 1 S.C.R. 1111 at 1158.

³⁸² *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 185.

³⁸³ *Hills et al. v. Canada (Attorney General)*, [1988] 1 S.C.R. 513 at 558. The Supreme court has also struck down common law rules in the criminal context where they violate *Charter* guarantees see for example *R. v. Swain* (1991) 63 C.C.C. (3d) 481 (S.C.C.)

disadvantage" may also benefit.³⁸⁴ The characterization of certain groups as "analogous groups", led the Court in *Andrews* to explore the American concept of "discrete and insular minorities". In finding that non-citizens in Canada qualify as a "discrete and insular minority", Madame Justice Wilson observed that they were a group:

"lacking in political powers and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated".

She went on to observe that non-citizens' needs and wishes are of no interest to elected officials and are always in danger of being overlooked. In *Turpin*, Wilson J, held that "stereotyping, historical disadvantage (and) vulnerability to social and political prejudice are the hallmarks of discrimination."³⁸⁵ which characterize analogous groups. Errol Mendez calls these groups vulnerable minorities, because of their vulnerability to being "excluded, degraded, devalued or punished on the basis of characteristics that should not be relevant."³⁸⁶

As Chapter one makes apparent, non-white immigrants to Canada share the same indicia of discrimination and devaluation as those enumerated in Section 15. Their experience has been one of racist stereotyping and prejudice, coupled with severe legal disadvantage. Non-white immigrants were not assessed for admission on their own personal merits and capabilities³⁸⁷, they were excluded solely on the basis of their race, religion, colour and national or ethnic origin, or a combination of these enumerated grounds.

³⁸⁴ *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 154.

³⁸⁵ *R. v. Turpin* [1989] 1 S.C.R. 1296 at 1333.

³⁸⁶ Errol P. Mendes, "Promoting Heterogeneity of the Judicial Mind": Minority and Gender Representation in the Canadian Judiciary. In *Appointing Judges: Philosophy, Politics and Practice*. O.L.R.C. 1991.

³⁸⁷ Justice McIntyre has indicated that distinctions based on an individual's personal merits and capacities will rarely be discriminatory. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 174-5.

Present day immigration statistics clearly illustrate that approximately 81% of new immigrants coming to Canada now are from these previously excluded groups. Because the predominant characteristics of this new group of immigrants are those of the enumerated classes under Section of the *Charter* analysis.

In *Thibaudeau v. Canada (Minister of National Revenue)*³⁸⁸ in dissent, both Madame Justice L'Heureux-Dube and Madame Justice McLachlin discuss the nature of the group "custodial spouses", for the purposes of *Charter* characterization. McLachlin, J. characterized custodial parents as an analogous group because the group was linked to the enumerated ground of sex as "the great majority of the members of this group are women".³⁸⁹ Similarly L'Heureux-Dube, J. found that because the "vast majority (of custodial parents) are women" that this forms a relevant characteristic of the group, even though a small percentage of custodial spouses are men.³⁹⁰ If we apply this same analysis to the group of new immigrants coming to Canada, it is clear that they are an analogous group as the vast majority are members of the enumerated groups. as Madame Justice L'Heureux-Dube points out, the fact that 19% of the group may not be linked to any enumerated ground does not change the overall characterization of the group.

Once we recognize new immigrants as an analogous group then the failure of human rights law and the *Charter* to protect this group against discrimination on the basis of their status becomes suspect. The determination however, that non-white immigrants are an analogous group does not mean that any type of differentiation or distinction is sufficient to create a violation of Section 15(1). A complainant must show in addition

³⁸⁸ *Thibaudeau v. Canada (Minister of National Revenue)*, [1995] S.C.J. No. 42 (Q.L.).

³⁸⁹ *Thibaudeau v. Canada (Minister of National Revenue)*, [1995] S.C.J. No. 42(Q.L.) at para 211.

³⁹⁰ *Thibaudeau v. Canada (Minister of National Revenue)*, [1995] S.C.J. No. 42(Q.L.) at para. 44.

that there has been a denial of one of the four equality rights, and that this results in discrimination.³⁹¹

As illustrated in Chapter two, new immigrants to Canada suffer numerous legal disadvantages in the immigration context. These include legislative limitations which deny access to human rights legislation, and judicial interpretations which have further limited redress. In combination, this has left immigrants without the protection of equality legislation, and the Department of Immigration immune from any meaningful human rights review in immigrant selection.

This lack of legal protection amounts to a denial of "equality before the law", as guaranteed by the *Charter*. It can be said that equality before the law means that no group or individual is treated more harshly than any other, or suffers under any legal disability. In *Turpin*, the Court found that "equality before the law" would be violated when a complainant is subject to an unequal demand or burden of a law, or is subject to a greater disability in the substance and application of the law than others.³⁹² Applying this test to those immigrants applying for admission, it is clear that immigrants have been denied equality before or under the law in a number of ways.

Sections 40(5)(a) and (c) of the *Canadian Human Rights Act* limit the powers of the Commission directly, by denying jurisdiction in cases where the discrimination occurred in Canada, but the person was not lawfully present here, or where the events occurred outside Canada and the victim was not either a Canadian citizen or a permanent resident.³⁹³

³⁹¹ *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 182.

³⁹² *R. v. Turpin*, [1989] S.C.R. 1296

³⁹³ Canadian Human Rights Act, 1976-77, c.33 s.40(5).

Clearly, the *CHRA* makes a distinction between those lawfully present in Canada and those who are not, and limits jurisdiction abroad to complainants who are Canadians and permanent residents. Denying access to human rights legislation to those who are not lawfully present here and who are neither permanent residents or citizens is *prima facie* unequal treatment.

The *Immigration Act* also discriminates on its face against disabled applicants for admission in Section 19(1)(a). Further, Federal Court decisions such as *Menghani*, which interpret the *Canadian Human Rights Act* so as to limit remedies, denies directly the benefits and advantages of human rights legislation to immigrants. Similarly, where the court in *Ruparel* held that the *Charter* does not apply to immigrant selection, immigrants have been denied the right to invoke the *Charter* to challenge immigration visa decisions, a benefit which is readily available to others who are subject to Canadian government actions or decisions.

The approach taken here parallels that taken by Krever, J.A. of the Ontario Court of Appeal in *Haig and Birch v. Canada*³⁹⁴. In *Haig* the Court found sexual orientation to be an analogous ground of discrimination under s.15 of the *Charter*, Krever, J.A. held that the failure to include homosexuality in the *Canadian Human Rights Act* withheld benefits or advantages available to other persons alleging discrimination. Krever, J.A. found that:

"The failure to provide an avenue for redress for prejudicial treatment of homosexual members of society and the possible inference from the omission that such treatment is acceptable create the effect of discrimination offending Section 15(1) of the *Charter*."³⁹⁵

In *Blainey*, the Ontario Court of Appeal accepted that human rights codes must conform to Section 15 of the *Charter*, and struck down

³⁹⁴ *Haig and Birch v. Canada* (1992) 9 O.R. (3d) 495 at 503.

³⁹⁵ *Haig and Birch v. Canada* (1992) 9 O.R. (3d) 495 at 503.

sections of the *Ontario Human Rights Code* which allowed sex discrimination in athletic organizations and activities.³⁹⁶

There is little to differentiate the situation described in *Haig* and *Blainey*, from that presented here. The *Canadian Human Rights Act* specifically denies redress to complainants who are not Canadian citizens or Permanent Residents, and judicial interpretations of both this *Act*, and the *Charter* have further limited immigrants access to the remedial provisions contained in both *Acts*.

Is then this failure to provide "equality before the law" a differentiation which is done with discrimination? As McIntyre J. stated in *Andrews*:

"A complainant under s.15(1) must show not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law but, in addition, must show that the legislative impact of the law is discriminatory"³⁹⁷

Mr. Justice McIntyre, after approving of the Human Rights understanding of discrimination, offered the following definition of discrimination:

"I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burden, obligations, or disadvantages on such individuals or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society"³⁹⁸

Again, evidence of past discrimination is relevant to a determination that a distinction has been made with discrimination. Madame Justice Wilson in *Turpin* tells us that we have to look beyond the distinction

³⁹⁶ *Blainey v. Ontario Hockey Association*, 54 O.R.(2nd) 513 (C.A.), leave to appeal to S.C.C. refused (1986), 58 O.R. (2d) 274 (S.C.C.).

³⁹⁷ *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. at 172.

³⁹⁸ *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. at 174.

created by the impugned legislation to the larger social, political and legal context. She says:

"..it is only by examining the larger context that a court can determine whether differential treatment results in inequalityA finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged."³⁹⁹

For the purposes of this paper, the evidence of the larger social, political and legal context for non-white immigrants to Canada is again found in Chapter one. This evidence of past discrimination forms the historic backdrop essential to an understanding of whether the present denial of legal equality is with discrimination. When the history of Canada's treatment of the non-white immigrants to Canada is linked to the present practice, it is argued that the present practice is clearly discriminatory.

The conclusion that immigrants are an "analogous group" for the purposes of Section 15 and that they have been subject to differentiation which is discriminatory, is a conclusion which is also consistent with the overall purpose of Section 15 of *The Charter*. If we accept that the *Charter's* purpose is to remedy or prevent discrimination against groups suffering social, political and legal disadvantage in our society, then protecting immigrants from discriminatory treatment falls squarely within that purpose. There is no danger that to provide this protection would "overshoot the actual purpose of the right or freedom in question"⁴⁰⁰. In fact, this result is also consistent with Section 27 of the *Charter*, which mandates that it shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canada. To recognize the right of immigrants to access human rights legislation is

³⁹⁹ *R. v. Turpin*, [1989] S.C.R. at 1331-2.

⁴⁰⁰ *R. v. Turpin*, [1989] S.C.R. at 1333..

to reinforce in the most fundamental way possible a commitment to equality.

Mr. Justice McIntyre of the Supreme Court has identified the evil that discrimination reinforced by law represents:

"Discrimination is unacceptable in a democratic society because it epitomizes the worst effects of the denial of equality, and discrimination reinforced by law is particularly repugnant. The worst oppression will result from discriminatory measures having the force of law. It is against this evil that s. 15 provides a guarantee"⁴⁰¹

The failure of the legislature and the Courts to protect immigrant rights, as argued, perpetuates a Canadian tradition of discrimination against non-white immigrants, and is precisely the type of discrimination reinforced by law which Mr. Justice McIntyre calls the worst oppression, and which he finds particularly repugnant.

⁴⁰¹From Mr. Justice McIntyre's majority decision in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 172.

The Role of the Courts

The introduction of the *Charter* has revolutionized the role of the courts in administrative law, requiring that the rationale of laws be measured against constitutional criteria.⁴⁰² The courts have taken on the role of the protectors of the values which the constitution enshrines,⁴⁰³ and ultimate responsibility now rests with the courts to ensure that all legislation complies with the *Charter*. The courts have the power to strike down, to read down, read in, or to render inoperative legislation which offends the *Charter*. When the courts fail to provide any of these remedies when, as is argued in this paper, the legislature and the bureaucracy have denied equality rights to immigrants, then ultimate responsibility for the failure to protect immigrant rights must lie with the courts.

The process of judicial decision making is no longer simply the application of law and precedent to a given set of facts, it is now acknowledged that judges are sometimes required to choose between competing social philosophies or between the state and the individual.⁴⁰⁴ This new task for the courts has been referred to as a new "public policy" or "political" role.⁴⁰⁵ Inevitably when courts are required to make choices of this nature, judges own perspectives, attitudes or biases can play an important role, for which they are often criticized:

"Judges are portrayed as suffering from a form of "attitudinal bias: - inherently prejudiced in favour of a specific outcome because of their social origin, their past political affiliations, their cultural background, or their gender."⁴⁰⁶

⁴⁰² Jones, D.P. *Principles of Administrative Law*, (Toronto: Carswell, 1994) at 65.

⁴⁰³ *R. v. Turpin*, [1989] 1 S.C.R. 1296 at 1331.

⁴⁰⁴ J. Webber, "The Adjudication of Contested Social Values: Implications of Attitudinal Bias for the Appointment of Judges" in Ontario, Ontario Reform Commission *Appointing Judges: Philosophy, Politics and Practice*, (Toronto: Ontario Law Reform Commission, 1991) at 4.

⁴⁰⁵ Weinrib, Lorraine *Eisenstat Appointing Judges to the Supreme Court of Canada in the Charter Era: A Study in Institutional Function and Institutional Design* (Faculty of Law, University of Toronto, (1989) [unpublished] at 18 ff.

⁴⁰⁶ J. Webber, "The Adjudication of Contested Social Values: Implications of Attitudinal Bias for the Appointment of Judges in Ontario", Ontario Law Reform Commission, *Appointing Judges: Philosophy, Politics and Practice*, (Toronto: Ontario Government Bookstore, 1991) at 5.

Gender bias has received the most academic and practical attention, and in the last 20 years some steps have been taken to eliminate it. Efforts have been made to increase the number of women judges and lawyers, institute legislative and professional reform and more recently, to educate judges themselves about the effects of gender bias.⁴⁰⁷ There is also an extensive body of literature which demonstrates gender bias in legal doctrine and judicial decision.⁴⁰⁸

More recently, some attention has been paid to discrimination against certain minority groups. The Donald Marshall Inquiry laid bare a criminal justice system in Nova Scotia which is racist in the extreme in its treatment of Native Canadians,⁴⁰⁹ and the Saskatchewan inquiry into Native justice found a similar situation in its investigation of the death of Elijah Harper⁴¹⁰. There can be no doubt that our judicial system has a pattern of failing to respond to the needs of visible minorities.

Judges, like all other people, bring to their appointed offices cultural baggage which can be race, class or gender biased. The traditional view that the judiciary were impartial arbiters of the law has been effectively challenged, particularly in light of the overt law making which judges are now required to perform under the *Charter*. Just as few would still maintain that judges are neutral, few would argue that the law itself has not developed in ways which discriminate against singular groups based upon myths and stereotypes which have permeated our society as a whole, and thereby influenced the development of the law itself.⁴¹¹

⁴⁰⁷ for a summary of the American situation see N.J. Wikler "Identifying and Correcting Judicial Gender Bias" in J. Martin and K. Mahoney, ed, *Equality and Judicial Neutrality* (Toronto: Carswells, 1987)

⁴⁰⁸ see Martin and K. Mahoney, ed, *Equality and Judicial Neutrality* (Toronto: Carswells, 1987); E.A. Sheehy "Canadian Judges and the Law of Rape: Should the *Charter* Insulate Bias?" 21 *Ottawa L. Rev.* 39; M. Brown, *Gender Equality in the Courts*, (Manitoba Association of Women and the Law, 1988); I. Grant and L. Smith, "Gender Representation in the Canadian Judiciary" *Appointing Judges: Philosophy, Politics and Practice* (Toronto: Ontario Law Reform Commission, 1991)

⁴⁰⁹ Canada, *Royal Commission on the Donald Marshall, Jr., Prosecution* (Halifax: Province of Nova Scotia, 1989).

⁴¹⁰ See also Canada, *Report of the Saskatchewan Indian Justice Review Committee*, (Ottawa: Government of Canada, 1992).

⁴¹¹ see *R. v. Seaboyer*, [1991] 2 S.C.R. 577. for a discussion of the influence of rape myths and stereotypes in the development of the criminal law.

It should therefore come as no surprise to find that when judges have been asked to define the limits of the rights of immigrants, that their decisions might have been tainted by bias. Indeed it would be surprising if it were otherwise. When judges have been asked to render their decisions in the context of a political climate that is profoundly anti-immigrant, one should expect the Judiciary to reflect these trends.

Stephen Legomsky, in looking at American and British immigration cases, argues that judges have choices, and when the case reasoning is not clearly consistent with mainstream jurisprudence, nor based upon persuasive legal reasoning, that other external influences may be the deciding factors. These "extra-legal" factors include a judge's own personal background and attitudes, or prevailing political forces. In summarizing the findings in American and British immigration cases, Legomsky comments:

"Yet, in many of the cases analyzed, the legal doctrine invoked by the court did not seem especially persuasive and at times required real stretching. Further, within the field of immigration law, the narrow issues raised by the cases discussed in this book have cut across numerous boundaries: they have been set in two different countries; they have been decided during different time periods; the challenged decisions have been legal, factual, and discretionary; those that were legal required interpretation of radically different provisions in constitutions, statutes, and regulations, as well as application of common law; the contexts have been exclusion, deportation, and change of status. Although the degree of conservatism has varied somewhat in accordance with the presence or absence of these and other factors, and although there have been noteworthy exceptions to the general conservative drift of these cases, the striking fact remains that the conservative results have for the most part engulfed these distinctions. So systematic and so all-embracing a conservative tilt cannot easily be ascribed *entirely* to superior persuasiveness of the specific legal doctrine that favours the government's position in individual cases."⁴¹²

Legomsky goes on to detail the "extra-legal" factors which he believed influenced both the American and British decisions: personal backgrounds and attitudes of the judges; their perceptions of their role; and contemporary social and political forces operating in society.

⁴¹² Legomsky, Stephen H. *Immigration and the Judiciary: Law and Politics in Britain and America* (Oxford: Clarendon Press, 1987) 224.

Legomsky's data is particularly striking when we look at Canada's Court decisions limiting jurisdiction which have also been made without persuasive legal reasoning, and are inconsistent with mainstream *Charter* jurisprudence. What we have in common with both the United States and Great Britain are political trends which turned public opinion against immigrants at the turn of the century, and a Judiciary which bears a marked resemblance to those of the United States and Great Britain. Having eliminated persuasive legal reasoning as the basis for the failure to grant *Charter* protection to immigration selection cases in Canada, we are left with Legomsky's "extra-legal considerations," which could well have played an influential role in Canadian judicial decisions.

The Canadian Judicial complexion differs little from the American and British, particularly at the highest levels of our court system where it wears an overwhelmingly white, Anglo-Saxon male, Protestant face, and represents the wealthiest and most powerful segments of our society.⁴¹³ Not only is this group over represented, out of all proportion to its numerical position in Canadian society, but ethnic and minority interests have no representation at all at the higher Canadian court levels.

In a country where the latest census data indicates that 31% of Canadians report that they are neither of British nor French origin, it is clear that our highest courts are far from representative⁴¹⁴. Not only do they fail to reflect the gender balance in our society, they do not reflect the different cultural, ethnic and religious groups that make up Canadian society.

Canadian judges look alike, but studies also show that they share the dominant political beliefs of the governing parties who appoint them.

⁴¹³ see P. McCormick & I. Greene, *Judges and Judging: Inside the Canadian Judicial System* (Toronto: James Lorimer & Co., 1990) and D. Olsen, *The State Elite* (Toronto: McClelland and Stewart Ltd., 1980) at 40 ff.

⁴¹⁴ Canada, 1991 Census of Canada *Ethnic Origin* (Ottawa: Industry, Science and Technology Canada, 1993) at 1.

Federally appointed judges have been for the most part, members of either the Liberal or the Conservative parties.⁴¹⁵

Olsen summarizes:

"By and large, the courts historically appear to have been filled from the supporters of the party in power. The bench has been part of the general patronage available for dispensation by those who control state power. The selection bias, in this instance, does not produce much confidence that politics is absent from the bench. On the contrary, it suggests that the judges have had the same politics as the elite that appointed them."⁴¹⁶

Not only do higher court judges share the politics of their appointers, but in many cases they were themselves part of the political machinery of the country.

Unfortunately, despite some minor reforms beginning during the Trudeau years⁴¹⁷, the appointment of Canada's highest judges remains an overtly political business. In 1985 the Canadian Association of Law Teachers established a committee to review judicial appointments in Canada. The committee found that:

"the single and most pervasive criticism was that the federal system was too politicized and too often was calculated to lead to appointments being made for the wrong reasons."⁴¹⁸

Similarly, the Canadian Bar Association Committee Report on the Independence of the Judiciary acknowledged that judges are not selected on the basis of excellence, particularly with the appointment of judges with previous electoral office experience. They comment:

⁴¹⁵ D. Olsen, *The State Elite* (Toronto: McClelland and Stewart Ltd., 1980) at 45 f.

⁴¹⁶ D. Olsen, *The State Elite* (Toronto: McClelland and Stewart Ltd., 1980) at 45 ff.

⁴¹⁷ Prime Minister P.E. Trudeau introduced minor reform in 1967 when he set up a committee of the Canadian Bar Association to advise on the qualifications for appointment. The work was informal, and limited to rating candidates as either well-qualified, qualified, or not qualified. See Weinrib, Lorraine Eisenstat, *Appointing Judges to the Supreme Court of Canada in the Charter Era: A Study in Institutional Function and Institutional Design* (Faculty of Law, University of Toronto, (1989) [unpublished] at 15-16. Prime Minister Mulroney introduced a Judicial Advisory Committee, which did not nominate candidates, but simply reported if people were "qualified". Russell, Peter and Ziegel, Jacob S., "Federal Judicial Appointments: An Appraisal of the First Mulroney Government's Appointments and the New Judicial Advisory Committees" (1991) 41 U.T.L.J. 4. at 7.

⁴¹⁸ J. S. Zeigel "Federal Judicial Appointments in Canada: The Time is Ripe for Change" and also see Gail, Gerald L. "The Qualities of a Judge" (Addresses to the Canadian Association of Law Teachers Special Committee on the Appointment of Judges, 1986) in *Judicial Selection in Canada: Discussion Papers and Reports* (Toronto: Canadian Association of Law Teachers, 1986)

"It is difficult to preserve the appearance of an independent judiciary when such practices exist, regardless of the qualifications and probity of those judges."⁴¹⁹

Peter Russell, when looking at the 228 federal judicial appointments, made by the Mulroney Government, between 1984 and 1988, found that patronage or "political favouritism" continued to have a major influence on judicial appointments. Just under half had a known political affiliation with the Conservative Party.⁴²⁰

The implications of this data are obvious. Judges have traditionally come from a fairly homogenous social and political background, and by the very nature of the appointment process can be expected to identify with the political agenda of the day. Additionally, they come from the ranks of the governing state elite, a group not known for its support of the interests of visible minorities.

The idea that the judiciary is not free of bias is not a novel idea in Canada, nor is it any longer a radical proposition. The traditional view that the judiciary are impartial arbiters of the law has been effectively challenged, particularly in light of the overt law making which judges are now required to perform under the *Charter*.⁴²¹ Few would pretend that judges are neutral, with no opinions, prejudices or biases which affect their decisions. Judges, like others, bring to their offices cultural baggage which is often gender biased, xenophobic or outright racist:

"While impartiality and fairness must remain centrally important goals for the judiciary, it must also be recognized that every person sees issues from a perspective, and....legal principles naturally tend to reflect the perspectives of those who developed them. The assignment of "objectivity" to the perspectives of those who developed our legal system (historically, men) is just as false as would be the assignment of the

⁴¹⁹ Canadian Bar Association Committee on The Independence of the Judiciary in Canada, *The Independence of the Judiciary in Canada* (Ottawa: The Canadian Bar Foundation, August 1985) at 32.

⁴²⁰ Russell, Peter and Ziegel, Jacob S., "Federal Judicial Appointments: An Appraisal of the First Mulroney Government's Appointments and the New Judicial Advisory Committees" (1991) 41 U.T.L.J. 4, at 19.

⁴²¹ see Ontario Law Reform Commission, *Appointing Judges: Philosophy, Politics and Practice* (Ontario: Ontario Law Reform Commission, 1991) at 1.

status to any other perspective. The point is that no one is "objective" in the sense of being without a frame of reference, yet we sometimes fail to notice the frame of reference of those who have been in a position to define the very terms and concepts in which we think. Thus, criteria such as "objectivity" are not, in reality, very helpful."⁴²²

The frame of reference for most superior court judges was developed during the formative years of Canada's racially based immigration policies. Non-white immigrants were not wanted, and they had no legal rights. Today's immigrants are for the most part from these same groups of people, and today's judges represent for the most part, the same ethnic and class interests which earlier sought to exclude them. When these judges render court decisions which effectively disenfranchise these groups, it is not surprising that their objectivity is brought into question. When we add to this the fact that their decisions are not grounded in persuasive legal reasoning, and are inconsistent with mainstream jurisprudence, it is difficult to come to any other conclusion but that judicial bias has influenced the court's decisions.

⁴²²1. Grant and L. Smith "Gender Representation in the Canadian Judiciary" In Ontario Law Reform Commission *Appointing Judges: Philosophy, Politics and Practice*. (Ontario: Ontario Law Reform Commission, 1991) at 79.

Conclusion

If we accept that "the purpose of the equality guarantee is the promotion of human dignity", as Wilson J, stated in *McKinney v. University of Guelph*⁴²³, then the failure of the Canadian state to provide equality redress to immigrants can be seen as a denial of any concept of human dignity. The lack of equality protection for immigrants leaves the impression that discrimination is acceptable, and adds to the exclusion, degradation and devaluation that non-white immigrants have historically suffered. It stands as a symbol of the lack of respect which Canada affords immigrants, and ultimately of the respect that Canadians afford themselves.

It could well be, when all is said and done, that there are compelling reasons why visa officer decisions should not be reviewable under the *Charter*. If indeed Canadians feel that non-reviewability is essential for foreign policy reasons or some notion of a need for executive sovereignty, or for any other reason, then these concerns must be dealt with. The difficulty we face however, is that this discussion has been preempted by the preliminary rulings made on standing by the Federal Court. If there are justifications for the failure to grant equality protections to immigrants, then these are properly the subject of a Section 1 analysis under the *Charter*, where the state bears the burden of justifying the limitations on rights.⁴²⁴ Madame Justice Wilson in *Turpin* has warned against the infiltration of justifications into the analysis of equality right violations under Section 15. She said:

"The equality rights must be given their full content divorced from justificatory factors properly considered under s.1. Balancing legislative purposes against the effects of legislation within the rights sections themselves is fundamentally at odds with this Courts's approach to the interpretation of *Charter* rights."⁴²⁵

⁴²³ *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at 391

⁴²⁴ *R. v. Turpin*, [1989] 1 S.C.R.1296 at 1326.

⁴²⁵ *R. v. Turpin*, [1989] 1 S.C.R.1296 at 1328.

It is unlikely that the legislature or the bureaucracy will move to protect immigrant rights to equality without prompting from the courts. The legislature is responsible for the statutory exclusions which currently limit a human rights review of visa officer decisions, and the bureaucracy has exhibited a consistent lack of respect for the spirit of the *Charter* in the conduct of their litigation.

Errol Mendez is not alone when he argues that groups who are different from the dominant one in terms of culture, language, race, sex or socio-economic status will be excluded from attaining substantive equality under the *Charter*.⁴²⁶ The performance of the Federal Court on this issue to date and the very make up of the judiciary, their backgrounds and the interests which they serve adds credence to these fears. However, in the final analysis, the Supreme Court remains the last repository of hope for these immigrants, and it is only hoped that immigrants will be accorded the dignity and respect which they deserve.

⁴²⁶ Mendez, Errol page 93 see also H.J. Glasbeek & M. Mandel, "the Legalisation of Politics in Advanced Capitalism: The Canadian Charter of Rights and Freedoms" (1984), 2 *Socialist Studies* 84; J. Fudge, "The Use of Charter Litigation to Further Feminist Struggles" (1987) 25 *Osgoode Hall L.J.* 485. M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall & Thompson, 1989) and A.C. Hutchinson & A. Petter, "Private Rights/Public Wrongs: The Liberal Lie of the Charter" (1988) 38 *U.T.L.G. Rev.* 531.

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APPENDICES

CANADIAN BILL OF RIGHTS

8-9 Elizabeth II, c. 44 (Canada)
(R.S.C. 1970, Appendix III)

Amended 1970-71-72, c. 38, s. 29; proclaimed in force January 1, 1972
Amended 1985, c. 26, s. 105; proclaimed in force August 13, 1985

An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms

PREAMBLE.

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

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

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

Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

PART I

BILL OF RIGHTS

RECOGNITION AND DECLARATION OF RIGHTS AND FREEDOMS.

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

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

CONSTRUCTION OF LAW.

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

- (a) authorize or effect the arbitrary detention, imprisonment or exile of any person;
- (b) impose or authorize the imposition of cruel and unusual treatment or punishment;
- (c) deprive a person who has been arrested or detained
 - (i) of the right to be informed promptly of the reason for his arrest or detention,
 - (ii) of the right to retain and instruct counsel without delay, or
 - (iii) of the remedy by way of *habeas corpus* for the determination of the validity of his detention and for his release if the detention is not lawful;

- (d) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self incrimination or other constitutional safeguards;
- (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;
- (f) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause; or
- (g) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted.

DUTIES OF MINISTER OF JUSTICE.

3. (1) Subject to subsection (2), the Minister of Justice shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every regulation transmitted to the Clerk of the Privy Council for registration pursuant to the *Statutory Instruments Act* and every Bill introduced in or presented to the House of Commons by a Minister of the Crown, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this Part and he shall report any such inconsistency to the House of Commons at the first convenient opportunity.

(2) A regulation need not be examined in accordance with subsection (1) if prior to being made it was examined as a proposed regulation in accordance with section 3 of the *Statutory Instruments Act* to ensure that it was not inconsistent with the purposes and provisions of this Part. 1970-71-72, c. 38, s. 29; 1985, c. 26, s. 105.

SHORT TITLE.

4. The provisions of this Part shall be known as the *Canadian Bill of Rights*.

PART II

SAVINGS—"Law of Canada" defined—Jurisdiction of Parliament.

5. (1) Nothing in Part I shall be construed to abrogate or abridge any human right or fundamental freedom not enumerated therein that may have existed in Canada at the commencement of this Act.

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

(3) The provisions of Part I shall be construed as extending only to matters coming within the legislative authority of the Parliament of Canada.

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Being Part I of the Constitution Act, 1982

Enacted by the Canada Act 1982 (U.K.) c. 11; proclaimed in force April 17,
1982

Amended by the Constitution Amendment Proclamation, 1983, SI/84-102,
effective June 21, 1984

Whereas Canada is founded upon principles that recognize the
supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

RIGHTS AND FREEDOMS IN CANADA.

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights
and freedoms set out in it subject only to such reasonable limits pre-
scribed by law as can be demonstrably justified in a free and democratic
society.

Fundamental Freedoms

FUNDAMENTAL FREEDOMS.

2. Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including
freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.

Democratic Rights

DEMOCRATIC RIGHTS OF CITIZENS.

3. Every citizen of Canada has the right to vote in an election of mem-
bers of the House of Commons or of a legislative assembly and to be qual-
ified for membership therein.

MAXIMUM DURATION OF LEGISLATIVE BODIES—Continuation in special circumstances.

4. (1) No House of Commons and no legislative assembly shall continue
for longer than five years from the date fixed for the return of the writs at
a general election of its members.

(2) In time of real or apprehended war, invasion or insurrection, a
House of Commons may be continued by Parliament and a legislative
assembly may be continued by the legislature beyond five years if such
continuation is not opposed by the votes of more than one-third of the

Section 4—*Continued*

members of the House of Commons or the legislative assembly, as the case may be.

ANNUAL SITTING OF LEGISLATIVE BODIES.

5. There shall be a sitting of Parliament and of each legislature at least once every twelve months.

Mobility Rights

MOBILITY OF CITIZENS—Rights to move and gain livelihood —Limitation—Affirmative action programs.

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

- (a) to move to and take up residence in any province; and
- (b) to pursue the gaining of a livelihood in any province.

(3) The rights specified in subsection (2) are subject to

- (a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
- (b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

Legal Rights

LIFE, LIBERTY AND SECURITY OF PERSON.

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

SEARCH OR SEIZURE.

8. Everyone has the right to be secure against unreasonable search or seizure.

DETENTION OR IMPRISONMENT.

9. Everyone has the right not to be arbitrarily detained or imprisoned.

ARREST OR DETENTION.

10. Everyone has the right on arrest or detention

- (a) to be informed promptly of the reasons therefor;
- (b) to retain and instruct counsel without delay and to be informed of that right; and
- (c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

PROCEEDINGS IN CRIMINAL AND PENAL MATTERS

11. Any person charged with an offence has the right
- (a) to be informed without unreasonable delay of the specific offence;
 - (b) to be tried within a reasonable time;
 - (c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
 - (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
 - (e) not to be denied reasonable bail without just cause;
 - (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
 - (g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;
 - (h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and
 - (i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

TREATMENT OR PUNISHMENT.

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

SELF-CRIMINATION.

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

INTERPRETER.

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Equality Rights

EQUALITY BEFORE AND UNDER LAW AND EQUAL PROTECTION AND BENEFIT OF LAW—Affirmative action programs.

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race,

Section 15—Continued

national or ethnic origin, colour, religion, sex, age or mental or physical disability.

NOTE: By s. 32(2) of the Constitution Act, 1982, the above section came into force April 17, 1985.

Official Languages of Canada

OFFICIAL LANGUAGES OF CANADA—Official languages of New Brunswick—Advancement of status and use.

16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

PROCEEDINGS OF PARLIAMENT—Proceedings of New Brunswick legislature.

17. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.

(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.

PARLIAMENTARY STATUTES AND RECORDS—New Brunswick statutes and records.

18. (1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.

(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.

PROCEEDINGS IN COURTS ESTABLISHED BY PARLIAMENT—Proceedings in New Brunswick courts.

19. (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.

(2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.

COMMUNICATIONS BY PUBLIC WITH FEDERAL INSTITUTIONS—Communications by public with New Brunswick institutions.

20. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

(a) there is a significant demand for communications with and services from that office in such language; or

(b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

CONTINUATION OF EXISTING CONSTITUTIONAL PROVISIONS.

21. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.

RIGHTS AND PRIVILEGES PRESERVED.

22. Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

Minority Language Educational Rights

LANGUAGE OF INSTRUCTION—Continuity of language instruction—
Application where numbers warrant.

23. (1) Citizens of Canada

- (a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or
- (b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province.

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

(3) The right of citizens of Canada under subsection (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

- (a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and
- (b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

Enforcement

ENFORCEMENT OF GUARANTEED RIGHTS AND FREEDOMS—Exclusion of evidence bringing administration of justice into disrepute.

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

General

ABORIGINAL RIGHTS AND FREEDOMS NOT AFFECTED BY CHARTER.

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

- (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
- (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired. SI/84-102, Sch.

OTHER RIGHTS AND FREEDOMS NOT AFFECTED BY CHARTER.

26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

MULTICULTURAL HERITAGE.

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

RIGHTS GUARANTEED EQUALLY TO BOTH SEXES.

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

RIGHTS RESPECTING CERTAIN SCHOOLS PRESERVED.

29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

APPLICATION TO TERRITORIES AND TERRITORIAL AUTHORITIES.

30. A reference in this Charter to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.

LEGISLATIVE POWERS NOT EXTENDED.

31. Nothing in this Charter extends the legislative powers of any body or authority.

Application of Charter

APPLICATION OF CHARTER—Exception.

32. (1) This Charter applies

- (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
- (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

EXCEPTION WHERE EXPRESS DECLARATION—Operation of exception—Five year limitation—Re-enactment—Five year limitation.

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

Citation

CITATION.

34. This Part may be cited as the *Canadian Charter of Rights and Freedoms*.

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PART VII

General

PRIMACY OF CONSTITUTION OF CANADA—Constitution of Canada—Amendments to Constitution of Canada.

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Section 52—Continued

(2) The Constitution of Canada includes

- (a) the *Canada Act 1982*, including this Act;
- (b) the Acts and orders referred to in the schedule; and
- (c) any amendment to any Act or order referred to in paragraph (a) or (b).

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

CANADIAN HUMAN RIGHTS ACT



CHAPTER H-6

CHAPITRE H-6

An Act to extend the laws in Canada that
proscribe discrimination

Loi visant à compléter la législation canadienne
en matière de discrimination

SHORT TITLE

TITRE ABRÉGÉ

Short title

1. This Act may be cited as the *Canadian Human Rights Act*. 1976-77, c. 33, s. 1.

1. *Loi canadienne sur les droits de la per-* Titre abrégé
sonne. 1976-77, ch. 33, art. 1.

PURPOSE OF ACT

OBJET

Purpose

2. The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability or conviction for an offence for which a pardon has been granted. 1976-77, c. 33, s. 2; 1980-81-82-83, c. 143, ss. 1, 28.

2. La présente loi a pour objet de compléter la législation canadienne en donnant effet, dans le champ de compétence du Parlement du Canada, au principe suivant : le droit de tous les individus, dans la mesure compatible avec leurs devoirs et obligations au sein de la société, à l'égalité des chances d'épanouissement, indépendamment des considérations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'état matrimonial, la situation de famille, l'état de personne graciée ou la déficience. 1976-77, ch. 33, art. 2; 1980-81-82-83, ch. 143, art. 1 et 28.

Objet

PART I

PARTIE I

PROSCRIBED DISCRIMINATION

MOTIFS DE DISTINCTION ILLICITE

General

Dispositions générales

Proscribed grounds of discrimination

3. (1) For all purposes of this Act, race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability and conviction for which a pardon has been granted are prohibited grounds of discrimination.

3. (1) Pour l'application de la présente loi, les motifs de distinction illicite sont ceux qui sont fondés sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'état matrimonial, la situation de famille, l'état de personne graciée ou la déficience.

Motifs de distinction illicite

Idem

(2) Where the ground of discrimination is pregnancy or child-birth, the discrimination

(2) Une distinction fondée sur la grossesse ou l'accouchement est réputée être fondée sur le

Idem

shall be deemed to be on the ground of sex. 1976-77, c. 33, s. 3; 1980-81-82-83, c. 143, s. 2.

sexe. 1976-77, ch. 33, art. 3; 1980-81-82-83, ch. 143, art. 2.

Orders in respect of discriminatory practices

4. A discriminatory practice, as described in sections 5 to 14, may be the subject of a complaint under Part III and anyone found to be engaging or to have engaged in a discriminatory practice may be made subject to an order as provided in sections 53 and 54. 1976-77, c. 33, s. 4; 1980-81-82-83, c. 143, s. 2.

4. Les actes discriminatoires prévus aux articles 5 à 14 peuvent faire l'objet d'une plainte en vertu de la partie III et toute personne reconnue coupable de ces actes peut faire l'objet des ordonnances prévues aux articles 53 et 54. 1976-77, ch. 33, art. 4; 1980-81-82-83, ch. 143, art. 2.

Ordonnances relatives aux actes discriminatoires

Discriminatory Practices

Denial of good, service, facility or accommodation

5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public

(a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or

(b) to differentiate adversely in relation to any individual,

on a prohibited ground of discrimination. 1976-77, c. 33, s. 5.

Actes discriminatoires

5. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public :

a) d'en priver un individu;

b) de le défavoriser à l'occasion de leur fourniture. 1976-77, ch. 33, art. 5.

Refus de biens, de services, d'installations ou d'hébergement

Denial of commercial premises or residential accommodation

6. It is a discriminatory practice in the provision of commercial premises or residential accommodation

(a) to deny occupancy of such premises or accommodation to any individual, or

(b) to differentiate adversely in relation to any individual,

on a prohibited ground of discrimination. 1976-77, c. 33, s. 6.

6. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de locaux commerciaux ou de logements :

a) de priver un individu de leur occupation;

b) de le défavoriser à l'occasion de leur fourniture. 1976-77, ch. 33, art. 6.

Refus de locaux commerciaux ou de logements

Employment

7. It is a discriminatory practice, directly or indirectly,

(a) to refuse to employ or continue to employ any individual, or

(b) in the course of employment, to differentiate adversely in relation to an employee,

on a prohibited ground of discrimination. 1976-77, c. 33, s. 7.

7. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects :

a) de refuser d'employer ou de continuer d'employer un individu;

b) de le défavoriser en cours d'emploi. 1976-77, ch. 33, art. 7; 1980-81-82-83, ch. 143, art. 3.

Emploi

Employment applications, advertisements

8. It is a discriminatory practice

(a) to use or circulate any form of application for employment, or

(b) in connection with employment or prospective employment, to publish any advertisement or to make any written or oral inquiry

that expresses or implies any limitation, specification or preference based on a prohibited ground of discrimination. 1976-77, c. 33, s. 8.

8. Constitue un acte discriminatoire, quand y sont exprimées ou suggérées des restrictions, conditions ou préférences fondées sur un motif de distinction illicite :

a) l'utilisation ou la diffusion d'un formulaire de demande d'emploi;

b) la publication d'une annonce ou la tenue d'une enquête, oralement ou par écrit, au sujet d'un emploi présent ou éventuel. 1976-77, ch. 33, art. 8.

Demandes d'emploi, publicité

Employee organizations	9. (1) It is a discriminatory practice for an employee organization on a prohibited ground of discrimination (a) to exclude an individual from full membership in the organization; (b) to expel or suspend a member of the organization; or (c) to limit, segregate, classify or otherwise act in relation to an individual in a way that would deprive the individual of employment opportunities, or limit employment opportunities or otherwise adversely affect the status of the individual, where the individual is a member of the organization or where any of the obligations of the organization pursuant to a collective agreement relate to the individual.	9. (1) Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour une organisation syndicale : a) d'empêcher l'adhésion pleine et entière d'un individu; b) d'expulser ou de suspendre un adhérent; c) d'établir, à l'endroit d'un adhérent ou d'un individu à l'égard de qui elle a des obligations aux termes d'une convention collective, que celui-ci fasse ou non partie de l'organisation, des restrictions, des différences ou des catégories ou de prendre toutes autres mesures susceptibles soit de le priver de ses chances d'emploi ou d'avancement, soit de limiter ses chances d'emploi ou d'avancement, ou, d'une façon générale, de nuire à sa situation.	Organisations syndicales
Exception	(2) Notwithstanding subsection (1), it is not a discriminatory practice for an employee organization to exclude, expel or suspend an individual from membership in the organization because that individual has reached the normal age of retirement for individuals working in positions similar to the position of that individual.	(2) Ne constitue pas un acte discriminatoire au sens du paragraphe (1) le fait pour une organisation syndicale d'empêcher une adhésion ou d'expulser ou de suspendre un adhérent en appliquant la règle de l'âge normal de la retraite en vigueur pour le genre de poste occupé par l'individu concerné.	Exception
Definition of "employee organization"	(3) For the purposes of this section and sections 10 and 60, "employee organization" includes a trade union or other organization of employees or local thereof, the purposes of which include the negotiation, on behalf of employees, of the terms and conditions of employment with employers. 1976-77, c. 33, s. 9; 1980-81-82-83, c. 143, s. 4.	(3) Pour l'application du présent article et des articles 10 et 60, «organisation syndicale» s'entend des syndicats ou autres groupements d'employés, y compris leurs sections locales, chargés notamment de négocier avec l'employeur les conditions de travail de leurs adhérents. 1976-77, ch. 33, art. 9; 1980-81-82-83, ch. 143, art. 4.	Définition de «organisation syndicale»
Discriminatory policy or practice	10. It is a discriminatory practice for an employer, employee organization or organization of employers (a) to establish or pursue a policy or practice, or (b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination. 1976-77, c. 33, s. 10; 1980-81-82-83, c. 143, s. 5.	10. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite et s'il est susceptible d'annihiler les chances d'emploi ou d'avancement d'un individu ou d'une catégorie d'individus, le fait, pour l'employeur, l'association patronale ou l'organisation syndicale : a) de fixer ou d'appliquer des lignes de conduite; b) de conclure des ententes touchant le recrutement, les mises en rapport, l'engagement, les promotions, la formation, l'apprentissage, les mutations ou tout autre aspect d'un emploi présent ou éventuel. 1976-77, ch. 33, art. 10; 1980-81-82-83, ch. 143, art. 5.	Lignes de conduite discriminatoires
Equal wages	11. (1) It is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees	11. (1) Constitue un acte discriminatoire le fait pour l'employeur d'instaurer ou de pratiquer la disparité salariale entre les hommes et	Disparité salariale discriminatoire

employed in the same establishment who are performing work of equal value.

Assessment of value of work

(2) In assessing the value of work performed by employees employed in the same establishment, the criterion to be applied is the composite of the skill, effort and responsibility required in the performance of the work and the conditions under which the work is performed.

les femmes qui exécutent, dans le même établissement, des fonctions équivalentes.

(2) Le critère permettant d'établir l'équivalence des fonctions exécutées par des salariés dans le même établissement est le dosage de qualifications, d'efforts et de responsabilités nécessaire pour leur exécution, compte tenu des conditions de travail.

Critère

Separate establishments

(3) Separate establishments established or maintained by an employer solely or principally for the purpose of establishing or maintaining differences in wages between male and female employees shall be deemed for the purposes of this section to be the same establishment.

(3) Les établissements distincts qu'un employeur aménage ou maintient dans le but principal de justifier une disparité salariale entre hommes et femmes sont réputés, pour l'application du présent article, ne constituer qu'un seul et même établissement.

Établissements distincts

Different wages based on prescribed reasonable factors

(4) Notwithstanding subsection (1), it is not a discriminatory practice to pay to male and female employees different wages if the difference is based on a factor prescribed by guidelines, issued by the Canadian Human Rights Commission pursuant to subsection 27(2), to be a reasonable factor that justifies the difference.

(4) Ne constitue pas un acte discriminatoire au sens du paragraphe (1) la disparité salariale entre hommes et femmes fondée sur un facteur reconnu comme raisonnable par une ordonnance de la Commission canadienne des droits de la personne en vertu du paragraphe 27(2).

Disparité salariale non discriminatoire

Idem

(5) For greater certainty, sex does not constitute a reasonable factor justifying a difference in wages.

(5) Des considérations fondées sur le sexe ne sauraient motiver la disparité salariale.

Idem

No reduction of wages

(6) An employer shall not reduce wages in order to eliminate a discriminatory practice described in this section.

(6) Il est interdit à l'employeur de procéder à des diminutions salariales pour mettre fin aux actes discriminatoires visés au présent article.

Diminutions de salaire interdites

Definition of "wages"

(7) For the purposes of this section, "wages" means any form of remuneration payable for work performed by an individual and includes

(7) Pour l'application du présent article, «salaire» s'entend de toute forme de rémunération payable à un individu en contrepartie de son travail et, notamment :

Définition de «salaire»

(a) salaries, commissions, vacation pay, dismissal wages and bonuses;

(b) reasonable value for board, rent, housing and lodging;

(c) payments in kind;

(d) employer contributions to pension funds or plans, long-term disability plans and all forms of health insurance plans; and

(e) any other advantage received directly or indirectly from the individual's employer.

1976-77, c. 33, s. 11.

a) des traitements, commissions, indemnités de vacances ou de licenciement et des primes;

b) de la juste valeur des prestations en repas, loyers, logement et hébergement;

c) des rétributions en nature;

d) des cotisations de l'employeur aux caisses ou régimes de pension, aux régimes d'assurance contre l'invalidité prolongée et aux régimes d'assurance-maladie de toute nature;

e) des autres avantages reçus directement ou indirectement de l'employeur. 1976-77, ch. 33, art. 11.

Publication of discriminatory notices, etc.

12. It is a discriminatory practice to publish or display before the public or to cause to be published or displayed before the public any notice, sign, symbol, emblem or other representation that

12. Constitue un acte discriminatoire le fait de publier ou d'exposer en public, ou de faire publier ou exposer en public des affiches, des écriteaux, des insignes, des emblèmes, des symboles ou autres représentations qui, selon le cas :

Divulguation de faits discriminatoires, etc.

(a) expresses or implies discrimination or an intention to discriminate, or

(b) incites or is calculated to incite others to discriminate

if the discrimination expressed or implied, intended to be expressed or implied or incited or calculated to be incited would otherwise, if engaged in, be a discriminatory practice described in any of sections 5 to 11 or in section 14. 1976-77, c. 33, s. 12; 1980-81-82-83, c. 143, s. 6.

a) expriment ou suggèrent des actes discriminatoires au sens des articles 5 à 11 ou de l'article 14 ou des intentions de commettre de tels actes;

b) en encourageant ou visent à en encourager l'accomplissement. 1976-77, ch. 33, art. 12; 1980-81-82-83, ch. 143, art. 6.

Hate messages

13. (1) It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

13. (1) Constitue un acte discriminatoire le fait, pour une personne ou un groupe de personnes agissant d'un commun accord, d'utiliser ou de faire utiliser un téléphone de façon répétée en recourant ou en faisant recourir aux services d'une entreprise de télécommunication relevant de la compétence du Parlement pour aborder ou faire aborder des questions susceptibles d'exposer à la haine ou au mépris des personnes appartenant à un groupe identifiable sur la base des critères énoncés à l'article 3.

Propagande haineuse

Exception

(2) Subsection (1) does not apply in respect of any matter that is communicated in whole or in part by means of the facilities of a broadcasting undertaking.

(2) Le paragraphe (1) ne s'applique pas dans les cas où les services d'une entreprise de radio-diffusion sont utilisés.

Exception

Interpretation

(3) For the purposes of this section, no owner or operator of a telecommunication undertaking communicates or causes to be communicated any matter described in subsection (1) by reason only that the facilities of a telecommunication undertaking owned or operated by that person are used by other persons for the transmission of that matter. 1976-77, c. 33, s. 13.

(3) Pour l'application du présent article, le propriétaire ou exploitant d'une entreprise de télécommunication ne commet pas un acte discriminatoire du seul fait que des tiers ont utilisé ses installations pour aborder des questions visées au paragraphe (1). 1976-77, ch. 33, art. 13.

Interprétation

Harassment

14. (1) It is a discriminatory practice,

(a) in the provision of goods, services, facilities or accommodation customarily available to the general public,

(b) in the provision of commercial premises or residential accommodation, or

(c) in matters related to employment,

to harass an individual on a prohibited ground of discrimination.

14. (1) Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait de harceler un individu :

a) lors de la fourniture de biens, de services, d'installations ou de moyens d'hébergement destinés au public;

b) lors de la fourniture de locaux commerciaux ou de logements;

c) en matière d'emploi.

Harcèlement

Sexual harassment

(2) Without limiting the generality of subsection (1), sexual harassment shall, for the purposes of that subsection, be deemed to be harassment on a prohibited ground of discrimination. 1980-81-82-83, c. 143, s. 7.

(2) Pour l'application du paragraphe (1) et sans qu'en soit limitée la portée générale, le harcèlement sexuel est réputé être un harcèlement fondé sur un motif de distinction illicite. 1980-81-82-83, ch. 143, art. 7.

Harcèlement sexuel

Exceptions

15. It is not a discriminatory practice if

15. Ne constituent pas des actes discriminatoires :

Exceptions

(a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirement;

(b) employment of an individual is refused or terminated because that individual has not reached the minimum age, or has reached the maximum age, that applies to that employment by law or under regulations, which may be made by the Governor in Council for the purposes of this paragraph;

(c) an individual's employment is terminated because that individual has reached the normal age of retirement for employees working in positions similar to the position of that individual;

(d) the terms and conditions of any pension fund or plan established by an employer provide for the compulsory vesting or locking-in of pension contributions at a fixed or determinable age in accordance with section 10 of the *Pension Benefits Standards Act*;

(e) an individual is discriminated against on a prohibited ground of discrimination in a manner that is prescribed by guidelines, issued by the Canadian Human Rights Commission pursuant to subsection 27(2), to be reasonable;

(f) an employer grants a female employee special leave or benefits in connection with pregnancy or child-birth or grants employees special leave or benefits to assist them in the care of their children; or

(g) in the circumstances described in section 5 or 6, an individual is denied any goods, services, facilities or accommodation or access thereto or occupancy of any commercial premises or residential accommodation or is a victim of any adverse differentiation and there is *bona fide* justification for that denial or differentiation. 1976-77, c. 33, s. 14; 1980-81-82-83, c. 143, s. 7.

a) les refus, exclusions, expulsions, suspensions, restrictions, conditions ou préférences de l'employeur qui démontre qu'ils découlent d'exigences professionnelles justifiées;

b) le fait de refuser ou de cesser d'employer un individu qui n'a pas atteint l'âge minimal ou qui a atteint l'âge maximal prévu, dans l'un ou l'autre cas, pour l'emploi en question par la loi ou les règlements que peut prendre le gouverneur en conseil pour l'application du présent alinéa;

c) le fait de mettre fin à l'emploi d'une personne en appliquant la règle de l'âge de la retraite en vigueur pour ce genre d'emploi;

d) le fait que les conditions et modalités d'une caisse ou d'un régime de retraite constitués par l'employeur prévoient la dévolution ou le blocage obligatoires des cotisations à des âges déterminés ou déterminables conformément à l'article 10 de la *Loi sur les normes des prestations de pension*;

e) le fait qu'un individu soit l'objet d'une distinction fondée sur un motif illicite, si celle-ci est reconnue comme raisonnable par une ordonnance de la Commission canadienne des droits de la personne rendue en vertu du paragraphe 27(2);

f) le fait pour un employeur d'accorder à une employée un congé ou des avantages spéciaux liés à sa grossesse ou à son accouchement, ou d'accorder à ses employés un congé ou des avantages spéciaux leur permettant de prendre soin de leurs enfants;

g) le fait qu'un fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public, ou de locaux commerciaux ou de logements en prive un individu ou le défavorise lors de leur fourniture pour un motif de distinction illicite, s'il a un motif justifiable de le faire. 1976-77, ch. 33, art. 14; 1980-81-82-83, ch. 143, art. 7.

Special
programs

16. (1) It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be or are based on or related to the race, national or ethnic origin, colour, religion, age, sex, marital status, family

16. (1) Ne constitue pas un acte discriminatoire le fait d'adopter ou de mettre en œuvre des programmes, des plans ou des arrangements spéciaux destinés à supprimer, diminuer ou prévenir les désavantages que subit ou peut vraisemblablement subir un groupe d'individus pour des motifs fondés, directement ou indirectement, sur leur race, leur origine nationale ou ethnique, leur couleur, leur religion, leur âge,

Programmes de
promotion
sociale

status or disability of members of that group, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group.

leur sexe, leur état matrimonial, leur situation de famille ou leur déficience en améliorant leurs chances d'emploi ou d'avancement ou en leur facilitant l'accès à des biens, à des services, à des installations ou à des moyens d'hébergement.

Advice and assistance

(2) The Canadian Human Rights Commission may

(a) make general recommendations concerning desirable objectives for special programs, plans or arrangements referred to in subsection (1); and

(b) on application, give such advice and assistance with respect to the adoption or carrying out of a special program, plan or arrangement referred to in subsection (1) as will serve to aid in the achievement of the objectives the program, plan or arrangement was designed to achieve. 1976-77, c. 33, s. 15; 1980-81-82-83, c. 143, s. 8.

(2) La Commission canadienne des droits de la personne peut :

a) faire des recommandations d'ordre général, relatives aux objectifs souhaitables pour les programmes, biens ou arrangements visés au paragraphe (1);

b) sur demande, prêter son concours à l'adoption ou à la mise en œuvre des programmes, plans ou arrangements visés au paragraphe (1). 1976-77, ch. 33, art. 15; 1980-81-82-83, ch. 143, art. 8.

Concours

Plans to meet the needs of disabled persons

17. (1) A person who proposes to implement a plan for adapting any services, facilities, premises, equipment or operations to meet the needs of persons arising from a disability may apply to the Canadian Human Rights Commission for approval of the plan.

17. (1) La personne qui entend mettre en œuvre un programme prévoyant l'adaptation de services, d'installations, de locaux, d'activités ou de matériel aux besoins particuliers des personnes atteintes d'une déficience peut en demander l'approbation à la Commission canadienne des droits de la personne.

Programme d'adaptation

Approval of plan

(2) The Commission may, by written notice to a person making an application pursuant to subsection (1), approve the plan if the Commission is satisfied that the plan is appropriate for meeting the needs of persons arising from a disability.

(2) La Commission peut, par avis écrit à l'auteur de la demande visée au paragraphe (1), approuver le programme si elle estime que celui-ci convient aux besoins particuliers des personnes atteintes d'une déficience.

Approbation du programme

Effect of approval of accommodation plan

(3) Where any services, facilities, premises, equipment or operations are adapted in accordance with a plan approved under subsection (2), matters for which the plan provides do not constitute any basis for a complaint under Part III regarding discrimination based on any disability in respect of which the plan was approved.

(3) Dans le cas où des services, des installations, des locaux, des activités ou du matériel ont été adaptés conformément à un programme approuvé en vertu du paragraphe (2), les questions auxquelles celui-ci pourvoit ne peuvent servir de fondement à une plainte déposée en vertu de la partie III portant sur une déficience visée par le programme.

Conséquence de l'approbation

Notice when application not granted

(4) When the Commission decides not to grant an application made pursuant to subsection (1), it shall send a written notice of its decision to the applicant setting out the reasons for its decision. 1980-81-82-83, c. 143, s. 9.

(4) Dans le cas où elle décide de refuser la demande présentée en vertu du paragraphe (1), la Commission envoie à son auteur un avis exposant les motifs du refus. 1980-81-82-83, ch. 143, art. 9.

Avis de refus

Rescinding approval of plan

18. (1) If the Canadian Human Rights Commission is satisfied that, by reason of any change in circumstances, a plan approved under subsection 17(2) has ceased to be appropriate for meeting the needs of persons arising

18. (1) La Commission canadienne des droits de la personne peut, par avis écrit à la personne qui entend adapter les services, les installations, les locaux, les activités ou le matériel conformément à un programme approuvé

Annulation de l'approbation

from a disability, the Commission may, by written notice to the person who proposes to carry out or maintains the adaptation contemplated by the plan or any part thereof, rescind its approval of the plan to the extent required by the change in circumstances.

en vertu du paragraphe 17(2), en annuler l'approbation, en tout ou en partie, si elle estime que, vu les circonstances nouvelles, celui-ci ne convient plus aux besoins particuliers des personnes atteintes d'une déficience.

Effect where approval rescinded

(2) To the extent to which approval of a plan is rescinded under subsection (1), subsection 17(3) does not apply to the plan if the discriminatory practice to which the complaint relates is subsequent to the rescission of the approval.

(2) Le paragraphe 17(3) ne s'applique pas à un programme, dans la mesure où celui-ci est annulé en vertu du paragraphe (1), si l'acte discriminatoire dénoncé par la plainte est postérieur à l'annulation.

Conséquence de l'annulation

Statement of reasons for rescinding approval

(3) Where the Commission rescinds approval of a plan pursuant to subsection (1), it shall include in the notice referred to therein a statement of its reasons therefor. 1980-81-82-83, c. 143, s. 9.

(3) Dans le cas où elle annule l'approbation d'un programme en vertu du paragraphe (1), la Commission indique dans l'avis y mentionné les motifs de l'annulation. 1980-81-82-83, ch. 143, art. 9.

Motifs de l'annulation

Opportunity to make representations

19. (1) Before making its decision on an application or rescinding approval of a plan pursuant to section 17 or 18, the Canadian Human Rights Commission shall afford each person directly concerned with the matter an opportunity to make representations with respect thereto.

19. (1) Avant de rendre une décision en vertu des paragraphes 17(2) ou 18(1), la Commission canadienne des droits de la personne donne aux intéressés la possibilité de présenter des observations à son sujet.

Possibilité de présenter des observations

Restriction on deeming plan inappropriate

(2) For the purposes of sections 17 and 18, a plan shall not, by reason only that it does not conform to any standards prescribed pursuant to section 24, be deemed to be inappropriate for meeting the needs of persons arising from disability. 1980-81-82-83, c. 143, s. 9.

(2) Pour l'application des articles 17 et 18, un programme n'est pas inadapté aux besoins particuliers des personnes atteintes d'une déficience du seul fait qu'il est incompatible avec les normes établies en vertu de l'article 24. 1980-81-82-83, ch. 143, art. 9.

Réserve

Certain provisions not discriminatory

20. A provision of a pension or insurance fund or plan that preserves rights acquired prior to March 1, 1978 or that preserves pension or other benefits accrued prior to that time does not constitute the basis for a complaint under Part III that an employer is engaging or has engaged in a discriminatory practice. 1976-77, c. 33, s. 16.

20. Les dispositions des caisses ou régimes de pension et des régimes ou fonds d'assurance protégeant les droits acquis avant le 1^{er} mars 1978 ou maintenant le droit aux prestations de pension ou autres accumulées avant cette date ne peuvent servir de fondement à une plainte déposée au titre de la partie III pour actes discriminatoires commis par l'employeur. 1976-77, ch. 33, art. 16.

Dispositions non discriminatoires

Funds and plans

21. The establishment of separate pension funds or plans for different groups of employees does not constitute the basis for a complaint under Part III that an employer is engaging or has engaged in a discriminatory practice if the employees are not grouped in those funds or plans according to a prohibited ground of discrimination. 1976-77, c. 33, s. 17.

21. La constitution de caisses ou de régimes de pension distincts pour différents groupes d'employés ne peut servir de fondement à une plainte déposée au titre de la partie III pour actes discriminatoires commis par l'employeur, lorsque ces groupes ne sont pas établis par suite de distinctions illicites. 1976-77, ch. 33, art. 17.

Caisses ou régimes

Regulations

22. The Governor in Council may, by regulation, prescribe the provisions of any pension or insurance fund or plan, in addition to those provisions described in sections 20 and 21, that

22. Outre les cas prévus aux articles 20 et 21, le gouverneur en conseil peut, par règlement, déterminer quelles dispositions des caisses ou régimes de pension et des régimes ou

Règlements

do not constitute the basis for a complaint under Part III that an employer is engaging or has engaged in a discriminatory practice. 1976-77, c. 33, s. 18.

fonds d'assurance ne peuvent servir de fondement à une plainte déposée au titre de la partie III pour actes discriminatoires commis par l'employeur. 1976-77, ch. 33, art. 18.

Regulations

23. The Governor in Council may make regulations respecting the terms and conditions to be included in or applicable to any contract, licence or grant made or granted by Her Majesty in right of Canada providing for

23. Le gouverneur en conseil peut, par règlement, assortir les contrats, permis, licences ou subventions accordés par Sa Majesté du chef du Canada, de conditions et modalités prévoyant :

Règlements

(a) the prohibition of discriminatory practices described in sections 5 to 14; and

a) l'interdiction des actes discriminatoires visés aux articles 5 à 14;

(b) the resolution, by the procedure set out in Part III, of complaints of discriminatory practices contrary to such terms and conditions. 1976-77, c. 33, s. 19; 1980-81-82-83, c. 143, s. 10.

b) le règlement, conformément à la procédure de la partie III, des plaintes relatives aux actes discriminatoires ainsi interdits. 1976-77, ch. 33, art. 19; 1980-81-82-83, ch. 143, art. 10.

Accessibility standards

24. (1) The Governor in Council may, for the benefit of persons having any disability, make regulations prescribing standards of accessibility to services, facilities or premises.

24. (1) Le gouverneur en conseil peut, par règlement, établir au profit des personnes atteintes d'une déficience des normes d'accès aux services, aux installations ou aux locaux.

Établissement de normes d'accès

Effect of meeting accessibility standards

(2) Where standards prescribed pursuant to subsection (1) are met in providing access to any services, facilities or premises, a matter of access thereto does not constitute any basis for a complaint under Part III regarding discrimination based on any disability in respect of which the standards are prescribed.

(2) Dans le cas où l'accès aux services, aux installations ou aux locaux est assuré conformément aux normes établies en vertu du paragraphe (1), l'accès à ceux-ci ne peut servir de fondement à une plainte déposée en vertu de la partie III portant sur une déficience visée par les normes.

Conséquence du respect des normes

Publication of proposed regulations

(3) Subject to subsection (4), a copy of each regulation that the Governor in Council proposes to make pursuant to this section shall be published in the *Canada Gazette* and a reasonable opportunity shall be afforded to interested persons to make representations with respect thereto.

(3) Sous réserve du paragraphe (4), les projets de règlements d'application du présent article sont publiés dans la *Gazette du Canada*, les intéressés se voyant accorder la possibilité de présenter leurs observations à cet égard.

Publication des projets de règlements

Exception

(4) Subsection (3) does not apply in respect of a proposed regulation that has been published pursuant to that subsection, whether or not it has been amended as a result of representations made pursuant to that subsection.

(4) Ne sont pas visés les projets de règlement déjà publiés dans les conditions prévues au paragraphe (3), qu'ils aient été modifiés ou non à la suite d'observations présentées conformément à ce paragraphe.

Exception

Discriminatory practice not constituted by variance from standards

(5) Nothing shall, by virtue only of its being at variance with any standards prescribed pursuant to subsection (1), be deemed to constitute a discriminatory practice. 1980-81-82-83, c. 143, s. 11.

(5) L'incompatibilité avec les normes établies en vertu du paragraphe (1) ne peut être assimilée à un acte discriminatoire. 1980-81-82-83, ch. 143, art. 11.

Incompatibilité

Definitions

"conviction for which a pardon has been granted"
"état..."

25. In this Act, "conviction for which a pardon has been granted" means a conviction of an individual for an offence in respect of which a pardon has been granted by any authority under law

25. Les définitions qui suivent s'appliquent à la présente loi.

Définitions

"déficience" Déficience physique ou mentale, qu'elle soit présente ou passée, y compris le défigurement ainsi que la dépendance, présente ou passée, envers l'alcool ou la drogue.

"déficience"
"disability"

"disability"
"déficience"

and, if granted under the *Criminal Records Act*, not revoked;

"disability" means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug. 1976-77, c. 33, s. 20; 1980-81-82-83, c. 143, s. 12.

«état de personne graciée» État d'une personne physique qui a légalement obtenu une réhabilitation qui, si elle a été accordée en vertu de la *Loi sur le casier judiciaire*, n'a pas été révoquée. 1976-77, ch. 33, art. 20; 1980-81-82-83, ch. 143, art. 12.

«état de
personne
graciée»
"conviction..."

PART II

CANADIAN HUMAN RIGHTS COMMISSION

Commission
established

26. (1) A commission is hereby established to be known as the Canadian Human Rights Commission, in this Part and Part III referred to as the "Commission", consisting of a Chief Commissioner, a Deputy Chief Commissioner and not less than three or more than six other members, to be appointed by the Governor in Council.

Members

(2) The Chief Commissioner and Deputy Chief Commissioner are full-time members of the Commission and the other members may be appointed as full-time or part-time members of the Commission.

Term of
appointment

(3) Each full-time member of the Commission may be appointed for a term not exceeding seven years and each part-time member may be appointed for a term not exceeding three years.

Tenure

(4) Each member of the Commission holds office during good behaviour but may be removed by the Governor in Council on address of the Senate and House of Commons.

Re-appoint-
ment

(5) A member of the Commission is eligible to be re-appointed in the same or another capacity. 1976-77, c. 33, s. 21.

Powers, Duties and Functions

Powers, duties
and functions

27. (1) In addition to its duties under Part III with respect to complaints regarding discriminatory practices, the Commission is generally responsible for the administration of this Part and Parts I and III and

(a) shall develop and conduct information programs to foster public understanding of this Act and of the role and activities of the Commission thereunder and to foster public recognition of the principle described in section 2;

PARTIE II

COMMISSION CANADIENNE DES DROITS DE LA PERSONNE

Constitution de
la Commission

26. (1) Est constituée la Commission canadienne des droits de la personne, appelée, dans la présente loi, la «Commission», composée de cinq à huit membres, ou commissaires, dont le président et le vice-président, nommés par le gouverneur en conseil.

Commissaires

(2) Le président et le vice-président sont nommés à temps plein et les autres commissaires, à temps plein ou à temps partiel.

Durée du
mandat

(3) La durée maximale du mandat des commissaires à temps plein est de sept ans et celle du mandat des commissaires à temps partiel, de trois ans.

Occupation du
poste

(4) Les commissaires occupent leur poste à titre inamovible, sous réserve de révocation par le gouverneur en conseil sur adresse du Sénat et de la Chambre des communes.

Nouveau
mandat

(5) Les commissaires peuvent recevoir un nouveau mandat, aux fonctions identiques ou non. 1976-77, ch. 33, art. 21.

Pouvoirs et fonctions

Pouvoirs et
fonctions

27. (1) Outre les fonctions prévues par la partie III au titre des plaintes fondées sur des actes discriminatoires et l'application générale de la présente partie et des parties I et III, la Commission :

- a) élabore et exécute des programmes de sensibilisation publique touchant le principe énoncé à l'article 2, la présente loi et le rôle et les activités que celle-ci lui confère;
- b) entreprend ou patronne des programmes de recherche dans les domaines qui ressortis-

(b) shall undertake or sponsor research programs relating to its duties and functions under this Act and respecting the principle described in section 2;

(c) shall maintain close liaison with similar bodies or authorities in the provinces in order to foster common policies and practices and to avoid conflicts respecting the handling of complaints in cases of overlapping jurisdiction;

(d) shall perform duties and functions to be performed by it pursuant to any agreement entered into under subsection 28(2);

(e) may consider such recommendations, suggestions and requests concerning human rights and freedoms as it receives from any source and, where deemed by the Commission to be appropriate, include in a report referred to in section 61 reference to and comment on any such recommendation, suggestion or request;

(f) shall carry out or cause to be carried out such studies concerning human rights and freedoms as may be referred to it by the Minister of Justice and include in a report referred to in section 61 a report setting out the results of each such study together with such recommendations in relation thereto as it considers appropriate;

(g) may review any regulations, rules, orders, by-laws and other instruments made pursuant to an Act of Parliament and, where deemed by the Commission to be appropriate, include in a report referred to in section 61 reference to and comment on any provision thereof that in its opinion is inconsistent with the principle described in section 2; and

(h) shall, so far as is practical and consistent with the application of Part III, endeavour by persuasion, publicity or any other means that it considers appropriate to discourage and reduce discriminatory practices referred to in sections 5 to 14.

sent à ses objets aux termes de la présente loi ou au principe énoncé à l'article 2;

c) se tient en liaison étroite avec les organismes ou les autorités provinciales de même nature pour favoriser l'adoption de lignes de conduite communes et éviter les conflits dans l'instruction des plaintes en cas de chevauchement de compétence;

d) exécute les fonctions que lui attribuent les accords conclus conformément au paragraphe 28(2);

e) peut étudier les recommandations, propositions et requêtes qu'elle reçoit en matière de droits et libertés de la personne, ainsi que les mentionner et les commenter dans le rapport visé à l'article 61 dans les cas où elle le juge opportun;

f) fait ou fait faire les études sur les droits et libertés de la personne que lui demande le ministre de la Justice et inclut, dans chaque cas, ses conclusions et recommandations dans le rapport visé à l'article 61;

g) peut examiner les règlements, règles, décrets, arrêtés et autres textes établis en vertu d'une loi fédérale, ainsi que les mentionner et les commenter dans le rapport visé à l'article 61 dans les cas où elle les juge incompatibles avec le principe énoncé à l'article 2;

h) dans la mesure du possible et sans transgresser la partie III, tente, par tous les moyens qu'elle estime indiqués, d'empêcher la perpétration des actes discriminatoires visés aux articles 5 à 14.

Guidelines

(2) The Commission may, on application or on its own initiative, by order, issue a guideline setting out the extent to which and the manner in which, in the opinion of the Commission, any provision of this Act applies in a particular case or in a class of cases described in the guideline.

Guideline binding

(3) A guideline issued under subsection (2) is, until it is subsequently revoked or modified, binding on the Commission, any Human Rights

(2) Dans un cas ou une catégorie de cas donnés, la Commission peut, sur demande ou de sa propre initiative, décider de préciser, par ordonnance, les limites et les modalités de l'application de la présente loi.

Directives

(3) Les ordonnances prises en vertu du paragraphe (2) lient, jusqu'à ce qu'elles soient abrogées ou modifiées, la Commission, les tribu-

Effet obligatoire

Tribunal appointed pursuant to subsection 49(1) and any Review Tribunal constituted pursuant to subsection 56(1) with respect to the resolution of any complaint under Part III regarding a case falling within the description contained in the guideline.

naux des droits de la personne constitués en vertu du paragraphe 49(1) et les tribunaux d'appel constitués en vertu du paragraphe 56(1) lors du règlement des plaintes déposées conformément à la partie III.

Publication or
communication

(4) Each guideline issued under subsection (2) that relates to the manner in which a provision of this Act applies in a class of cases shall be published in Part II of the *Canada Gazette*, and each such guideline that applies in a particular case shall be communicated to the persons directly affected thereby in such manner as the Commission deems appropriate. 1976-77, c. 33, s. 22; 1977-78, c. 22, s. 5; 1980-81-82-83, c. 143, s. 13.

(4) Les ordonnances prises en vertu du paragraphe (2) et portant sur les modalités d'application de certaines dispositions de la présente loi à certaines catégories de cas sont publiées dans la partie II de la *Gazette du Canada*; celles qui portent sur des cas particuliers sont communiquées aux personnes directement concernées selon les modalités que la Commission estime appropriées. 1976-77, ch. 33, art. 22; 1977-78, ch. 22, art. 5; 1980-81-82-83, ch. 143, art. 13.

Publication ou
communication

Assignment of
duties

28. (1) On the recommendation of the Commission, the Governor in Council may, by order, assign to persons or classes of persons specified in the order who are engaged in the performance of the duties and functions of the Department of Labour of the Government of Canada such of the duties and functions of the Commission in relation to discriminatory practices in employment outside the public service of Canada as are specified in the order.

28. (1) Sur recommandation de la Commission, le gouverneur en conseil peut, par décret, déléguer à des personnes ou catégories de personnes données travaillant pour le ministère fédéral du Travail certaines fonctions de la Commission, qui y sont précisées, concernant les actes discriminatoires en matière d'emploi à l'extérieur de l'administration publique fédérale.

Délégation de
fonctions

Interdelegation

(2) Subject to the approval of the Governor in Council, the Commission may enter into agreements with similar bodies or authorities in the provinces providing for the performance by the Commission on behalf of those bodies or authorities of duties or functions specified in the agreements or for the performance by those bodies or authorities on behalf of the Commission of duties or functions so specified. 1976-77, c. 33, s. 22.

(2) Sous réserve de l'autorisation du gouverneur en conseil, la Commission peut conclure avec les organismes ou les autorités provinciales de même nature des accords portant, à charge de réciprocité éventuelle, délégation de fonctions déterminées. 1976-77, ch. 33, art. 22.

Délégations
réciproques

Regulations

29. The Governor in Council, on the recommendation of the Commission, may make regulations authorizing the Commission to exercise such powers and perform such duties and functions, in addition to those prescribed by this Act, as are necessary to carry out the provisions of this Part and Parts I and III. 1976-77, c. 33, s. 23.

29. Sur recommandation de la Commission, le gouverneur en conseil peut lui accorder par règlement, outre les pouvoirs et les fonctions prévus par la présente loi, ceux qui sont nécessaires à l'application de la présente partie et des parties I et III. 1976-77, ch. 33, art. 23.

Règlements

Remuneration

Rétribution

Salaries and
remuneration

30. (1) Each full-time member of the Commission shall be paid a salary to be fixed by the Governor in Council and each part-time member of the Commission may be paid such remuneration, as is prescribed by by-law of the

30. (1) Les commissaires à temps plein reçoivent le traitement que fixe le gouverneur en conseil. Les commissaires à temps partiel reçoivent la rémunération fixée par règlement administratif lorsque le président requiert leur

Traitements et
rémunération

Commission, for attendance at meetings of the Commission, or of any division or committee of the Commission, that the member is requested by the Chief Commissioner to attend.

présence aux réunions tant de la Commission que de ses sections ou comités.

Additional remuneration

(2) A part-time member of the Commission may, for any period during which that member, with the approval of the Chief Commissioner, performs any duties and functions additional to the normal duties and functions of that member on behalf of the Commission, be paid such additional remuneration as is prescribed by by-law of the Commission.

(2) Les commissaires à temps partiel reçoivent la rémunération supplémentaire fixée par règlement administratif à l'occasion des missions extraordinaires qu'ils accomplissent pour le compte de la Commission avec l'approbation du président.

Rémunération supplémentaire

Travel expenses

(3) Each member of the Commission is entitled to be paid such travel and living expenses incurred by the member in the performance of duties and functions under this Act as are prescribed by by-law of the Commission. 1976-77, c. 33, s. 24.

(3) Les commissaires sont indemnisés, conformément au règlement administratif, des frais de déplacement et de séjour engagés dans l'exercice des fonctions qui leur sont confiées en application de la présente loi. 1976-77, ch. 33, art. 24.

Frais de déplacement et de séjour

Officers and Staff

Dirigeants et personnel

Chief Commissioner

31. (1) The Chief Commissioner is the chief executive officer of the Commission and has supervision over and direction of the Commission and its staff and shall preside at meetings of the Commission.

31. (1) Le président est le premier dirigeant de la Commission; à ce titre, il en assure la direction, préside ses réunions et contrôle la gestion de son personnel.

Président

Absence or incapacity

(2) In the event of the absence or incapacity of the Chief Commissioner, or if that office is vacant, the Deputy Chief Commissioner has all the powers and may perform all the duties and functions of the Chief Commissioner.

(2) En cas d'absence ou d'empêchement du président ou de vacance de son poste, la présidence est assumée par le vice-président.

Absence ou empêchement

Idem

(3) In the event of the absence or incapacity of the Chief Commissioner and the Deputy Chief Commissioner, or if those offices are vacant, the full-time member with the most seniority has all the powers and may perform all the duties and functions of the Chief Commissioner. 1976-77, c. 33, s. 25.

(3) En cas d'absence ou d'empêchement du président et du vice-président ou de vacance de leurs postes, la présidence est assumée par le commissaire à temps plein ayant le plus d'ancienneté dans son poste. 1976-77, ch. 33, art. 25.

Idem

Staff

32. (1) Such officers and employees as are necessary for the proper conduct of the work of the Commission shall be appointed in accordance with the *Public Service Employment Act*.

32. (1) Le personnel nécessaire à l'exécution des travaux de la Commission est nommé conformément à la *Loi sur l'emploi dans la fonction publique*.

Personnel

Contractual assistance

(2) The Commission may, for specific projects, enter into contracts for the services of persons having technical or specialized knowledge of any matter relating to the work of the Commission to advise and assist the Commission in the exercise of its powers or the performance of its duties and functions under this Act, and those persons may be paid such remuneration and expenses as may be pre-

(2) La Commission peut, pour des travaux déterminés, engager à contra. des experts compétents dans des domaines relevant de son champ d'activité et leur verser à cette occasion la rémunération et les indemnités fixées par règlement administratif. 1976-77, ch. 33, art. 26.

Assistance contractuelle

scribed by by-law of the Commission. 1976-77, c. 33, s. 26.

Compliance
with security
requirements

33. (1) Every member of the Commission and every person employed by the Commission who is required to receive or obtain information relating to any investigation under this Act shall, with respect to access to and the use of such information, comply with any security requirements applicable to, and take any oath of secrecy required to be taken by, individuals who normally have access to and use of such information.

33. (1) Les commissaires et les agents de la Commission appelés à recevoir ou à recueillir des renseignements dans le cadre des enquêtes prévues par la présente loi doivent, quant à l'accès à ces renseignements et à leur utilisation, respecter les normes de sécurité applicables et prêter les serments imposés à leurs usagers habituels.

Respect des
normes de
sécurité

Disclosure

(2) Every member of the Commission and every person employed by the Commission shall take every reasonable precaution to avoid disclosing any matter the disclosure of which

(a) might be injurious to international relations, national defence or security or federal-provincial relations;

(b) would disclose a confidence of the Queen's Privy Council for Canada;

(c) would be likely to disclose information obtained or prepared by any investigative body of the Government of Canada

(i) in relation to national security,

(ii) in the course of investigations pertaining to the detection or suppression of crime generally, or

(iii) in the course of investigations pertaining to particular offences against any Act of Parliament;

(d) might, in respect of any individual under sentence for an offence against any Act of Parliament,

(i) lead to a serious disruption of that individual's institutional, parole or mandatory supervision program,

(ii) reveal information originally obtained on a promise of confidentiality, express or implied, or

(iii) result in physical or other harm to that individual or any other person;

(e) might impede the functioning of a court of law, or a quasi-judicial board, commission or other tribunal or any inquiry established under the *Inquiries Act*; or

(f) might disclose legal opinions or advice provided to a government department or body or privileged communications between lawyer and client in a matter of government business. 1976-77, c. 33, s. 27.

(2) Les commissaires et les agents de la Commission prennent toutes précautions raisonnables pour éviter de dévoiler des renseignements dont la révélation serait susceptible :

a) de nuire aux relations internationales, à la défense ou à la sécurité nationales ou aux relations fédéro-provinciales;

b) de violer le secret attaché aux travaux du Conseil privé de la Reine pour le Canada;

c) d'entraîner la divulgation de renseignements obtenus par un organisme d'enquête du gouvernement du Canada :

(i) soit sur la sécurité nationale,

(ii) soit au cours d'enquêtes sur la détection ou la prévention du crime en général,

(iii) soit au cours d'enquêtes sur des infractions précises aux lois fédérales;

d) dans le cas d'un individu condamné pour infraction à une loi fédérale :

(i) soit d'avoir de graves conséquences sur son régime pénitentiaire, sa libération conditionnelle ou sa surveillance obligatoire,

(ii) soit d'entraîner la divulgation de renseignements qui, à l'origine, ont été obtenus expressément ou implicitement sous le sceau du secret,

(iii) soit de causer, à lui ou à quiconque, des dommages, corporels ou autres;

e) d'entraver le fonctionnement d'un tribunal judiciaire ou quasi judiciaire, ou le déroulement d'une enquête instituée en vertu de la *Loi sur les enquêtes*;

f) d'entraîner la divulgation de consultations juridiques données à un ministère ou à un organisme gouvernemental ou de violer le secret professionnel existant entre l'avocat et son client à propos d'une affaire touchant à l'administration publique. 1976-77, ch. 33, art. 27.

Divulgence

Head office	34. (1) The head office of the Commission shall be in the National Capital Region described in the schedule to the <i>National Capital Act</i> .	34. (1) Le siège de la Commission est fixé dans la région de la capitale nationale définie à l'annexe de la <i>Loi sur la capitale nationale</i> .	Siège
Other offices	(2) The Commission may establish such regional or branch offices, not exceeding twelve, as it considers necessary to carry out its powers, duties and functions under this Act.	(2) La Commission peut créer, jusqu'à concurrence de douze, les bureaux régionaux ou locaux dont elle estime la création nécessaire à l'exercice de ses pouvoirs et fonctions dans le cadre de la présente loi.	Bureaux régionaux ou locaux
Meetings	(3) The Commission may meet for the conduct of its affairs at such times and in such places as the Chief Commissioner considers necessary or desirable. 1976-77, c. 33, s. 28.	(3) La Commission tient ses réunions aux dates, heures et lieux choisis par le président selon les besoins. 1976-77, ch. 33, art. 28.	Réunions
Majority is a decision of the Commission	35. A decision of the majority of the members present at a meeting of the Commission, if the members present constitute a quorum, is a decision of the Commission. 1976-77, c. 33, s. 28.	35. La Commission prend ses décisions, sous réserve du quorum, à la majorité des voix des commissaires présents. 1976-77, ch. 33, art. 28.	Décisions à la majorité des voix
Establishment of divisions	36. (1) For the purposes of the affairs of the Commission, the Chief Commissioner may establish divisions of the Commission and all or any of the powers, duties and functions of the Commission, except the making of by-laws, may, as directed by the Commission, be exercised or performed by all or any of those divisions.	36. (1) Le président peut constituer au sein de la Commission des sections qui peuvent exercer, conformément aux instructions de la Commission, tout ou partie des pouvoirs et fonctions de celle-ci, à l'exception du pouvoir de prendre des règlements administratifs.	Constitution de sections
Designation of presiding officer	(2) Where a division of the Commission has been established pursuant to subsection (1), the Chief Commissioner may designate one of the members of the division to act as the presiding officer of the division. 1976-77, c. 33, s. 28.	(2) Le président peut choisir le président d'une section parmi les commissaires qui la composent. 1976-77, ch. 33, art. 28.	Désignation du président de section
By-laws	37. (1) The Commission may make by-laws for the conduct of its affairs and, without limiting the generality of the foregoing, may make by-laws (a) respecting the calling of meetings of the Commission or any division thereof and the fixing of quorums for the purposes of those meetings; (b) respecting the conduct of business at meetings of the Commission or any division thereof; (c) respecting the establishment of committees of the Commission, the delegation of powers, duties and functions to those committees and the fixing of quorums for meetings thereof; (d) respecting the procedure to be followed in dealing with complaints under Part III	37. (1) La Commission peut, par règlement administratif, régir son activité et, notamment, prévoir : a) la convocation de ses réunions et de celles des sections, ainsi que la fixation de leur quorum; b) le déroulement de ses réunions et de celles des sections; c) la constitution de comités, la délégation de pouvoirs et fonctions aux comités et la fixation de leur quorum; d) la procédure relative aux plaintes déposées sous le régime de la partie III et ayant leur origine dans le territoire du Yukon ou dans les Territoires du Nord-Ouest; e) le barème de rémunération des commissaires à temps partiel, des membres des tribunaux des droits de la personne et des personnes visées au paragraphe 32(2);	Règlements administratifs

that have arisen in the Yukon Territory or the Northwest Territories;

(e) prescribing the rates of remuneration to be paid to part-time members, members of a Human Rights Tribunal and any person engaged pursuant to subsection 32(2); and

(f) prescribing reasonable rates of travel and living expenses to be paid to members of the Commission, members of a Human Rights Tribunal and any person engaged pursuant to subsection 32(2).

Treasury Board approval

(2) No by-law made under paragraph (1)(e) or (f) has effect unless it is approved by the Treasury Board. 1976-77, c. 33, s. 29.

Superannuation, etc.

38. The full-time members of the Commission are deemed to be persons employed in the Public Service for the purposes of the *Public Service Superannuation Act* and to be employed in the public service of Canada for the purposes of the *Government Employees Compensation Act* and any regulations made under section 9 of the *Aeronautics Act*. 1976-77, c. 33, s. 30.

f) le barème des frais de déplacement et de séjour payables aux commissaires, aux membres des tribunaux des droits de la personne et aux personnes visées au paragraphe 32(2).

(2) Les règlements administratifs pris sous le régime des alinéas (1)e) ou f) sont inopérants tant qu'ils n'ont pas été approuvés par le Conseil du Trésor. 1976-77, ch. 33, art. 29.

Approbation du Conseil du Trésor

38. Les commissaires à temps plein sont réputés appartenir à la fonction publique pour l'application de la *Loi sur la pension de la fonction publique* et appartenir à l'administration publique fédérale pour l'application de la *Loi sur l'indemnisation des agents de l'État* et des règlements pris en vertu de l'article 9 de la *Loi sur l'aéronautique*. 1976-77, ch. 33, art. 30.

Pensions de retraite, etc.

PART III

DISCRIMINATORY PRACTICES AND GENERAL PROVISIONS

Definition of "discriminatory practice"

39. For the purposes of this Part, a "discriminatory practice" means any practice that is a discriminatory practice within the meaning of sections 5 to 14. 1976-77, c. 33, s. 31; 1980-81-82-83, c. 143, s. 14.

Complaints

40. (1) Subject to subsections (5) and (7), any individual or group of individuals having reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice may file with the Commission a complaint in a form acceptable to the Commission.

Consent of victim

(2) If a complaint is made by someone other than the individual who is alleged to be the victim of the discriminatory practice to which the complaint relates, the Commission may refuse to deal with the complaint unless the alleged victim consents thereto.

Investigation commenced by Commission

(3) Where the Commission has reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice, the Commission may initiate a complaint.

PARTIE III

ACTES DISCRIMINATOIRES ET DISPOSITIONS GÉNÉRALES

39. Pour l'application de la présente partie, «acte discriminatoire» s'entend d'un acte visé aux articles 5 à 14. 1976-77, ch. 33, art. 31; 1980-81-82-83, ch. 143, art. 14.

Définition de «acte discriminatoire»

40. (1) Sous réserve des paragraphes (5) et (7), un individu ou un groupe d'individus ayant des motifs raisonnables de croire qu'une personne a commis un acte discriminatoire peut déposer une plainte devant la Commission en la forme acceptable pour cette dernière.

Plaintes

(2) La Commission peut assujettir la recevabilité d'une plainte au consentement préalable de l'individu présenté comme la victime de l'acte discriminatoire.

Consentement de la victime

(3) La Commission peut prendre l'initiative de la plainte dans les cas où elle a des motifs raisonnables de croire qu'une personne a commis un acte discriminatoire.

Autosaisine de la Commission

Complaints
may be dealt
with together

(4) Where complaints are filed jointly or separately by more than one individual or group alleging that a particular person is engaging or has engaged in a discriminatory practice or a series of similar discriminatory practices and the Commission is satisfied that the complaints involve substantially the same issues of fact and law, it may deal with those complaints together under this Part and may appoint a single Human Rights Tribunal pursuant to subsection 49(1) to inquire into those complaints.

(4) En cas de dépôt, conjoint ou distinct, par plusieurs individus ou groupes de plaintes dénonçant la perpétration par une personne donnée d'actes discriminatoires ou d'une série d'actes discriminatoires de même nature, la Commission peut, pour l'application de la présente partie, joindre celles qui, à son avis, soulèvent pour l'essentiel les mêmes questions de fait et de droit et charger, conformément au paragraphe 49(1), un tribunal unique de les examiner.

Jonction de
plaintes

No complaints
to be considered
in certain cases

(5) No complaint in relation to a discriminatory practice may be dealt with by the Commission under this Part unless the act or omission that constitutes the practice

(a) occurred in Canada and the victim of the practice was at the time of the act or omission either lawfully present in Canada or, if temporarily absent from Canada, entitled to return to Canada;

(b) occurred in Canada and was a discriminatory practice within the meaning of section 8, 10, 12 or 13 in respect of which no particular individual is identifiable as the victim; or

(c) occurred outside Canada and the victim of the practice was at the time of the act or omission a Canadian citizen or an individual lawfully admitted to Canada for permanent residence.

(5) Pour l'application de la présente partie, la Commission n'est valablement saisie d'une plainte que si l'acte discriminatoire :

Recevabilité

a) a eu lieu au Canada alors que la victime y était légalement présente ou qu'elle avait le droit d'y revenir;

b) a eu lieu au Canada sans qu'il soit possible d'en identifier la victime, mais tombe sous le coup des articles 8, 10, 12 ou 13;

c) a eu lieu à l'étranger alors que la victime était un citoyen canadien ou qu'elle avait été légalement admise au Canada à titre de résident permanent.

Determination
of status

(6) Where a question arises under subsection (5) as to the status of an individual in relation to a complaint, the Commission shall refer the question of status to the appropriate Minister and shall not proceed with the complaint unless the question of status is resolved thereby in favour of the complainant.

(6) En cas de doute sur la situation d'un individu par rapport à une plainte dans les cas prévus au paragraphe (5), la Commission renvoie la question au ministre compétent et elle ne peut procéder à l'instruction de la plainte que si la question est tranchée en faveur du plaignant.

Renvoi au
ministre
compétent

No complaints
to be dealt with
in certain cases

(7) No complaint may be dealt with by the Commission pursuant to subsection (1) that relates to the terms and conditions of a superannuation or pension fund or plan, if the relief sought would require action to be taken that would deprive any contributor to, participant in or member of, the fund or plan of any rights acquired under the fund or plan before March 1, 1978 or of any pension or other benefits accrued under the fund or plan to that date, including

(a) any rights and benefits based on a particular age of retirement; and

(7) La Commission ne peut connaître, au titre du paragraphe (1), d'une plainte qui porte sur les conditions et les modalités d'une caisse ou d'un régime de pensions, lorsque le redressement demandé aurait pour effet de priver un participant de droits acquis avant le 1^{er} mars 1978 ou de prestations de pension ou autres accumulées jusqu'à cette date, notamment :

Cas d'irrecevabilité

a) de droits ou de prestations attachés à un âge déterminé de retraite;

b) de prestations de réversion. 1976-77, ch. 33, art. 32; 1980-81-82-83, ch. 143, art. 15.

(b) any accrued survivor's benefits. 1976-77, c. 33, s. 32; 1980-81-82-83, c. 143, s. 15.

Commission to deal with complaint

41. Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that

(a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;

(b) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act;

(c) the complaint is beyond the jurisdiction of the Commission;

(d) the complaint is trivial, frivolous, vexatious or made in bad faith; or

(e) the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint. 1976-77, c. 33, s. 33.

Notice

42. (1) Subject to subsection (2), when the Commission decides not to deal with a complaint, it shall send a written notice of its decision to the complainant setting out the reason for its decision.

Attributing fault for delay

(2) Before deciding that a complaint will not be dealt with because a procedure referred to in paragraph 41(a) has not been exhausted, the Commission shall satisfy itself that the failure to exhaust the procedure was attributable to the complainant and not to another. 1976-77, c. 33, s. 34.

Investigation

Designation of investigator

43. (1) The Commission may designate a person, in this Part referred to as an "investigator", to investigate a complaint.

Manner of investigation

(2) An investigator shall investigate a complaint in a manner authorized by regulations made pursuant to subsection (4) and the Commission may authorize an investigator,

(a) subject to such limitations as the Governor in Council may prescribe in the interests of national defence or security, at any reasonable time, to enter any premises, other than a private dwelling-place or any part of

41. Sous réserve de l'article 40, la Commission statue sur toute plainte dont elle est saisie à moins qu'elle estime celle-ci irrecevable pour un des motifs suivants :

Irrecevabilité

a) la victime présumée de l'acte discriminatoire devrait épuiser d'abord les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;

b) la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale;

c) la plainte n'est pas de sa compétence;

d) la plainte est frivole, vexatoire ou entachée de mauvaise foi;

e) la plainte a été déposée plus d'un an après le dernier des faits sur lesquels elle est fondée. 1976-77, ch. 33, art. 33.

42. (1) Sous réserve du paragraphe (2), la Commission motive par écrit sa décision auprès du plaignant dans les cas où elle décide que la plainte est irrecevable.

Avis

(2) Avant de décider qu'une plainte est irrecevable pour le motif que les recours ou procédures mentionnés à l'alinéa 41a) n'ont pas été épuisés, la Commission s'assure que le défaut est exclusivement imputable au plaignant. 1976-77, ch. 33, art. 34.

Imputabilité du défaut

Enquête

43. (1) La Commission peut charger une personne, appelée, dans la présente loi, «l'enquêteur», d'enquêter sur une plainte.

Nomination de l'enquêteur

(2) L'enquêteur doit respecter la procédure d'enquête prévue aux règlements pris en vertu du paragraphe (4) et peut être autorisé par la Commission :

Procédure d'enquête

a) sous réserve des restrictions que le gouverneur en conseil peut imposer dans l'intérêt de la défense nationale ou de la sécurité, à pénétrer à toute heure convenable, dans tous locaux, à l'exclusion des logements privés et

any premises that is designed to be used and is being used as a permanent or temporary private dwelling-place, and carry out such inquiries as are reasonably necessary for the investigation of the complaint; and

(b) to require any individual found in any premises entered pursuant to paragraph (a) to produce for inspection or for the purpose of obtaining copies thereof or extracts therefrom any books or other documents containing any matter relevant to the investigation of the complaint.

des locaux conçus pour l'habitation et utilisés comme logements privés permanents ou temporaires, pour y procéder aux investigations justifiées par l'enquête;

b) à obliger toute personne trouvée sur les lieux à produire pour examen ou reproduction totale ou partielle les livres et documents qui contiennent des renseignements utiles à l'enquête.

Obstruction (3) No person shall obstruct an investigator in the investigation of a complaint.

(3) Il est interdit d'entraver l'action de l'enquêteur. **Entraves**

Regulations (4) The Governor in Council may make regulations

(4) Le gouverneur en conseil peut fixer, par règlement : **Règlements**

(a) prescribing procedures to be followed by investigators;

a) la procédure à suivre par les enquêteurs;

(b) authorizing the manner in which complaints are to be investigated pursuant to this Part; and

b) les modalités d'enquête sur les plaintes dont ils sont saisis au titre de la présente partie;

(c) prescribing limitations for the purpose of paragraph (2)(a). 1976-77, c. 33, s. 35.

c) les restrictions nécessaires à l'application de l'alinéa (2)a). 1976-77, ch. 33, art. 35.

Report 44. (1) An investigator shall, as soon as possible after the conclusion of an investigation, submit to the Commission a report of the findings of the investigation.

44. (1) L'enquêteur présente son rapport à la Commission le plus tôt possible après la fin de l'enquête. **Rapport**

Action on receipt of report (2) If, on receipt of a report referred to in subsection (1), the Commission is satisfied

(2) La Commission renvoie le plaignant à l'autorité compétente dans les cas où, sur réception du rapport, elle est convaincue, selon le cas : **Suite à donner au rapport**

(a) that the complainant ought to exhaust grievance or review procedures otherwise reasonably available, or

a) que le plaignant devrait épuiser les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;

(b) that the complaint could more appropriately be dealt with, initially or completely, by means of a procedure provided for under an Act of Parliament other than this Act,

b) que la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale.

it shall refer the complainant to the appropriate authority.

Idem (3) On receipt of a report referred to in subsection (1), the Commission

(3) Dans les cas où, sur réception du rapport, la Commission est convaincue : **Idem**

(a) may adopt the report if it is satisfied that the complaint to which the report relates has been substantiated and should not be referred pursuant to subsection (2) or dismissed on any ground referred to in paragraphs 41(c) to (e); or

a) que la plainte est fondée, qu'il n'y a pas lieu de la renvoyer conformément au paragraphe (2), ni de la rejeter pour les motifs énoncés aux alinéas 41c) à e), elle peut accepter le rapport;

(b) shall dismiss the complaint to which the report relates if it is satisfied that the complaint has not been substantiated or should

b) que la plainte n'est pas fondée ou qu'il y a lieu de la rejeter pour les motifs énoncés aux alinéas 41c) à e), elle rejette la plainte.

be dismissed on any ground mentioned in paragraphs 41(c) to (e).

Notice

(4) After receipt of a report referred to in subsection (1), the Commission

(a) shall notify in writing the complainant and the person against whom the complaint was made of its action under subsection (2) or (3); and

(b) may, in such manner as it sees fit, notify any other person whom it considers necessary to notify of its action under subsection (2) or (3). 1976-77, c. 33, s. 36.

Definition of "Review Committee"

45. (1) In this section and section 46, "Review Committee" has the meaning assigned to that expression by the *Canadian Security Intelligence Service Act*.

Complaint involving security considerations

(2) When, at any stage after the filing of a complaint and before the commencement of a hearing before a Human Rights Tribunal in respect thereof, the Commission receives written notice from a minister of the Crown that the practice to which the complaint relates was based on considerations relating to the security of Canada, the Commission may

(a) dismiss the complaint; or

(b) refer the matter to the Review Committee.

Notice

(3) After receipt of a notice mentioned in subsection (2), the Commission

(a) shall notify in writing the complainant and the person against whom the complaint was made of its action under paragraph (2)(a) or (b); and

(b) may, in such manner as it sees fit, notify any other person whom it considers necessary to notify of its action under paragraph 2(a) or (b).

Stay of procedures

(4) Where the Commission has referred the matter to the Review Committee pursuant to paragraph (2)(b), it shall not deal with the complaint until the Review Committee has, pursuant to subsection 46(1), provided it with a report in relation to the matter.

Application of the *Canadian Security Intelligence Service Act*

(5) Where a matter is referred to the Review Committee pursuant to paragraph (2)(b), subsections 39(2) and (3) and sections 43, 44 and 47 to 51 of the *Canadian Security Intelligence Service Act* apply, with such modifications as the circumstances require, to the matter as if the referral were a complaint made pursuant to

(4) Après réception du rapport, la Commission : Avis

a) informe par écrit les parties à la plainte de la décision qu'elle a prise en vertu des paragraphes (2) ou (3);

b) peut informer toute autre personne, de la manière qu'elle juge indiquée, de la décision qu'elle a prise en vertu des paragraphes (2) ou (3). 1976-77, ch. 33, art. 36; 1980-81-82-83, ch. 143, art. 16.

45. (1) Au présent article et à l'article 46, «comité de surveillance» s'entend au sens de la *Loi sur le Service canadien du renseignement de sécurité*.

Définition de «comité de surveillance»

(2) Si, à toute étape entre le dépôt d'une plainte et le début d'une audience à ce sujet devant un tribunal des droits de la personne, la Commission reçoit un avis écrit d'un ministre fédéral l'informant que les actes qui font l'objet de la plainte mettent en cause la sécurité du Canada, elle peut :

Plainte mettant en cause la sécurité

a) soit rejeter la plainte;

b) soit transmettre l'affaire au comité de surveillance.

(3) Sur réception de l'avis mentionné au paragraphe (2), la Commission :

Avis

a) informe par écrit les parties à la plainte de la décision qu'elle a prise en vertu des alinéas (2)a) ou b);

b) peut informer toute autre personne, de la manière qu'elle juge indiquée, de la décision qu'elle a prise en vertu des alinéas (2)a) ou b).

(4) Lorsqu'elle a transmis une affaire au comité de surveillance en vertu de l'alinéa (2)b), la Commission ne peut poursuivre l'étude d'une plainte avant que celui-ci ne lui ait remis son rapport à cet égard en vertu du paragraphe 46(1).

Suspension des procédures

(5) Lorsqu'une affaire est transmise au comité de surveillance en vertu de l'alinéa (2)b), les paragraphes 39(2) et (3) et les articles 43, 44 et 47 à 51 de la *Loi sur le Service canadien du renseignement de sécurité* s'appliquent, compte tenu des adaptations de circonstance, à cette affaire comme s'il s'agissait d'une

Application de la *Loi sur le Service canadien du renseignement de sécurité*

section 42 of that Act except that a reference in any of those provisions to "deputy head" shall be read as a reference to the minister referred to in subsection (2).

plainte présentée en vertu de l'article 42 de cette loi, sauf qu'un renvoi dans l'une de ces dispositions à l'administrateur général vaut renvoi au ministre visé au paragraphe (2).

Statement to be sent to person affected

(6) The Review Committee shall, as soon as practicable after a matter in relation to a complaint is referred to it pursuant to paragraph (2)(b), send to the complainant a statement summarizing such information available to it as will enable the complainant to be as fully informed as possible of the circumstances giving rise to the referral. 1984, c. 21, s. 73.

(6) Afin de permettre au plaignant d'être informé de la façon la plus complète possible des circonstances qui ont donné lieu à la transmission de l'affaire en vertu de l'alinéa (2)b), le comité de surveillance lui envoie, dans les plus brefs délais possible après la transmission, un résumé des informations dont il dispose à ce sujet. 1984, ch. 21, art. 73.

Résumé envoyé à la personne visée

Report

46. (1) On completion of its investigation under section 45, the Review Committee shall, not later than forty-five days after the matter is referred to it pursuant to paragraph 45(2)(b), provide the Commission, the minister referred to in subsection 45(2) and the complainant with a report containing the findings of the Committee.

46. (1) À l'issue de son enquête et au plus tard quarante-cinq jours après qu'une affaire lui a été transmise en vertu de l'alinéa 45(2)b), le comité de surveillance remet à la Commission, au ministre visé au paragraphe 45(2) et au directeur un rapport contenant ses conclusions.

Rapport

Action on receipt of report

(2) After considering a report provided pursuant to subsection (1), the Commission

(a) may dismiss the complaint or, where it does not do so, shall proceed to deal with the complaint pursuant to this Part; and

(b) shall notify, in writing, the complainant and the person against whom the complaint was made of its action under paragraph (a) and may, in such manner as it sees fit, notify any other person whom it considers necessary to notify of that action. 1984, c. 21, s. 73.

(2) Après examen du rapport remis en vertu du paragraphe (1), la Commission :

a) peut rejeter la plainte ou, si elle ne la rejette pas, doit continuer à l'étudier en conformité avec la présente partie;

b) doit informer par écrit les parties à la plainte de la décision qu'elle a prise en vertu de l'alinéa a) et peut informer toute autre personne, de la manière qu'elle juge indiquée, de cette décision. 1984, ch. 21, art. 73.

Conséquences du rapport

Conciliator

Appointment of conciliator

47. (1) Subject to subsection (2), the Commission may, on the filing of a complaint, or if the complaint has not been

(a) settled in the course of investigation by an investigator,

(b) referred or dismissed under subsection 44(2) or (3) or paragraph 45(2)(a) or 46(2)(a), or

(c) settled after receipt by the parties of the notice referred to in subsection 44(4),

appoint a person, in this Part referred to as a "conciliator", for the purpose of attempting to bring about a settlement of the complaint.

47. (1) Sous réserve du paragraphe (2), la Commission peut charger un conciliateur d'en arriver à un règlement de la plainte, soit dès le dépôt de celle-ci, soit ultérieurement dans l'un des cas suivants :

a) l'enquête ne mène pas à un règlement;

b) la plainte n'est pas renvoyée ni rejetée en vertu des paragraphes 44(2) ou (3) ou des alinéas 45(2)a) ou 46(2)a);

c) la plainte n'est pas réglée après réception par les parties de l'avis prévu au paragraphe 44(4).

Nomination du conciliateur

Eligibility

(2) A person is not eligible to act as a conciliator in respect of a complaint if that person has already acted as an investigator in respect of that complaint.

(2) Pour une plainte donnée, les fonctions d'enquêteur et de conciliateur sont incompatibles.

Incompatibilité

Confidentiality

(3) Any information received by a conciliator in the course of attempting to reach a settlement of a complaint is confidential and may not be disclosed except with the consent of the person who gave the information. 1976-77, c. 33, s. 37; 1984, c. 21, s. 74.

(3) Les renseignements recueillis par le conciliateur sont confidentiels et ne peuvent être divulgués sans le consentement de la personne qui les a fournis. 1976-77, ch. 33, art. 37; 1980-81-82-83, ch. 143, art. 17; 1984, ch. 21, art. 74.

Renseignements confidentiels

Settlement

Referral of a settlement to Commission

48. (1) When, at any stage after the filing of a complaint and before the commencement of a hearing before a Human Rights Tribunal in respect thereof, a settlement is agreed on by the parties, the terms of the settlement shall be referred to the Commission for approval or rejection.

48. (1) Les parties qui conviennent d'un règlement à toute étape postérieure au dépôt de la plainte, mais avant le début de l'audience d'un tribunal des droits de la personne, en présentent les conditions à l'approbation de la Commission.

Présentation des conditions de règlement à la Commission

Certificate

(2) If the Commission approves or rejects the terms of a settlement referred to in subsection (1), it shall so certify and notify the parties. 1976-77, c. 33, s. 38.

(2) Dans le cas prévu au paragraphe (1), la Commission certifie sa décision et la communique aux parties. 1976-77, ch. 33, art. 38; 1980-81-82-83, ch. 143, art. 18.

Certificat

Human Rights Tribunal

Human Rights Tribunal

49. (1) The Commission may, at any stage after the filing of a complaint, appoint a Human Rights Tribunal, in this Part referred to as a "Tribunal", to inquire into the complaint.

49. (1) La Commission peut, à toute étape postérieure au dépôt de la plainte, constituer un tribunal des droits de la personne, appelé dans la présente partie le «tribunal», chargé d'examiner la plainte.

Tribunal des droits de la personne

Membership

(2) A Tribunal may not be composed of more than three members.

(2) Le tribunal se compose d'au plus trois membres.

Composition

Eligibility

(3) No member, officer or employee of the Commission, and no individual who has acted as investigator or conciliator in respect of the complaint in relation to which a Tribunal is appointed, is eligible to be appointed to the Tribunal.

(3) Les fonctions de commissaire ou d'employé de la Commission et, pour une plainte donnée, celles d'enquêteur ou de conciliateur sont incompatibles avec les fonctions de membre du tribunal.

Incompatibilité

Remuneration

(4) A member of a Tribunal is entitled to be paid such remuneration and expenses for the performance of duties as a member of the Tribunal as may be prescribed by by-law of the Commission.

(4) Les membres du tribunal ont droit, pour l'exercice de leurs fonctions, à la rémunération et aux indemnités de dépenses fixées par règlement administratif de la Commission.

Rémunération

Panel

(5) In selecting any individual or individuals to be appointed as a Tribunal, the Commission shall make its selection from a panel of prospective members, which shall be established and maintained by the Governor in Council.

(5) La Commission choisit, sur une liste établie par le gouverneur en conseil, les membres du tribunal.

Listes

Chairman

(6) Where a Tribunal is composed of more than one member, the Commission shall designate one of the members to be the Chairman of the Tribunal. 1976-77, c. 33, s. 39; 1980-81-82-83, c. 143, s. 19.

(6) La Commission nomme le président du tribunal dans le cas où celui-ci se compose de plus d'un membre. 1976-77, ch. 33, art. 39; 1980-81-82-83, ch. 143, art. 19.

Président

Duties	50. (1) A Tribunal shall, after due notice to the Commission, the complainant, the person against whom the complaint was made and, at the discretion of the Tribunal, any other interested party, inquire into the complaint in respect of which it was appointed and shall give all parties to whom notice has been given a full and ample opportunity, in person or through counsel, to appear before the Tribunal, present evidence and make representations to it.	50. (1) Le tribunal, après avis conforme à la Commission, aux parties et, à son appréciation, à tout intéressé, examine l'objet de la plainte pour laquelle il a été constitué; il donne à ceux-ci la possibilité pleine et entière de comparaître et de présenter, en personne ou par l'intermédiaire d'un avocat, des éléments de preuve ainsi que leurs observations.	Fonctions
Powers	(2) In relation to a hearing under this Part, a Tribunal may (a) in the same manner and to the same extent as a superior court of record, summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce such documents and things as the Tribunal deems requisite to the full hearing and consideration of the complaint; (b) administer oaths; and (c) receive and accept such evidence and other information, whether on oath or by affidavit or otherwise, as the Tribunal sees fit, whether or not that evidence or information is or would be admissible in a court of law.	(2) Pour la tenue de ses audiences, le tribunal a le pouvoir: a) d'assigner et de contraindre les témoins à comparaître, à déposer verbalement ou par écrit sous la foi du serment et à produire les pièces qu'il juge indispensables à l'examen complet de la plainte, au même titre qu'une cour supérieure d'archives; b) de faire prêter serment; c) de recevoir des éléments de preuve ou des renseignements par déclaration verbale ou écrite sous serment ou par tout autre moyen qu'il estime indiqué, indépendamment de leur admissibilité devant un tribunal judiciaire.	Pouvoirs
Limitation in relation to evidence	(3) Notwithstanding paragraph (2)(c), a tribunal may not admit or accept as evidence anything that would be inadmissible in a court by reason of any privilege under the law of evidence.	(3) Malgré l'alinéa (2)c), le tribunal ne peut admettre en preuve les éléments qui, dans le droit de la preuve, sont confidentiels devant les tribunaux judiciaires.	Restriction
Conciliator not competent or compellable	(4) Notwithstanding paragraph (2)(a), a conciliator appointed to settle a complaint is not a competent or compellable witness at a hearing of a Tribunal appointed to inquire into the complaint.	(4) Malgré l'alinéa (2)a), le conciliateur n'est un témoin ni compétent ni contraignable devant le tribunal.	Le conciliateur n'est ni compétent ni contraignable
Witness fees	(5) Any person summoned to attend a hearing pursuant to this section is entitled in the discretion of the Tribunal to receive the like fees and allowances for so doing as if summoned to attend before the Federal Court. 1976-77, c. 33, s. 40.	(5) Les témoins assignés à comparaître en vertu du présent article peuvent, à l'appréciation du tribunal, recevoir les frais et indemnités accordés aux témoins assignés devant la Cour fédérale. 1976-77, ch. 33, art. 40.	Frais des témoins
Duty of Commission on appearing	51. The Commission, in appearing before a Tribunal, presenting evidence and making representations to it, shall adopt such position as, in its opinion, is in the public interest having regard to the nature of the complaint being inquired into. 1976-77, c. 33, s. 40.	51. En comparaisant devant le tribunal et en présentant ses éléments de preuve et ses observations, la Commission adopte l'attitude la plus proche, à son avis, de l'intérêt public, compte tenu de la nature de la plainte. 1976-77, ch. 33, art. 40.	Obligations de la Commission
Hearing in public	52. A hearing of a Tribunal shall be public, but a Tribunal may exclude members of the	52. Les audiences du tribunal sont publiques, mais le tribunal peut, dans l'intérêt	Audiences publiques

public during the whole or any part of a hearing if it considers that exclusion to be in the public interest. 1976-77, c. 33, s. 40.

public, ordonner le huis clos pour tout ou partie de leur durée. 1976-77, ch. 33, art. 40.

Complaint dismissed

53. (1) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is not substantiated, it shall dismiss the complaint.

53. (1) À l'issue de son enquête, le tribunal rejette la plainte qu'il juge non fondée.

Rejet de la plainte

Order

(2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, it may, subject to subsection (4) and section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in that order any of the following terms that it considers appropriate:

(2) À l'issue de son enquête, le tribunal qui juge la plainte fondée peut, sous réserve du paragraphe (4) et de l'article 54, ordonner, selon les circonstances, à la personne trouvée coupable d'un acte discriminatoire :

Ordonnance

(a) that the person cease the discriminatory practice and, in order to prevent the same or a similar practice from occurring in the future, take measures, including

a) de mettre fin à l'acte et de prendre, en consultation avec la Commission relativement à leurs objectifs généraux, des mesures destinées à prévenir des actes semblables, notamment :

(i) adoption of a special program, plan or arrangement referred to in subsection 16(1), or

(i) d'adopter un programme, plan ou arrangement visé au paragraphe 16(1),

(ii) the making of an application for approval and the implementing of a plan pursuant to section 17,

(ii) de présenter une demande d'approbation et de mettre en œuvre un programme prévu à l'article 17;

in consultation with the Commission on the general purposes of those measures;

b) d'accorder à la victime, dès que les circonstances le permettent, les droits, chances ou avantages dont, de l'avis du tribunal, l'acte l'a privée;

(b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, such rights, opportunities or privileges as, in the opinion of the Tribunal, are being or were denied the victim as a result of the practice;

c) d'indemniser la victime de la totalité, ou de la fraction qu'il juge indiquée, des pertes de salaire et des dépenses entraînées par l'acte;

(c) that the person compensate the victim, as the Tribunal may consider proper, for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice; and

d) d'indemniser la victime de la totalité, ou de la fraction qu'il juge indiquée, des frais supplémentaires occasionnés par le recours à d'autres biens, services, installations ou moyens d'hébergement, et des dépenses entraînées par l'acte.

(d) that the person compensate the victim, as the Tribunal may consider proper, for any or all additional cost of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice.

Special compensation

(3) In addition to any order that the Tribunal may make pursuant to subsection (2), if the Tribunal finds that

(3) Outre les pouvoirs que lui confère le paragraphe (2), le tribunal peut ordonner à l'auteur d'un acte discriminatoire de payer à la victime une indemnité maximale de cinq mille dollars, s'il en vient à la conclusion, selon le cas :

Indemnité spéciale

(a) a person is engaging or has engaged in a discriminatory practice wilfully or recklessly, or

(b) the victim of the discriminatory practice has suffered in respect of feelings or self-respect as a result of the practice,

the Tribunal may order the person to pay such compensation to the victim, not exceeding five thousand dollars, as the Tribunal may determine.

Order or
recommendation
to be made
to avoid undue
hardship

(4) If, at the conclusion of its inquiry into a complaint regarding discrimination based on a disability, the Tribunal finds that the complaint is substantiated but that the premises or facilities of the person found to be engaging or to have engaged in the discriminatory practice require adaptation to meet the needs of a person arising from such a disability, the Tribunal shall

(a) make such order pursuant to this section for that adaptation as it considers appropriate and as it is satisfied will not occasion costs or business inconvenience constituting undue hardship, or

(b) if the Tribunal considers that no such order can be made, make such recommendations as it considers appropriate,

and, in the event of such finding, the Tribunal shall not make an order unless required by this subsection. 1976-77, c. 33, s. 41; 1980-81-82-83, c. 143, s. 20.

Limitation of
order

54. (1) Where a Tribunal finds that a complaint related to a discriminatory practice described in section 13 is substantiated, it may make only an order referred to in paragraph 53(2)(a).

Idem

(2) No order under subsection 53(2) may contain a term

(a) requiring the removal of an individual from a position if that individual accepted employment in that position in good faith; or

(b) requiring the expulsion of an occupant from any premises or accommodation, if that occupant obtained such premises or accommodation in good faith. 1976-77, c. 33, s. 42.

Appeals

55. Where a Tribunal that made a decision or order was composed of fewer than three members, the Commission, the complainant before the Tribunal or the person against whom the complaint was made may appeal the decision or order by serving a notice, in a manner and form prescribed by order of the Governor in Council, within thirty days after the decision or order appealed was pronounced, on all per-

a) que l'acte a été délibéré ou inconsidéré;

b) que la victime en a souffert un préjudice moral.

(4) Le tribunal qui, à l'issue de son enquête, juge fondée une plainte portant sur une déficience et estime que les locaux ou les installations de l'auteur de l'acte discriminatoire doivent être adaptés aux besoins des personnes atteintes de cette déficience :

a) soit rend une ordonnance d'adaptation en vertu du présent article qui, à son avis, n'entraîne aucune contrainte financière ou commerciale excessive et est indiquée;

b) soit, s'il ne peut rendre une telle ordonnance, fait les recommandations qu'il estime indiquées;

le tribunal ne peut toutefois rendre d'autres ordonnances que celle qui est prévue au présent paragraphe. 1976-77, ch. 33, art. 41; 1980-81-82-83, ch. 143, art. 20.

Exception en
cas de
contraintes
excessives

54. (1) Le tribunal qui juge fondée une plainte tombant sous le coup de l'article 13 ne peut rendre que l'ordonnance prévue à l'alinéa 53(2)a).

Restriction

(2) L'ordonnance prévue au paragraphe 53(2) ne peut exiger :

a) le retrait d'un employé d'un poste qu'il a accepté de bonne foi;

b) l'expulsion de l'occupant de bonne foi de locaux, moyens d'hébergement ou logements. 1976-77, ch. 33, art. 42.

Idem

55. La Commission ou les parties peuvent interjeter appel de la décision ou de l'ordonnance rendue par un tribunal de moins de trois membres en signifiant l'avis prescrit par décret du gouverneur en conseil aux personnes qui ont reçu l'avis prévu au paragraphe 50(1), dans les trente jours du prononcé de la décision ou de l'ordonnance. 1976-77, ch. 33, art. 42.1.

Appels

sons who received notice from the Tribunal under subsection 50(1). 1976-77, c. 33, s. 42.1.

**Establishment
of Review
Tribunal**

56. (1) The Commission shall, forthwith after serving a notice of appeal where it is the appellant or after receipt of a notice of appeal, select three members from the panel of prospective members referred to in subsection 49(5), other than the member or members of the Tribunal whose decision or order is being appealed, to constitute a Review Tribunal to hear the appeal.

56. (1) Dès la signification de l'avis d'appel, si elle interjette appel, ou dès la réception de l'avis d'appel, la Commission constitue un tribunal d'appel de trois membres à partir de la liste prévue au paragraphe 49(5), à l'exclusion des membres du tribunal qui ont rendu la décision ou l'ordonnance visée par l'appel.

Constitution
d'un tribunal
d'appel

**Constitution
and powers**

(2) Subject to this section, a Review Tribunal shall be constituted in the same manner as, and shall have all the powers of, a Tribunal appointed pursuant to section 49, and subsection 49(4) applies in respect of members of a Review Tribunal.

(2) Sous réserve des autres dispositions du présent article, les tribunaux d'appel sont constitués comme les tribunaux prévus à l'article 49 et sont investis des mêmes pouvoirs; leurs membres ont droit à la rémunération et aux indemnités prévues au paragraphe 49(4).

Constitution et
pouvoirs

**Grounds for
appeal**

(3) An appeal lies to a Review Tribunal against a decision or order of a Tribunal on any question of law or fact or mixed law and fact.

(3) Le tribunal d'appel peut entendre les appels fondés sur des questions de droit ou de fait ou des questions mixtes de droit et de fait.

Motifs d'appel

**Hearing of
appeal**

(4) A Review Tribunal shall hear an appeal on the basis of the record of the Tribunal whose decision or order is appealed and of submissions of interested parties but the Review Tribunal may, if in its opinion it is essential in the interests of justice to do so, admit additional evidence or testimony.

(4) Le tribunal d'appel entend l'appel en se basant sur le dossier du tribunal dont la décision ou l'ordonnance fait l'objet de l'appel et sur les observations des parties intéressées; mais il peut, s'il l'estime indispensable à la bonne administration de la justice, recevoir de nouveaux éléments de preuve ou entendre des témoignages.

Audience

**Disposition of
appeal**

(5) A Review Tribunal may dispose of an appeal under section 55 by dismissing it, or by allowing it and rendering the decision or making the order that, in its opinion, the Tribunal appealed against should have rendered or made. 1976-77, c. 33, s. 42.1.

(5) Le tribunal d'appel qui statue sur les appels prévus à l'article 55 peut soit les rejeter, soit y faire droit et substituer ses décisions ou ordonnances à celles faisant l'objet des appels. 1976-77, ch. 33, art. 42.1.

Décision

**Enforcement of
order**

57. Any order of a Tribunal under subsection 53(2) or (3) or any order of a Review Tribunal under subsection 56(5) may, for the purpose of enforcement, be made an order of the Federal Court by following the usual practice and procedure or, in lieu thereof, by the Commission filing in the Registry of the Court a copy of the order certified to be a true copy, and thereupon that order becomes an order of the Court. 1976-77, c. 33, s. 43.

57. Aux fins de leur exécution, les ordonnances rendues en vertu des paragraphes 53(2) ou (3) ou 56(5) peuvent, selon la procédure habituelle ou dès que la Commission en dépose au greffe de la Cour fédérale une copie certifiée conforme, être assimilées aux ordonnances rendues par celle-ci. 1976-77, ch. 33, art. 43.

Exécution des
ordonnances

**Application
respecting
disclosure of
information**

58. (1) Where any investigator or Tribunal requires the disclosure of any information and a minister of the Crown or any other person interested objects to its disclosure, the Commission may apply to the Federal Court for a determination of the matter.

58. (1) Dans les cas où un ministre fédéral ou une autre personne intéressée s'oppose à la divulgation de renseignements demandée par l'enquêteur ou le tribunal, la Commission peut demander à la Cour fédérale de statuer sur la question.

Divulgence de
renseignements

Certificate

(2) Where the Commission applies to the Federal Court pursuant to subsection (1) and the minister of the Crown or other person interested objects to the disclosure in accordance with sections 37 to 39 of the *Canada Evidence Act*, the matter shall be determined in accordance with the terms of those sections.

(2) Dans le cas où le ministre ou l'autre personne intéressée se prévalent du droit d'opposition à la divulgation, prévu aux articles 37 à 39 de la *Loi sur la preuve au Canada*, la Cour fédérale statue sur la demande prévue au paragraphe (1) conformément à ces articles.

Opposition

No certificate

(3) Where the Commission applies to the Federal Court pursuant to subsection (1) but the minister of the Crown or other person interested does not within ninety days thereafter object to the disclosure in accordance with sections 37 to 39 of the *Canada Evidence Act*, the Court may take such action as it deems appropriate. 1976-77, c. 33, s. 44; 1980-81-82-83, c. 111, s. 5, c. 143, s. 21.

(3) Dans les cas où le ministre ou l'autre personne intéressée ne se prévalent pas du droit d'opposition à la divulgation, prévu aux articles 37 à 39 de la *Loi sur la preuve au Canada*, dans les quatre-vingt-dix jours suivant la demande, la Cour fédérale prend les mesures qu'elle juge indiquées. 1976-77, ch. 33, art. 44; 1980-81-82-83, ch. 111, art. 5, ch. 143, art. 21.

Absence d'opposition

Intimidation or discrimination

59. No person shall threaten, intimidate or discriminate against an individual because that individual has made a complaint or given evidence or assisted in any way in respect of the initiation or prosecution of a complaint or other proceeding under this Part, or because that individual proposes to do so. 1976-77, c. 33, s. 45.

59. Est interdite toute menace, intimidation ou discrimination contre l'individu qui dépose une plainte, témoigne ou participe de quelque façon que ce soit au dépôt d'une plainte, au procès ou aux autres procédures que prévoit la présente partie, ou qui se propose d'agir de la sorte. 1976-77, ch. 33, art. 45.

Intimidation ou discrimination

Offences and Punishment

Infractions et peines

Offence

60. (1) Every person is guilty of an offence who

- (a) fails to comply with the terms of any settlement of a complaint approved and certified under section 48;
- (b) obstructs a Tribunal in carrying out its functions under this Part; or
- (c) contravenes subsection 11(6) or 43(3) or section 59.

60. (1) Commet une infraction quiconque, selon le cas :

- a) ne se conforme pas aux conditions approuvées et certifiées par la Commission en vertu de l'article 48;
- b) entrave l'action d'un tribunal dans l'exercice des fonctions que lui confère la présente partie;
- c) enfreint les paragraphes 11(6) ou 43(3) ou l'article 59.

Infraction

Punishment

(2) A person who is guilty of an offence under subsection (1) is liable on summary conviction

- (a) if the accused is an employer, an employer association or an employee organization, to a fine not exceeding fifty thousand dollars; or
- (b) in any other case, to a fine not exceeding five thousand dollars.

(2) Quiconque commet une infraction prévue au paragraphe (1) encourt, sur déclaration de culpabilité par procédure sommaire :

- a) une amende maximale de cinquante mille dollars, dans le cas d'un employeur, d'une association patronale ou d'une organisation syndicale;
- b) une amende maximale de cinq mille dollars, dans les autres cas.

Peine

Prosecution of employer association or employee organization

(3) A prosecution for an offence under this section may be brought against an employer association or employee organization and in the name of that association or organization and for the purpose of the prosecution that association or organization shall be deemed to be a

(3) Les poursuites fondées sur les infractions prévues au présent article peuvent être intentées contre ou au nom d'une association patronale ou d'une organisation syndicale; à cette fin, l'association ou l'organisation est considérée comme une personne et toute action ou

Poursuites d'associations patronales et d'organisations syndicales

person and any act or thing done or omitted by an officer or agent of that association or organization within the scope of that officer's or agent's authority to act on behalf of the association or organization shall be deemed to be an act or thing done or omitted by the association or organization.

omission de ses dirigeants ou mandataires dans le cadre de leurs pouvoirs d'agir pour le compte de l'association est réputée être une action ou omission de l'association.

Consent of
Attorney
General

(4) A prosecution for an offence under this section may not be instituted except by or with the consent of the Attorney General of Canada.

(4) Les poursuites fondées sur les infractions prévues au présent article ne peuvent être intentées que par le procureur général du Canada ou qu'avec son consentement.

Consentement
du procureur
général

Definition of
"employer
association"

(5) For the purposes of this section, "employer association" means any organization of employers the purposes of which include the negotiation, on behalf of employers, of the terms and conditions of employment of employees. 1976-77, c. 33, s. 46.

(5) Pour l'application du présent article, «association patronale» désigne une association d'employeurs chargée notamment de négocier les conditions de travail des employés. 1976-77, ch. 33, art. 46.

Définition de
«association
patronale»

Reports

Rapports

Annual report

61. (1) The Commission shall, within three months after December 31 in each year, transmit to the Minister of Justice a report on the activities of the Commission under this Part and Part II for that year including references to and comments on any matter referred to in paragraph 27(1)(e) or (g) that it considers appropriate.

61. (1) Dans les trois mois qui suivent la fin de l'année civile, la Commission présente au ministre de la Justice un rapport sur l'application de la présente partie et de la partie II au cours de cette année, y mentionnant et commentant tout point visé aux alinéas 27(1)e) ou g) qu'elle juge pertinent.

Rapport annuel

Special reports

(2) The Commission may, at any time, transmit to the Minister of Justice a special report referring to and commenting on any matter within the scope of its powers, duties and functions where, in its opinion, the matter is of such urgency or importance that a report thereon should not be deferred until the time provided for transmission of its next annual report under subsection (1).

(2) La Commission peut, à tout moment, présenter au ministre de la Justice un rapport spécial mentionnant et commentant toute question relevant de ses pouvoirs et fonctions d'une urgence ou d'une importance telles qu'il ne saurait attendre la présentation du prochain rapport annuel visé au paragraphe (1).

Rapports
spéciaux

Tabling reports

(3) The Minister shall cause any report transmitted to the Minister pursuant to this section to be laid before each House of Parliament on any of the first fifteen days on which that House is sitting after the day the Minister receives it. 1976-77, c. 33, s. 47; 1980-81-82-83, c. 143, s. 22.

(3) Le ministre dépose les rapports devant chaque chambre du Parlement dans les quinze premiers jours de séance de celle-ci suivant leur réception. 1976-77, ch. 33, art. 47; 1980-81-82-83, ch. 143, art. 22.

Dépôt devant le
Parlement

Application

Application

Limitation

62. (1) This Part and Parts I and II do not apply to or in respect of any superannuation or pension fund or plan established by an Act of Parliament enacted before March 1, 1978.

62. (1) La présente partie et les parties I et II ne s'appliquent, ni directement ni indirectement, aux régimes ou caisses de retraite constitués par une loi fédérale antérieure au 1^{er} mars 1978.

Restriction

Review of Acts
referred to in
subsection (1)

(2) The Commission shall keep under review those Acts of Parliament enacted before March 1, 1978 by which any superannuation or pension fund or plan is established and, where the Commission deems it to be appropriate, it may include in a report mentioned in section 61 reference to and comment on any provision of any of those Acts that in its opinion is inconsistent with the principle described in section 2. 1976-77, c. 33, s. 48.

(2) La Commission examine les lois fédérales, antérieures au 1^{er} mars 1978, établissant des régimes ou caisses de retraite; dans les cas où elle le juge approprié, elle peut mentionner et commenter dans le rapport visé à l'article 61 toute disposition de ces lois qu'elle estime incompatible avec le principe énoncé à l'article 2. 1976-77, ch. 33, art. 48.

Examen des lois
visées au par.
(1)

Application in
the Territories

63. Where a complaint under this Part relates to an act or omission that occurred in the Yukon Territory or the Northwest Territories, it may not be dealt with under this Part unless the act or omission could be the subject of a complaint under this Part had it occurred in a province. 1976-77, c. 33, s. 48.

63. Les plaintes déposées sous le régime de la présente partie qui portent sur des actions ou des omissions survenues dans le territoire du Yukon ou dans les Territoires du Nord-Ouest ne sont recevables sous ce régime que dans la mesure où elles le seraient dans les provinces. 1976-77, ch. 33, art. 48.

Application
dans les
territoires

Canadian
Forces and
Royal
Canadian
Mounted Police

64. For the purposes of this Part and Parts I and II, members of the Canadian Forces and the Royal Canadian Mounted Police are deemed to be employed by the Crown. 1976-77, c. 33, s. 48.

64. Pour l'application de la présente partie et des parties I et II, les personnels des Forces canadiennes et de la Gendarmerie royale du Canada sont réputés être employés par la Couronne. 1976-77, ch. 33, art. 48.

Forces
canadiennes et
Gendarmerie
royale du
Canada

Acts of
employees, etc.

65. (1) Subject to subsection (2), any act or omission committed by an officer, a director, an employee or an agent of any person, association or organization in the course of the employment of the officer, director, employee or agent shall, for the purposes of this Act, be deemed to be an act or omission committed by that person, association or organization.

65. (1) Sous réserve du paragraphe (2), les actes ou omissions commis par un employé, un mandataire, un administrateur ou un dirigeant dans le cadre de son emploi sont réputés, pour l'application de la présente loi, avoir été commis par la personne, l'organisme ou l'association qui l'emploie.

Présomption

Exculpation

(2) An act or omission shall not, by virtue of subsection (1), be deemed to be an act or omission committed by a person, association or organization if it is established that the person, association or organization did not consent to the commission of the act or omission and exercised all due diligence to prevent the act or omission from being committed and, subsequently, to mitigate or avoid the effect thereof. 1980-81-82-83, c. 143, s. 23.

(2) La personne, l'organisme ou l'association visé au paragraphe (1) peut se soustraire à son application s'il établit que l'acte ou l'omission a eu lieu sans son consentement, qu'il avait pris toutes les mesures nécessaires pour l'empêcher et que, par la suite, il a tenté d'en atténuer ou d'en annuler les effets. 1980-81-82-83, ch. 143, art. 23.

Réserve

PART IV

APPLICATION

Binding on Her
Majesty

66. (1) This Act is binding on Her Majesty in right of Canada, except in matters respecting the Government of the Yukon Territory or the Northwest Territories.

66. (1) La présente loi lie Sa Majesté du chef du Canada sauf en ce qui concerne les gouvernements du territoire du Yukon et des Territoires du Nord-Ouest.

Obligation de
Sa Majesté

Commence-
ment

(2) The exception referred to in subsection (1) shall come into operation in respect of the

(2) L'exception prévue au paragraphe (1) entre en vigueur à l'égard du gouvernement du

Entrée en
vigueur

Government of the Yukon Territory on a day to be fixed by proclamation.

territoire du Yukon à la date fixée par proclamation.

Idem

(3) The exception referred to in subsection (1) shall come into operation in respect of the Government of the Northwest Territories on a day to be fixed by proclamation. 1976-77, c. 33, s. 63; 1980-81-82-83, c. 143, ss. 24, 29.

(3) L'exception prévue au paragraphe (1) entre en vigueur à l'égard du gouvernement des Territoires du Nord-Ouest à la date fixée par proclamation. 1976-77, ch. 33, art. 63; 1980-81-82-83, ch. 143, art. 24 et 29. Idem

Saving

67. Nothing in this Act affects any provision of the *Indian Act* or any provision made under or pursuant to that Act. 1976-77, c. 33, s. 63.

67. La présente loi est sans effet sur la *Loi sur les Indiens* et sur les dispositions prises en vertu de cette loi. 1976-77, ch. 33, art. 63. Exception

Immigration Act

R.S.C. 1985, c. I-2

Am. R.S.C. 1985 (1st Supp.), c. 31, s. 99;
R.S.C. 1985 (2nd Supp.), cc. 10, 46;
R.S.C. 1985 (3d Supp.), c. 30;
R.S.C. 1985 (4th Supp.), c. 1, s. 27; cc. 28, 29, 30;
S.C. 1990, c. 8, ss. 51-55; c. 16, ss. 12, 13; c. 17, ss. 23, 24; c. 38; c. 44, s. 16; 1992, c. 1,
ss. 73-78, 143; 1992, c. 47, ss. 77-78; 1992, c. 49, ss. 1-107; 1992, c. 51, ss. 52-53; 1993,
c. 28, s. 78 [not in force at date of publication].

Short Title

1. This Act may be cited as the Immigration Act. 1976-77, c. 52, s. 1.

PART I CANADIAN IMMIGRATION POLICY

Objectives

IMMIGRATION OBJECTIVES.

3. It is hereby declared that Canadian immigration policy and the rules and regulations made under this Act shall be designed and administered in such a manner as to promote the domestic and international interests of Canada recognizing the need

(a) to support the attainment of such demographic goals as may be established by the Government of Canada in respect of the size, rate of growth, structure and geographic distribution of the Canadian population;

(b) to enrich and strengthen the cultural and social fabric of Canada, taking into account the federal and bilingual character of Canada;

(c) to facilitate the reunion in Canada of Canadian citizens and permanent residents with their close relatives from abroad;

(d) to encourage and facilitate the adaptation of persons who have been granted admission as permanent residents to Canadian society by promoting cooperation between the Government of Canada and other levels of government and non-governmental agencies in Canada with respect thereto;

(e) to facilitate the entry of visitors into Canada for the purpose of fostering trade and commerce, tourism, cultural and scientific activities and international understanding;

(f) to ensure that any person who seeks admission to Canada on either a permanent or temporary basis is subject to standards of admission that do not discriminate in a manner inconsistent with the *Canadian Charter of Rights and Freedoms*;

(g) to fulfil Canada's international legal obligations with respect to refugees and to uphold its humanitarian tradition with respect to the displaced and the persecuted;

(h) to foster the development of a strong and viable economy and the prosperity of all regions in Canada;

(i) to maintain and protect the health, safety and good order of Canadian society; and

(j) to promote international order and justice by denying the use of Canadian territory to persons who are likely to engage in criminal activity. 1976-77, c. 52, s. 3; R.S.C. 1985 (4th Supp.), c. 28, s. 2.

**PART III
EXCLUSION AND REMOVAL**

Inadmissible Classes

INADMISSIBLE PERSONS — *Meaning of "senior members . . ." — Inadmissible classes where entry permitted — Discretionary grant of entry.*

19. (1) No person shall be granted admission who is a member of any of the following classes:

(a) Persons who are suffering from any disease, disorder, disability or other health impairment as a result of the nature, severity or probable duration of which, in the opinion of a medical officer concurred in by at least one other medical officer,

(i) they are or are likely to be a danger to public health or to public safety, or

(ii) their admission would cause or might reasonably be expected to cause excessive demands on health or social services;

(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; [1992, c. 49, s. 10.]

Not in force at date of publication.