Law Reform Commission of Canada

Commission de réforme du droit du Canada

the immigration appeal board

administrative law series

Law Reform Commission of Canada

THE IMMIGRATION APPEAL BOARD

A Study Prepared
for the
Law Reform Commission of Canada

1976

Available by mail from

Printing and Publishing
Supply and Services Canada
Ottawa, Canada K1A 0S9

and at Canadian Government Bookstores:

HALIFAX
1683 Barrington Street

MONTREAL
640 St. Catherine Street West

OTTAWA
171 Slater Street

TORONTO
221 Yonge Street

WINNIPEG
393 Portage Avenue

VANCOUVER
800 Granville Street

or through your bookseller

Catalogue No. J 32-3/13

Price: Canada: $2.75
Other countries: $3.30

Price subject to change without notice

Notice

This study describes an important part of the federal administrative process. In the course of this description the authors identify a number of problems and suggest solutions for them. These suggestions may be useful for legislators and administrators currently considering reforms in this area. They are, however, solely those of the authors, and should not be considered as recommendations by the Law Reform Commission of Canada.

The concerns of the Law Reform Commission are more general and embrace the relationships between law and discretion, administrative justice and effective decision-making by administrative agencies, boards, commissions and tribunals. This study, and its companions in the Commission's series on federal agencies, will obviously play a role in shaping the Commission's views and eventual proposals for reform of administrative law and procedure.

Comments on these studies are welcome and should be sent to:

Secretary
Law Reform Commission of Canada
130 Albert Street
Ottawa, Ontario
K1A 0L6

Commission

Honourable Antonio Lamer, Chairman
Honourable John Bouck, Vice-Chairman
Dr. Gérard V. La Forest, Q.C., Commissioner
Mr. Jean-Louis Baudouin, Commissioner

Secretary

Jean Côté

Research Personnel

Ian A. Hunter
Ian F. Kelly

Consultant

Gaylord Watkins

Contents

Preface

This study* of the Immigration Appeal Board is the first to appear in a series of studies of federal administrative agencies,[1] boards, commissions and tribunals prepared for the Law Reform Commission of Canada. Like its companions in the series,[2] the study describes a particular agency's legal and administrative contexts, its powers, practices and procedures, its administrative, adjudicative and legislative functions, and how it has coped with its mandate and workload.

Studies of this nature have been rare in Canada, even by those considering the reform of administrative law. Reformers have seldom attempted to examine in any detail the practices and procedures that have evolved within the scope of an agency's jurisdiction. Some have tended to presume that agencies should use courts as models for procedural purposes. And since the courts have largely fashioned what has come to be known as administrative law through reviewing agency decisions, a primary focus for many reformers has been expediting judicial review as a guarantee for fairness of administrative action.

Such initiatives may well be needed. But they neglect the simple fact that very few decisions of administrative agencies ever reach the courts, even in jurisdictions with simplified judicial review provisions. To know whether administrative justice exists (with its interlocking components of fairness and efficiency), one must look closely at what administrative agencies actually do, from day to day.

Underlining the necessity for this kind of approach is the usual practice of our legislators to allow a good deal of discretion to administrative agencies in determining how agency objectives are to be met.[3] Discretion is indeed often essential for effective and acceptable decisions. It can, however, have harmful as well as beneficial consequences. Looking closely at what administrative agencies do should tell us something about administrative justice, and how agencies ensure that their discretion is exercised responsibly and creatively to achieve their legislative objectives fairly and efficiently.

*Editor's Note: Notes in this paper are to be found at the end of the paper on pages 75 to 88.

Although the agencies represented in this series all have discretionary power, this was not the only criterion applied in selecting them for study. The series confines itself to agencies whose powers of adjudication, or involvement in the making of rules or regulations, affect private rights or interests in a substantial way. Apparent independence of close departmental direction is a characteristic of most of the agencies studied. Most important, every study in the series has only been possible because of the agency's cooperation with our researchers.

Two general and methodological studies preceded the research work for the studies in this series. The first identified the basic characteristics of the federal administrative agencies that might possibly meet our criteria.[4] And second, since other disciplines provide important insights and research techniques for studying administrative agencies, a multidisciplinary group at Carleton University prepared a report on the approaches and perspectives of political scientists, public administrators, economists, sociologists and lawyers towards federal administrative and regulatory agencies.[5] This report has proved useful in the preparation of some of the studies in this series as well as helping to stimulate and focus the increasing academic concern with the techniques and effectiveness of economic regulation.

Having decided that the Immigration Appeal Board was a suitable agency to study and having received support from the Board Chairman, Janet V. Scott, Q.C., the Law Reform Commission was fortunate that Professor Ian A. Hunter agreed to undertake a study of the Board.[6] Professor Hunter had recently studied some of the Board's discretionary powers, and jointly published one of the few analyses dealing with the work of this important tribunal.[7]

The Commission hopes that this study and its companions in the series will help to shed some needed light on the functioning of Canadian administrative agencies, prominent features of our legal system that for too long have not received the attention they merit.

The observations and suggestions in the study are those of its authors and should not be considered as recommendations by the Law Reform Commission of Canada. We would, of course, appreciate comments on the study since, like others in the series, it will in some way influence our thinking about the reform of administrative law and procedure.

Foreword

To examine the Immigration Appeal Board necessarily involves a consideration of Canadian immigration generally. And Canadian immigration involves a consideration of Canadian history. Oscar Handlin is reported to have once thought of writing a history of the immigrant in America until he discovered "...that the immigrants were American history". Though this is less true in Canada where the central fact of our history, national identity and development has not been immigration but rather the presence of two distinct founding races, nevertheless immigration has influenced Canadian history, demography, culture and institutions. In turn, the pattern of Canadian immigration has itself been shaped by our institutions, one of which, the Immigration Appeal Board of Canada, is the subject of this study.

Since this Board operates within a relatively complex and little known area of the law, any consideration of the Board's functioning must of necessity include a consideration of the law the Board applies and the law that it makes. Much of this study, as a result, is devoted to describing and commenting upon this body of immigration law.

Chapter I deals with the background to Canadian Immigration and the federal government's regulatory response. It describes the creation and powers of the Immigration Appeal Board and also examines two of the critical problems with which the Board must grapple — the world refugee problem and sponsorship. Chapter II examines the determination and admissibility to Canada. Although the essential function of the Immigration Appeal Board is adjudication, it is only one of several agencies in the immigration process which has substantive adjudicative powers. Chapter III isolates the *loci* of decision-making power at each stage of the immigration process with, of course, specific and detailed examination of the Immigration Appeal Board. Chapter IV narrows the focus and attempts to describe how an appeal is conducted and what appeared to us to be the central issues confronting the Board, notably the constant tension between form and substance. The final chapter outlines the main conclusions to which we have come.

The word "we" is used advisedly throughout the report in an attempt to make clear that this study was a collaborative effort between Ian Kelly and myself. A former student and valued friend, Ian Kelly worked imaginatively throughout the summer of 1974 in compiling material for this study and such merits as it may have are a reflection of his insight and diligence.

Acknowledgement and thanks are owed to the members and staff of the Immigration Appeal Board as well as to many people in the Department of Manpower and Immigration. To enumerate them by name would court the risk of omitting some, so to all a collective and sincere thanks. However, one person's assistance to us and patience with us deserves special acknowledgement. Janet V. Scott, Q.C., Chairman of the Immigration Appeal Board, was unstintingly available and unfailingly knowledgeable. Without her cooperation the study would not have been possible. Finally, Gaylord Watkins of the Law Reform Commission of Canada met our many requests with aplomb and our several delays with patience and encouragement.

Ian A. Hunter
Faculty of Law
University of Western Ontario

CHAPTER I

Canadian Immigration and the Regulatory Response

(A) BACKGROUND

This study of the Immigration Appeal Board is written amidst the expectation of imminent change. A long awaited "green paper" on immigration policy has been published by the Government. The future policy directions it suggests are being debated across the country. Even before the green paper, newspaper reports had suggested that fundamental changes in Canadian immigration requirements to restrict immigration were being given serious consideration by Cabinet ministers.[8] At such a time, it would be risky to attempt to foretell future Canadian immigration policy; moreover, policy, except as it related to the Immigration Appeal Board, is not our primary concern. Whatever imponderables vex the future, it is possible to examine the origins of the Board, its past performance and present problems. But before doing so, it may be instructive to begin with a brief review of the major factors that have shaped post-war immigration to Canada.

Before the Second World War, immigration to Canada was not subject to detailed government control. "Free" migration was basically the policy, a remnant of earlier concern for frontier development, settlement of Western Canada and economic expansion.

However, since 1945 the aims of Canadian immigration policy have been more complex. In May of 1947, Prime Minister Mackenzie King announced the aims of Canada's post-war immigration policy in a carefully

formulated statement which for years to come was regarded as the definitive exposition of Canadian intention:

> The policy of the government is to foster the growth of the population of Canada by the encouragement of immigration. The government will seek by legislation, regulation and vigorous administration, to ensure the careful selection and permanent settlement of such numbers of immigrants as can advantageously be absorbed in our national economy.
>
> Like other major problems of today, the problem of immigration must be viewed in the light of the world situation as a whole. A wise and productive policy for Canada cannot be devised by studying only the situation within our own country.... Among other considerations, it should take account of the urgent problem of the resettlement of persons who are displaced and homeless as an aftermath of the world conflict.
>
> ...The fear has been expressed that immigration would lead to a reduction in the standard of living. This need not be the case. If immigration is properly planned, the result will be the reverse.
>
> ...With regard to the selection of immigrants, much has been said about discrimination. I wish to make it quite clear that Canada is perfectly within her rights in selecting the persons whom we regard as desirable future citizens. It is not a 'fundamental human right' of any alien to enter Canada. It is a privilege. It is a matter of domestic policy.[9]

The basic contrast between pre-war and post-war Canadian immigration policy is the steadily increasing government control to serve what is perceived to be the national interest. The single most important criterion used by government to shape post-war immigration policy has been domestic manpower requirements. Consequently, the emphasis has been on professional and managerial skills, higher educational standards, a more equal sex distribution amongst immigrants (formerly, there was an imbalance in favour of female immigrants) and more balanced representation of all social classes. Canada still receives many unskilled immigrants but they are usually sponsored.

Immigration has made a substantial contribution to the Canadian labour force. From 1950 to 1960, the Economic Council of Canada estimated that Canada's net immigration exceeded 1,100,000 people. This represents approximately two-thirds of the total increase in the labour force during that decade. This has declined in the 1960's and 1970's because of the remarkable expansion of the Canadian labour force from domestic sources.

Two particularly difficult problems have confronted policy-makers, departmental officials and the members of the Immigration Appeal Board. These problems — the world refugee problem and sponsorship deserve separate examination.

(i) The World Refugee Problem

Few problems pose a more acute humanitarian dilemma than the status of world refugees. The focus of the problem shifts depending on different

times, places and circumstances; only the toll of human suffering remains constant. Military conflicts, violent overthrow of governments, civil rebellion, famine and flood all bring forth their victims seeking a haven of refuge. Since 1945, the major receiving countries of refugees have been the United States, Canada and Australia who together, it is estimated, have admitted 75 per cent of all post-war refugees.[10] Canada alone has welcomed more than 300,000 refugees.

The 1951 Status of Refugees Convention has been ratified or acceded to by 58 states, including Canada. Since 1961, a Branch Office of the United Nations High Commissioner for Refugees has been located in Canada, first in Toronto and since 1971 in Ottawa. A refugee, under the Convention, is any person who:

> ...owing to well-founded fear of being persecuted for reason of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

In 1973, the *Immigration Appeal Board Act* was amended to allow for an appeal to the Board from a person against whom an order of deportation had been made on the ground that he "...claims he is a refugee protected by the Convention".[11] Thus, the agonizing responsibility of striking an appropriate balance between exclusionary immigration requirements and compassion for genuine refugees has now been assigned to the Immigration Appeal Board.

(ii) Sponsorship

Sponsored immigration merits separate consideration because it is the way most unskilled and uneducated immigrants come to Canada. Relatives and near-relatives are admitted not because they qualify on the basis of selective assessment criteria designed to ensure, among other things, a reasonable prospect of employability, but rather because they have close relatives living in Canada who are willing to assist them. In the twenty years from 1946 to 1966, of some two and a half million immigrants, 900,000 (or 36 per cent) were sponsored.[12] It seems unlikely that immigration officials were sufficiently aware of the explosive potential of a sponsorship system. In the mid-1950's, it was estimated that one Italian immigrant meant 49 sponsored Italian relatives.[13] What Dr. Freda Hawkins has aptly described as a "...rapid process of chain migration"[14] occurred and caught Canadian immigration officials by surprise.

No Canadian government has yet been willing to take effective steps to limit this "chain migration". The basis for the sponsorship policy — a

compassionate desire to see families and relatives united — has prevailed. The political hazards of attempting to reduce the numbers of sponsored immigrants were illustrated in 1959 when the Government decided to limit sponsorship to immediate family members. But the Order-in-Council which would have rescinded automatic admission of non-dependent relatives had to be withdrawn in the face of strong protests from immigrant and ethnic groups, opposition M.P.'s and even some members of the governing party.[15]

Some alleviation of the sponsorship explosion came with the 1967 regulations that created three distinct categories for admission: independent applicants, sponsored dependents and nominated relatives.

Independent applicants are subject to the full assessment process. This involves consideration of nine criteria:

- education and training
- personal qualities
- the demand in Canada for the occupation in which the applicant is likely to be employed
- occupational skills
- age
- the existence of arranged employment
- the applicant's knowledge of English and French
- the presence in Canada of relatives prepared to assist; and
- the general employment prospects of the area in which he proposes to reside in Canada.[16]

Sponsored dependents are confined to close relatives, including spouses or fiancees and adopted children.[17] A sponsored dependent must comply with the *Immigration Act* and its regulations, but need not be ranked according to the nine assessment criteria.

The third category, nominated relatives, includes relatives more distant than those defined as sponsored dependents. For example, nephews, nieces, uncles, aunts, grandchildren and grandparents are all included.[18] A nominated relative must meet five of the nine assessment criteria — education and training, personal qualities, occupational demand, level of occupational skill and age.

The immigration process from the determination of admissibility to eventual deportation is discussed in detail in Chapter II. We now turn to a consideration of the origins of the Immigration Appeal Board.

(B) THE IMMIGRATION APPEAL BOARD

An Immigration Appeal Board was first authorized by the 1952 Immigration Act[19] but its jurisdiction was limited and its tenure precarious.[20] A decade later, regulations extending the jurisdiction of the Boards was passed. At that time, the Department of Citizenship and Immigration claimed greater independence for the Immigration Appeal Board:

> Under the new regulations, the responsibility for the hearing of all appeals rests with the Immigration Appeal Board, which is completely independent of the Immigration Branch.[21]

Nevertheless, the "complete independence" proclaimed by the Department was more illusory than real. Board decisions were still subject to reversal at ministerial discretion. The Board was still perceived as a departmental agency rather than as an independent tribunal.[22]

On June 19, 1964, prompted by the publicity surrounding a number of ship desertions, the federal government appointed Joseph Sedgwick, Q.C., to prepare a report on procedures used to deal with people illegally in Canada. Subsequently, Sedgwick's terms of reference were broadened to include "...the making of recommendations respecting the exercise of ministerial discretion under the *Immigration Act*".[23] Undoubtedly, the most important of Sedgwick's far-ranging recommendations were those concerning the Immigration Appeal Board.[24] He recommended two fundamental changes — true independence, and finality of decision, subject to a right of appeal to the Courts. Sedgwick stated: "(T)o make appeals to the Board subject to review and to final determination by the Minister is to render the Board essentially sterile."[25] In February, 1967, the House of Commons commenced debate on legislation based on Sedgwick's proposals. On November 13, 1967, the *Immigration Appeal Board Act* was proclaimed in force. No fundamental amendments were made to the *Act* until 1973.[26]

The members of the Immigration Appeal Board, not less than seven or more than nine, are appointed by the Governor-in-Council and hold office during good behaviour and until the age of seventy.[27] The 1973 amendments authorized the appointment of up to seven temporary members for limited terms not to exceed two years.

Section 7(1) of the *Act* provides that:

> The Board is a Court of Record and shall have an official seal, which shall be judicially noticed.

It has been suggested that this section has had considerable effect in shaping the Board's self-image and, in turn, its procedure and its decisions.[28] We examine this point in greater detail in Chapters IV and V.

The Board has power, with the approval of the Governor-in-Council, to make rules relating to practice and procedure before the Board.[29] Rules, primarily concerning time limits for appeals, hearings and applications for release from detention, were proclaimed at the same time as the *Act*.[30]

Section 11 of the *Act* formerly authorized an appeal to the Board by "a person against whom an order of deportation has been made". The practice grew up of people entering Canada as visitors and then applying for landing status from within the country. If they were ordered deported, lengthy appeal procedures could be invoked. As a result, prior to the 1973 amendments, delays and backlogs of up to several years in the appeal process were common.[31] A person who had filed notice of appeal could not be deported while the appeal was pending. Hence, the generous appeal provisions of the original *Act* became a recognized technique for subverting the ordinary immigration procedures.[32]

To curb this abuse, in 1973 the Department of Manpower and Immigration instituted an "adjustment of status" program by which persons illegally in Canada were encouraged to report to immigration offices and were assured of sympathetic and generous treatment. At the expiry of the adjustment of status program, the 1973 amendments were passed limiting rights of appeal to permanent residents, persons in possession of a valid visa, refugees protected by the Convention[33] and persons claiming to be Canadian citizens.[34]

Section 15 is, without question, the most important and contentious section of the *Immigration Appeal Board Act*. The Chairman of the Board has acknowledged that "the interpretation and administration of justice under this section is by far the most difficult problem confronting the Board".[35] It is worth setting out the full text of section 15(1):

> Where the Board dismisses an appeal against an order of deportation or makes an order of deportation pursuant to paragraph 14(*c*), it shall direct that the order be executed as soon as practicable, except that the Board may,
>
> (a) in the case of a person who was a permanent resident at the time of the making of the order of deportation having regard to all the circumstances of the case, or
>
> (b) in the case of a person who was not a permanent resident at the time of the making of the order of deportation, having regard to:
>
> (i) the existence of reasonable grounds for believing that the person concerned is a refugee protected by the Convention or that, if execution of the order is carried out, he will suffer unusual hardship, or
>
> (ii) the existence of compassionate or humanitarian considerations that in the opinion of the Board warrant the granting of special relief,
>
> direct that the execution of the order of deportation be stayed, or quash the order and direct the grant or entry or landing to the person against whom the order was made.

The Board's decisions interpreting section 15 have recently been analysed in part by one of the authors of this study. We shall be referring to this analysis later.[36]

CHAPTER II

The Determination of Admissibility

The most pressing question facing any prospective immigrant is whether he or she will be permitted to enter Canada. In Canadian immigration law and policy, permission to enter depends on the person's admissibility. No survey of any part of this country's regulatory system for immigration would be comprehensible or complete without describing how admissibility is determined.

(A) WHO CAN BE AN IMMIGRANT?

The basic provisions governing immigration to Canada are set out in the *Immigration Act*[37] and the regulations[38] made under this Act. Other statutes relevant to the immigration process include the *Immigration Appeal Board Act*,[39] a 1973 *Act* respecting certain immigration laws and procedures[40] and the *Federal Court Act*.[41] Other relevant regulations and rules are found in the Immigration Inquiries Regulations,[42] the Special Visa Exemption Regulations,[43] the Immigration Appeal Board (Definitions) Regulations,[44] and the Immigration Appeal Board Rules.[45]

These statutes, regulations and rules govern the admission requirements for immigrants and non-immigrants, the procedures for inquiries and for the issuance of deportation orders, and the rights of appeal to the Immigration Appeal Board and the Courts. "Admission" is defined by the *Immigration Act* as including "...entry into Canada, landing in Canada, and the return to Canada of persons who have previously landed in Canada and have not acquired Canadian domicile". The term "entry" refers to the lawful admission of a non-immigrant, whereas "landing" means the lawful admission of an immigrant to Canada for permanent residence.

A Canadian citizen has an unqualified right to come into Canada. Persons who have acquired and not lost Canadian domicile must also be admitted as of right unless they have assisted Canada's enemies or left Canada for that purpose, in which case an authorization by the Minister of Manpower and Immigration is necessary for admission.[46]

(i) The Significance of Domicile

Canadian domicile, for immigration purposes, is acquired by a person having his place of domicile in Canada for five years after having been admitted as a landed immigrant.[47] Canadian domicile may be lost if a person voluntarily resides out of Canada with the intention of making his permanent home out of Canada, but it is not lost if residence out of Canada stems from the requirements of employment.[48] The accrual time of Canadian domicile continues to run during a temporary absence from the country.[49] An abandonment of domicile must be complete and effective. The retention of a house and bank account coupled with repeated declarations of intention to return negates an alleged abandonment of domicile.[50]

Canadian domicile cannot be acquired while a person is an inmate of a penitentiary, gaol, reformatory, prison, or hospital for treatment of mental disease.[51] Nor may a person acquire domicile who legally resides in Canada by virtue of a Ministerial permit issued pursuant to section 8 of the *Act*.[52] The length of time a person has resided in Canada before and after a deportation order has been made against the person does not count towards acquiring domicile unless the deportation order is successfully appealed.[53] The Immigration Appeal Board has held that the exercise of their statutory discretion, on compassionate and humanitarian grounds, pursuant to section 15 of the *Immigration Appeal Board Act*, does not constitute a successful appeal against a deportation order for the purposes of acquiring Canadian domicile.[54] A parity of reasoning would suggest that Canadian domicile cannot be acquired by a person who has been permitted to remain in Canada, or alternatively admitted to Canada by Ministerial consent under section 35 of the *Immigration Act* after the making of a deportation order against him.

Canadian domicile is automatically lost if a person is found upon inquiry to be a subversive or security risk unless, of course, an appeal against the resultant deportation order is allowed.[55] Similarly, persons found on inquiry to have committed certain offences under the *Narcotic Control Act* also lose their domicile.[56] In comparing the ways in which domicile can be lost, an anomaly emerges. A person found on inquiry to have been involved in extremely serious offences against the state (such as subversion, espionage or sabotage) will lose Canadian domicile unless his appeal against a deportation order is allowed. The same severe consequence follows conviction for the relatively minor offence of possession of a narcotic, but

here there is no provision for reinstatement of Canadian domicile status should an appeal against deportation be successful.[57]

Is the loss of Canadian domicile, pursuant to the *Immigration Act*, a relevant consideration in determining a person's eligibility for citizenship under the *Citizenship Act*? It would appear not, since the *Citizenship Act* speaks of "residence" rather than "domicile" as follows:

> ...the applicant has
>
> > (i) been lawfully admitted to Canada for permanent residence and has, since such admission, *resided* in Canada for at least five of the eight years immediately preceding the date of application...[58]
>
> *(Our emphasis)*

The purpose and real significance of Canadian domicile appears not to be related to admissions but to deportation. The *Immigration Act* sets out ten grounds for deportation (including prostitution, homosexuality, commission of a criminal offence and membership in a "prohibited class" as defined by the *Act*) of any person "...other than a Canadian citizen or a person with Canadian domicile".[59] In effect then, the person who can establish Canadian domicile has for all practical purposes the same protection against deportation as a Canadian citizen.

The wisdom of using Canadian domicile as a protection against deportation was questioned by Joseph Sedgwick and will be examined in Chapter V. Mr. Sedgwick wrote:

> ...(A)liens with Canadian domicile who commit extremely serious crimes such as murder, robbery or rape have a right to remain in Canada. I submit there is no valid reason for this concept of Canadian domicile and there should be only two classes of permanent residents, namely Canadian citizens and persons who have been lawfully admitted for permanent residence. While persons in the latter class should have certain rights to remain in Canada, they should not be equated to Canadian citizens and should be subject to deportation for such valid reasons as the commission of serious criminal offences after entry or for having entered illegally in the first place.[60]

(ii) Prohibited Classes

Persons other than Canadian citizens or those who have acquired Canadian domicile as required by the *Immigration Act* who seek admission to Canada must be examined to determine whether they are within a prohibited class. This applies to non-immigrants, immigrants, and returning landed immigrants who have not yet acquired Canadian domicile.

Certain people may be allowed to enter and remain in Canada as non-immigrants. Included in this category are diplomats, members of foreign armed forces authorized by the Minister to enter for training

purposes, tourists or visitors, persons passing through Canada en route to another country, clergymen entering Canada to carry out their religious duties, students, entertainers, persons in the temporary exercise of their profession, persons entering for seasonal or temporary employment, crew members, and persons authorized by the Minister to enter for medical treatment.[61] Holders of a Ministerial permit may be granted entry as non-immigrants even though in a prohibited class.[62] These permits are considered more fully in Chapter III.

The *Immigration Act* describes in some detail the sorts of people who may not be admitted to Canada except by Ministerial permit.[63] These descriptions of prohibited classes form an eclectic list. Classes range from people with objectively ascertainable disqualifications, such as epilepsy or tuberculosis, to subjective, discretionary factors, "...persons who are not, in the opinion of (the admitting official)...*bona fide* immigrants or non-immigrants".[64] Prohibited also are more or less obvious social nuisances such as beggars, vagrants and pimps as well as those who have been convicted of that vague and changing offence, "...a crime involving moral turpitude".[65]

It is worthwhile looking more closely at the more significant of the prohibited classes. Idiots, imbeciles and morons are not admissible. However, persons who are presently sane but have at any time been insane may be admitted as immigrants at the discretion of the Cabinet if satisfactory evidence is available from a qualified medical practitioner that the person has suffered no symptoms of insanity for seven years and such symptoms are not likely to recur.[66] Epileptics are admissible as non-immigrants but are prohibited as immigrants.[67] Furthermore, persons afflicted with tuberculosis, trachoma, or "...any contagious or infectious disease" are prohibited.[68] However, if the disease is one that is curable within a reasonably short time the afflicted person may be allowed to come into Canada for treatment.[69] On the other hand, physically handicapped persons, such as the blind or deaf, may be admissible as immigrants if they have sufficient means of support, or they are members of a family that gives satisfactory security against such an immigrant becoming a public charge.[70]

1. *Criminals as a Prohibited Class*

In general, persons who have been convicted or admit having committed any crime involving moral turpitude are prohibited from entering Canada.[71] However, this prohibition can be lifted by the Cabinet upon satisfactory evidence that at least five years have elapsed since the termination of imprisonment or completion of the sentence.[72] To deny admission on this basis involves consideration of two elements: the

commission of a crime, and the definition of that crime as a crime involving moral turpitude.

The term "crime" is not restricted to the offences found in the *Criminal Code* of Canada. In *Folino*,[73] the definition of the word "crime" was imported by the Immigration Appeal Board from Osborne's Concise Law Dictionary:

> ...a crime may be described as an act, default or conduct prejudicial to the community, the commission of which law renders the person responsible liable to punishment by fine or imprisonment in special proceedings normally instituted by officers in the service of the Crown.

In a later case, *Mahmassani*,[74] the Board adopted the Supreme Court of Canada's definition of some years standing:

> A summary conviction offence is a "crime" if it is clear that the relevant statute imposed a duty in the public interest; that default in performing that duty constituted an offence against the public law; and that Parliament provided for the infliction of a prescribed punishment by a tribunal which ordinarily exercises criminal jurisdiction and by procedure enacted by the Criminal Code.[75]

The problem of knowing what is a "crime" is compounded by the fact that in many immigration cases, the act in question occurred in a foreign country with different notions of criminality and turpitude. The Board has adopted the practical presumption that foreign law is the same as Canadian law in the absence of proof to the contrary.[76] The onus of establishing just what the foreign law is lies on the party relying on it, whether that be the Minister of Manpower and Immigration or the person appealing the Minister's deportation order.[77] In the absence of proof of foreign law, where it is impossible to determine whether the act in question is or is not a crime by Canadian law[78] or if the alleged crime is one unknown to Canadian law,[79] the Board has considered deportation orders based on this ground to be invalid. On the other hand, foreign conviction *in absentia* has been viewed as a conviction within the meaning of the *Immigration Act* because it was issued within the jurisdiction of the foreign court without fraud or substantial injustice, such as failing to give the person notice of the date of trial.[80]

The interpretation of the phrase "crime involving moral turpitude" has vexed the Immigration Appeal Board. In *Turpin*,[81] the Board held that the phrase referred to the inherent nature of the crime and that this must be analysed in its generic sense to determine whether or not, in the abstract, its commission necessarily involves moral turpitude. The question is not the blameworthiness of the person's conduct but whether the crime considered in isolation necessarily involves moral turpitude. The Board in *Turpin*[82]

favoured the definition of moral turpitude given by Bouvier's Law Dictionary:

> An act of baseness, vileness or depravity in the private and social duty which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man...

However, the Board chose not to limit its notion of moral turpitude to "baseness, vileness or depravity" and added two other criteria, "dishonesty" and "immorality" taken from a Quebec case.[83] As the Chairman of the Board said in *Turpin*:

> Does the crime of fraud as defined by this section necessarily involve depravity, vileness, baseness, dishonesty or immorality?... Since fraud as described in section 323(1) necessarily involves dishonesty, it is a crime involving moral turpitude within the meaning of the *Immigration Act*.[84]

The *Turpin* decision can be taken to hold that conviction for fraud involves moral turpitude simply because it is a dishonest act. However, the *Turpin* holding may have been modified by a later decision of the Board, *Mahmassoni*,[85] in which it stated:

> It is clear that the appellant was dishonest when he completed his application for permanent residence. However...the Court finds that the false statements are not such acts of baseness, vileness or depravity... as come within the definition of a crime involving moral turpitude.

These conflicting views on whether or not dishonesty necessarily involves moral turpitude await conclusive resolution.

Moral turpitude as a criterion is obviously amorphous and difficult to define. Because the crime has been considered generically by the Board, it is not surprising that most criminal acts will continue to fall within the definition, particularly if the *Turpin* view that dishonesty itself involves moral turpitude prevails. But it is questionable whether the *Immigration Act*[86] was intended to be so inclusive in defining this particular class of prohibited persons.

It could be argued that by using the phrase "*any* crime *involving* moral turpitude" (our emphasis), Parliament intended that the question be considered in the light of the accused's conduct in the particular circumstances rather than by applying an abstract definition to the generic offence. If Parliament had intended the crime involved to be considered generically, would not the draughtsman have chosen a different phrase such as "...*a* crime *of* moral turpitude" (our emphasis).

Of course, probing the state of mind of the individual at the time the offence was committed and the evidentiary problems this poses are telling

points in favour of the approach which the Board has adopted. But it has led to anomalies. Common assault has been held to be a crime not involving moral turpitude.[87] On the other hand, simple possession of marijuana has been held to be a crime involving moral turpitude. In *Klipper*, the Board stated:

> It follows that as marijuana has a potential for harm, society as we know it must be protected so that its existence as a ... viable order for sustaining a creative and democratic process of human development and self-realization may take place. The person who is in possession of marijuana for his own use therefore has committed a generic act of baseness which is contrary to the social duty owed by him to society in general, contrary to the accepted customary rule of right and duty between man and man ... generically simple possession of marijuana and its use can cause serious mental problems and therefore its possession as already stated, is an act of baseness, vileness and depravity coming within the definition of moral turpitude.[88]

The generic approach, here, may have become a trap. In this case, the cause was slight for the presumed effect because Klipper had never been convicted or arrested for possession. He had merely made a voluntary admission of prior use at the time of seeking admission as a non-immigrant. Furthermore, he apparently had not had any marijuana for at least five months before his application for admission and the largest amount of marijuana he had ever had in his possession at one time was a quarter of an ounce. In addition, the deportation order arose out of an application for admission to Canada for a total period of one day. Denying Mr. Klipper a day in Canada is not easily justified by the Board's fears for the continued survival of "a creative and democratic process".[89]

In fairness to the Board, it should be noted that the Board has on occasion expressed disapproval of the phrase "crime involving moral turpitude". Even in *Turpin*, the Board expressed agreement with a dissenting opinion of Justice Jackson of the Supreme Court of the United States in which he stated that the phrase was so vague and uncertain that to order a person deported on that ground was to deprive him of his rights to due process of law.[90]

2. *Other Prohibited Classes*

Continuing our consideration of significant prohibited classes, prostitutes, homosexuals and persons living on the avails of prostitution or homosexuality are prohibited.[91] So too are persons who procure prostitutes or homosexuals,[92] and professional beggars or vagrants.[93] Persons who are public charges or who are likely to become such are prohibited.[94] Proof that the person is currently receiving assistance from a municipal welfare department is sufficient evidence that he is a public charge.[95]

Other prohibited classes include chronic alcoholics,[96] drug addicts[97] and traffickers.[98] Persons who have been members of or have associated

with any subversive organization are not admissible unless the Minister of Manpower and Immigration is satisfied that they are no longer associated with such an organization and that their admission would not be detrimental to Canadian security.[99] The Minister's decision is final and not subject to review by any Court; nor is he obliged to disclose the sources of his information or the grounds of his decision. The Board has held this consistent with the *Canadian Bill of Rights*.[100]

Not surprisingly, persons who have engaged in or advocated subversion or are likely to engage in or advocate subversion are not admissible.[101] However, the Board has insisted that proof of a person's likelihood of engaging in such activities must be based on proof of a course of conduct in the past inside or outside Canada which could give rise to a reasonable belief that the person concerned would engage in such conduct again.[102]

Similarly, where there are reasonable grounds for believing that persons are likely to engage in espionage, sabotage, or other subversive activities directed against the Canadian nation, admission is prohibited.[103] Here, the Board has adopted the Shorter Oxford English Dictionary definition of subversion, "having a tendency to subvert or overthrow". In *Wenberg*, the appellant admitted to having been a ranking official in the Australian Nazi party.[104] Said the Board:

> Active adherence to a policy of advocating the extermination of a large portion of the people of Canada (Jews and Negroes) cannot be other than subversion — directed against Canada as a whole. This is so even though so far as the Court is aware, the Canadian National Socialist party is a perfectly legal political party in Canada.[105]

No argument was made to the Board of the possible application of the *Canadian Bill of Rights*.

Other members of a family accompanying one who is not admissible are themselves prohibited persons, unless no hardship would be involved by the separation of the family.[106] It has been held by the Board that this section of the *Immigration Act* should only be invoked in the case of a person who in fact accompanies a member of his family and arrives in Canada at the same time.[107]

Membership in the prohibited class of persons who are not *bona fide* immigrants or non-immigrants is the most frequent bar to admission.[108] It is invoked when the conclusion is reached by the admitting official[109] that someone purporting to be a non-immigrant — the normal ploy is to pose as a visitor — actually intends to stay permanently in Canada.

The Board in *Vela*[110] has suggested guidelines in determining whether a person is a *bona fide* non-immigrant and thus has demonstrated its willingness to structure the statutory discretion of the officials deciding on admissibility at the point of entry into Canada.[111]

Several other prohibited classes round out the lengthy list, notably persons found guilty of espionage,[112] treason or conspiracy,[113] persons certified as impaired physically or mentally in a way that seriously reduces their ability to earn a living,[114] and finally, persons who have not complied with conditions, requirements or orders under the *Immigration Act* or regulations.[115]

3. *Several Anomalies*

The net of "prohibited classes" has obviously been drawn very widely indeed. The admitting official, who is known as the Immigration Officer, must satisfy himself on a great many points before he can be certain that someone does not fall within a prohibited class.

The classes themselves seem to reflect earlier concerns rather than current reality. For example, it seems anomalous that epileptics are still absolutely prohibited as immigrants. Similary, the extension of prohibited classes to family members seems excessive. Someone who may well be of great value to Canadian society could be denied admission because his wife or her husband is presently insane, an epileptic, or a chronic alcoholic.

It is also anomalous that homosexuals are prohibited from admission to Canada. Equally or more remarkable, is the situation that a person who formerly suffered some form of mental illness can only be admitted after the elapse of a seven year period. And even then, a statement by a doctor that the symptoms of insanity are unlikely to recur is required before the Cabinet will exercise its discretion to approve or disapprove. In contrast, there is no statutory waiting period for former subversives who require the authorization of the Minister for admission, rather than the entire Cabinet.

Although these anomalies may be mitigated in practice, the Act to the ordinary reader still reveals a rather out-dated and sometimes incomprehensible scale of values. Joseph Sedgwick also criticized the admissions policy of the *Immigration Act* for persons who had suffered mental illness:

> Many desirable immigrants may have had a mental breakdown which resulted in extended treatment and even confinement in an institution. But such persons may and often do make a complete recovery and if they have recovered their past misfortune should not be as it now is an absolute bar to their admission.[116]

(B) PRE-ADMISSION REQUIREMENTS

The immigration process begins in the country of origin. Immigrants must obtain a passport, a visa and a medical certificate while non-immigrants usually need only a passport.

Every immigrant or non-immigrant who seeks admission to Canada must first obtain a passport from his own country. Citizens or landed immigrants of the United States, crew members arriving in Canada, members of the Armed Forces of any NATO country and refugees are excluded from this requirement.

To obtain an immigrant visa, a letter of pre-examination, a non-immigrant visa or a medical certificate, the person must report to a Canadian immigration or consular office abroad to be assessed and examined. In countries where there are no Canadian offices, assessment and examination is performed by a diplomatic representative of the United Kingdom.

The requirement of an immigrant visa is clearly stated in the Immigration Regulations:[117]

> Every immigrant who seeks to land in Canada ... shall be in possession of a valid and subsisting immigrant visa issued to him by a visa officer and bearing a serial number which has been recorded in a register prescribed by the Minister for that purpose, and unless he is in possession of such visa, he shall not be granted landing in Canada.[118]

The Minister of Manpower and Immigration may exempt any group or class of persons from the requirements of an immigrant visa by substituting what is known as a letter of pre-examination in a prescribed form. The substitution of such a letter applies only to British subjects from the United Kingdom, Australia and New Zealand, Ireland, and to citizens of France, the United States and landed immigrants from the United States.[119]

For most purposes, the letter of pre-examination is, "...merely a visa by another name".[120] For a time, however, there was a potentially important distinction between immigrant visas and letters of pre-examination — an immigrant visa could only be issued abroad but the regulations were silent concerning where a letter of pre-examination may be issued. Sedgwick reported that in practice these letters were often issued in the exempted countries but an occasional letter was also issued in Canada. This meant that while some non-immigrants would have to return to their home country in order to obtain an immigrant visa, others from exempted countries could be granted a letter of pre-examination in Canada and thereby avoid travel, time and expense. The Immigration Appeal Board recently laid this inequity to

rest by holding that a letter of pre-examination could not be obtained within Canada.[121] Consequently, all applicants for landing must now have either an immigrant visa or a letter of pre-examination and both can only be granted abroad.

In determining whether a prospective immigrant should be issued an immigrant visa or a letter of pre-examination, the visa officer abroad examines the person to see if he falls within any of the prohibited classes in the *Immigration Act*.[122] If the officer determines that the person is a member of a prohibited class, a visa cannot be issued.[123]

(i) Determining Who May Be Admitted

Anyone over eighteen years of age may apply outside of Canada as an independent applicant. The visa officer must ensure that the applicant and his immediate family — his spouse and any children under twenty-one — comply fully with the *Act* and the regulations. If any member of his family is in a prohibited class — for example, a child may be an epileptic — the visa officer may not issue a visa.

Since all members of the family must be examined, it appears that a visa will not be issued if one member of the family is not available for examination unless proof of death of that family member is conclusively established. The stringency of proof required in some cases appears to be excessive. A recent decision of the Immigration Appeal Board, *Ulysse*,[124] is illustrative.

In *Ulysse*, the applicant was a Haitian woman who applied for landing from within Canada under a regulation that has since been repealed.[125] The first question was whether she and her immediate family complied fully with the *Act* and regulations — the same question that would have been asked by a visa officer outside of Canada. The applicant's husband had been arrested and imprisoned as a political prisoner by Haitian authorities in 1964. And since then, despite her best efforts to make contact, she had heard nothing whatsoever from him. Prison officials were completely uncooperative. The applicant called a Haitian witness whose credibility according to the Immigration Appeal Board "... cannot be doubted". The witness testified that "public rumour" indicated the applicant's husband had died in prison. However, the Board was not satisfied because the applicant was unable to file a formal death certificate. Since the applicant's claim to remain in Canada on "compassionate and humanitarian" grounds was also rejected, she was ordered deported.

Here, the Board's insistence on documentary proof of death of a family member as the reason for that member's unavailability for examination

seems overly zealous and capable of causing serious injustice. Would it not make more sense if the *Act* simply required examination of the particular person and other members of his family also applying for admission to Canada?

(ii) Assessment

Once the visa officer has determined that the independent applicant and his family are not members of any prohibited classes, the officer must then decide whether the applicant is

> ...likely to establish himself successfully in Canada and has the means to maintain himself and his immediate family until he is established.[126]

In forming his opinion, the visa officer assesses the applicant in accordance with the assessment criteria mentioned earlier that are set out in the Immigration Regulations.[127] A point system is used under which the applicant must normally achieve a minimum of 50 points. However, the visa officer retains an ultimate discretion — he may refuse a visa to someone who has attained 50 points or grant a visa to someone who has not achieved 50 points if he believes that the norms do not accurately reflect this particular applicant's chances of successfully establishing himself in Canada.

If the visa officer decides to invoke his discretionary authority, he must give written reasons for doing so. Furthermore, these reasons must be approved by an officer named for this purpose by the Minister of Manpower and Immigration. Normally the approving officer is the chief immigration officer in the applicant's country of origin.

The assessment system merits some description. First, fifteen of a possible one hundred points are awarded on the basis of the visa officer's subjective evaluation of the applicant's personal suitability and his chance of successfully establishing himself in Canada. The other norms of assessment include:

- education and training — one point for each year of formal education successfully completed to a maximum of twenty;
- occupational demand in Canada — up to fifteen points based on "...information gathered by the Department on employment opportunities in Canada";
- skill factors — up to ten points;
- age — ten points if the applicant is between 18 and 35, one point to be deducted for each year over 35;
- arranged employment in Canada — up to ten points if there is a specific job with a "... reasonable prospect of continuity" awaiting the applicant in Canada;

- knowledge of English and French — ten points for fluency in both languages, five points for fluency in one language only;
- presence of a relative in Canada able to sponsor the applicant — five points if the relative lives in the same municipality as the applicant's intended destination, three points otherwise;
- regional employment prospects in the area of destination in Canada — points range from zero to five depending on the strength of demand for labour in the applicant's intended destination area.

Periodically, the Department issues what is known as an Occupational Demand Guide to facilitate the assessment process. This provides a detailed breakdown of various occupations showing current demand for certain skills, regional variations of demand in Canada and future employment prospects.

If the applicant is intending to open his own business or to retire in Canada, somewhat different considerations apply. Here the visa officer will issue the corresponding number of points if the person has sufficient financial resources to open a business or retire and if in the opinion of the officer the proposed business has a reasonable chance of success. No criteria have been introduced to assist the visa officer to decide whether a business is reasonably likely to succeed.

Sponsored dependents — generally a spouse and direct family — are not subject to point assessment and will be granted a visa if they are not members of a prohibited class. The sponsor must reside in Canada and be a Canadian citizen or a landed immigrant. If the sponsor has no close relatives[128] who are either inside or outside of Canada,[129] he may sponsor one person from among his next closest relatives and any accompanying immediately family of that person. The sponsored dependent may be either inside or outside of Canada at the time of application. In either event, an immigrant visa or letter of pre-examination is required before landing can be granted. If the person is within Canada at the time the sponsorship application is made, the *Act* would appear to require that he first go abroad and obtain a visa before he can be granted landing in Canada. In actual practice, this trip could be avoided by Order-in-Council.

The third main category, nominated relatives, also requires a visa or letter of pre-examination. The visa officer must examine the person to determine whether he falls within a prohibited class and must assess him in accordance with yet another point system.[130] Any Canadian citizen or landed immigrant may nominate certain relatives for admission to Canada for permanent landing who may be less closely related to the nominator than sponsored dependents. However, the nominator must undertake to provide

for the care and the maintenance of the nominated relative and his immediate family for five years, in accordance with standards prescribed by the Minister. So far as we could discover, these standards have not been prescribed.

As with the independent applicant, the entire immediate family of the nominated relative must be examined. The visa officer's assessment is based on five rather similar criteria. Language, presence of a relative, arranged employment and regional employment demand variations do not serve as criteria in this assessment. However, the minimum number of points varies with the status of the nominator and the relationship of the nominator to the person assessed. For close relatives, the minimum is twenty points if the nominator is a Canadian citizen and twenty-five points if he is a landed immigrant. For more distant relatives, thirty points are required if the nominator is a landed immigrant. There may be some valid reason for the differences in the number of points required according to the relationship of the nominator and the nominated relative. We found no clear statement of any underlying policy.

In addition to assessment and obtaining a visa, a potential immigrant must have a medical examination to determine whether he falls within a prohibited class. If his health is acceptable, his passport is marked to indicate this.

Having now obtained a passport, visa and medical certificate, the immigrant is ready to leave his country, travel to Canada and apply for landing.

(C) NON-IMMIGRANTS

To complete this analysis of the rules governing admissibility to Canada, it is necessary to deal briefly with non-immigrants.

A non-immigrant must have a non-immigrant visa before entry may be granted, although Ministerial exemption to this requirement may be granted.[131] As with immigrant visas, this visa is issued in the country of origin. In examining the applicant, the visa officer could presumably require the person to undergo a medical examination to satisfy himself whether the person falls within certain of the prohibited classes defined in the *Immigration Act*.[132]

Persons arriving from anywhere in North or South America, Britain, Ireland, France or South Africa are exempted from the non-immigrant visa

requirement. The only documentation required is a passport. Citizens of most other European countries and Japan do not require a non-immigrant visa if they come as visitors and intend to stay for less than three months.

(D) A COMMENT ON NON-IMMIGRANTS APPLYING IN CANADA

At present, no visa or letter of pre-examination may be issued within Canada. This appears to cause some confusion and hardship. Persons often come to Canada as non-immigrants legitimately intending only to visit a friend or relative. When they arrive they find Canada congenial and decide to apply for permanent residence. However, upon application, they are told that they must first return to their own country to be assessed and examined by a visa officer. Having thus applied for landing without being in possession of a visa or letter of pre-examination, they may then be ordered deported even though their non-immigrant status would otherwise still be unexpired.

This unfortunate result may be mitigated by *Koo Shew Wan*,[133] a recent decision of the Federal Court of Canada. Here, the Federal Court held that a person applying for landing before his non-immigrant status had expired had *not* ceased to be a non-immigrant and therefore could not be deported for not having an immigrant visa. In other words, in what seems to be an obvious result, a person does not cease to be a non-immigrant within the meaning of the *Immigration Act*[134] until his non-immigrant status has expired.

Admittedly, this is not the only interpretation that could be given to the phrase used by the *Immigration Act* — "ceases to be a non-immigrant". A person could be said to have voluntarily relinquished his non-immigrant status by the act of applying for landing as an immigrant. But this would result in the inequity of forcing people legally in Canada who applied for landing in Canada to return immediately to their country of origin in order to go through what could well be a perfunctory process.

Before the 1973 amendments to the *Immigration Act* and Regulations,[135] it was possible for a non-immigrant to apply for landing within Canada. This was changed in part because of the backlog of appeals pending before the Immigration Appeal Board. This problem could have been resolved in a way that would not produce the inequity described earlier merely by abolishing appeals to the Immigration Appeal Board by persons who do not have a visa. Assessment within Canada could then be allowed.

The approach would have the additional advantage of treating applicants within and without Canada similarly — the assessment decision

for both would be final and not subject to appeal, although possibly to review by the Federal Court. The present requirement, which forces non-immigrants seeking landing within Canada to return to their country of origin, imposes unnecessary financial hardship upon prospective immigrants and engenders anger and bewilderment. Assessment within Canada does not inevitably mean a backlog of appeals. By confining appeals to the Board to those in possession of a visa and at the same time allowing for assessment within Canada, immigration procedures would be fairer and no less efficient.

CHAPTER III

The Adjudicative Process

We now consider how decisions are reached on immigration matters arising under the *Immigration Act* and regulations. These decisions are made by officials of the Department of Manpower and Immigration, by members of the administrative tribunal — the Immigration Appeal Board, by politicians — the Minister of Manpower and Immigration, and by judges of the Federal and Supreme Courts of Canada.

(A) THE IMMIGRATION OFFICER

The *Immigration Act* provides that every person seeking to come into Canada, whether Canadian citizen, Canadian domiciled, immigrant or non-immigrant, must first report to an immigration officer at a port of entry for an examination.[136] Failure to answer honestly the questions asked by an immigration officer during such an examination is sufficient grounds for deportation. If the answers given satisfy the immigration officer that it would not be contrary to the *Act* or regulations to admit the person to Canada, then he is obliged to do so.[137] Prospective immigrants are questioned and the issuance of a visa, letter of pre-examination or medical certificate abroad is not conclusive concerning admissibility. Indeed, the immigration officer may even review the point assessment done abroad and substitute his own assessment. However, in practice it is rare that someone who has already been granted a visa is ever reassessed.[138]

If the immigration officer decides that the person appearing before him cannot be properly examined due to the effects of alcohol, drugs, illness or other cause, he may either defer the examination until such time as the

person may properly be examined or he may make an order for rejection of the person.[139] A rejection order must then be served on the person and on the owner or master of the vehicle on which the person came into Canada. A rejection order, however, ceases to have effect when the person again appears before the immigration officer in a state fit for examination. If, on examination, the immigration officer has any doubt as to the physical or mental condition of a prospective immigrant, he may refer him for further medical examination.[140]

Where an immigration officer grants landing to an immigrant he must record the landing on a prescribed form or else the landing is deemed not to have taken place.

The most important determination the immigration officer must make is whether the person is a member of a prohibited class.[141] If so, the immigration officer may cause the person to be detained pending a hearing before a special inquiry officer.[142]

(B) THE SPECIAL INQUIRY OFFICER

Under the *Immigration Act*, there are four avenues that lead to a special inquiry by the special inquiry officer, who is either "an immigration officer in charge" or a nominee of the Minister of Manpower and Immigration.[143]

(i) An Inquiry Where Entry is Contrary to the *Act*

The first avenue stems from what is known as a section 22 report. This is made by an immigration officer to a special inquiry officer when the immigration officer decided that it is contrary to the *Act* or the regulations for a particular person to come into Canada. If the report concerns a person seeking to come into Canada from the United States or St. Pierre and Miquelon, the special inquiry officer will not hold an inquiry, but rather will conduct a "further examination".[144] Thereafter, he may permit the person to come into Canada or he may make a deportation order. If ordered deported, the person will be returned as soon as practicable to the country from which he came to Canada.

If, on the other hand, the section 22 report concerns a person from a country other than the United States or St. Pierre and Miquelon, the special inquiry officer may permit the person to come into Canada without holding an inquiry or he may order the person detained for immediate inquiry.

Section 22 reports must be in writing and set out the provisions of the *Act* or regulations relied on the by the immigration officer.[145] The report must

be made by the officer who actually examined the person concerned, for Immigration Appeal Board has held that an inquiry based on a report by someone other than the examining officer is a nullity.[146] Generally speaking, a section 22 report should inform the person concerned of the allegations against him. And if setting out the individual section of the *Act* and the regulations on which the immigration officer based his opinion does this, then nothing more is required. The report should specify every allegation if there are more than one. Failure to do so is justification for the Board on an appeal to declare that any inquiry based on such a report is a nullity.[147]

Once an inquiry is properly commenced by a valid section 22 report, the special inquiry officer may, if proper notice is given to the parties, add or substitute another ground for deportation which was not indicated in the original report. Failure to give notice, however, will invalidate a deportation order made on such grounds.[148] A special inquiry officer cannot introduce as a substitute ground[149] the failure to answer truthfully questions that were asked by an immigration officer at an examination. Such a failure is a condition for entering the second avenue to a special inquiry.

(ii) An Inquiry Because of Falsehoods During Examination

When an immigration officer discovers that a person seeking to come into Canada has failed to answer truthfully all questions put to him on examination, he prepares what is known as a section 19(2) report for a special inquiry officer. There does not appear to be any requirement that this report be in writing. However, in practice, section 19(2) reports are usually accompanied by section 22 reports and consequently are also in written form. The special inquiry officer has a discretion under the *Immigration Act* to order deportation solely on the basis of failure to answer truthfully any question asked by an immigration officer.[150]

(iii) An Inquiry Based on Knowledge of Certain Illegal or Immoral Behaviour

Where information becomes available that a person has engaged in certain illegal or immoral behaviour, as set out in the *Immigration Act*,[151] an immigration or municipal peace officer must send what is known as a section 18 report to the Chief of the Enforcement Division of the Department of Manpower and Immigration. This official may direct the holding of a special inquiry.[152] Here, the special inquiry officer is limited, however, to the ground for deportation set out in the direction to hold the inquiry.[153]

(iv) An Inquiry Following Arrest

The fourth avenue to a special inquiry follows an arrest without warrant

of a person who has obtained entry to Canada by using false documents, or by eluding examination or inquiry, or remained in Canada after a deportation order has been issued, or jumped ship.[154] After the person has been arrested, the inquiry must be held "forthwith", or in other words, "with reasonable promptness" in all the circumstances of the case. An inquiry held twenty-eight days after an arrest, where the person arrested was immediately released on bond, was held by the Board to be "forthwith".[155]

A person may also be arrested by a Ministerial warrant and authority to issue such warrants may be delegated.[156] Delegation must be proven or the warrant will be invalid.[157] A special inquiry following such an arrest must also be held "forthwith". However, the Ministerial warrant is by itself insufficient to institute an inquiry. It must be accompanied by a section 22 report or a direction of the type mentioned earlier.[158] If so, the inquiry is properly constituted and may proceed, the Board has held, notwithstanding any defect in the arrest.[159]

(v) An Excursus: Grounds for Deportation

For persons already in Canada, special inquiries are held to determine their legal right to continue to remain in Canada. The grounds for deportation on which a special inquiry officer must base his decision to order deportation are set out in the *Immigration Act* in some detail.[160] Our comments immediately follow particular grounds as they are listed.

> Persons involved in subversion, espionage, sabotage;[161]
>
> Persons convicted of certain offences under the *Narcotics Control Act*;...[162]

It is because of this ground that a landed immigrant or domiciled person could be deported for simple possession of marijuana. Continuing the grounds listed by the *Act*:

> Persons involved in prostitution or homoxesuality;[163]
>
> Persons convicted of an offence under the *Criminal Code*;...[164]

Unlike the provisions of the *Immigration Act* concerning admissibility, the offence need not be an offence involving moral turpitude.[165]

> Persons who have become inmates of penal institutions or mental asylums;...[166]

Here, phraseology is important: "...have become inmates". The relevant time is the time at which the section 18 report was made. If a deportation order is based on a report that the person concerned was an inmate but at the time of the report was not an inmate, the Board has considered the report and any deportation based on it to be invalid.[167] The Board has also held this ground to be applicable to cases of voluntary

self-committal to a mental institution or voluntary imprisonment rather than payment of a fine.[168]

> Persons who are members of a prohibited class at the time of their admission;[169]
>
> Persons who become a member of a prohibited class after their admission to Canada;[170]
>
> Persons who entered Canada as non-immigrants and remained after ceasing to be non-immigrants;...[171]

The burden of proving the particular class of non-immigrant under which admission was granted has been held to rest on the Minister of Manpower and Immigration.[172] The new regulations for registration of non-immigrants would appear to facilitate such proof. The Board considers that expiry of the time for which a person was admitted as a non-immigrant brings him within the operation of this ground since non-immigrant status is not a continuing status.[173] On the other hand, this ground cannot properly be invoked when a person presents himself for examination as required by the *Act* within the period of his non-immigrant status of "forthwith" on its ending since the *Act* deems him then to be a person seeking admission to Canada.[174]

The proper course of action for the immigration officer here would be to determine whether the person is a member of a prohibited class as defined by the *Act*,[175] and if so to make a section 22 report to a special inquiry officer. However, if the person does not voluntarily present himself for examination, but rather comes to the attention of an immigration officer in another way, then the officer must make a section 18 report to the Chief of the Enforcement Division. To continue our listing of the grounds for deportation:

> (Persons who) came into Canada at any place other than a port of entry or eluded examination or inquiry under the *Act*;...[176]

It has been held by the Board that *mens rea* is not a necessary element to bring a person within the first part of this ground,[177] but may be a necessary element of the second part — eluding examination.[178]

> Persons who enter Canada with false or improperly issued documents;...[179]

A passport regularly issued by the proper authorities but in a false name is considered to be an "improperly issued passport".[180] Again, *mens rea* is not required in such circumstances by the Board and hence by the special inquiry officer basing a deportation order on this ground.[181]

> Persons ... (giving) ... false or misleading information;...[182]

The Board has stated that the phrase "false or misleading information" should be read disjunctively, so that it would be sufficient to show that the

information was *either* false *or* misleading, whether intentionally so or not. All questions asked by an immigration officer must be answered accurately and to the best knowledge of the person concerned. Inaccurate answers must be carefully examined to determine whether the inaccuracy was by inadvertence or carelessness or was "false or misleading". The critical question then would be whether the inaccuracy, if known to the immigration authorities, would have prevented the grant of landing or entry.[183] Failure to disclose material information, even if no specific question is asked concerning it, the Board has considered to be equivalent to giving "false or misleading information" and therefore falls within this ground of deportation.[184]

The "false or misleading" ground in the *Immigration Act* also includes the words "improper means". The Board has decided that "improper means" covers the case of an independent applicant for permanent residence residing in Canada whose application was refused and who entered into a marriage of convenience in order to acquire the status of a sponsored dependent.[185] The last two grounds are:

> Persons who return or remain in Canada after a deportation order has been made against them;...[186]
>
> Persons who come into Canada as a member of a ship's crew and, without the approval of an immigration officer remain in Canada after the ship has departed.[187]

These then are the essential grounds for deportation for persons who are not Canadian citizens or may not have Canadian domicile but who are in Canada. The standard procedure used here would be a report by an immigration officer to the Chief of Investigation who may[188] as a result direct that an inquiry be held. There is, however, a method in the *Immigration Act* which would appear to provide for the issuance of deportation orders without a special inquiry.[189] The Minister of Manpower and Immigration may declare that any non-immigrant who in his opinion is a person described in any of the grounds for deportation described above[190] has ceased to be a non-immigrant. The Minister may then deport that person. There appears to be no right to a special inquiry hearing if this method of deportation is used. And because of this, the possibility exists for abuse; "possibility" because we were unable to discover any cases in which this method was used. Nor were we able to find any guidelines governing the exercise of this summary procedure of deportation of non-immigrants. Perhaps these sections are simply statutory anachronisms; if so they should be repealed.

(vi) The Special Inquiry

The special inquiry is a unique proceeding, usually inquisitorial, but resembling on occasion an adversarial hearing, particularly if the person is

represented by a lawyer. Representation, however, is rare. Inquiries are held *in camera* but in the presence of the person concerned, wherever practical.

At the commencement of an inquiry, if the person is not represented by counsel,[191] the special inquiry officer must inform the person of his right to retain counsel and he must adjourn the inquiry if the person wishes to do so. The special inquiry must also be adjourned if the services of an interpreter are required. The Department of Manpower and Immigration has a roster of interpreters who can normally be obtained with a minimum of delay and are provided at no expense to the person needing this assistance.

Where the inquiry originates by a section 22 report, or because of a direction from the Chief of Investigation, the report or direction is filed as an original exhibit and read to the person concerned. The purpose of the inquiry must be explained as, too, must the fact that the inquiry could result in the person's deportation.

In the conduct of the inquiry, the special inquiry officer has a wide latitude regarding evidence. He may receive whatever information he considers credible or trustworthy in the circumstances of the particular case.

The person concerned is normally present, as too may be his representative or counsel. Representation is more often by relatives or non-lawyers who are sometimes described as immigration "counsellors". However, no one appears as counsel or representative for the other side — that is the Minister of Manpower and Immigration. All questions are asked by the special inquiry officer. It should be noted that the right to counsel — to being represented by a lawyer — is available not just to the person directly involved, but to those indirectly affected, such as dependents. Usually, most of the special inquiry officer's questions are directed at the potential deportee himself. In cases where deportation is ordered, the most incriminating evidence invariably comes from the deportee's own mouth.

The special inquiry officer has all the powers and authority of a commissioner appointed under Part I of the *Inquiries Act*. He may summon witnesses, although usually he confines the inquiry to those witnesses called by the person concerned.[192]

Evidence may be accepted on oath. While an oath is not required, the Immigration Appeal Board has held that where the subject of an inquiry testifies under oath, contradictions are to be resolved in favour of the person testifying under oath.[193] It is not known if people appearing at special inquiries are aware of this decision and therefore testify accordingly.

Special inquiry officers, in our experience, consider that their primary function is to do all things necessary to provide a full and proper inquiry. They are aware that the Board had decided that evidence on the face of the record indicating that the special inquiry officer has not retained an open mind must vitiate the inquiry.[194] So too will bias. The bias test applied by the Board has been "real apprehension" apparent to the mind of a reasonable man fully aware of the circumstances.[195] However, the Board has been less concerned about the harm that might be seen to flow from the fact that the special inquiry officer may have had access to information not made available to the subject of the inquiry. This, the Board has held, is not improper so long as it does not affect the special inquiry officer's decision.[196] Nor has consultation between the special inquiry officer and an immigration officer during the course of an inquiry led to the Board's upsetting the special inquiry officer's decision.[197]

Where the inquiry concerns a person seeking to come into Canada (an inquiry commenced by a section 22 report), the onus of proving admissibility lies upon this person. However, where the inquiry concerns a person already within Canada, the onus of proof that the person is subject to deportation lies on the Minister.

In *Gana*,[198] the Supreme Court of Canada held that the special inquiry officer must review decisions of immigration officers that they are required by the *Immigration Act* to make, based on their opinion of whether applicants meet certain criteria prescribed by the *Act* and regulations. In undertaking this review the special inquiry officer, said the Federal Court in *Srivastava*,[199] is acting administratively:

> ... (I)n carrying out the steps outlined as conditions precedent to a deportation order, both the immigration officer and the special inquiry officer are performing acts of an administrative nature.... (W)hile this hearing, which must precede the making of a deportation order by a special inquiry officer, has some of the trappings of a judicial hearing, it is only, in my view, an inquiry by an administrative officer with a view to ensuring that that officer has available to him the facts necessary for the application of the law... The importance of some of the requirements of a judicial hearing make it more likely that the true facts would be ascertained, but such an inquiry is not the equivalent of a judicial hearing. In my view, the deportation order is not an adjudication by a judicial tribunal but ... like an assessment under the *Income Tax Act* (,) is an administrative act by an official of a government department, taken after more than usual safeguards to ensure that it has been properly made.[200]

These safeguards include the taking of a verbatim transcript of everything said during the inquiry as well as of the decision given by the special inquiry officer. This transcript forms what is known as the written report which is then signed by the special inquiry officer and in the event of an appeal to the Immigration Appeal Board, becomes part of the record.

At the conclusion of the inquiry, the special inquiry officer must give his decision as soon as possible and in the presence of the person concerned, if practicable. The special inquiry officer has no discretion regarding deportation, not even to order a stay of deportation. He must admit the person if found to be admissible and must order his deportation if inadmissible. Admissibility and inadmissibility, the Board has indicated, are to be determined on the facts as they existed at the time of the inquiry, not at the time of the filing of the initiating report.[201]

If a deportation order is made against the head of a family, no dependent members of the family may be included in such an order unless the dependent has first had an opportunity of establishing that he or she should not be included. Dependents have all the rights of the head of the family in participating in the special inquiry, at this stage, including as mentioned earlier the right to counsel.

As might be expected, a deportation order must be issued by the special inquiry officer who conducted the inquiry.[202] However, if a change of inquiry officers occurs before the merits of the case have been discussed, the Board has held the subsequent deportation order to be valid.[203]

When he makes a deportation order, the special inquiry officer must inform the person of the provisions of the *Act* or regulations pursuant to which the order is made. In addition, a copy of the deportation order must be given to the person affected by it. The special inquiry officer must inform the person of his right to appeal to the Immigration Appeal Board and explain the procedures necessary to invoke the appeal process. However, the special inquiry officer need not inform the person of any rights of appeal to the Federal Court of Canada or any possibility of activating that Court's review functions.

In certain instances,[204] the transportation company which brought the person into Canada is responsible for the cost of deportation and so a copy of the deportation order will be forwarded to the company. It must then arrange for the person's travel arrangements in accordance with the provisions of the order. When a person is delivered into the custody of a transportation company for deportation, a representative of the company must provide a receipt indicating that the deportee has been discharged to them and recording the date and time when they assumed responsibility for his transport out of the country. The transportation company must convey the person in a manner similar to that of a paying passenger.

Should new facts emerge, and if no appeal to the Immigration Appeal Board has been instituted, the special inquiry officer has authority on

application to re-open an inquiry within thirty days of his earlier decision in order to receive additional testimony. At this re-opening, as it is called, he may confirm, amend or reverse the previous decision.[205] Moreover, the Immigration Appeal Board has authority to order a special inquiry officer to re-open an inquiry to receive additional evidence or testimony.[206]

(C) THE IMMIGRATION APPEAL BOARD

(i) Its Composition and Nature

The present Immigration Appeal Board was established, as previously mentioned, by the *Immigration Appeal Board Act*, proclaimed on November 13, 1967, and subsequently amended on August 15, 1973. Of the permanent members of the Board, one is designated Chairman and four Vice-Chairmen.[207] The Chairman and at least two other permanent members must be barristers of at least ten years standing.[208]

In formulating rules of practice and procedure, a quorum of the Board consists of the Chairman and not less than two other permanent members. For all other purposes, including the hearing and disposition of appeals, a quorum ordinarily consists of a permanent member and not less than two other members of the Board.[209] However, the Chairman of the Board may direct that all or part of the evidence relating to an appeal be received by a single member of the Board who shall then report to a quorum of the Board.[210] The Board will then decide the appeal. This procedure is considered unworkable and seldom used. Since 1973 the Board has conducted single member hearings in order to get through the accumulated backlog of appeals.[211] Once this has been done, the Board reverts back to three-member quorum hearings.

The Board has had one Chairman since 1967, Miss Janet V. Scott, Q.C., and under her strong influence it has functioned as an appellate court of record. This, of necessity, has meant adherence to the procedural and to some extent the evidentiary requirements governing appellate court practice. Some observers of the Board consider that this formalism is incompatible with the essentially discretionary and humanitarian jurisdiction under section 15 of the *Immigration Appeal Board Act*.[212]

The statutory basis for the Board's existence as an administrative tribunal that functions like an appellate court is based on a strict interpretation of two provisions of the *Immigration Appeal Board Act* which reads:

> The Board is a court of record and shall have an official seal, which shall be judicially noticed.[213]

> The Board has ... all such powers, rights and privileges as are vested in a superior court of record...[214]

The conferral of similar kinds of powers on administrative tribunals, boards and commissions is not uncommon. In most instances, however, this does not determine the legal nature of the tribunal. Nevertheless, as Chairman Scott has written:

> (The Board) ... functions as a Court, the adversary system prevails at all its hearings ... it follows, though not rigidly, ordinary Court procedure ... it applies so far as possible, the ordinary rules of evidence.[215]

We believe it can be demonstrated from an analysis of Board decisions that the Board's conception of itself as an appellate court has permeated its philosophy, procedure and decision-making. This conception, as a result, has influenced the course of development of Canadian immigration law.[216]

(ii) Its ''Clients'': Who Can Appeal to the Board?

Prior to August 15, 1973, *any* person ordered deported could appeal to the Board.[217] Amendments at that time, following the adjustment of status program, limited the full right of appeal to two classes of persons: first, permanent residents or landed immigrants, and second, persons seeking admission to Canada who have a visa. In addition, two other classes of persons were granted qualified rights of appeal: persons claiming to be refugees under the Convention on the Status of Refugees, and persons claiming to be Canadian citizens.

To exercise a qualified right of appeal, a person must attach to his notice of appeal a declaration made under oath setting out the nature of his claim and a statement of the facts on which it is based and any supportive evidence. On receipt of this the Board must ''forthwith'' consider whether there are reasonable grounds for believing that the claim ''...could, upon the hearing of the appeal, be established''.[218] If so, the appeal proceeds; but if not, the Board will direct that an order of deportation be executed.

In practice, this separate preliminary hearing of claims to refugee or citizenship status is often combined into a single proceeding at which the preliminary claim is disposed of on its merits.[219] If, however, there are two separate hearings, the decision of the first, if adverse to the appellant and resulting in an order of deportation, could be considered as a ''final'' decision of the Board. Written reasons could be requested by either party, and review by the Federal Court sought, pursuant to section 28(1) of the *Federal Court Act*. On the other hand, appellants with an absolute right of appeal may contest two issues before the Immigration Appeal Board: the

legality of the deportation order and a claim to compassionate and humanitarian relief under section 15.

The deporting authority, the Minister of Manpower and Immigration, also has a right of appeal to the Board. The Minister may appeal a special inquiry officer's decision that a person is not to be deported.[220] Oddly, the Board has held that a special inquiry officer's decision that he does not have jurisdiction to hold an inquiry is not subject to appeal by the Minister even though the authorizing section countenances appeals on a pure question of law.[221]

The right to appeal to the Immigration Appeal Board has also been granted to a Canadian citizen where application for admission of a sponsored dependent has been refused.[222] We note that while landed immigrants may also sponsor dependents,[223] they have not been granted any right to appeal the refusal of a sponsorship application.[224] We find it difficult to justify this difference.

The sponsorship program rests on a humanitarian desire to see families united. Landed immigrants have been lawfully admitted to Canada and their inclusion within the scope of this humanitarian impulse is evidenced by the fact that they may sponsor dependents. Why then extend to them the statutory right to sponsor but deny them a right of appeal against what may be an unjust or perverse withholding of that right?

It might be reasonable on policy grounds to deny landed immigrants the right to sponsor dependents. On the other hand, it might be reasonable to provide that departmental decisions on sponsorship cannot be appealed. But it is unreasonable and unfair to extend landed immigrants the right to sponsor but deny them (but not Canadian citizens granted the same right) the right to appeal on adverse decision. Citizenship *may* be an acceptable criterion in determining who can sponsor dependents but it is not an acceptable criterion in determining who can appeal an adverse sponsorship decision.

It should be noted that the Minister is required to notify a sponsor of the ground on which a refusal is based.[225] But the Minister need not, as the special inquiry officer ordering deportation must, advise the Canadian citizen sponsor of his right to appeal to the Immigration Appeal Board. It would be a simple matter to include with the Minister's decision a notification of rights of appeal and a simple statement of what can be done to appeal the decision.[226]

In addition to appeals from deportation and the refusal of sponsorship, the Immigration Appeal Board also hears applications for release from

detention. The special inquiry officer has authority to order detention pending deportation. If the person detained files notice of appeal to the Board, the Board can review the detention order and release the person detained subject to any terms or conditions which the Board "...deems advisable".[227]

These applications and appeals of sponsorship refusals do not take up much of the Board's time. In fact, the overwhelming portion of the Board's work load consists of appeals against deportation.

(iii) Appeal Procedure

An appeal by a person ordered deported[228] is instituted by serving a notice of appeal on either an immigration officer or the special inquiry officer who presided at the inquiry. This notice must be served within twenty-four hours from the service of the deportation order. This rather short period can be extended at the Chairman's discretion for up to five days.[229]

The officer who has been served with a notice of appeal must file with the Board's Registrar three copies of the notice and three certified copies of what is called the record. The record includes a copy of the deportation order, the minutes of the special inquiry, of the special inquiry officer, any exhibits filed at the inquiry, the decision and other supporting documents. The Minister of Manpower and Immigration is served with a copy of the notice of appeal. Both he and the appellant receive a copy of the record. The Minister must file a reply with the Board in ten days. This reply is also sent to the appellant.

Once an appeal is instituted, it may only be withdrawn or abandoned by written notice signed by the appellant or his counsel and either served on an immigration officer or filed with the Registrar of the Board. If served on an immigration officer, the officer must immediately notify the Registrar.

An appeal by the Minister must be instituted within thirty days of the making of the special inquiry officer's decision. It seems anomolous and unfair that the times for filing of appeals should be so disparate. A person ordered deported has only twenty-four hours to appeal, a very short period that can be lengthened to five days by the Chairman. Yet the Minister has thirty days, as of right, to file a similar notice if *he* chooses to appeal.

It could be argued that given the sheer volume of cases which the Department must handle, a longer time for review of the merits of a special inquiry decision, consideration of its policy implications and a weighing of the prospects on appeal necessitate a longer period. But even so, would the

appearance and the reality of justice not be better served by extending the time limits for appeal to both parties?

It is true that this might mean delay in the execution of deportation orders following special inquiries. Nevertheless, the 1973 amendments limited appeal to the Immigration Appeal Board to people who have a strong claim on our conscience: visa holders, permanent residents and people claiming Canadian citizenship or refugee status. They should have no less claim on procedural fairness. A prescribed time limit for serving notice of appeal of twenty-four hours is shamefully inadequate on its face; still more so, when one considers the emotional, linguistic and cultural obstacles facing the new arrival in the port of entry. The Immigration Appeal Board Rules should be amended to provide a similar, reasonable period of time for either the person ordered deported or the Minister to serve notice that they wish to appeal the decision of a special inquiry officer.[230]

(iv) The Board's Rules of Evidence

Having patterned itself on an appellate court model, the Immigration Appeal Board has tended to rely on the rules of evidence used by the courts. This approach has served both for determining the legality of deportation orders and for the Board's subsequent consideration of whether it should exercise its compassionate and humanitarian discretion conferred by section 15.

The *Immigration Appeal Board Act* gives no explicit direction to the Board about rules of evidence but does suggest that a departure from normal appellate court practices would be permissible. The Board may, for example,

> ...receive such additional information as it may consider credible or trustworthy and necessary for dealing with the subject matter before it.[231]

This suggestion has, however, been interpreted rather narrowly by the Board. It has held that "additional information" means "evidence" subject to the usual rules determining such issues as admissibility and probative value.[232]

Another evidentiary issue faced by the Board is the admissibility of new evidence concerning the validity of a deportation order. In *Srivastava*, the Board refused to hear evidence that had not been raised before the special inquiry officer who had made the order of deportation. An excerpt from the transcript of proceedings illustrates the Board's position:

> Mr. Frith (lawyer for the appellent): Well, perhaps that's another issue — perhaps the Board might be on. I understand that this is especially a proceeding *de novo* —

> Chairman: No, it's an appeal, a straight appeal.
>
> Mr. Frith: Well, then, there is no evidence admissible? Do we have to proceed entirely...
>
> Chairman: It's admissible in respect to, of course, your claim, relief under 15, section 15 of our *Act*, but as far as the new ground of the deportation order is concerned the only new evidence that would be admissible would be evidence that you could not physically have brought in before the special inquiry officer. In other words, the same rules as any other court of appeal.

The Board's decision was appealed to the Federal Court. In a decision written by Chief Justice Jackett, the Court concluded that the Board's position in limiting the appeal essentially to the record failed to deal with the matter as required by law, and that a new hearing should be held.[233] The Court found support for its decision in several sections of the *Immigration Appeal Board Act* that give the Board the power to determine all questions of fact and law that arise in making an order of deportation[234] and to receive additional information.[235] Also supportive were the Immigration Appeal Board Rules authorizing the parties to an appeal to call witnesses[236] and to make oral or written submissions on any matter pertaining to the appeal.[237] But of particular importance was Chief Justice Jackett's view of the *in camera* inquiry held by the special inquiry officer. He considered this to be merely an administrative function or act required as a condition precedent to a deportation order.[238] Consequently, in his view there could not be that

> ... assumption of completeness and accuracy such as there can be when there has been a contest under the adversary system before a judicial officer and the hearing has taken place in public.[239]

The result of *Srivastava* is that an appellant has the right to call new evidence before the Board so long as it is relevant to either the validity of the deportation order or the exercise of its discretion under section 15. The new evidence is, of course, subject to the Board's usual rules and powers concerning admissibility of evidence.[240]

Srivastava also affects the right of the Minister of Manpower and Immigration to introduce new evidence. In *Brooks*, the Board in 1972 held that the Minister could add new grounds to a deportation order if these grounds had been thoroughly explored by the special inquiry officer, although he had chosen to base the deportation order on other grounds.[241]

Then, the Board held in *Podlaszecka*[242] that the Minister could *not* introduce new evidence which had not been before the special inquiry. Presumably *Srivastava* invalidated this decision, both parties now being able to introduce new evidence before the Immigration Appeal Board subject to the considerations we have noted. The statutory direction to the Board to "...render the decision and make the order that the special inquiry

officer should have made'' must now be interpreted as having an additional implicit clause: ''...if he had before him all the evidence which the Board had before it''.[243]

(v) Reviewing an Opinion of the Special Inquiry Officer

The *Immigration Act* and regulations require an immigration officer and a special inquiry officer to base their decisions in some instances on their ''opinion''.[244] The Immigration Appeal Board initially held that as a court of appeal it had no power to review an ''opinion'' reached under statutory authority except in cases of error of law or where there was no evidence supporting the opinion. In other words, as an appellate court the Board felt reluctant to substitute its opinion for that of the officer. However, the Supreme Court of Canada and the Federal Court have held in two cases[245] that the Board must review and if necessary substitute its own opinions for those of immigration and special inquiry officers. These Courts have held that the term ''court of record'' imports less stringent judicial formality than the Board apparently desires.

These attempts to ''loosen up'' the judiciality of the Board have been strenuously resisted. Although forced to review the opinions formed by immigration and special inquiry officers, the Board has held that a high degree of proof would be required before it will substitute its opinion. In a recent case, the Chairman stated:

> This Court ... is a statutory court of appeal with, insofar as its jurisdiction in law (not equity) is concerned, the normal powers of a court of appeal. It is not an admission board. It has, insofar as its appellate jurisdiction in law is concerned, no power and no interest in directly admitting anyone to Canada. Since the *Gana* decision, its review of the decision of the special inquiry officer and the immigration officer, and the substitution of its own opinion for theirs, may have the effect of admitting an appellant to Canada, but this review and substitution is done as a Court of Appeal, with the heavy burden of proof on the appellant that this concept entails.[246]

We question the need for forcing appellants to bear this additional burden. Legalistic interpretation and procedural formality may well be the hallmarks of a Court of Appeal, but they are also obstacles to appellants who may lack the resources to cope with complex proceedings.

Refusing to review ''opinions'' or imposing a heavy burden of proof on those challenging these opinions in our view frustrates the common sense purposes of the *Immigration Act* and the Board. The *Act* and its regulations are essentially an attempt to provide fairly simple admission standards for people seeking entry to Canada. The Board is designed to supervise important decisions made by ''low visibility'' departmental officials. We submit that the Board should simply review the facts to determine whether

or not the officer's opinion was correct or at the very least supportable on the evidence. Expatiation on the relative stringency of the "burden of proof" merely obfuscates the real issue: whether or not the person is desirable for admission.

Mr. Justice Laskin, then of the Ontario Court of Appeal, has criticized the Board for "grasping the form rather than the substance".[247] Regrettably, his criticism is apt for this area of the Board's procedures and decision-making.

(vi) What the Board Decides

On an appeal of a deportation order, the Board may dispose of the issues of the order's legality by allowing or dismissing the appeal or by making the order the special inquiry officer should have made. However, the latter alternative[248] is chosen only if requested by the appellant. Ordinarily, the Board would simply allow the appeal[249] if it decided that the deportation order was legally invalid.

Where the successful appellant has a continuing legal status in Canada, such as that of landed immigrant, this status revives as soon as an appeal against a deportation order is allowed. However, if no legal status in Canada had ever been acquired (a ship deserter, for example) or if legal status had expired by the time the appeal was decided, the fact that an appeal is allowed does not of itself create a legal status. The Board's only authority to do this is to make the decision that the special inquiry officer should have made. And this the Board will not do, unless specifically requested. Anomalous as it seems, a successful appeal may nevertheless leave the appellant without legal status to remain in Canada. This anomaly could be easily removed if the Board would invariably use its power to substitute its own decision for that of the special inquiry officer. Some appellants, without counsel or understanding of the Board's procedures, may otherwise be prejudiced merely because they did not know what they should ask the Board to do.

(vii) Status and *Res Judicata*

The *Yeung* case illustrates the status problem resulting from allowing an appeal by a ship deserter facing an order of deportation.[250] Such an order is legally valid only if the particular ship has departed. Because no evidence introduced showed that Yeung's ship had in fact departed, the Board allowed his appeal.[251]

Subsequently, Yeung was again ordered deported but on different grounds, notably eluding examination. And on a second appeal, evidence of the ship's departure was introduced. However, the Board held that the

doctrine of *res judicata* or estoppel by judgment applied and declared that a deportation order based on the same ground arising from the same set of facts was a nullity. Since the additional grounds supporting the second order of deportation arose from the same set of facts, they should have been relied on for the first deportation order and could not later be raised. We note that the Board reached its conclusion that *res judicata* applied not because of a common sense of fairness but rather because of its emphasis on its appellate court nature complete with "all such powers, rights and privileges as are vested in a superior court of record".[252]

The result is that Yeung, although never legally admitted to Canada, cannot be deported unless he commits a criminal offence or does something else that would justify a deportation order.[253] However, since he has no status in Canada, Yeung can never acquire Canadian domicile. Furthermore, he can never leave Canada whatever the reason, without losing his ability to stay within Canada as a person without status.

Res judicata, of course, does not apply in cases where a second deportation order is based on different facts and grounds. For example, a legally admitted non-immigrant may successfully appeal an order of deportation issued because of the person's alleged membership in a prohibited class. Once, however, the person's non-immigrant status expires, a deportation order based on that fact alone would be legally unassailable and beyond the reach of *res judicata*.[254] The Board in such a case might even find itself allowing the person's appeal even though another ground existed — the expiry of non-immigrant status — for a valid deportation order. This could arise because the relevant state of events for the Board's consideration is the state of events at the time the deportation order was made.

(viii) The Board's Compassionate and Humanitarian Jurisdiction

The legality of the deportation order is in many cases only a preliminary issue. More often than not, the real hope of the appellant is that the Board will be moved to exercise its compassionate and humanitarian jurisdiction under section 15(1)(*b*).

The Chairman of the Board has written that

> ... the interpretation and administration of justice under this section is by far the most difficult problem confronting the Board.[255]

Although the language of section 15 would appear to confer unfettered discretion on the Board, the Board's interpretations of this section have added constraints and limitations. The Board's justification for doing so is more formal than practical. "Since the Board is a Court", the Chairman has written, "its discretion can only be judicial discretion".[256] Judicial

discretion apparently is more formal, more objective, more subject to procedural and evidentiary rigour than ordinary laymen's discretion. It bears

> ... no relationship to ministerial or executive clemency...the interpretation of the subjective words 'compassionate' and 'humanitarian' must be made objectively, that is on proof of reasonable not sentimental or emotional grounds and that proof must be in accordance with the ordinary rules of evidence, except as to admissibility.[257]

The decisions of the Board interpreting its discretionary mandate under section 15 have recently been analysed.[258] We would agree with the finding of this analysis that the Board's preoccupation with its status as a court has hampered, if not frustrated, a common sense, non-legalistic interpretation of section 15.

Section 15, of course, has been amended since the analysis was completed, and one ground for exercise of the Board's discretion has been altered. The likelihood that the appellant would be punished for activities of a political character has been replaced by:

> ...the existence of reasonable grounds for believing that the person concerned is a refugee protected by the Convention or that, if execution of the order is carried out, he will suffer unusual hardships.[259]

But, it is unlikely that this amendment will alter the Board's approach to section 15.

What can the Board actually do in cases where it decides on the evidence to exercise its section 15 discretion? First, it may direct that the execution of the deportation order be stayed.[260] Alternatively, the Board may quash the order and direct the grant of entry or landing to the appellant.[261] Where execution of a deportation order is stayed, the person concerned may come into or remain in Canada.[262] However, the Board must review the case from time to time "as it considers necessary or advisable".[263] This jurisdiction to review continues notwithstanding the departure from Canada of the person concerned during the period of stay.[264]

Upon a review, the Board may amend the terms and conditions on which the stay was granted or cancel the stay order and direct deportation.[265] Conversely, in the case of a landed immigrant the Board may quash the deportation order or in the case of persons who are not permanent residents of Canada "quash the deportation order and direct the grant of entry or landing to the person against whom the order was made".[266]

If no grounds are established for the granting of special relief, the Board must direct that the deportation order be executed as soon as practicable. It has no jurisdiction to specify the place of deportation.[267]

A problem might arise where the Board finds a deportation order invalid. In such a case, it could not consider exercising its discretion under section 15.[268] Suppose the Minister of Manpower and Immigration appeals the Board's decision to the Federal Court and the court holds the deportation order valid. Should the case now be referred back to the Board for consideration of the special discretionary relief provided in section 15? This issue arose in *Ram*.[269] The Federal Court, after reviewing the evidence brought before the Board, concluded there was no evidence to warrant the exercise by the Board of its discretion under section 15. Consequently, the Federal Court refused to refer the case back to the Board.

Unless the Federal Court intends to usurp the discretionary jurisdiction of the Board, this must mean that if the Court discerns in the record of proceedings before the Board *prima facie* evidence that might support discretionary relief, they will refer the case back to the Board. The *Ram* decision, that where there is no evidence to justify discretionary relief there is no need to refer the matter back, comes dangerously close to usurping what we would have thought was an exclusive jurisdiction of the Board.

(ix) The National Security Exception

Political control of the Board's jurisdiction in cases with national security overtones has been retained by the Minister of Manpower and Immigration, and the Solicitor General. As section 21(1) states:

> Notwithstanding anything in this Act, the Board shall not,
>
> (a) in the exercise of its discretion under section 15, stay the execution of a deportation order or thereafter continue to review the stay, quash a deportation order, or direct the grant of entry or landing to any person, or
>
> (b) render a decision pursuant to section 17 that a person whose admission is being sponsored and the sponsor of that person meet the requirements referred to in that section,
>
> if a certificate signed by the Minister and the Solicitor General is filed with the Board stating that in their opinion, based upon security or criminal intelligence reports received and considered by them, it would be contrary to the national interest for the Board to take such action.[270]

The Board has held that the issuance of a certificate is a purely ministerial act and is not open to review.[271] Reasons need not be given by the Solicitor General in support of his conclusion that admission would jeopardize the national interest. And the person affected has no right to a hearing on the filing of the certificate.[272] Since it has been held that the certificate does not deprive the person concerned of any rights, the *Canadian Bill of Rights* is inapplicable.[273]

The national security exception applies to both appeals against deportation and sponsorship. However, it applies only to the Board's discretionary jurisdiction and not to its power to allow an appeal on the basis of an invalid deportation order.[274]

The Board may reconsider or reopen an appeal and hear new evidence that relates to the exercise of its discretionary power under section 15. On the other hand, a final decision on the legal validity of a deportation order or the legal validity of the rejection of a sponsorship application may not be reconsidered.[275]

While there is no explicit statutory authority for the Board to reopen an appeal in order to consider new evidence after initially disposing of the case, the Board's view that it has inherent jurisdiction to do so has been upheld by the Supreme Court of Canada.[276] Reopenings, however, are rare and motions to reopen are only brought in Ottawa. The Board requires the appellant to show that the evidence could not have been obtained at the original appeal and that the evidence is of such a nature that, if satisfactorily proved, it would furnish sufficient reason for reconsideration of the Board's original disposition of the appeal.[277]

One point remains to be mentioned: the status of an original deportation order quashed by the Board, pursuant to its discretionary power under section 15. Is the quashed deportation order "dead" or merely unenforceable? In *De Porres*,[278] the Board held that the deportation order remains valid, but unenforceable. Consequently, if for any reason a person whose deportation order is quashed leaves Canada, he does so at his peril. On return, he may not be readmitted to Canada without the consent of the Minister. Even a short visit, if only to see a sick relative, is effectively precluded. Any attempt to enter Canada without Ministerial consent could result in another deportation order.

Indeed, a similar and similarly anomalous result may arise when the Board quashes a deportation order and directs a grant of landing. Even though the person is now a landed immigrant, he may not be able to leave the country and freely return since there is an outstanding, although quashed, deportation order.[279] This result seems absurd. We prefer the reasoning of Vice-Chairman Campbell in his dissenting opinion in *De Porres*:

> To sum up I am of the opinion that when the Board allows an appeal from a deportation order pursuant to Section 14 then such order no longer exists, it is null and void. I am of opinion further that when the Board exercises its discretionary jurisdiction under Section 15 of the Act and quashes a deportation order then such order is annulled and it no longer exists. When an appeal is allowed or the deportation order quashed the legal effect and result thereof is the same, namely, that the deportation order in question is no longer in existence.[280]

(D) THE MINISTER

Before the creation of the Immigration Appeal Board, discretion was exercised only by the Minister. While the *Immigration Appeal Board Act* gives important discretion and decision-making authority to the Board, the Minister of Manpower and Immigration has retained some discretionary power.

There are three important areas when ministerial discretion survives. These are:

(i) Orders-in-Council (known as waivers, granted under section 57) exempting certain individuals from complying with the Immigration Regulations

(ii) permits (under section 8) authorizing persons to enter or remain for periods up to twelve months

(iii) consent (under section 35) to remain or return to persons ordered deported.

We deal with each of these areas in turn.

(i) Section 57 Waivers

This section grants broad regulation-making authority to the Cabinet under a number of heads "for carrying into effect the purposes and provisions of (the Immigration) *Act*".[281] The Immigration Regulations governing admissibility were made pursuant to this authority. Section 57 has also served as authority for Orders-in-Council exempting certain individuals from compliance with the regulations and ordering the conferral of landed immigrant status even though the person does not comply with the Immigration Regulations.

A variety of situations have resulted in section 57 waivers, as these Orders-in-Council are called. Little would be gained, for example, by forcing a foreign diplomat who has been in Canada for many years and who now wishes to retire in Canada to return to his country of origin to apply for a visa. Similarly, there could be no good reason to ask students who have been in Canada for a considerable period of time and now wish to acquire landed status to return to their homelands and begin the immigration process there. In such cases, Orders-in-Council have been passed exempting resident non-immigrants without immigrant visas from this requirement.

There may also be compassionate reasons for wishing to help relatives who have been nominated for admission to Canada but who do not meet the

assessment criteria or otherwise comply with the regulations. Section 57 warrants have been issued for such people.

The same discretionary authority has also been used to cope with refugees. Claimants for refugee status would normally be unable to comply with the Immigration Regulations since they would not possess the documents required for landing. As the *Act* stands, such people could technically be ordered deported and then appeal to the Immigration Appeal Board under section 15.[282] In practice, however, cases involving claims to refugee status are examined by an Inter-departmental Committee on Refugees. If the Committee is convinced that a person is a *bona fide* refugee then an Order-in-Council may be passed authorizing a grant of landing. If the Committee rejects the claim to refugee status, there would be an inquiry by a special inquiry officer, the issuance of a deportation order and a right of appeal to the Immigration Appeal Board.

Obviously, the use of Orders-in-Council under section 57 waiving the ordinary requirements of admissibility contained in the Immigration Regulations is a practice that while adding flexibility and fairness could also be seriously abused. The "waiver decision" may respond to situations of hardship and need. But it may also respond to political considerations, to pressure from "prominent" people or groups. Indeed, it was to remove the Minister from just such pressure that the Immigration Appeal Board was created. The Hon. Richard Bell, a former Immigration Minister, said in the parliamentary debate on the Bill creating the Board:

> In no department of government is a Minister...called upon to exercise so many discretions or subject to so many pressures — pressures from members of Parliament, from candidates, from ethnic groups, from religious and philanthropic organizations...[283]

We agree with Joseph Sedgwick that the potential for abuse of section 57 waivers outweighs their marginal utility and that their issuance should be discontinued. As Mr. Sedgwick stated:

> The situation then comes down to this: the Governor-in-Council passes regulations of general application which, in accordance with the requirements of the *Regulations Act*, are published in the Canada Gazette for the express purpose of giving the public at large notice of what the law is, and who is admissible under it. The Governor-in-Council then turns around and exempts persons on an individual basis without, I must add, publishing the exempting orders. It should be noted that while these exempting orders are passed by the Governor-in-Council it is, in practice, the Minister of Citizenship and Immigration who decides who shall be exempt because the recommendations are invariably submitted to the Governor-in-Council by him and passed as a matter of routine...
>
> I have serious doubts concerning the legality of this procedure, but apart from this I have no hesitation in questioning the ethics of it and, in my opinion, it should be discontinued.[284]

(ii) Section 8 Permits

Section 8 of the *Immigration Act* authorizes the Minister of Manpower and Immigration to issue a written permit that allows a person to remain in or enter Canada for a specified period not exceeding twelve months.[285] These permits may be extended indefinitely or cancelled at any time. If cancelled, the Minister himself may make a deportation order against the person.[286] However, this summary mode of deportation apparently has only been used once in the last twenty years. Instead the person whose permit has been cancelled would be made the object of a direction under section 25 and deported pursuant to section 18 of the *Act*.[287]

It should be noted that a ministerial permit does not confer immigrant status on the person to whom it is issued. The person is simply a non-immigrant allowed to enter or remain in Canada.

Permits are generally issued in two types of case. First, where the national interest requires that a prospective immigrant be admitted immediately, a permit will be used to circumvent the delay inherent in the assessment process. Subsequently, an Order-in-Council under section 57 will be used to waive the visa requirement.

The second and most prevalent use of ministerial permits involves sponsored dependents who come to Canada without a visa. When they are stopped at the port of entry, they are deportable. However, departmental policy for compassionate reasons requires the examining officer to refer the person to the officer-in-charge who has authority to issue a section 8 permit. The dependent can then be examined in Canada and if he is not otherwise prohibited, an Order-in-Council will be obtained waiving the visa requirement.

Permits are not shrouded in secrecy like section 57 waivers. The Minister must make an annual report to Parliament giving details of all the permits issued.[288]

(iii) Section 35 Consents

Persons ordered deported may be admitted to Canada or allowed to remain here if the Minister of Manpower and Immigration "consent(s)".[289] Section 35, in effect, authorizes the Minister to admit a person who has been deported. In the past, consents were occasionally issued to persons who had been ordered deported but who had not yet actually left the country. We understand that since the creation of the Immigration Appeal Board, the Minister and Department of Manpower and Immigration have decided that they will not interfere with a Board decision that the order of deportation be executed.

Section 35 does not mesh neatly with section 15 of the *Immigration Appeal Board Act*. Section 35 provides that a consent is necessary for readmission of a person ordered deported "unless an appeal against such order has been allowed". Section 15 of the *Immigration Appeal Board Act* stipulates that the Board may only exercise its power to grant discretionary relief "where the Board dismisses an appeal against an order of deportation".

It has been held by the Board in *De Porres* that a deportation order quashed under section 15 continues to exist for all purposes except execution of the order.[290] In other words, the quashing of an order by the Board merely stays the execution of the order permanently. It is not a successful appeal within the meaning of section 35 of the *Immigration Act*. Thus, as we have mentioned earlier, until the person has acquired Canadian citizenship, and if for any reason he goes outside Canada, for however short a time, he technically cannot be readmitted to Canada without the consent of the Minister. In addition, a person who has been ordered deported and leaves Canada before his appeal may not be able to re-enter Canada for the purposes of his appeal without the Minister's consent under section 35.[291]

An example illustrates the difficulties created by these provisions. A person in Canada holding an immigrant visa is ordered deported because in the opinion of an immigration officer he falls within a prohibited class. He may, for example, have committed a crime involving moral turpitude. The person launches an appeal to the Immigration Appeal Board but before it is heard, he returns to his home country to visit his dying father. Upon returning to Canada, he is now issued with a second order of deportation, this time because he lacks ministerial consent to return.

At the hearing of the appeal, the Immigration Appeal Board holds the first deportation order invalid because in its view, no crime of moral turpitude was committed. However, the second order of deportation is still valid because it was issued, quite properly, at a time when there was an outstanding deportation order against the person. As a matter of practice, the Board would probably quash the second order using its discretion under section 15. Nevertheless, the person is in the invidious position of being unable to leave the country until he acquires citizenship since he will continue to require a section 35 ministerial consent in order to return. And all these consequences flow from no fault of his, but from the eventually altered opinion of an immigration officer!

(E) THE COURTS

Decisions of the Immigration Appeal Board may be appealed to the

Federal Court of Canada and hence to the Supreme Court of Canada. As the *Immigration Appeal Board Act* provides:

> An appeal lies to the Federal Court of Appeal on any question of law, including a question of jurisdiction, from a decision of the Board on an appeal under this *Act* if leave to appeal is granted by that Court within fifteen days after the decision appealed from is pronounced or within such extended time as a judge of that Court may, for special reasons, allow.[292]

The Federal Court of Appeal also has jurisdiction to review and set aside certain decisions of federal boards, commissions or other tribunals — the Immigration Appeal Board included — for such reasons as failure to observe the rules of natural justice, exceeding or refusing to exercise the Board's jurisdiction, errors of law and decisions based on findings of fact made in a perverse or capricious manner. This review, the Federal Court has held,[293] is a "minimum right" available to every party directly affected by a decision or order.

One need not have leave of the Court to activate its review powers. However, to appeal a decision of the Immigration Appeal Board and engage this aspect of the Federal Court's appellate jurisdiction, leave of the Court is required.[294] We note too the different time periods for initiating reviews and appeals — ten days for review[295] and fifteen days for appeal.[296]

A person faced with an adverse decision of the Immigration Appeal Board may, of course, initiate both appeal and review proceedings. In such a case, the Federal Court has indicated that leave to appeal would be given as a matter of course and the proceedings consolidated and determined without delay. This would seem to be a sensible way of avoiding delay and minimizing duplication. As Chief Justice Jackett stated:

> I see no reason to read the words on an appeal as if they included by extension the words from a deportation order or 'from the refusal to make a deportation order'. The words 'on an appeal' are more easily susceptible of being read to mean 'in the course of an appeal' or 'in the hearing of an appeal', and point as much to the entire course of proceedings as to the narrower issue of the competency of a deportation order *per se*.[297]

On this basis, it could be argued that an appeal also lies to the Federal Court from the Board's preliminary disposition of an appeal under section 11(3) of the *Immigration Appeal Board Act*.[298] Here, the Board makes a decision only on whether there is sufficient evidence to warrant a hearing. This is, nevertheless, a decision made "in the course of an appeal". The *Boulis* decision suggests that such a preliminary determination is appealable if formulated as a question of law. Presumably then, the Minister would also be entitled to appeal a determination by the Board that reasonable grounds do exist. In all likelihood, however, the Minister would probably await the Board's conclusive disposition of the refugee claim.

An exercise by the Board of its discretionary powers[299] may also be appealed, if a question of law is involved.[300] However, the Supreme Court has held that the courts should not interfere with the weight assigned by the Board to evidence adduced in support of a claim for discretionary relief.[301]

Where the Board lacks jurisdiction to hear an appeal, section 28 of the Federal Court Act allows a review by the Federal Court of Appeal of the decision of the special inquiry officer. However, it is unclear whether the Federal Court would review a decision of a special inquiry officer if an appeal to the Immigration Appeal Board is possible. We noted one case[302] in which the Federal Court reviewed a decision of a special inquiry officer on an application for review without discussing whether a right of appeal existed to the Immigration Appeal Board; nor did the Court discuss the question of jurisdiction to review.

The question could assume some importance. The Immigration Appeal Board has allowed an appeal where an allegation of bias on the part of the special inquiry officer was substantiated. However, it has also held that failure to object to suspected bias at the time of the inquiry is fatal at the Board's "appellate" stage.[303] It seems unlikely that the Federal Court could on a review under section 28 so narrowly confine its power to remedy a decision tainted by bias, even if an appeal to the Board were possible.

It should also be noted that section 18 of the *Federal Court Act* gives the trial division of the Federal Court original jurisdiction to hear and determine any application for relief in the form of an injunction, certiorari, prohibition, mandamus, *quo warranto*, or declaration. The scope and application of section 18 in relation to immigration law is uncertain. To date, and to our knowledge, applications for review have proceeded to the Federal Court of Appeal only under section 28.

Under the *Federal Court Act*, a further appeal to the Supreme Court of Canada lies with leave of either the Federal Court or the Supreme Court of Canada.[304]

CHAPTER IV

Procedure

The Immigration Appeal Board differs from other federal agencies, boards, commissions or tribunals. Many of these are regulatory in the sense of licensing, enforcing standards of behaviour or setting rates. The Immigration Appeal Board is not a regulatory agency. Rather it is what John Willis has called a "miniature court", an agency whose *raison d'être* is the adjudication of disputes in a specialized area of law. The Board is an adjudicative tribunal deciding on the validity of protested orders of deportation made by government officials. As such its procedures are of critical importance.

The Board's procedures determine its accessibility and all that this entails in terms of cost, delay, method of presentation and, most importantly, the appearance and reality of justice to those persons whose lives are affected by the Board's decisions.

(A) LOCATION OF BOARD HEARINGS

The Board hears cases in a number of cities across the country. Appeals of persons ordinarily resident in the Atlantic provinces and Quebec are normally heard in Montreal. Ontario appeals (except those from the Ottawa-Hull area which are heard in Ottawa) are heard in Toronto. Those from the prairie provinces and British Columbia are heard in Vancouver. The Board has continuous hearings in Ottawa, Toronto, Montreal and Vancouver. However, it will hold hearings in any provincial capital where the volume of appeals warrants this. Regional Registrars provide organizational and administrative assistance to the Board.

(B) INITIATING AN APPEAL AND SELECTING BOARD MEMBERS TO HEAR IT

The appeal process is usually begun by the special inquiry officer who presided over an inquiry that has led to an order of deportation. If the affected person decides to appeal, the special inquiry officer forwards this person's notice of appeal to the appropriate regional Registrar of the Board. The Registrar sets a date for the hearing and after consulting the schedules of Board members, assigns a member to the appeal.

When an appeal raises a difficult legal question, it would ordinarily be referred to the regional Vice-Chairman, who in every region except Vancouver is legally trained. The Vice-Chairman then determines whether the case is appropriate for hearing by a single member or a quorum of the Board. As we have mentioned earlier, a quorum is constituted by the Chairman or a Vice-Chairman and at least two other Board members.[305] A single member, even after commencing a hearing, may refer it to a quorum of the Board if the appeal begins to disclose unsuspected legal complexity. Motions to reopen or rehear will always be heard by a quorum.

The Immigration Appeal Board follows the *locus standi* requirement and only the immediate parties and material witnesses are heard. It appears that the Board has never been faced with a request by a third party to participate in a hearing. However, several Board members indicated that they would grant standing to third parties in an appropriate case.

(C) *AUDI ALTERAM PARTEM* AND OTHER FAIR PROCEDURES

The Board follows all the established principles of natural justice. For example, appeals to the Board are heard only after notice to the parties. And both parties have the right to counsel.[306]

(D) OVERCOMING LINGUISTIC BARRIERS

If necessary the Board will provide interpretation services at its expense; certainly, on request of the appellant, an interpreter will always be provided.

(E) PROVIDING ASSISTANCE IN MEETING NECESSARY TRAVEL COSTS

Where the appellant has been held in custody pending an appeal,

transportation to the hearing will be provided at public expense. If the Board's hearing place is more than one hundred miles from where the appellant is situated, the Board is prepared, on application, to render financial assistance to defray the cost of attendance. But few applications for financial assistance are received — less than twelve annually. The Board's willingness to provide financial assistance does not appear to be widely known. In considering applications for financial assistance, the Board considers the appellant's family size, assets and work. The Board by voluntarily adhering to these criteria has chosen to "structure" its discretion, informally.[307]

(F) HEARING PROCEDURES

If neither party is present at an appeal, the Board may render a decision on the basis of the record alone. We have observed that if the parties are present, full opportunity is given to examine and cross-examine witnesses and to make submissions. Evidence is taken on oath or affirmation. Submissions may be oral or written and directed to the legality of the deportation order, the exercise of the Board's discretion or any other relevant issue. Written submissions must be signed and verified by affidavit.

Procedures before the Board are adversary in nature. The appellant and his witnesses are heard first. They can be subjected to cross-examination by counsel for the Minister of Manpower and Immigration. Rarely, we discovered, does the Minister's counsel call witnesses. Board members may ask questions at any time but rarely do so when the appellant is represented. However, when he is unrepresented, procedure becomes more informal and inquisitorial, with the Board members participating more freely. Often an appellant will call witnesses but is incapable of phrasing questions in a way that brings out the information he seeks. In our experience, the unrepresented appellant may have an advantage over the poorly represented appellant. We observed Board members, particularly those with legal training, frequently assisting the unrepresented appellant in formulating pertinent questions.

After evidence has been adduced, the appellant or his counsel may make submissions. These are usually very brief and often non-existent. Counsel for the Minister then makes fairly extensive submissions. A curious balance is often apparent: the appellant calls witnesses, the Minister does not; the Minister makes submissions, the appellant does not. After the Minister's submissions, the appellant enjoys a rarely exercised right of reply. If the appellant has not taken the stand, the Board will usually ask him if he has anything to say. Usually he does but it is often repetitious and seldom relevant.

(G) BOARD PROCEDURE AFTER A HEARING

After the hearing, the Board members meet informally to discuss it. They may request the Registrar to have the transcript prepared before deciding, unless there is ready agreement. If reasons are requested, the choice of the Board member to prepare reasons may be made by the Vice-Chairman. A dissenting member may also, of course, prepare reasons.

(H) PUBLICATION OF DECISIONS OR GUIDELINES

The Immigration Appeal Board has not seen fit to "structure" or "confine"[308] its discretion by the publication of guidelines or hypothetical cases except to the extent that guidelines can be cumulatively deduced from an examination of the Board's decisions. So long as the Board maintains its adherence to an appellate court image, it would no doubt regard any such move as inappropriate.

(I) DETENTION RELEASE PROCEDURES

The Board has never, for example, released guidelines on when it will authorize release from detention pending an appeal. Nevertheless, it would appear that the following "guidelines" are, in fact, considered: the person's assets, whether the person if released would become a public charge, and whether the person is likely to appear at the appeal.

Detention release applications are heard in chambers by a quorum of Board members in the absence of the person detained. The decision is based on the record of inquiry, the application for release and whatever written submissions may have been made by the detainee and the Minister of Manpower and Immigration. Occasionally, the Board may desire to have the detainee present; in such a case, a full adversarial proceeding would be initiated.

(J) SECTION 15 REVIEW PROCEDURES

Also meriting description are the procedures used for a review of the Board's exercise of discretion under section 15. First, these reviews are conducted in chambers. When the appeal has been disposed of by a single member of the Board, the review may be conducted by any member or by a quorum of the Board. If the appeal was disposed of by a quorum of the Board, a further quorum is necessary for review. The review will normally

be conducted on the basis of reports submitted by the person concerned and by immigration officers to whom the person has been ordered to report periodically. If on the basis of its review, the Board contemplates taking any action it must give advance notice by registered mail to the person concerned and the Minister. Within fifteen days of the date of the mailing of such notice, the person concerned and the Minister may make written submissions to the Board. If requested, the Board has discretion to allow oral submissions on review.

(K) ENFORCEMENT PROCEDURES

Turning now to the enforcibility of Board decisions, we note that this is a moot point. If the Board quashes a deportation on discretionary grounds and directs a grant of landing but the Department of Manpower and Immigration refuses to grant landing, what then? We were told that such cases had occurred. Ordinarily the Board would never know of the Department's action since its involvement usually terminates on the disposition of the appeal. The Chairman has suggested that the Board cannot compel the Department to act on its decisions, and that the proper course would be an application for an order of mandamus against the Department under section 18 of the *Federal Court Act*. Similarly, if the Board dismisses an appeal and confirms the deportation order, it cannot compel the Department to deport and occasionally the Department has refused to deport.

(L) EXPEDITION AND DELAY

The Board has striven to ensure that its proceedings are expeditious. Before the repeal of Regulation 34, persons could apply for landing from within Canada and appeal a refusal to the Immigration Appeal Board. As a result, the appeal process was clogged and delays of five years and more before hearing were common. These delays in our opinion were in no part the fault of the Board. Its members, we observed, resolve a prodigious workload with fairness and dispatch.

The time spent for a typical appeal against deportation would generally be between four and eight weeks as follows:

- one day for initial examination
- one day for opening of inquiry
- three days — inquiry adjourned to permit person to retain counsel

- one day for resumed inquiry, deportation order, notice of appeal filed
- ten days — special inquiry officer obtains and files transcript
- ten days — notice of hearing
- one day — Immigration Appeal Board hearing
- three days — reserved judgment; and
- ten days — judgment given and execution of deportation order.

This is creditable expedition. Additional delays may, of course, result from adjournments for counsel to prepare the case, scheduling problems and obtaining interpreters. Claims to refugee status may involve another month for consideration by the Inter-departmental Committee we mentioned earlier. Motions to re-open and appeals to the Federal Court may import major delays before disposition of the case. Indeed, competent counsel determined to foil deportation of his client by exploiting all delaying tactics may delay final determination for years.

(M) COMMENTS

(i) Providing Equality Before the Law

From our observation of appeals to the Board, two points stand out sharply. The first is the difficulty of securing meaningful "equality before the law" in the face of what can be an obvious imbalance of expertise. Often the appellant will be unrepresented or represented by a legally untrained "immigration counsellor". Even where the appellant was represented by trained legal counsel, the imbalance was evident. There are at least two possible explanations for this. Immigration is not a lucrative field for practising barristers and appellants are often impecunious. Secondly, Canadian immigration law is complex. In addition to the extensive, detailed statutes and regulations that may affect the outcome, the Immigration Appeal Board has developed a sophisticated body of case law on the interpretation of the Act and regulations.

Since 1967, the Immigration Appeal Board has given decisions in some twenty-five thousand cases. Even a competent lawyer must invest considerable time and energy to master this specialized and to some extent arcane area. And there are formidable obstacles to achieve this mastery. Many important decisions are unreported,[309] few lawyers subscribe to the Immigration Appeal Cases reports, and there has been little analysis in legal periodicals of the Board and its jurisprudence. Moreover, the lawyer's

adversaries — appeals officers appearing for the Minister — although not legally trained, have built up through experience over the years a facility and expertise in the area that is difficult to match. Consequently, key legal arguments as to the validity of the deportation order are ignored. And striking precedents in which the board has exercised its discretion in similar circumstances remain unknown.

(ii) Are Adversarial Procedures Appropriate?

The second point that impresses an outside observer is the inappropriateness of strict adversary procedures in immigration appeal. We have mentioned disabilities and an unfamiliarity with adversary procedure which make the appellant extremely vulnerable. He is unable to question witnesses properly. The only effect of putting these witnesses in the stand is sometimes to make them available for vigorous cross-examination by counsel for the Minister. True, as we have already noted, some members of the Board try to assist the unrepresented appellant by asking questions, but we fear that even their assistance may be insufficient. The rigour with which the Board has followed court-like rules of procedure, evidentiary requirements and to some extent *stare decisis* can redound to the appellant's disadvantage.[310]

(iii) Suggested: an Informal Lay Tribunal

Would justice not be better served if the Board saw itself as an informal lay tribunal — an immigration admissibility review board, if you will — and followed a relaxed, common-sense approach taking as the central issue the desirability of the appellant as a future citizen of Canada? Why should the proceedings not be an inquiry in which the Board takes a much more active role in the questioning? We submit that the Board's reluctance to do this can be traced to its self-conception as an appellate court of record. Without question this has had a profound influence on both its procedures and the substantive content of its decisions. The Board has often seemed to be "grasping at the form rather than the substance".[311] And this can affect either party to an appeal. Deportation orders have been quashed because a section 22 report was not technically valid in form. The doctrine of *res judicata* has been invoked to prevent reception of evidence that might show the undesirability of the person remaining in Canada. Why should such legal technicalities be decisive? If the Board saw itself as a final review board, empowered to determine whether the applicant meets Canada's admissions criteria, the interests of the individual, the Minister and ultimately Canadian immigration policy would be better served.

CHAPTER V

Conclusions: The Form and the Substance

It is one thing to criticize, another to be constructive. Our examination of the immigration process has revealed deficiencies and anomalies. Throughout this report we have pointed these out and it would be redundant to repeat all of them here. In this chapter, we concentrate on more important and fundamental immigration procedures and institutions. Yet even the recommendations that follow can hardly be seen as radically restructuring the immigration process. They are not so intended. We are convinced that despite certain problems our present immigration system is fundamentally fair and expeditious. Consequently, we crave no *tabula rasa* upon which to draw grand new designs. Our recommendations seek to iron out creases in the existing fabric of Canadian immigration law rather than to cut new patterns from whole cloth. Some of these recommendations extend beyond the Immigration Appeal Board and into the process of immigration decision-making generally of which the Board is an integral part. All of our recommendations follow from our exposure to the immigration process during the research for this report.

(A) THE IMMIGRATION APPEAL BOARD

In the report that preceded the creation of the Immigration Appeal Board, Joseph Sedgwick outlined his expectations for the new Board:

> I would expect that an independent Board exercising discretion ... would soon, on the basis of precedent, evolve intelligible and reasonable guidelines which would be made known to members of the legal profession and others particularly interested in immigration matters as well as to the public generally.[312]

This expectation has been partially realized. In the many thousands of cases that the Board has considered, it has built up a formidable number of precedents that interpret, analyze, refine and reinterpret the relevant statutes and regulations. The Board has indeed pioneered the creation of what can be called, without exaggeration, a distinctive corpus of Canadian immigration jurisprudence. It has evolved intelligible guidelines limiting the application of its very wide statutory discretion.

Unfortunately, however, while these guidelines and precedents exist, they are not readily available or in a form that makes them easily accessible to appellants or other interested people. Indeed, as we discovered with some surprise, the distinctive corpus of Canadian immigration jurisprudence is unknown even to most lawyers who practise in the area.

Unquestionably, some efforts have recently been made to correct this problem. Most notable is the commencement of the Immigration Appeal Cases reports, which have been published since 1972. For the first time, this allows access, at least for diligent lawyers, to some but by no means all important decisions of the Board.

But this is far from enough. It does not help the unrepresented appellant, nor from our observations most legally represented appellants. If the public and the profession are to know and understand the substance of Canadian immigration law (and how the Board exercises its discretionary powers) much more must be done. New ways must be explored to communicate the Board's expertise and experience in the interpretation and application of Canadian immigration law to its "constituency" — to those who may be affected by its decisions. And best-equipped to do just this is the Board itself.

Accepting this task may well be seen as incompatible with the Board's self-conceived status as a neutral, austere appellate court. However, knowledge is close to fairness. The Board's concern with the latter should justify its involvement in promoting the former. It should allow the Board to see itself as what can be called a quasi-judicial tribunal, a tribunal with a number of mandates which would include not only the adjudication of legal issues but also the monitoring, explaining and facilitating of its role in implementing Canadian immigration policy. This would not destroy the Board's neutrality nor would it jeopardize its effective functioning as an appellate tribunal. In our view, it would in fact expedite appeals and perhaps even reduce the number of appeals because appellants and prospective appellants would have a greater understanding of the Board's jurisdiction, its powers and how they can be exercised.

In his pioneering study of discretion, Kenneth Culp Davis has written:

> The typical tendency of agencies to hold back from resort to the rule-making power is understandable and often it is justifiable. Waiting for a case to arise, then clarifying only to the extent necessary to decide the case, and then waiting for the next case is one way to build cautiously.
>
> ...(But) administrators, by and large, have fallen into habits of unnecessarily delaying the use of rule-making power. They too often hold back even when their understanding suffices for useful clarification through rule-making. This is the point at which significant reform is needed and this is the point at which significant reform can be accomplished.[313]

Rule-making, according to Davis, is the best way for an administrative or quasi-judicial tribunal to tell its constituency what to expect from it by indicating openly and clearly how it has reacted, or is likely to react, to likely factual or legal situations. Ways of doing this range from the publishing of decisions used as precedents to the circulation of hypothetical cases and decisions. But also involved are such sensible practices as the regular distribution of guidelines and policies, the early announcement of rules to be followed in later cases, the adoption and continuing appraisal of simple, fair and informal hearing procedures, the maintenance of communication channels with the tribunal's constituency to learn quickly of problems with procedures, policies, practices or decisions so that these may be speedily remedied. Not all of these techniques are suitable for every tribunal. But a tribunal such as the Immigration Appeal Board should consider some of them, if only to discover and remedy what could well be a need among appellants for more information, advice and representation.

We find it difficult to accept the position that any attempt by the Board to "structure" or "confine" its discretion, while appropriate for "administrative" agencies or tribunals, is wholly incompatible with the status of the Immigration Appeal Board as an appellate court.[314] One does not, of course, want to transform the Immigration Appeal Board into an appendage of the Department of Manpower and Immigration, an immigration counselling service or a public relations bureau.

Obviously, any tribunal exercising adjudicative powers in cases where the Department is a party must be seen to be dealing with the Department at "arms-length". But, for example, is there anything intrinsically reprehensible about the Immigration Appeal Board publishing a manual for the legal profession and the public explaining clearly and simply the guidelines and precedents it follows in deciding whether or not to exercise its discretion to quash a deportation order on compassionate and humanitarian grounds? Would not the use of hypothetical cases facilitate clarification of grey areas of Canadian immigration practice? Why should Board hearings not be more informal, relaxed inquisitorial-style proceedings in which emphasis is less

on the legal validity of a deportation order and more on whether the appellant is a fit person to be admitted to Canada? And how do the convoluted, essentially exclusionary niceties of the law of evidence facilitate determination of this question?

Some of the initiatives we have mentioned could undoubtedly originate in the Department rather than the Board.[315] But some should not. Central to our recommendations is a transformation of the Immigration Appeal Board from an appellate court of record to an informal, quasi-judicial tribunal deciding what are essentially discretionary "non-legal" issues.

Several objections to this view of the Board merit further consideration. First, some people will argue that immigration to Canada is legally a "privilege" not a "right". As such, supervision by a superior court is required to ensure against laxity in administration that could transform the privilege into a right.

We see no "magic" in the distinction between privilege and right. It is equally arguable that immigration is a statutory right of those who meet the prescribed qualifications as set out by domestic Canadian law. Subject to compliance with the requisite statutory provision, in other words, immigration is a right conferred by Act of Parliament.

Even if one accepts that immigration is a privilege rather than a right, surely the logical corollary is not a superior court to administer it but rather the executive branch of government — that is, the Department of Manpower and Immigration. Courts, after all, are primarily concerned with "rights". The granting of state "privileges", whether in the form of licences, grants or status (such as citizenship) is ultimately the prerogative of the executive, not the judiciary.

Another objection sees the Board dealing with legal questions, such as the validity of a deportation order. Therefore, runs this view, the Board should have the status and authority of a Court. We find this objection unconvincing. Many quasi-judicial and some administrative tribunals must deal with questions of law but by definition their *raison d'être* is as an alternative to formal courts. Furthermore, so long as an appeal on questions of law to the Federal Court is available, there is ample protection against legal error by the tribunal. Also, as a plain fact apparent to all who examine the Board's workload, the overwhelming majority of appeals to the Board do not raise questions of law but are essentially applications for discretionary relief on humanitarian grounds.

A further objection argues that a transformation of the Immigration Appeal Board from an appellate court into a quasi-judicial tribunal

concerned with admission would involve the Board in questions of policy. It is possible to imagine that the Department of Manpower and Immigration might have, for example, a *de facto* policy of never deporting a person back to an Iron Curtain country. Our proposal, however, does not involve the Board in policy questions any more than either the special inquiry officer or the present Board are now. It happens today that the Board orders deportation and the Department for policy reasons refuses to deport. Our recommendations would not change this.

Our recommendations could, however, result in the Board considering departmental policy as one factor in assessing whether a particular case was an appropriate one for the exercise of its discretionary mandate. And this would have the effect of clarifying and publicizing what the phrase "compassionate and humanitarian considerations" means in the context of Canadian immigration policy. Is this undesirable? Surely it is preferable for the Board openly to refuse to exercise its discretionary jurisdiction because to do so would contravene departmental policy rather than, as now may happen, to order deportation and have the Department for unspoken policy reasons refuse to execute that order.

Some transformation of the Immigration Appeal Board may become necessary through changing circumstances. Once the present backlog of appeals has been cleared, the Board's caseload will drop dramatically to perhaps five hundred appeals or less annually. The bulk of the Board's appeals will be initiated by landed immigrants ordered deported under section 18 of the *Immigration Act*. And the most common ground of deportation will be for the commission of offences under the *Narcotic Control Act* or the *Criminal Code*.[316]

An annual workload reduced from in excess of three thousand five hundred to five hundred cases may well be thought an appropriate time to reconsider the Board's purpose and how it can best operate to achieve that purpose. We have concluded that the basic purposes of the Board should be twofold. First, the Board should be a reviewing authority to ensure that rights of prospective immigrants are not abused by departmental officials, primarily immigration and special inquiry officers. Second, we see the Board as the agency charged with the critical and important discretionary decisions that make Canadian immigration laws and procedures compassionate as well as fair. The Board, in our view, should be thought of as a quasi-judicial tribunal performing two functions: the review of administrative action and the application of discretion.

To accomplish this purpose requires, we have concluded, less a transformation in structure than in attitude, less in law than in procedure.

Our notion of the Board as a "quasi-judicial" tribunal rather than an appellate court, adjudicating but not limited to adjudication, locates the Board clearly within the "immigration process" ensuring that the goals of Canadian immigration policy are realized with equity, dispatch and compassion. We are willing to forego the austere majesty of an appellate court for the relaxed informality of a tribunal whose concern is less for procedure, evidence and substantive law than for common-sense solutions to what are essentially non-legal problems. The analogy we have in mind, although inexact in some respects, is a Board of Inquiry under provincial human rights legislation.[317]

We think informality, accessibility, economy and efficiency are essential. Proceedings before the Board should be in the nature of an inquiry. Parties would retain the right to counsel and be able to call witnesses and to make oral or written submissions. The rules of evidence would be much relaxed and the Board members, unlike judges, would feel free to participate vigorously in attempting to bring all the relevant facts to light.

In reviewing decisions of special inquiry officers, the Board would have to decide, *inter alia*, whether the person is admissible to Canada at the time of his appearance before the Board. Consideration of the legal validity of a deportation order would be of secondary importance. An appeal on a question of law should lie with the Federal Court of Canada.

In proposing this transformation of the Immigration Appeal Board, we do not ignore the valuable contribution made by the present Board. Its diligence and conscientiousness are evidenced by the thousands of decisions it has given. In a short period of time, it has built an invaluable edifice of Canadian immigration jurisprudence. But, in the process, it has become legalistic, captured by its own adherence to court-like procedures and precedents. This is not an uncommon phenomenon. The Income Tax Appeal Board, which was originally created to be a flexible, informal, common-sense travelling court for income tax matters, became similarly ossified and so was recently replaced by the Tax Review Board.

The task of striking an appropriate balance between rules and procedures that make for certainty and discretion that allows for flexible, individualized justice, is as constant as it is difficult. Aristotle wrote that

> An arbitrator decides in accordance with equity, a judge in accordance with law; and it is for this purpose that arbitration was introduced, mainly, that equity might prevail.[318]

It is our view that the vital decisions on immigration matters, the consequences of which for the individual and to a lesser extent for the state are

so far-reaching, are better decided by an arbitral model according to equity, rather than by a judicial model according to law. We do not suggest that these models are mutually exclusive but in cases of conflict in immigration matters, we submit that the arbitral model is preferable.

The Immigration Appeal Board has served well in a difficult, sensitive area. What is called for is not abolition but invigoration; a transformation of its conception and function that will stress its uniqueness not its similarity to a court, and which in structure, attitude and adjudication will exemplify the great truth that while the letter killeth, the spirit giveth life.

> Legal history shows, if not alternating periods of justice according to law and justice without law, at least periodic waves of reform during which the sense of justice, natural law, or equity introduces life and flexibility into the law and makes it adjustable to its work. In course of time, however, under the social demand for certainty, equity gets hardened and reduced to rigid rules, so that, after a while, a new reform wave is necessary.[319]

(B) THE IMMIGRATION APPEAL BOARD ACT

Whatever the nature of the Board in the future, it must cope today with several situations that could easily be rectified by the legislative amendment of two sections of its creating *Act*.

First, the Board's power to direct a grant of entry or landing when an appeal from deportation is allowed should be clearly stated. A successful appellant, although not deportable, should never be left in Canada without status.[320]

In addition, clarification is needed of the legality of deportation orders affected by the Board's exercise of discretion under section 15. These should be rendered null and void for all purposes when quashed by the Board. This would enable all persons permitted in this way to remain in Canada to gain Canadian domicile, and to leave the country and enter again without the obtaining of ministerial consent.[321]

We now turn to a number of recommendations that extend beyond the Immigration Appeal Board and into the process of immigration decision-making generally. Here we are concerned with improving both the fairness and efficiency of the immigration process.

(C) EXAMINATION OF SPONSORED DEPENDENTS IN CANADA

Sponsored dependents while not assessed are required to undergo an examination to ascertain whether they fall within a prohibited class. We

believe that provision should be made for this examination to be held in Canada.

Often the husband of a family of prospective immigrants will come to Canada first. Once settled, he will sponsor his wife and children as dependents. Under present procedures, the wife and children must obtain an immigrant visa abroad, a process that may take several months notwithstanding the highest priority that visa officers try to give to sponsored dependents. Because of the potential delay, the wife and children will often ignore the visa requirement and simply come to Canada.

As might be expected, they are stopped at the Canadian port of entry. However, despite its right to order deportation, the Department of Manpower and Immigration has adopted an informal practice of not deporting sponsored dependents who lack immigrant visas. Instead, they are issued a Minister's permit, valid until they are examined. An Order-in-Council is obtained that, in effect, waives the visa requirement.

The vast majority of Orders-in-Council, so we were informed, are of this type. These orders result in considerable expense and require the time of high-ranking departmental officials. In terms of economic and procedural efficiency, it would seem more sensible to abolish the visa requirement for sponsored dependents. Dependents coming to join a family in Canada should be given the status of "admitted, subject to examination". The examination could then take place in Canada. If, on examination, the person is found not to be within a prohibited class, they could be granted landing. Otherwise, they would be deported.[322]

(D) VISITOR REGISTRATION

We have observed that under Canada's present immigration laws, the largest problem at ports of entry is attempting to apprehend persons who purport to be "visitors" but actually are attempting to reside permanently in Canada. The largest enforcement problem, quite understandably, facing the Department is apprehension of "visitors" who do not leave the country. The relative wealth of Canada is a strong inducement for persons who are unlikely to meet the assessment criteria to simply come as visitors and then remain here illegally. At present, illegal immigrants are difficult to apprehend — no record is kept of their entry into Canada as visitors, or of their present whereabouts. While the Department officials maintained that there are few illegal immigrants in Canada, we were told a much different story by the immigrant aid societies.

The problem could be solved by requiring visas for all non-immigrants, as in the United States. However, the political obstacles to adoption of such

a system are formidable. Agreements with foreign countries, a general desire to promote free movement of people, and the competitive position of the Canadian tourist industry all must be weighed against the attractive simplicity of a non-immigrant visa system.

Another alternative would be increased screening procedures at ports of entry. However, the goal of facilitating the free movement of people is again encountered. Furthermore, the costs of such a system might well outweigh the marginal benefits.

The best alternative, we believe, is a visitor registration program. Most illegal immigrants in this country apparently come from countries other than the United States and arrive either by aircraft or ship. Transportation companies could be requested to record on airline and ship tickets such data as the person's address while in Canada and expected length of stay. And a copy of the ticket could then be obtained by immigration authorities at the time and place of entry and departure.

Alternatively, the law could require the airline or shipping companies to file such information directly with the Department. This information, however obtained, could be computerized and the computer programmed to print out the names and addresses of persons who overstay their visit in Canada. A simple check would then reveal whether the person left the country by other modes of transportation or has remained illegally.

Of course, an "overstayed" visitor might move to avoid detection and apprehension. And false addresses could be given. However, such a system would provide a specific place for enforcement officials to commence their search. It would seem to be the simplest and least expensive approach that would not unduly hamper the free movement of people between countries.

(E) REFORM OF ADMISSIBLE, PROHIBITED AND DEPORTABLE CLASSES

There are a number of areas concerning these classes which could be improved.

(i) The Concept of Domicile

The concept of Canadian domicile presently affects both admissibility and deportability. Persons with Canadian domicile must be admitted unless they have assisted Canada's enemies.[323] They are only deportable for such reasons as subversion, sabotage or offences under the *Narcotic Control Act*.[324] However, except for these rather rare situations, a person who has

acquired domicile has substantially the same protections as a Canadian citizen.

Joseph Sedgwick was critical of the use of Canadian domicile in this way. Why, he asked, should domiciled persons who commit serious crimes like murder, robbery or rape be protected against deportation? In his view, there should only be two relevant categories of permanent residence — Canadian citizens and landed immigrants.

Arguably, domicile does fulfill two functions. First, the concept protects persons who are late in applying for or receiving Canadian citizenship. A person must normally reside in Canada for a minimum of five years before he is eligible for citizenship. The concept of domicile protects persons who would have acquired citizenship had they applied promptly and before they committed the act which brings them within a deportable class.[325] The concept of domicile also protects persons who live outside of Canada for part of the five-year period immediately after the date of their grant of landing. While domicile continues to accrue during a temporary absence from Canada, residency for the purpose of acquiring citizenship under the *Citizenship Act* does not continue to run during such absences.

Whether or not the concept of domicile should be retained at all is essentially a question of policy beyond the scope of this paper. However, it is our view that the concept's protection of late applicants for citizenship is a sensible legislative purpose. Also, we would suggest the repeal of the provision that allows the deportation of a person who is domiciled in Canada for an offence under the *Narcotic Control Act*.[326] It is anomalous that someone may be deported for simple possession of marijuana but not for murder, robbery or rape.

(ii) Loss of Landing Status

While the *Immigration Act* spells out the circumstances under which domicile may be lost, it is silent concerning the loss of landed status. Once landing has been granted, can it ever be lawfully revoked? It would seem implicit that landed status is lost when an order of deportation is made against a person, but this is not clearly stated in the *Immigration Act*. We suggest the *Act* should specify that landed immigrant status may be lost in at least two situations. The first would be where an order of deportation has been issued against a person and an appeal, if taken, has been unsuccessful. The second situation would arise when the person voluntarily leaves Canada and assumes permanent residence abroad.

(iii) Changes in Prohibited Classes

An obvious modernization of these classes concerns epileptics,

homosexuals and persons who were formerly insane. These prohibitions require re-examination in the light of current medical advances and changing social mores.

Another class meriting reform covers those prospective immigrants considered inadmissible because a member of their immediate family is a prohibited person. At present, if a person's husband, wife or child is insane or is a chronic alcoholic, the entire family will be inadmissible. We suggest that where an independent applicant meets the assessment criteria and is not himself a prohibited person, the disabilities of other family members should not be a bar to his admission.

We also would suggest that the prohibited class established by the phrase "crime involving moral turpitude"[327] be abolished. Instead, a prohibited class should include those who have committed an indictable offence under the *Criminal Code*, the *Narcotic Control Act* or a parallel offence under foreign law. This recommendation would reduce incompatibilities in the *Immigration Act* and ensure that a minor infraction would not be a bar to admission.[328]

(iv) Deportation of "Public Charges"

At present, a landed immigrant who has not yet acquired domicile may be deported for having become or being likely to become a public charge.[329] We concur in Joseph Sedgwick's criticism of this provision:

> A person might become a public charge by reason of circumstances quite beyond his or her control, and the condition may be of a very temporary nature. Such a person should only be liable to deportation if they actually become public charges and that by reason of their own indolence or depravity.[330]

Given the present instability of national economies, we believe there is great force in Sedgwick's view. Governments have shown themselves unable to prevent cyclical downturns or depressions in the economy. During a depression, it is usually those at the bottom fifteen per cent of the economic scale who are thrown out of work. And among these people are many recent immigrants. For Canada to have openly fostered immigration, and yet refuse to support landed immigrants during times of unemployment, is gravely unjust.

(v) Counselling Illegal Immigrants

Again, we concur in another of Joseph Sedgwick's recommendations. A new class of deportable persons should be added to the *Immigration Act*, namely, persons in Canada who counsel, aid or abet others to remain in the country illegally. As Sedgwick wrote:

> In many instances aliens who were in Canada legally are active participants in this illegal activity and, in my opinion, they should forfeit the privilege of remaining if they choose to assist and encourage others to violate Canadian immigration laws. This would be an effective deterrent.[331]

How effective a deterrent such a provision would in fact prove to be, in our view, is uncertain. Nevertheless, if it even marginally assists in reducing the number of illegal entrants to Canada by diminishing the incentives for domestic immigration rackets it will be worthwhile.

This concludes our examination of the Immigration Appeal Board and its legal and administrative context. We hope our observations and recommendations will be useful to the Board, to the Department of Manpower and Immigration, to Parliament and all people affected by or interested in the Canadian immigration process.

Notes

1. A "prominent feature of the legal system" (Richard Posner, "The Behaviour of Administrative Agencies (1972), J. of Legal Studies 305), an administrative agency is a statutorily created governmental or public authority, neither court nor legislative body, but often possessing attributes of each, that affects the rights of private parties through adjudication or through an important or initiating role in the making of rules or regulations. "An administrative agency may be called a commission, board (or tribunal), authority, bureau, office, officer, administrator, department, (Crown) corporation, administration, division, or agency. Nothing of substance hinges on the choice of name, and usually the choices have been entirely haphazard.": Davis, *Administrative Law* (1965), 1.

2. That include studies of the National Parole Board, the National Energy Board, the Atomic Energy Control Board, the Canadian Transport Commission, the Unemployment Insurance Commission, the Pension Appeals Board, the Canadian Radio and Television Commission and the Anti-Dumping Tribunal, all carried out under the general guidance of the Commission's Administrative Law and Procedure Project.

3. A practice exhaustively documented by Philip Anisman in his study for the Law Reform Commission, *A Catalogue of Discretionary Powers* (1975) Information Canada Catalogue No. J-31-4-1975.

4. By David Cuthbertson, *A Profile of the Federal Administrative Process* (1973), on file in the Ottawa office of the Law Reform Commission of Canada.

5. G. Bruce Doern, Ian A. Hunter, Donald Swartz and V. Seymour Wilson, *Approaches to the Study of Federal Administrative and Regulatory Agencies, Boards, Commissions and Tribunals* (1974), on file in the Ottawa office of the Law Reform Commission of Canada. An article based on the report has been published by its authors in 18 Canadian Public Administration 189-215, (1975).

6. The Board's decisions and related judicial decisions up to the early autumn of 1974, whether officially reported or not, were considered by Professor Hunter and his research associate Ian F. Kelly as part of their research efforts.

7. William Janzen and Ian A. Hunter, "The Interpretation of Section 15 of the *Immigration Appeal Board Act*" (1972), 11 Alberta L. Rev. 260.

8. For example, the Globe and Mail's headline on September 30, 1974, was "Andras plans stiff rules to cut back on immigration".

9. Quoted in David C. Corbett, *Canada's Immigration Policy: A Critique* (1957, University of Toronto Press) at 3.

10. Hawkins, *Canada and Immigration: Public Policy and Public Concern* (1972, McGill-Queen's University Press) at 17, hereinafter cited as Hawkins.

11. See S.C. 1973-74 c.27, s.11(*c*).

12. Hawkins, at 47.

13. *Id.*, at 51.

14. *Id.*, at 49.

15. Professor Hawkins provides an interesting account of the political pressures that led to the withdrawal of this Order-in-Council. Hawkins, at 6.

16. Immigration Regulations, P.C. 1962-86, s.31(2). See also 1967 Regulations; 1974 amendments not considered.

17. *Id.*, s.31.

18. *Id.*, s.33(1).

19. S.C. 1952 c.325. The Board was not in fact established until 1956.

20. Section 12(1) of the Act provided:

> The Minister *may* nominate such persons as he deems necessary to serve on Immigration Appeal Boards.
>
> The jurisdiction of a Board was set out in section 31:
>
> s.31(2):
>
> All appeals from deportation orders shall be reviewed and decided by the Minister with the exception of appeals that the Minister directs should be dealt with by an Immigration Appeal Board.
>
> s.31(4):
>
> The Minister may in any case review the decision of an Immigration Appeal Board and confirm or quash such decision or substitute his decision therefor as he deems just and proper...

21. Department of Citizenship and Immigration, *Annual Report 1963*, at 15.

22. This fact was openly admitted during the 1967 House of Commons debate on the "new" Immigration Appeal Board. For example, John Munro, Parliamentary Secretary to the Minister of Manpower and Immigration, stated:

> In these circumstances, the effectiveness of the existing Board is extremely limited. The public is aware of the Board's limitations. Everyone knows that its decisions may be reversed by the Minister or by officials acting on the Minister's behalf. It is regarded as merely an arm of the immigration division which appears, in effect, to decide the outcome of appeals against the action of its own officers. This casts doubt on the application of other aspects of immigration law, policy and procedure.

House of Commons Debates, 1st Sess., 27th Parl., February 20, 1967, at 13268.

23. Joseph Sedgwick, Q.C., *Report on Immigration*, Part I, 38. Hereinafter this report will be cited as Sedgwick, Part I or Sedgwick, Part II.

24. Sedgwick, Part II at 6-10.

25. Sedgwick, Part I at 8.

26. *Supra* note 4.

27. *Immigration Appeal Board Act*, S.C. 1966-67, c.90, s.3.

28. By William Janzen and Ian A. Hunter in *The Interpretation of Section 15 of the Immigration Appeal Board Act*, (1972). 11 Alberta L. Rev. 260. Hereinafter referred to as Janzen and Hunter.

29. *Immigration Appeal Board Act*, *supra* note 20, s.8.

30. S.O.R. 67-559; P.C. 1967-2084.

31. Some delays were for as long as seven years, according to one enforcement official of the Department of Manpower and Immigration.

32. Coupled with this was the now repealed right to apply in Canada for permanent residence (s.34, Immigration Regulations, repealed). According to Chairman Scott of the Board, the ratio of appeals filed to deportation orders made rose from roughly 46 per cent in 1968 to 56 per cent in 1972.

33. *Supra*, at 3-4.

34. S.C. 1973 c.275, s.11(1).

35. J.V. Scott, Q.C., *Immigration Inquiries and Appeals from Orders of Deportation*, Special Lectures of the Law Society of Upper Canada (1971) at 126.

36. Janzen and Hunter, *supra* note 21.

37. R.S.C. 1970 c.1-2.

38. S.O.R./62-36, as amended.

39. R.S.C. 1970 c. 1-3, as amended by S.C. 1973 c.27.

40. S.C. 1973 c.28.

41. S.C. 1970-71-72 c.1.

42. SOR/67-621, as amended.

43. SOR/66-547.

44. SOR/73-442.

45. SOR/67-559.

46. *Immigration Act*, R.S.C. 1970 c.1-2, s.3(3).

47. *Id.*, s.4(1).

48. *Id.*, s.4(3).

49. *Foulger v. Minister of Manpower and Immigration — henceforth M.M.I.*, 68-5015, (Number given by Immigration Appeal Board to a decision of the Board. Our use of this number indicates the decision is unreported). March 19, 1968.

50. *Tonner v. M.M.I.*, 68-5474, September 23, 1968.

51. *Immigration Act*, R.S.C. 1970 c.1-2, s.4(2)(*a*).

52. *Id.*, s.4(2)(*c*).

53. *Id.*, s.4(2)(*b*).

54. *De Porres v. M.M.I.*, 71-3659, May 4, 1972.

55. *Immigration Act*, R.S.C. 1970 c.I-2, s.4(4) and ss.18(1)(*a*), (*b*) or (*c*).

56. *Id.*, s.4(s), s.18(1)(*d*) and ss.3-6 of the *Narcotic Control Act*. Section 3 of this *Act* makes simple possession of a narcotic an offence. Thus, a landed immigrant who has resided in Canada for more than five years would automatically lose his or her Canadian domicile status and could be ordered deported (pursuant to s.18 of the *Immigration Act*) merely by being convicted of simple possession of marijuana.

57. It could be concluded that for those who wish to retain Canadian domicile, it would appear safer to engage in treason than to smoke pot.

58. *Canadian Citizenship Act*, R.S.C. 1970 c.C-19, s.10(1)(*c*)(i).

59. *Immigration Act*, s.18(1)(*e*)(i)(x).

60. Sedgwick, Part II, at 4-5.

61. *Immigration Act*, R.S.C. 1970 c.I-2 ss.7(1) and (2).

62. *Id.*, s.7(2)(*c*).

63. *Id.*, s.5.

64. *Id.*, s.5(*p*).

65. *Id.*, s.5(*d*). The phrase "crime involving moral turpitude", was adopted from the U.S. Immigration and Nationality Act, 8 U.S.C. 1101. For a classic exposition of the difficulty in interpreting such a phrase, see *Repouille v. U.S.*, 165 F.(2d) 152 (1947).

66. *Id.*, s.5(*a*)(i).

67. *Id.*, s.5(*a*)(iv).

68. *Id.*, s.5(*b*).

69. There would appear to be some uncertainty about the status to be given to such persons entering the country for medical treatment.

70. Immigration Act, s.5(*e*)(ii).

71. *Id.*, s.5(*d*).

72. *Id.*

73. *Folino v. M.M.I.*, 69-21, April 23, 1969.

74. *Mahmassani v. M.M.I.*, (1973) 3 Immigration Appeal Cases (henceforth I.A.C.) 406 at 410.

75. *Regina v. Bell* (1925) S.C.R. 59 at 64.

76. See *Moore v. M.M.I.*, (1973) 4 I.A.C. 199.

77. *Id.*

78. *Edmonson v. M.M.I.*, (1972) 1 I.A.C. 332.

79. *Akkaoui v. M.M.I.*, 73-1527, June 11, 1973.

80. *Soares v. M.M.I.*, (1973) 5 I.A.C. 70.

81. *Turpin v. M.M.I.*, 67-5006, February 12, 1968.

82. *Id.*, at 18.

83. *Hecht v. McFaul*, (1961) Que. S.C. 392.

84. *Turpin, supra* note 74, at 25.

85. *Mahmassani v. M.M.I., supra* note 67 at 412.

86. Section 5(*d*) in particular.

87. *Peters v. M.M.I.*, 70-2688, November 18, 1970.

88. *Klipper v. M.M.I.*, 71-4012, October 23, 1973 at p.9.

89. Though the deportation order was subsequently quashed under section 15, on a strict interpretation of the *Act*, Klipper may never again be admitted to Canada without ministerial consent pursuant to section 35.

90. *Jordan v. St. George* (1951) S. Ct. 703. This raises the interesting prospect of a potential challenge to section 5(1)(*b*) based on the *Canadian Bill of Rights*. Recent decisions, however, dampen the prospect: see *Jolly v. M.M.I.*, 72-3934, August 7, 1974, affirmed by the Federal Court of Appeal, February 13, 1975, not yet reported.

91. *Immigration Act*, s.5(*e*).

92. *Id.*, s.5(*f*).

93. *Id.*, s.5(*g*).

94. *Id.*, s.5(*h*).

95. *Ibrahim v. M.M.I.* 71-4012, October 16, 1968.

96. *Immigration Act*, s.5(*i*).

97. *Id.*, s.5(*j*).

98. *Id.*, s.5(*k*).

99. *Id.*, s.5(*l*).

100. *Cronan v. M.M.I.*, (1973) 3 I.A.C. 42. (Section 2(*e*) of the *Canadian Bill of Rights* in particular.)

101. *Id.*, s.5(*m*).

102. *Brooks v. M.M.I.*, (1972) 1 I.A.C. 33; overruled on other grounds; 36 D.L.R. (3d) 522 (S.C.).

103. *Immigration Act*, s.5(*n*).

104. *Wenburg v. M.M.I.*, (1973) 4 I.A.C. 292.

105. *Id.*, at 308 (The Chairman's decision).

106. *Immigration Act*, s.5(*o*).

The determination of hardship is left to the opinion of the Special Inquiry Officer, about whom more will be said later.

107. *Athanassopoulos v. M.M.I.*, 69-2545, February 17, 1972.

108. *Immigration Act*, s.5(*p*).

109. Invocation is by the Immigration Officer or the Special Inquiry Officer and the question of *bona fides* is left to their opinion.

110. *Vela v. M.M.I.*, 69-528, November 27, 1969.

111. The guidelines suggested in *Vela* are that the person falls within section 7(1) or (2) of the *Act*; has established that entry to Canada is sought for a legitimate and temporary purpose; that the person is truthful on examination; apparently in good health; is of good character; is not otherwise a prohibited person as defined by section 5 of the *Act*; that the person has sufficient assets or access to sufficient assets to maintain himself in Canada and to ensure his departure; that the person has satisfactory proof of his readmissibility to his home country or to a third country; and a valid passport exists, if this is required. The Board has indicated that these guidelines should be applied subject to two overriding considerations — the credibility of the person concerned, and his true interest in coming to Canada as shown by all the evidence.

112. *Immigration Act*, s.5(*q*).

113. *Id.*, s.5(*r*).

114. *Id.*, s.5(*s*).

115. *Id.*, s.5(*t*).

116. Sedgwick, Part 1 at 5.

117. Immigration Regulations, SOR/62-36, Regulation 27.

118. Regulation 28.

    This regulation also applies to an immigrant who reports pursuant to section 7(3) of the *Immigration Act*; that is, a person who has been admitted to Canada as a non-immigrant but seeks to remain as a landed immigrant must report to an immigration officer for examination and shall be deemed to be a person seeking admission to Canada. Note that an immigrant seeking landing, including a section 7(3) applicant, must have a visa issued by a "visa officer". By definition (s.2, Regulations), visa officers exist only outside Canada.

119. Regulation 28(2).

120. Sedgwick, Part I at 14.

121. *Ashby v. M.M.I.*, 73-4594, March 4, 1974.

122. Discussed *supra*.

123. Whether or not the person is an independent applicant (Reg. 32), a nominated relative (Reg. 33) or a sponsored dependent (Reg. 31).

124. In 1972.

125. Regulation 34.

126. Immigration Regulations, Reg. 32(1)(b).

127. *Supra* at 7; See Schedule A to the Immigration Regulations.

128. As defined in Regulation 21.

129. *Kalusyan v. M.M.I.*, 1973 3 I.A.C. 16.

130. Schedule B of the Regulations.

131. Regulation 28(3).

132. S.5(*a*), (*b*), (*c*) or (*s*).

133. *Koo Shew Wan v. M.M.I.*, (1973) F.C. 578.

134. S.7(3).

135. To be precise, the repeal of Regulation 34.

136. *The Immigration Act*, s.19.

137. *Id.*, s.19(3).

138. Immigration Regulations, Reg. 30:

> The passing of any test or medical examination outside of Canada or the issue of a visa, letter of pre-examination or medical certificate as provided for in these Regulations is not conclusive of any matter that is relevant in determining the admissibility of any person to Canada.

139. *Immigration Act*, s.21.

140. Immigration Regulations, Reg. 29(2).

141. Prohibited classes are defined in section 5 of the *Immigration Act* and have been discussed in detail in the preceding chapter.

142. *Immigration Act*, s.22. Persons detained are housed at public expense.

143. *Id.*, s.11(1).

144. *Id.*, s.23(1).

145. Immigration Inquiries Regulations, Reg. 5.

146. *Raulins v. M.M.I.*, (1973) 4 I.A.C. 326.

147. *Ho v. M.M.I.*, 69-278, September 11, 1969; *Paresa v. M.M.I.*, (1972) 1 I.A.C. 370. See also *Mariano v. M.M.I.*, 69-459, November 3, 1969; *Silvini v. M.M.I.*, 69-566, September 3, 1970. These decisions consider it insufficient for an immigration officer to express an opinion on a section 22 report but fail to set out the specific provisions of the Act or regulation on which his opinion is based.

148. *Arcellano v. M.M.I.*, 70-109, October 26, 1971.

149. *Roberti v. M.M.I.*, 70-2111, June 6, 1973.

150. S.19(2).

151. S.18.

152. S.25.

153. *Yeung v. M.M.I.*, 69-1954, November 27, 1969.

154. S.18(1)(*e*)(vii), (viii), (ix), or (x).

155. *Kim v. M.M.I.*, 68-6046, March 4, 1969.

156. *Immigration Act*, s.14(1).

157. *Caruana v. M.M.I.*, 68-6147, December 3, 1969.

158. Pursuant to section 25.

159. *Shamsher Singh Gill v. M.M.I.*, (1973) 2 I.A.C. 266.

160. S.18. What follows in the text is a summary of this section with explanation and comment.

161. S.18(*a*), (*c*).

162. S.18(*d*).

163. S.18(*e*)(i).

164. S.18(*e*)(ii).

165. This raises an interesting hypothetical situation which was postulated by the Chairman of the Board in 67-5006, February 12, 1968. Under section 5(*d*) of the *Act*, a person is in a prohibited class if he has committed a crime involving moral turpitude. Assume that while previously in Canada as a visitor a person committed a common assault, which is not an offence involving moral turpitude; suppose he was convicted, but no order of deportation was made. Many years later he now desires to come to Canada as a landed immigrant. Since he does not fall within a prohibited class of section 5, he must be granted admission by the immigration officer at the port of entry. However, once he is admitted, he is subject to a report pursuant to section 18(1)(*e*)(ii) and may be ordered deported. If he is deported, although he does not fall within a prohibited class, he nevertheless will require ministerial consent before he is again capable of returning to Canada.

166. S.18(*e*)(iii).

167. *Smogor v. M.M.I.*, (1973) F.C. 350.

168. *Peters v. M.M.I.*, 70-2688, November 18, 1970.

169. S.18(*e*)(iv).

170. S.18(*e*)(v).

171. S.18(*e*)(vi).

172. *Hughes v. M.M.I.*, (1973) 3 I.A.C. 434.

173. *Zygouris v. M.M.I.*, (1972) 1 I.A.C. 270.

174. S.7(3). See also *Eletheratos v. M.M.I.*, (1973) 2 I.A.C. 230.

175. S.5.

176. S.18(*e*)(vii).

177. *Chloros v. M.M.I.*, 68-5799, October 28, 1968.

178. *Grgic v. M.M.I.*, (1973) 3 I.A.C. 1.

179. S.18(*e*)(viii).

180. *Clairjeune v. M.M.I.*, (1973) 3 I.A.C. 351.

181. *Brooks v. M.M.I.*, (1973) 36 D.L.R. (3d) 522 (S.C.C.).

182. S.18(*e*)(viii).

183. *Brooks, supra* note 74.

184. *Id.*

185. *Khere v. M.M.I.*, 71-3758, May 7, 1973.

186. S.18(*e*)(ix).

187. S.18(*e*)(x).

188. Pursuant to section 25.

189. S.7(4) and (5).

190. I.e., in section 18.

191. Editor's note: The need for legal representation has been recognized by the recent creation of a federally-funded legal aid service for persons seeking admission to Canada at Montreal International Airport, Dorval. See Press Release 75-30, Office of the Minister of Manpower and Immigration, May 2, 1975.

192. See section 11 of the *Immigration Act*.

193. *Roberti v. M.M.I., supra* note 142.

194. *Janvier v. M.M.I.*, 68-6103, December 18, 1969.

195. *Id.*

195. *Turpin v. M.M.I.*, 67-5006, February 12, 1968.

197. *Caruana v. M.M.I., supra* note 150.

198. *Gana v. M.M.I.*, (1970) S.C. 699.

199. *Srivastava v. M.M.I.*, (1973) F.C. 138.

200. *Id.*, at 143-44.

201. This principle was affirmed by the Federal Court when it denied leave to appeal in *Zuniga v. M.M.I.*, 72-5776, June 16, 1972. However, in *Smoger v. M.M.I.*, a decision of the Federal Court of Appeal of March 30, 1973, the crucial date was said to be that of the section 18 report.

202. Or else the order is a nullity; *Hatzihristos v. M.M.I.*, (1973) 4 I.A.C. 169.

203. *Folino v. M.M.I.*, 69-21, April 23, 1969.

204. See Part V of the *Immigration Act*.

205. *Bichozze v. M.M.I.*, (1973) 2 I.A.C. 395.

206. *Immigration Appeal Board Act*, R.S.C. 1970 c.I-3, section 13.

207. *Id.*, s.3(5) as amended.

208. *Id.*, s.3(7).

209. *Id.*, s.6(3).

210. *Id.*, s.10(1).

211. S.C. 1973-74 c.27 s.10.1. See also section 4; a decision by a single member is deemed to be a decision of the Board. See also *Lu v. M.M.I.*, 69-392, December 16, 1969.

212. Janzen and Hunter, *supra* note 21.

213. *Immigration Appeal Board Act*, s.7(1).

214. *Id.*, s.7(2).

215. Janet V. Scott, *Immigration Inquiries and Appeals from Orders of Deportation*, Special Lectures of the Law Society of Upper Canada (1971) at 121.

216. As we would argue that Janzen and Hunter have demonstrated.

217. *Immigration Appeal Board Act*, s.11.

218. *Id.*, s.11(3).

219. *Cylien v. M.M.I.*, 73C-1002, October 16, 1972. Editor's note: This decision has recently been clarified, or in the view of Chairman Scott, repealed, by the Federal Court of Appeal in two decisions: *Fuentes*, on October 30, 1974, and *Hat Huyuh Huu*, on December 5, 1974. It would appear that the Board's decision on whether the appeal should proceed must now be based only on the claim to refugee or citizenship status.

220. *Immigration Appeal Board Act*, s.12.

221. *M.M.I. v. Ramendra Kumar*, 69-1493, August 24, 1970.

222. *Immigration Appeal Board Act*, s.17.

223. Immigration Regulations, Reg. 31.

224. Immigration Sponsorship Appeals Order, S.O.R. 67-552. This defines "person" for the purpose of section 17 of the *Act* as "a Canadian citizen".

225. *Immigration Appeal Board Act*, s.19(2).

226. We also note that the Board in *Lim Lim Sew v. M.M.I.*, (1973) 3 I.A.C. 23, held that a sponsorship appeal, being in essence an *in persona* claim, does not survive the death of the sponsor.

227. *Immigration Appeal Board Act*, s.18(2).

228. Under section 11 of the *Immigration Appeal Board Act*.

229. Immigration Appeal Board Rules. These are the bases for the following textual description of appeal procedures.

230. Rules 4 and 5, in particular.

231. S.7(2)(*c*).

232. *Srivastava v. M.M.I.*, (1973) F.C. 138.

233. *Id.*

234. Section 22:

> Subject to this *Act* and except as provided in the *Immigration Act*, the Board has sole and exclusive jurisdiction to hear and determine all questions of fact or law, including questions of jurisdiction, that may arise in relation to the making of an order of deportation.

235. Section 7(2)(*c*):

> The Board ... may ... during a hearing receive such additional information as it may consider credible or trustworthy and necessary for dealing with the subject-matter before it.

236. Immigration Appeal Board Rules. S.O.R. 1967-559, Rule 13: The parties to an appeal may call witnesses to give evidence under oath or affirmation.

237. *Id.*, Rule 11(1): Except as otherwise provided in these rules, the appellant or respondent in an appeal may make oral or written submissions to the Board on any matter pertaining to the appeal.

238. *Srivastava, supra* note 225 at 150.

239. *Id.*

240. Such as the Board's overriding discretion under section 7(2)(*c*).

241. *Brooks v. M.M.I.*, (1973) 1 I.A.C. 116.

242. *Podlaszecka v. M.M.I.*, (1973) 4 I.A.C. 116.

243. Section 14(*c*), The *Immigration Appeal Board Act*.

244. Eg., sections 21(1) and 22 of the *Immigration Act*.

245. *Srivastava, supra* note 225; *Gana v. M.M.I.*, (1970) S.C. 699.

246. *Harjit Chand v. M.M.I.*, (1973) 3 I.A.C. 255.

247. *Leiba v. M.M.I.*, (1972) 23 D.L.R. (3d) 476 at 483.

248. Based on section 14(*c*) of the *Immigration Appeal Board Act*: "rendering the decision that the special inquiry officer should have made".

249. Editor's note: The Chairman of the Board considers that the Board's practice in this regard is accurately stated in the 4 C.E.D. (3rd) paragraph on immigration (197) which she authored: "It would appear that the appellant's notice of appeal is sufficient notice to the Minister that he may invoke the use of section 14(*c*), since, in general the institution of an appeal from a deportation order necessarily implies that the appellant is seeking a legal status in Canada, either temporary or permanent".

A random example she cites of the use of section 14(c) in favour of an appellant, without formal notice except the filing of the appeal itself, and based on the evidence, is *Mayoute v. M.M.I.*, (1974) I.A.C. 272, where the Board entered the appellant pursuant to section 7(1)(*h*) of the *Immigration Act* — the decision the Special Inquiry Officer should have made.

250. Deportable under section 18(1)(*e*)(x) of the *Immigration Act*.

251. *Yeung v. M.M.I.*, 69-1954, November 26, 1969.

252. In *Yeung* the Chairman of the Board said: "In other words, within the ambit of its jurisdiction (the Board) is a Court of Appeal and the doctrine of *res judicata* as formulated in Kingston's case applies to its decisions".

254. Under section 18 of the *Immigration Act*.

254. Pursuant to section 18(1)(*e*)(vi).

255. *Scott, supra* note 208 at 126.

256. *Id.*, at 128-9.

257. *Id.*, at 131.

258. By Janzen and Hunter.

259. S.15(1)(*b*)(i), as amended.

260. S.15(1).

261. *Id.*

262. S.15(2).

263. *Id.*

264. *Rudolph Meeser v. M.M.I.*, (1972) 1 I.A.C. 436.

265. S.15(3).

266. S.15(4). The Board has held that section 15(4) must be read supplying the following words: "quash the order, or quash the order and direct the grant of entry or landing...". These omitted words are necessary since section 15(1) takes precedence over section 15(4) and the Board's powers on review cannot be less than on appeal.

267. *Moore v. M.M.I.*, (1973) 4 I.A.C. 199.

268. Under section 15(1)(*b*), in particular.

269. *M.M.I. v. Ram*, (1973) F.C. 500.

270. Section 21(1) of the *Immigration Appeal Board Act*.

271. *Hatefi v. M.M.I.*, (1973) 3 I.A.C. 130. Nor is a certificate invalidated because it is signed by an Acting Minister: *id.*

272. *Prata v. M.M.I.*, (1972) F.C. 643, affirming I.A.B. 71-6810, January 13, 1972.

273. *Prata, id.; Hatefi, supra* note 264; *Cronan v. M.M.I.*, (1973) 3 I.A.C. 42. Nor has the use of a certificate been held to be discriminatory.

274. *Brooks v. M.M.I.*, (1972) 1 I.A.C. 33 (appeal pursuant to section 14(*a*) not covered by national security exception).

275. *Grillas v. M.M.I.*, (1972) 23 D.L.R. (3d) 1.

276. *Id.*

277. *Ghan v. M.M.I.*, 68-5105, June 28, 1968.

278. *De Porres v. M.M.I.*, 71-3659, May 4, 1972.

279. Section 35 of the *Immigration Act* reads:

> "Unless an appeal against such an order is allowed, a person against whom a deportation order has been made and who is deported or leaves Canada shall not thereafter be admitted to Canada or allowed to remain in Canada without the consent of the Minister".

280. *Supra* note 271.

281. *Immigration Act*, s.57.

282. Section 15(1)(*b*)(i), in particular.

283. House of Commons Debates, 1967, at 13280.

284. Sedgwick, Part II, at 14.

285. There are two statutory exclusions from the Minister's power to issue section 8 permits: (1) a person under order of deportation who was not issued such a written permit before November 13, 1967; (2) a person in respect of whom an unsuccessful appeal under section 17 of the *Immigration Appeal Board Act* has been taken; i.e., a refusal to approve an application for sponsorship.

286. *Immigration Act*, s.8(4).

287. To section 18(1)(*e*)(vi), in particular.

288. *Immigration Act*, s.8(5).

289. *Immigration Act*, s.35.

290. *Supra* note 201.

291. *Sherman v. M.M.I.*, (1973) 2 I.A.C. 192 and *Magakis v. M.M.I.*, (1973) 3 I.A.C. 314, overruling *Moniz v. M.M.I.*, 69-1590, November 23, 1970.

292. S.23(1), as amended by R.S.C. 1970 c.10 (2nd Supp.), Item 18.

293. *Aly Abdel Hafez Aly v. M.M.I.*, (1971) F.C. 540 at 541.

294. Section 23(1) of the *Immigration Appeal Board Act*.

295. Section 28 of the *Federal Court Act*.

296. *Supra* note 287.

297. *Boulis v. M.M.I.*, (1972) 26 D.L.R. (3d) 216.

298. For example, when the Board examines a declaration of a person claiming to be a refugee and determines that there exist "reasonable grounds to believe that the claim could, upon the hearing of appeal, be established". But see *M.M.I. v. Fuentes*, (1974) (2) F.C. 331.

299. Under section 15 and 17 (appeals by sponsors) of the *Immigration Appeal Board Act*.

300. Under section 23(1).

301. *Boulis, supra* note 290 at 220 per Laskin, J.:

> On this view, the question that remains in this case is whether the Board erred in its assessment of the evidence, either by misstating or misunderstanding it or ignoring relevant portions thereof, to such a degree as to make its conclusion one that is not supportable on the evidence. I do not think that this Court's appellate jurisdiction in relation to a decision of the Board under section 15(1)(*b*)(i) should be extended to the point of interference with the weight assigned by the Board to evidence where, either taken by itself or in relation to conflicting or modifying evidence, the Board must decide on its force in meeting the standards fixed by section 15(1)(*b*)(i).

302. *Olivarria v. M.M.I.*, (1973) F.C. 1035.

303. *Janvier v. M.M.I.*, 68-6103, December 18, 1969.

304. *Federal Court Act*, s.31.

305. *Immigration Appeal Board Act*, s.6(3).

306. We received estimates of the frequency of representation by legally-trained counsel that ranged from one-third to one-half of all appellants.

307. See: Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry*, (1969, Louisiana State University Press) Chapter 4.

308. *Id.*

309. Only in 1972 did the Carswell Company establish the Immigration Appeal Cases reports and, of course, these are far from exhaustive in reporting Board decisions.

310. See, *e.g.*, Chapter IV at 105ff., and Chapter V at 127-138. See also Janzen and Hunter.

311. In the words of Laskin, J., in *Leiba v. M.M.I.*, (1972) D.L.R. (3d) 476.

312. Sedgwick, Part II, at 5.

313. Kenneth Culp Davis, *supra* note 300 at 57.

314. A position stated by the Board's Chairman, Miss Janet Scott, Q.C., in a conversation on December 20, 1974.

315. Editor's note: Some might question the Department's impartiality since it does act as "prosecutor" and "enforcer" in immigration matters.

316. The Board currently receives between thirty-five and fifty such appeals per month. Other appeals will be generated by refugee and citizenship claimants. Numbers here are difficult to estimate since these claimants must establish a *prima facie* case in order to appeal. Other sources of a limited and perhaps negligible number of appeals will be holders of non-immigrant visas refused entry, holders of immigrant visas refused landing (which now occurs some six to eight times a year at Toronto International Airport according to immigration officers there but apparently has not yet led too any appeals) and returning landed immigrants refused admission.

317. *Cf.*, Tarnopolsky: *The Iron Hand in the Velvet Glove: Administration and Enforcement of Human Rights Legislation in Canada*, (1968) 46 C.B.R. 565; Hunter: *The Ontario Human Rights Code: A Decade in Retrospect*, (1972) 22 U. of T. L.J. 237.

318. Aristotle, *Rhetoric I*, 13.9., quoted by Davis, *supra* note 300 at 57, n. 4.

319. Morris Cohen, *Law and the Social Order* (1933), 261.

320. This would require amendment of section 14 of the *Immigration Appeal Board Act*.

321. This would require amendment of section 15 of the *Immigration Appeal Board Act* and probably consequential amendments to sections 4(2)(*b*), 4(4), 18(1)(*e*)(ix), 35 and 35.1 of the *Immigration Act*.

322. Editor's note: The cost of deportation could be a charge on the transportation company which it in turn could recover from the person deported or require as a security deposit from the spouse residing in Canada prior to the trip to Canada.

323. *The Immigration Act*, s.3(3).

324. *Id.*, s.18(1)(*a*), (*b*), (*c*) or (*d*).

325. Under section 18 of the *Immigration Act*, *id.*

326. *Id.*, s.18(1)(*d*).

327. In section 5(*d*) of the *Immigration Act*.

328. The recommendation would bring section 5 into closer line with section 18 and restrict membership in the prohibited class replacing the "crime involving moral turpitude" class to persons committing indictable offences.

329. The *Immigration Act*, s.18(1)(*e*)(v).

330. Sedgwick, Part II at 5.

331. *Id.*