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NOVEL FEATURES OF THE IMMIGRATION ACT, 1976

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Introduction

On April 10th, 1978, after almost five years in the making, a new Immigration Act came into force in Canada. The legislation marked the culmination of a national debate initiated by a Government-published *Green Paper*, followed by hearings across Canada by a Special Joint Committee of Parliament and extensive scrutiny by the Standing Parliamentary Committee on Labour, Manpower and Immigration after second reading in the House of Commons. The new Act incorporates many of the recommendations of these committees.

The new Act¹ is the first comprehensive legislative revision in immigration since 1952. Only a few significant, piecemeal legislative changes had been enacted in the intervening period. In 1967, the Immigration Appeal Board Act² established the Board as an independent appeal tribunal and transferred considerable discretion from the Minister to that agency. Unfortunately, the universal right of appeal coupled with the right to apply for landing in Canada soon led to a virtual collapse of the system. In late 1972, the regulation which had permitted applications for landing within Canada was withdrawn, and in 1973 the Immigration Appeal Board Act³ was amended to limit the right of appeal to four categories of person, including for the first time, persons claiming to be refugees protected

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¹ S.C., 1976-77, c. 52.

² S.C., 1966-67, c. 90.

³ S.C., 1973-74, c. 27.

by the United Nations Convention and Protocol Relating to the Status of Refugees.⁴ A number of other major initiatives in immigration policy during that period—institution of a non-discriminatory selection system, introduction of employment visas for non-immigrant workers—were enacted by regulatory changes.

The legislation recently proclaimed attempts to strike a balance between administrative efficiency and respect for civil liberties. It accords the Government increased power to deal with terrorists, subversives, criminals and those seeking to circumvent immigration laws; at the same time, it offers increased protection to the individual in a number of areas—refugees, the adjudication system, alternatives to deportation, and arrest and detention. For the first time, it also recognizes the increased interest of provincial governments in the immigration process.

The new Act is longer, and more detailed and subtle than the 1952 legislation. It attempts to deal with a wider variety of fact patterns and to tailor its remedies and sanctions accordingly. In many instances, it was drafted with a view to resolving differences or bridging gaps which had arisen in the past. In so doing, the legislator inevitably has created new problems which the courts will be called upon to settle. Unfortunately, some of the legislative intent is not readily ascertainable upon an initial reading of the statute. By highlighting the novel features of the new legislation in comparison with the old, the present article seeks to contribute to a better understanding of this complex statute.

I. *Statement of Objectives.*

The 1952 Immigration Act⁵ had been cast in rather negative, exclusionary terms. In order to achieve a more positive approach, the new Act sets out the objectives of Canadian immigration policy in section 3. Taken together, these objectives are impressive and have the advantage of introducing the reader to the policy goals which the Government will seek to implement within the framework of the Act. When applied to individual cases, however, at times they may prove somewhat inconsistent, and it will be interesting to see how they are interpreted by the courts, considering their location in an operative section of the Act rather than a preamble.⁶

⁴ 189 U.N.T.S. 150, 606 U.N.T.S. 267.

⁵ R.S.C., 1952, c. 325.

⁶ A similar statement of objectives is found in s. 3 of the National Transportation Act, R.S.C., 1970, c. N-17, and in s. 3 of the Broadcasting Act, R.S.C., 1970, c. B-11. For some judicial comment on the objectives of broadcasting policy, see *Regina v. CKOY Ltd* (1977), 70 D.L.R. (3d) 662, aff'd by S.C.C., Oct. 3, 1978, not yet reported.

II. *Categories of Person Envisaged by Immigration Law.*

The new Immigration Act envisages a number of categories of person, most of whom are defined in section 2—Canadian citizens; registered Indians; permanent residents; Convention refugees; holders of a permit; persons described in section 14(1)(c); immigrants and visitors.⁷

Pursuant to section 12, all persons seeking to come into Canada are subject to examination at a port of entry. Canadian citizens, registered Indians and permanent residents not described in section 27(1) have a right to come into Canada (section 4). These persons, as well as permit holders and persons described in section 14(1)(c), shall be allowed to come into Canada (section 14); all others must seek admission and are subject to the provisions of section 19. Immigrants who meet the requirements of the Act and the Regulations *shall* be granted landing (section 5(2)); visitors who meet the requirements of the Act and Regulations *may* be granted entry (section 5(3)). By the latter provision, the Act recognizes the privileged nature of the status granted to visitors, and this principle is reinforced in other parts of the Act, notably section 17(1) relating to requests by visitors for extension of status, and section 27(2)(d) respecting removal of visitors for criminal activities.

III. *Selection of Immigrants.*

The process for selecting immigrants generally takes place outside Canada. Section 9 of the Act requires every immigrant, except in such cases as are prescribed in the Regulations, to "make an application for and obtain a visa before he appears at a port of entry". The courts have accepted the necessity for this examination to be conducted abroad,⁸ and the Federal Court more recently has held that the refusal of a visa officer to issue a visa is an administrative decision which is not subject to judicial review.⁹

The former Immigration Act provided very little indication as to how immigrants were selected. Aside from a number of broad regulation-making powers in section 57, the entire selection system was found in the Immigration Regulations. The new Act attempts to achieve a better balance between the Act and the Regulations by setting out the basis of the selection system in sections 6 and 115(1)(a)-(f).

⁷ The term "visitor" includes all of the categories of person described as non-immigrants under s. 7 of the former Act, with the exception of permit holders.

⁸ *Re Mannira* (1959), 17 D.L.R. (2d) 482.

⁹ *Bhadauria v. Minister of Manpower and Immigration*, [1978] 1 F.C. 229.

Section 6 provides that the purpose of the selection standards is to determine "whether or not an immigrant will be able to become successfully established in Canada". Section 115(1)(a) sets out some of the factors by which successful establishment is to be judged. The wording of section 9(4) makes it clear that the issuance of a visa does not constitute a conclusive determination that an immigrant meets the requirements of the Act and the Regulations. The final decision must be made by an immigration officer at a port of entry pursuant to sections 12(1) and 20(1) of the Act. Nevertheless, a visa holder denied admission at a port of entry is accorded a right of appeal to the Immigration Appeal Board (section 72(2)(b)).

Immigrants who are neither members of the family class (similar to the former sponsored category) nor Convention refugees seeking resettlement are subject to the selection criteria referred to in sections 8 and following of the Regulations. Included in this category are "independent" immigrants, assisted relatives (similar to the former nominated group), retired persons, self-employed persons and entrepreneurs. Except in the case of retired persons, selection is on the basis of the factors and units of assessment specified in Schedule I to the Regulations.

In addition to the selection of regular immigrants, for the first time the Act provides for the enactment of regulations to select outside Canada immigrants who are also Convention refugees within the meaning of the United Nations Convention and Protocol Relating to the Status of Refugees. Regulation 7 establishes these selection criteria. This system goes beyond the strict legal requirements of the Convention, which obliges contracting states only to refrain from expelling Convention refugees from their territories under certain circumstances. While Convention refugees must be capable of successful establishment in Canada, this is determined by taking into account only the factors mentioned in Schedule I, without the awarding of points. Only "Convention refugees seeking resettlement" are entitled to the benefit of this provision, and a refugee who has already been resettled in a third country will be assessed according to the selection standards applicable to regular immigrants.

The Act and the Regulations also recognize past Canadian practice of admitting many persons who find themselves in unfortunate circumstances, but who are unable to meet the Convention definition of refugee—members of oppressed minorities still within their country of nationality, victims of natural disasters, war, and so on. In the past, there was no specific mention in the Regulations of these groups, whose members were admitted from time to time by various administrative measures and special orders-in-council. Sections 6(2) and 115(1)(d) of the new Act now

provide the authority for the Governor-in-Council to designate classes, the admission of whose members "would be in accordance with Canada's humanitarian tradition with respect to the displaced and the persecuted". Regulations providing for the admission of limited numbers of such persons will be enacted from time to time as the need arises.

IV. Visas and Authorizations.

Section 9(1) of the Act provides:

Except in such cases as are prescribed, every immigrant and visitor shall make an application for and obtain a visa before he appears at a port of entry.

As under the former Act, visitors from many countries will be exempted from the visa requirement pursuant to regulation 13(1) and Schedule II to the Regulations. In some cases, immigrants will also be exempted from the visa requirement, primarily by "special relief regulation" (section 115(2)).

In addition, visitors seeking entry to study or work will require an employment or student authorization, defined in regulation 2(1). In general, these authorizations can only be obtained outside Canada. This is intended to discourage persons from securing entry as visitors, searching for employment or a course of studies in Canada, and then applying to change their status.

There is an important distinction between visas and authorizations. The former are intended to lapse upon presentation at a port of entry, whereas the latter are to be of continuing effect even after admission to Canada.

Visa holders ordered removed at a port of entry may appeal to the Immigration Appeal Board pursuant to section 72(2)(b). The granting of a right of appeal in these circumstances recognizes the need for a review of a decision to deny entry to a person who has come forward to Canada on the strength of a preliminary clearance by a visa officer. While the same logic would appear to be applicable to holders of employment or student authorizations, section 72(2)(b) does not accord a right of appeal to such persons. Nevertheless, the same effect is achieved by regulation 13(1), which requires every visitor seeking to study or work in Canada to obtain a visa as well as an authorization. This requirement applies even to nationals of countries who otherwise would be exempted under Schedule II from the need to obtain a visitor's visa.

The details relating to student authorizations are found in regulations 15-17 and those relating to employment authorizations in regulations 18-20. In prescribed cases, some categories of person will be permitted to apply for these authorizations in Canada; some persons seeking to engage in employment (but not students) will be

exempted entirely from the necessity of obtaining an authorization; and some employment authorizations may be issued notwithstanding the effect upon employment opportunities for Canadian citizens and permanent residents.

The Regulations give immigration officers broader discretion than under the former Regulations to determine whether or not an employment authorization should be issued to a visitor. Under former regulation 3D(2)(a), the test was whether a qualified Canadian or permanent resident was willing and available to engage in the employment. This wording gave rise to at least one expression of judicial doubt that an employment visa could be denied if no particular Canadian citizen or permanent resident were presented to fill the employment.¹⁰ Under new regulation 20(1)(a), an immigration officer is now prohibited from issuing an employment authorization if "in his opinion, employment of the person in Canada will adversely affect employment opportunities for Canadian citizens or permanent residents in Canada". This broader wording seems to permit resort to general statistics on employment vacancies rather than a determination as to whether a particular person is available to fill a particular employment. The officer is also entitled to take into account whether the employer has made reasonable efforts to hire or train citizens or permanent residents for the employment, the qualifications of the applicant for the employment, and the adequacy of wages and working conditions.

V. Applications to Immigration Officers.

There are three potential points of contact between immigrants or visitors and immigration officials:

- (a) sections 9 and 10 govern applications for visas or authorizations, or both, outside Canada;
- (b) sections 12-15 govern examinations at ports of entry;
- (c) sections 16-17 relate to applications by visitors in Canada to vary or cancel terms and conditions or extend their authorized stay in Canada.

Sections 16 and 17 represent a considerable change from the former Act. Section 7(3) of that statute had deemed persons seeking extensions or changes in status to be seeking admission to Canada, and they were entitled to admission unless the examining immigration officer considered that they were members of a prohibited class. By means of this provision, some persons repeatedly were able to renew their status, at least until a case could be established that they

¹⁰ *Doran v. The Queen and the Minister of Manpower and Immigration*, [1977] 1 F.C. 3, at pp. 9-10.

were no longer *bona fide* non-immigrants. By contrast, under the new Act the grant of extensions is exclusively within the discretion of an immigration officer (section 17(1)). If the request is refused, however, the person is entitled to complete his stay in Canada (section 17(3)).

It is important to remember that an application to an immigration officer pursuant to section 16 may only be made by a visitor. "Visitor" is defined in section 2 as "a person who is lawfully in Canada . . . for a temporary purpose . . .". If a visitor fails to apply prior to the expiry of his status, he loses that status under section 26(1)(b) and becomes subject to removal under section 27(2)(e). Regulation 24(2) also requires that an application pursuant to section 16(1) be made in person.

VI. Terms and Conditions.

Under section 7 of the former Act, non-immigrants were sub-divided into particular categories depending upon the purpose for which entry was sought.¹¹ Changes in activities could cause the individual to cease to be a non-immigrant or to be in the particular class in which he was admitted as a non-immigrant, thereby obliging him to report for examination. However, it was not possible to impose terms and conditions, except as to the period of time and indirectly in the case of employment visas.

Under the new Act, the term "non-immigrant" has now been replaced by that of "visitor". There are no longer sub-categories of visitor, the term referring to any person lawfully in Canada or seeking to come into Canada for any temporary purpose. Visitors are regulated through the imposition of terms and conditions (section 14(3)). The types of terms and conditions that may be imposed are prescribed in regulation 23(e). Failure to comply with terms and conditions results in loss of visitor's status (section 26), bringing about liability to removal under section 27(2)(e).

Terms and conditions of a prescribed nature may also be imposed on immigrants who have been granted landing (section 14(2)(a)); but no such term or condition may specify the area in which that person shall reside (section 115(4)). The only terms and conditions which may be prescribed in the case of immigrants are that a sponsored fiancé(e) marry within a specified time period, and that certain immigrants report for medical observation and treatment or to furnish evidence of compliance with terms or conditions (regulation 23(d)).

¹¹ *Srivastava v. Minister of Manpower and Immigration*, [1973] F.C. 138; *Narain v. Minister of Manpower and Immigration*, [1974] 2 F.C. 747.

The new Act also provides for "landing at destination" (section 14(2)(b)), which differs from the imposition of terms and conditions. Its purpose is to ensure that immigrants proceed to the destination indicated in their applications by landing them at those destinations rather than at a port of entry. It is hoped that this will encourage them to remain at the destinations indicated. Once an immigrant has been landed at destination, terms and conditions may still be imposed (section 14(4)).

VII. *Criminality*

The new Act introduces significant changes with respect to exclusion or removal on grounds of criminality:

- (a) it eliminates the abstract moral turpitude criterion contained in section 5(d) of the former Act and replaces it with provisions which seek to gauge the seriousness of foreign criminal convictions in terms of Canadian equivalents;
- (b) a simple admission of the commission of a crime is no longer grounds for exclusion or removal;
- (c) in determining admissibility, sections 19(1) and (2) distinguish between very serious crimes, for which no exception is possible except by way of Minister's permit, and less serious offences which, while barring immigrants, will permit entry of visitors for relatively brief periods in the interest of other objectives of immigration policy;
- (d) with respect to removal, the commitment which Canada has assumed to permanent residents is recognized by authorizing removal only for relatively serious criminal activity;
- (e) in keeping with the abridging of the residence requirement for citizenship from five to three years,¹² the concept of domicile is deleted, although acquired rights are respected (section 127). Henceforth, all permanent residents who have not acquired citizenship are treated uniformly in terms of criminal activity;
- (f) the most rigorous standards of conduct are required of visitors who, pursuant to section 27(2)(d), may be removed for a single summary conviction under the Criminal Code;
- (g) inadmissible classes have been established to deal with members of organized crime, subversives and terrorists, and new evidentiary procedures have been developed to facilitate proof where the evidence is based on security or criminal intelligence reports (sections 39-40).

¹² S. 5(b), Citizenship Act, S.C., 1974-75-76, c. 108.

While the moral turpitude criterion possessed a certain intuitive logic in the case of many offences, its vague and abstract nature gave rise to a number of interpretative difficulties.¹³ The criminality provisions of the new Act seek to obviate some of these difficulties by determining inadmissibility in terms of convictions in Canada, or convictions outside Canada where the offence is one which would also be punishable under Canadian law. This is more objective than the moral turpitude criterion, and it is now clear that Canadian and not foreign law is to be used for assessing the seriousness of criminal activity. However, the new provisions may result in a new set of uncertainties. For example, what is the position of persons convicted of offences in countries with entirely different legal systems from ours? What if the foreign offence is broader than and includes an equivalent Canadian offence? What if the foreign offence relates to more than one Canadian offence? In addition, there may be evidentiary difficulties involved in determining the elements of the foreign offence so as to compare it to its Canadian equivalent. The courts will undoubtedly be called upon in the near future to resolve these problems.

With respect to removal, section 27(1) deals with permanent residents while section 27(2) refers to all others. Sections 27(1)(a) and (2)(a) are intended to deal with foreign convictions which were unknown at the time of landing or entry, or with permanent residents who leave Canada, are convicted of offences outside Canada, and seek to return. Sections 27(1)(d) and (2)(d) deal with convictions in Canada.

VIII. *Admission of Members of Inadmissible Classes.*

The new Act provides two mechanisms by means of which the rigour of the inadmissible classes may be mitigated. As under the former Act, section 37 authorizes the Minister to issue a written permit authorizing an inadmissible person to come into Canada or a visitor subject to removal to remain in Canada. In addition, section 19(3) allows a senior immigration officer or an adjudicator to grant entry to any person who is a member of an inadmissible class described in section 19(2) for a period not exceeding thirty days, subject to such terms and conditions as are deemed appropriate.

Section 19(3) applies only to visitors who are members of the less serious inadmissible classes. While Canada may not wish to accept such individuals as immigrants, in most cases there is little reason to deny entry for short periods of time if they are unlikely to cause any difficulties while in Canada. It was apparently considered

¹³ *Moore v. Minister of Manpower and Immigration* (1973), 4 I.A.C. 199; *Button v. Minister of Manpower and Immigration*, [1975] F.C. 277.

by the legislator that such cases will arise fairly frequently and need not warrant the issuance of Minister's permits pursuant to section 37.¹⁴

One important change from the former Act is that the definition of visitor in section 2 now excludes permit holders, so that upon expiry or cancellation of a permit, such persons are removed according to the procedure in sections 37(5) and (6) rather than section 27(2)(e).

IX. *Adjudicators.*

Under the former Act, there was some criticism of the special inquiry system on the grounds that the special inquiry officer assumed the incompatible roles of prosecutor and judge. While the courts tended to reject any necessary conclusion of bias arising out of the nature of the office, because the statute sanctioned this dual role,¹⁵ the category of adjudicator was established to avoid even the appearance of partiality.

At first glance, section 113 of the new Act appears simply to substitute the designation of adjudicator for that of special inquiry officer, without any substantive changes. Nevertheless, some important administrative changes have been introduced. While adjudicators will still be employees of the Employment and Immigration Commission, they will be members of a branch separate from the rest of the Commission which will report to the Executive Director, Immigration and Demographic Policy. The Minister's position at an inquiry will be presented by case presenting officers, and adjudicators will not have access to the Commission's files.

X. *Elimination of Further Examinations.*

Pursuant to section 23(3)(c), all persons who are not granted admission or allowed to come into Canada are entitled to an inquiry. The concept of a "further examination", a summary type of proceeding under the former Act applicable to persons seeking to come into Canada from the United States or St-Pierre and Miquelon, has been abolished. However, where the individual has been residing or sojourning in the United States, he may be directed to return to

¹⁴ While it is true that the authority to issue Minister's permits in some cases will be delegated to Commission officials, the Minister will still be obliged to report to Parliament pursuant to s. 37(7). The legislator apparently considered that persons inadmissible on relatively minor grounds need not warrant the attention of Parliament.

¹⁵ *Re Gooliah and Minister of Citizenship and Immigration* (1967), 63 D.L.R. (2d) 224; *Re Caccamo and Minister of Manpower and Immigration*, [1978] 1 F.C. 366.

that country until an adjudicator is reasonably available (section 23(4)).

XI. *Loss of Status.*

While the former Act dealt with the loss of Canadian domicile in section 4(3), it was silent on the question as to whether a person who had been granted landing could lose his status. The Immigration Appeal Board had held that the status of landed immigrant could be lost by residence outside Canada coupled with the intention to no longer reside permanently in this country, and upon the making of a deportation order.¹⁶ The question of loss of status does not appear to have been directly dealt with by the Federal Court, but in *Wilby v. the Minister of Manpower and Immigration*,¹⁷ Jackett C.J. expressed doubt about the correctness of the Board's views regarding termination of status.

The new Act remedies this lacuna by providing that a permanent resident loses his status when he leaves or remains outside Canada with the intention of abandoning Canada as his place of permanent residence, or upon the making of a deportation order against him (section 24(1)). In the case of abandonment, a series of presumptions and a procedure for obtaining returning resident permits is established in order to facilitate proof of intention. A permanent resident considered to have lost his status and ordered removed has no right of appeal to the Immigration Appeal Board, unless he is in possession of a returning resident permit (section 72(1)).

A visitor loses status in the circumstances referred to in section 26. Presumably, he also loses status upon departure from Canada.¹⁸

XII. *Representation of Minors and Incapables at Immigration Inquiries.*

The former Act was silent as to the representation of minors or incapables who were the subject of immigration inquiries or who were to be included in deportation orders. In *Rodney v. Minister of Manpower and Immigration*,¹⁹ Jackett C.J. said:

Before leaving the matter, it might be useful to refer to the situation of the appellant Ernest Rodney. It is common ground that no "opportunity" was given to him as required by Regulation 11 even if it be assumed that the

¹⁶ *Eric Ray Wenberg* (1973), 4 I.A.C. 292; *Osmond Erestas Nembhard* (1975), 10 I.A.C. 199.

¹⁷ [1975] F.C. 636, at p. 642. See also *Bibi Rahiman Ali v. Minister of Manpower and Immigration*, [1978] 2 F.C. 277.

¹⁸ *Regina v. Special Inquiry Officer; Ex parte Washington* (1969), 3 D.L.R. (3d) 518; *Dickens v. The Queen*, [1974] 2 F.C. 39.

¹⁹ [1972] F.C. 663, at p. 670.

"father" or the "mother" had the necessary authority to act in his behalf. It is, moreover, difficult to visualize, as a practical matter, how such an "opportunity" could have been given in the case of a young child. In some jurisdictions in Canada, a legal parent has no authority to legally represent a child in respect of his property without obtaining special authority under the appropriate provincial legislation. Even if such legislation were apt to authorize the legal representative of a child for the purpose of immigration proceedings, there might be practical difficulties in resorting to it.

Subsections 29(4) and (5) of the new Act now provide for representation by a parent or guardian or by another person designated by the adjudicator.

XIII. *Alternatives to Deportation Orders.*

Under the former Act, deportation was the only means of removing from Canada a person who had infringed immigration law, with no differentiation being made between criminals and those failing to comply with technical legal requirements. Under the new Act, deportation is reserved for serious cases, with provision being made for exclusion orders and departure notices under certain circumstances (sections 32(5) and (6)). Unlike a deportation order, which carries a perpetual bar from Canada in the absence of ministerial consent, an exclusion order only prevents return to this country for a period of 12 months (unless the consent of the Minister is obtained within that period (section 57(2))). A person who leaves Canada following a departure notice does not require ministerial consent to return.

Subsection 20(1)(b) also enables an immigration officer to allow a person to leave Canada forthwith, thereby avoiding an inquiry. Once an inquiry has commenced, however, it is doubtful that the subject has a right to withdraw.²⁰

XIV. *Security.*

Pursuant to section 21 of the Immigration Appeal Board Act, the filing of a certificate by the Minister of Employment and Immigration and the Solicitor-General had the effect of precluding the Board from exercising its compassionate or humanitarian discretion under section 15 of that statute.²¹ However, the Immigration Act contained no similar provision to be used at an immigration inquiry, with the result that evidentiary difficulties were sometimes encountered where the information was based on security or criminal intelligence reports. The new Act in section 39 remedies this deficiency by

²⁰ *Morris v. Minister of Manpower and Immigration*, [1974] 2 F.C. 616.

²¹ The validity of this procedure and its conformity with the Canadian Bill of Rights was upheld in *Prata v. Minister of Manpower and Immigration*, [1976] 1 S.C.R. 376.

extending the certification procedure to the inquiry stage. The certification procedure before the Immigration Appeal Board is continued in section 83.

Section 40 establishes a special procedure for the removal of permanent residents on security grounds.

XV. Refugees.

The refugee provisions are among the most complex in the new Act. Canada acceded to the United Nations Convention and Protocol Relating to the Status of Refugees in 1969, and undertook a number of key obligations, particularly those set out in articles 32 and 33 of the Convention:

Article 32:

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.
3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Article 33:

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

The former Immigration Act did not mention refugees. The only legislative recognition of Canada's obligations was found in the Immigration Appeal Board Act, which accorded a qualified right of appeal to "a person who claims he is a refugee protected by the Convention". An attempt was made to distinguish between serious claims and those which were frivolous or founded exclusively upon the desire for economic betterment. Only those persons able to establish a *prima facie* case by means of a declaration under oath were permitted to have their case proceed to a full appeal, at which the Board could set aside the deportation order if there were reasonable grounds to believe that the person was a refugee protected by the Convention or would suffer unusual hardship, or if

compassionate or humanitarian considerations existed. The Federal Court of Appeal developed an elaborate jurisprudence upholding the validity of this procedure.²² While this system worked reasonably well, it did not directly incorporate in Canadian law the Convention definition of refugee, nor its exceptions on grounds of security or public order; it failed to distinguish between refugees lawfully and unlawfully in Canada, in accordance with articles 32 and 33 of the Convention; and it produced the anomalous situation whereby a refugee had to be ordered deported before asserting his claim to refugee status at the appeal stage. In order to avoid the latter difficulty, elaborate administrative procedures developed within the Employment and Immigration Commission, notably deferral or suspension of the inquiry and referral of the claim to a committee of Government officials which could advise the Minister to grant permanent resident status by special regulation.

The new Act seeks to overcome these difficulties and to incorporate some of the earlier administrative improvements into the legislation. First, it incorporates almost *verbatim* the Convention definition of "refugee" into section 2 of the Act, and in sections 4(2) and 55, it clearly identifies the security and public order considerations which may result in the removal of refugees. Second, a procedure is established for refugee claims which arise during an inquiry. The inquiry is adjourned, the person examined under oath and an administrative determination made by the Minister of Employment and Immigration, on the advice of a newly-created Refugee Status Advisory Committee, as to whether the person is a Convention refugee (sections 45-48). The Committee is to be composed of both Government and non-Government officials, with the Canadian representative of the United Nations High Commissioner for Refugees as a non-voting observer and adviser. A negative decision by the Minister may be the subject of a "redetermination" by the Immigration Appeal Board, although the screening procedure of the earlier legislation is retained to guard against frivolous claims (sections 70 and following).

If the person is recognized as a Convention refugee, either by the Minister or the Board, the inquiry resumes and if lawfully in Canada and not a criminal or subversive, he is entitled to remain in Canada (sections 47 and 4(2)). This gives effect to article 32 of the Convention. On the other hand, if the Minister or the Board rejects the refugee claim, the inquiry recommences and a removal order may ensue. In this case, there is no right of appeal to the Board.

²² *Minister of Manpower and Immigration v. Diaz Fuentes*, [1974] 2 F.C. 331; *Lugano v. Minister of Manpower and Immigration*, [1976] 2 F.C. 438; *Maslej v. Minister of Manpower and Immigration*, [1977] 1 F.C. 194.

If the person is recognized as a Convention refugee, but is unlawfully in Canada, he may nevertheless be ordered removed, but in this event, he enjoys a full right of appeal to the Board on grounds of law, fact or compassionate or humanitarian considerations (section 72(2)). This is a right separate and distinct from the right to a redetermination of his refugee claim. Even if the Board rejects his appeal, section 55 of the Act (reflecting article 33 of the Convention) prevents his removal to a country where his life or freedom would be threatened.

The new Act also recognizes, as does the Convention, that it may be necessary to remove refugees who constitute a threat to the security or public order of Canada, or have been convicted of serious crimes. Such persons nevertheless enjoy a right of appeal to the Board on legal or factual grounds, although they may not benefit from the Board's compassionate jurisdiction (section 72(3)). In any event, section 55 prevents removal to a country where the life or freedom of the individual would be threatened unless he is a member of certain subversive or terrorist classes or has been convicted of offences for which a term of imprisonment of ten years or more may be imposed, and the Minister is of the opinion that he should not be allowed to remain in Canada.

On an application for redetermination before the Board, the new law tends to strike a balance between avoiding frivolous claims and ensuring that legitimate refugees are not removed. No evidence other than that contained in the declaration may be considered by the Board, but the time limit for applying to the Board is extended to seven days by regulation 40(1).

The Supreme Court of Canada has recently granted leave to appeal on the question as to whether the refugee claims procedure under the Immigration Appeal Board Act is contrary to the Canadian Bill of Rights.²³ Since the redetermination procedure under the new Act is similar, this is a judgment which will be awaited with anticipation.

XVI. Appeals and Judicial Review.

With a few minor variations, essentially the same categories of person are accorded rights of appeal to the Immigration Appeal Board against removal orders as under the former Immigration Appeal Board Act (sections 72-73). One significant change in the appeals process is that the Board is no longer obliged to dismiss an

²³ *Ernewein v. Minister of Employment and Immigration*, decision of Federal Court of Appeal dated November 8th, 1977, refusing leave to appeal from a decision of the Immigration Appeal Board.

appeal before it can act on humanitarian or compassionate grounds. Rather than dismissing an appeal and quashing a deportation order, the Board will now simply allow an appeal on factual, legal or humanitarian grounds. The power to stay execution of a removal order is retained.²⁴

With respect to sponsorship appeals (section 79), the provisions of the former Immigration Appeal Board Act remain essentially unchanged. Only Canadian citizen sponsors may appeal to the Board. The Federal Court of Appeal has also held that there is no appeal against a sponsorship refusal where the sponsored dependant is not a member of the family class, although the application nevertheless must be considered and refused by an immigration officer.²⁵ It would also appear that a person under an unexecuted removal order cannot be sponsored, as section 50 requires the order to be executed as soon as reasonably practicable.

It frequently occurs that a person seeking admission is reported for inquiry as soon as a probable ground of inadmissibility is discovered, sometimes before the examination has been completed. If the Board allows an appeal against the deportation order on legal grounds, this would not necessarily have the effect of rendering admissible the individual, but it would simply eliminate that inadmissible class as a ground of removal. Under the former Act, such persons had been left in limbo, without any clear indication as to how their status might be regularized. The new Act therefore makes it clear that when an appeal has been allowed by the Board but the examination of the appellant has not been completed by the Employment and Immigration Commission, the examination is to be resumed (sections 76(1)(b) and 79(4)).

Under section 84 of the new Act, an appeal lies to the Federal Court of Appeal on the same basis as under section 23 of the former Immigration Appeal Board Act, except that leave to appeal no longer need be granted within fifteen days of the decision. It is sufficient if the application for leave to appeal is filed within that time period.

XVII. *Stay of Execution of Removal Orders Pending Legal Proceedings.*

Section 51 stays the execution of a removal order until the appeal process from adjudicator to Immigration Appeal Board to Federal Court of Appeal and to the Supreme Court of Canada has been

²⁴ *Quare*: does this change deprive the Board of its continuing "equitable" jurisdiction as described in *Grillas v. Minister of Manpower and Immigration*, [1972] S.C.R. 577?

²⁵ *Minister of Manpower and Immigration v. Tsiafakis*, [1977] 2 F.C. 216.

completed or the applicable time periods for filing an appeal have elapsed. On the other hand, the Act does not provide for a stay of execution when an application under section 28 of the Federal Court Act²⁶ has been filed.

XVIII. Offences.

Section 95 is similar to section 46 of the former Act, although the potential penalties are increased somewhat. An important new offence is contained in section 97(1), which makes it illegal to knowingly employ any person who requires and lacks an employment authorization. A presumption is also created in an attempt to facilitate proof of knowledge on the part of the employer. This provision, together with the requirement of section 10 that employment authorizations be obtained outside Canada, is intended to reduce the flow of persons seeking to enter Canada to work illegally.

XIX. Arrest and Detention.

As under the former Act, provision is made for arrest with and without warrant (section 104(1) and (2)). However, no warrant may be issued and no person may be arrested without warrant unless an opinion can be formed by the responsible official and he poses a danger to the public or would not otherwise appear for examination, inquiry or removal.

Another significant change is that it will now be possible to arrest without warrant for an inquiry a person who on reasonable grounds is suspected of working illegally or remaining in Canada after ceasing to be a visitor, provided that the arresting officer is of the opinion that the person poses a danger to the public or would not otherwise appear. Under the former Act, such persons could only be arrested with a warrant.

On the subject of release from detention, section 17 of the former Act gave the special inquiry officer a broad discretion.²⁷ Sections 104(3) and following of the new Act establish a procedure for periodic review of the detention by an adjudicator, and limit the exercise of discretion by specifying that release is to be granted where the adjudicator is not satisfied of the danger to the public or the likelihood of non-appearance. If the detention review does not take place within the time periods specified in the Act, *habeas corpus* will probably issue. It is likely, however, that the jurisdiction

²⁶ S.C., 1970-71-72, c. 1.

²⁷ *Ex parte Tirey* (1972), 21 D.L.R. (3d) 475; *Lignos v. Minister of Manpower and Immigration*, [1972] F.C. 1301; *Edwards v. Minister of Manpower and Immigration*, [1975] F.C. 3.

of an adjudicator to order release terminates upon the filing of an appeal against a removal order, and vests in the Immigration Appeal Board pursuant to section 80.

Conclusion

In the past, there has been a dearth of legal writing on Canadian immigration law. There is no authoritative text on immigration law in this country, as there is in the United States, and aside from the occasional case comment on a judgment having interesting administrative law implications, legal writers have tended to ignore immigration as a distinct area of law. In recent years, however, the Federal Court has been hearing an increasing number of immigration cases, primarily by way of applications under section 28 of the Federal Court Act; increasing numbers of practitioners are acquiring familiarity in this domain; at least one law school offers a course in immigration law; and the Canadian Bar Association (Ontario) recently held a session on immigration as part of its Proceedings on Continuing Legal Education. There is obviously a need for more legal writing in this highly specialized, rapidly-changing area, and it is hoped that the present article, by offering an initial explanation of the objectives of the new statute, will encourage others to express their views on the subject.
