Chapter 8

THE CANADIAN ACT AND POLICY

The frequency of change to the Australian Migration Act 1958 and its subordinate legislation make it difficult to follow and as a result more complex than it need be. Is refugee law in Canada more stable and simpler?

Refugee policy and immigration policy, while inevitably inter-related, should be clearly distinguished. Immigration policy is oriented towards control over entry of would-be immigrants into Canada and is pre-occupied with domestic economic and labour market considerations. It is frequently at odds with the humanitarian considerations and the international obligations that underlie refugee policy.

Refugees in Canada are seen primarily as immigrants. The immigrant label has enabled refugees to protect their personal history and identity as victims of persecution. As refugee policy was organised under the Employment and Immigration portfolio, the protection decision was implicit in immigration policy about "selecting" and "accepting" refugees.

The immigration linkage has also been responsible for abuse and queue-jumping rhetoric which has had a negative effect on public sympathy for asylum-seekers. This rhetoric rests on the centrality of immigration programs. It pushes international refugee law, the Geneva Convention and sympathy for victims right off the map. Currently in Canada, there is a perception that some refugee claimants who are not accepted by the Immigration and Refugee Board are deemed to have "abused" the system (Personal Communciation, 1995). It places the decision of the Immigration and Refugee Board above question and makes the asylum seeker guilty until proven innocent. Queue-jumping is based on the abdicated notion of denying the many distinct programs/criteria/doors under which different classes of immigrants come into Canada (eg family class, investors, independents). It reduces the image of a country's many entry points to one door for all immigrants. Under this non-popular image, any refugee claimant who is accepted is understood not as a victim of persecution, but as someone who has successfully fooled the immigration system.

The early refugees did not want to be identified as Jews fleeing from Europe after World War 2. The inclusion of refugees within the label of immigrants could be viewed as marginalising the particularity of the refugee experience. I do not believe there is anything wrong with this. The early refugees in Canada as was the case in Australia, were grateful of resettlement and wanted to put the atrocities of war behind them. It was not a concern to them that they were regarded as immigrants. Of course at that time, governments did not concern themselves with trauma counselling and other special needs refugees have. Today the uniqueness of the refugee experience is recognised by the provision of special services.

It must, however, be pointed out that refugees are processed separately. They do not affect the numbers of economic immigrants or family class immigrants who come to Canada. If refugee numbers are greater than expected, there is no corresponding cutback in non-refugee immigration.

When considering Canadian refugee policy it is difficult not to recall the obsession of Prime Minister Mackenzie King with Jews during the late 1930s. In June 1939 when the ill-fated St Louis, a boat of 900 Jews forced out of Germany by the Nazis attempted to land in Canada, the Canadian Government stood firm and turned the boat away. The so-called "Voyage of the Damned" headed back to Europe where many of its passengers died in the gas chambers and crematoria of the Third Reich. Between 1933 and 1939 Canada admitted only 4000 Jews seeking refuge from the Third Reich. Australia admitted 10 000 and was preparing to receive another 15 000 when war broke out and the USA admitted some 140 000.

At the end of the Second World War, Canada's immigration policies were still governed by an Act of 1927 which included sections dating back to nineteenth century practices. Largely due to the economic depression of the inter-war period, immigration to Canada had been severely restricted before and during the war. There was a growing recognition that Canada would need more people once the war was over, but there was a strong preference for British immigrants and a reluctance to accept a large number of "displaced persons" from Europe. According to Abella and Troper (1986, 238-279), Canadian immigration officials were encouraged to issue visas to Protestant and Catholic refugees but to limit the number of Jews admitted, largely by insisting that those accepted should have "agricultural experience", or be prepared to work as domestic servants. They cite International Refugee Organisation

records to confirm the anti-Jewish bias in Canada's "bulk-labour" schemes for domestics, woodworkers, mining and railroad maintenance in 1948.

The Immigration Act of 1953 listed "prohibited classes". It empowered the Governor-in-Council to make regulations "prohibiting or limiting admission of persons by reason of,

(i) nationality, citizenship, ethnic group, occupation, class or geographic area of origin,

(ii) peculiar customs, habits, modes of life or methods of holding property,

(iii) unsuitability having regard to the climatic, economic, social, industrial, educational, labour, health or other conditions or requirements existing temporarily or otherwise in Canada, or in another country from or through which such persons come to Canada, or

(iv) probable inability to become readily assimable or to assume the duties and responsibilities of Canadian citizenship within a reasonable time after their admission."

There was no explicit provision for the admission of refugees. At that time Canada had not signed the 1951 Convention. Refugees were subject to the same selection criteria applied to all immigrants. Regulations were made under the 1953 Act and were not repealed until 1962. The Regulations gave preference to immigrants from the United Kingdom, France and the USA, followed by those from northern and western European countries, eastern and southern Europe and the rest of the world, in that order. In the case of non-European countries, sponsorship by a Canadian citizen was generally required. This effectively excluded almost anyone from Africa, Asia, the Caribbean or Latin America. There were token quotas for immigrants from the Commonwealth countries of the Indian sub-continent (India, Pakistan and Sri Lanka). The requirements were so stringent that the quotas (less than 300 from each country) were rarely reached. A scheme for admitting Caribbean women as domestic workers was instituted in the mid-1950s. Caribbean males were not admissible in most cases (Richmond, 1967, 13).

An Order-in-Council made in 1962 abolished the explicit racial discrimination in the Regulations although it left potential immigrants to Canada from Third World countries at a disadvantage, at least in part because there were numerous offices in the United Kingdom, United States of America and Western Europe capable of handling visa applications but very few in Africa, Asia or Latin America. By 1967 a "points system" of selection had been adopted, emphasising education and occupational

qualifications and elementary ethnic preferences. (cf. Hawkins, 1972, 33-67). This opened the way for Canada to respond to the crisis in Uganda in 1972 when Idi Amin expelled large numbers of Asians, many of whom had a good education and business experience. It should be noted that Australia, caught totally unaware, made no response. It was the first time Third World refugees had been given explicit consideration. However, it has been suggested that Canada tended to select the "cream", leaving less well qualified Ugandan Asians to find asylum in the United Kingdom or elsewhere (cf. Hawkins, 1973; Pereira, Adams and Bristow, 1978, 352-364). A small number of Tibetans was also admitted in 1970. Meanwhile, other refugee movements had originated from more traditional sources in Europe, including Hungary and Czechoslovakia (Dirks, 1977).

In 1974 Canada published a "Green Paper" on immigration policy. Statistics contained in the paper indicated that Canada had accepted very few non-white refugees and very few refugees from right-wing regimes. It would appear there was an ideological bias in favour of rightist refugees from communist regimes and against politically active leftist refugees from conservative/fascist regimes.

Dirks, writing in 1977, was of the view that race was less important in determining the eligibility of refugees to enter Canada than ideological persuasion. He especially cited (1977, 258, 247) the "intensive security screenings" of Chilean refugees in 1973-74, screenings which were not made of a group comparable in urgency, Ugandan Asians, in 1972. This omission seems to verify Dirks' contention that the race of the Asians was not considered significant, given their occupations (seventy-five per cent professional, managerial or entrepreneurial (Pereira et al. 1978, 360) whereas Royal Canadian Mounted Police (RCMP) were sent to interview both Czechoslovakian (Green Paper II, 108) and Chilean refugees among whom it was assumed a substantial number were socialists or communists. Preoccupation with possible communist leanings of potential refugees has been a feature of Canadian policy since 1947 when RCMP officers originally sent to Europe to filter out Nazis or Nazi sympathisers from among displaced persons seeking to enter Canada quickly turned their attention to communists (Dirks 1977, 145).

Canada did not sign the Geneva Convention until 1969 although it sat on the UNHCR Executive Committee since its inception in 1959. The delay was apparently caused by suspicion that in signing Canada might be forgoing some of her rights of deportation (Green Paper II, 115) despite the Conventions' provisions that a refugee who is a danger to the security of the host country or who has been convicted of a serious

crime may be deported. A statement issued by the Department of Manpower and Immigration at the time said that accession would not alter the generous treatment Canada had traditionally extended to refugees and went on to say:

> "Although Canada's treatment of refugees has been, as a matter of policy, in accordance with the letter and spirit of the international instruments for the protection of refugees, the act of acceding will denote official acceptance of the international standards for the protection of refugees and of the improved international and universal definition of the term 'refugee'" (quoted in Dirks 1977, 182).

An Immigration Appeal Board was established by legislation in 1967 to hear appeals from individuals ordered deported by immigration officials. This Act required the Board to determine whether the individual qualified as a bona fide refugee under the 1951 Convention, that is, whether persecution would follow if the individual was deported back to his country of origin. As Dirks (1977, 230) observed, "the Board has been a small but significant factor in shaping Canadian refugee policy because of its ability to quash deportation orders".

Amendments to the Immigration Appeal Board Act 1967 in 1973 established the first statutory basis for refugee claims made from within Canada. According to Hathaway (1988) this basis contained two flaws. First, it was wholly within the Board's discretion to grant or withhold landing in any particular case. As a result, there was no guarantee that refugees would receive protection from Canada. Second, because the refugee claim could only be raised on appeal rather than at the immigration inquiry itself, those persons whose claims did not go beyond the initial hearing had no means of demonstrating their refugee status.

IMMIGRATION ACT 1976

Canada's ad hoc refugee policy was given a more permanent basis by the Immigration Act 1976 which commenced on 10 April 1978. Section 3(g) provided the Act was to "fulfill Canada's international legal obligations with respect to refugees and to uphold its humanitarian tradition with respect to the displaced and the persecuted".

The Act introduced three important provisions. First, individuals who qualified under the Geneva Convention and Protocol were to constitute a separate class of immigrants within Canada's overall immigration program to be known as Convention refugees. They were to be given top processing priority and exempted from the points system

used for immigrant selection. Section 2 adopted the Convention definition of "refugee" to define this class.

In *Orelien v Minister for Employment and Immigration* [1992] 1 F.C. 592 it was held that Canada's obligations in the area of refugees stem from the 4th Geneva Convention of August 12, 1949 both approved by Acts of Parliament (Geneva Conventions Act, R.S.C. 1985, c. G-3, s.2, as amended S.C. 1990, c. 14, s.1) as well as a customary norm of temporary refuge. To return a person to Haiti in the circumstances that presently exist and have existed at relevant times, in this case would have violated Canada's obligations under the Convention, the protocol and the customary norm of international law prohibiting the forcible repatriation of foreign nationals who have fled generalised violence and other threats to their lives and security arising out of internal armed conflict within their State of nationality. The Convention, the protocol and the customary norm of international law have the force of domestic law in Canada and can be enforced in the courts of Canada at the suit of a private individual. The intention to execute a deportation order which if executed would breach those laws does not colour the process under the Immigration Act by which a person from such a country may be ordered deported. This is not to denigrate the importance of the Convention, the protocol and the customary norms of international law. It would be a grave and justiciable matter if Canada were to execute deportation orders in circumstances which breached obligations under international law and put the life, liberty or security of persons in peril.

Second, the Minister was empowered to designate by Regulation certain groups as special humanitarian classes whose admission was in accordance with Canada's concern for the persecuted and the displaced. The admission of members of such "Designated Classes" was to be made on grounds similar to those governing the acceptance of individual victims of persecution who qualified as Convention refugees. Regulations effective from 1 January 1979 established three designated classes namely, the Self-Exiled Designated Class, the Indo-Chinese Designated Class, and the Political Prisoners and Oppressed Persons Designated Class.

The Act also vested an overriding discretion in the Governor in Council to facilitate the admission of persons "for reasons of public policy or due to the existence of compassionate or humanitarian conditions" (section 114(2)). Pursuant to this sub section administrative procedures were developed to permit individuals from countries experiencing an adverse domestic situation to benefit from the functional equivalent

of temporary asylum and even to apply for permanent residence. The procedures are known as the Special Measures Programs.

A third provision of the 1976 Act was to allow private groups and organisations to participate in refugee resettlement through sponsorship agreements with the Canadian Government. The Government could sponsor a number of refugees each year. An annual global refugee plan would establish allocations for the number to be admitted under government sponsorship annually.

It was recognised at that time that in addition to a planned government effort to help refugees, Canada would benefit from a system which would permit private citizens and businesses to become involved in refugee resettlement. What was originally viewed as an incidental part of the refugee intake system became the most imaginative innovation in refugee resettlement with the massive intake of Indo-Chinese refugees in 1979-80 when 32 000 refugees were sponsored by the private sector. A guiding principle behind the program is the belief that refugees are assisted in their adaptation to Canadian culture through close association with established residents of Canada.

The Act provides for the admission of refugees in two distinct ways. Individuals claiming refugee status within Canada were subject to an inland determination system. Those chosen outside Canada, whether Convention refugees or members of Designated Classes, for resettlement were selected by Canadian visa officers. Eligibility was based on four criteria:

(i) applicants must meet the Convention definition of a refugee;

(ii) applicants must not have been permanently resettled;

(iii) the refugee must not be a member of one of the inadmissible classes stipulated in the Immigration Act 1976; and

(iv) it must be determined that the person seeking admission as a refugee is capable of "successful establishment in Canada" (section 19).

The Designated Classes are subject to a broadly similar selection procedure. Members of the various classes must be outside Canada and must be deemed capable to successful establishment in Canada. The applicant must not be a self-exile and need only be in a refugee-like situation.

The Act determined a formal procedure for determining refugee claims in Canada. The Act introduced a procedure that increased the rights of claimants while removing

much of the discretion exercised by the Immigration Appeal Board. Succinctly, the process consisted of four distinct stages:

(1) examination of the claimant by a senior immigration officer;

(2) the review of the transcript of that examination by the Refugee Status Advisory Committee and the recommendation of that body to the Minister;

(3) the actual decision by the Minister with respect to refugee status; and

(4) the possible re-determination of the Minister's decision by the Immigration Appeal Board.

Ratushny (1984, 4-5) observed that the legislation formalised previous determination practice with some modifications. Most importantly, claimant's rights were recognised in law and a number of specific safeguards were included; such as a right to a copy of the transcript of the examination, the right to retain a lawyer and to be informed of that right.

According to Plaut (1985, 25-26), section 45(1) of the Immigration Act 1976 contemplated that all claims to Convention refugee status would be made at any time during the course of an inquiry conducted by an adjudicator under the provisions of the Act. When such a claim was made, the adjudicator, after finding that the claimant was in violation of the Act but before issuing a departure notice or making a removal order, was obliged to adjourn the inquiry to enable the applicant to present a claim to the Minister for Employment and Immigration. The original inquiry had then to be adjourned and an examination scheduled.

The claimant would be examined under oath by a senior immigration officer concerning claim for refugee status. A transcript was made of the examination and forwarded to the Minister together with a copy of the claim. The claimant has a right to be legally represented at the examination, to an interpreter and to a copy of the transcript (section 45(1), (2), (3) and (6)).

The Minister then referred the claim and transcript to the Refugee Status Advisory Committee (RSAC) for consideration and advice. If the RSAC case review officer concluded that the case was "manifestly unfounded" a summary of the case was prepared for review by the Committee (Plaut) 1985, 26). There were four categories of "manifestly unfounded claims":

(1) claims that presented no evidence of any of the five essential criteria of the definition;
(2) claims where the evidence presented was so manifestly unreliable "that no reasonable person could believe it";
(3) claims made under section 45 of the Act when the claimant had already submitted an in-status claim and the second claim presented no new information; and
(4) claims made by the spouse of a rejected claimant when the claim was based solely on the rejected spouses claim (Immigration Manual, summary quoted in Plaut 1985, 199).

Certain safeguards applied to this consideration. No claims from traditional refugee - producing countries were treated as manifestly unfounded, nor was a claim automatically considered to be manifestly unfounded simply because it was from a country that normally did not produce refugees (Ratushny 1984, 6).

If, however, the case was not manifestly unfounded, the full transcript was considered by the RSAC, although a Committee member could at any time request that the full transcript for even manifestly unfounded cases be put before the Committee (Plaut 1985, 26). In considering claims, the RSAC had to take into account the political considerations in the country in question. This information may have been known to Committee members through their own reading, experience with other cases, or from specific enquiries they might have initiated. Under the Act, the Committee members did not see the claimant personally so they were unable to raise matters that might have appeared prejudicial but were not discussed during the examination of the claimant. An informal step was added to the procedure to allow the claimant to provide refutation, the examination could be re-opened and additional evidence presented or new issues raised (Ratushny 1984, 6).

A representative of the UNHCR was entitled to sit in on Refugee Status Advisory Committee sessions, review claims and give an opinion. Although the representative had no vote the case had to be reviewed personally by the Chairman if that representative disagreed with the Committee (Plaut 1985, 26-27). The RSAC then forwarded its recommendation to the Minister. Three courses of action were possible. If the determination was favourable, the inquiry had to be resumed to establish whether the person should nevertheless be removed because the person was a serious criminal, terrorist or security risk (Ratushny 1984, 7).

Second, if the Minister concluded that the individual, though declared a refugee, should not be permitted to remain in Canada, the inquiry was resumed and the refugee

might be subjected to a removal order. However, this decision could be appealed to the Immigration Appeal Board and by leave, to the Federal Court of Appeal. Section 55 of the Immigration Act 1976 followed Article 33 of the 1951 Convention in guaranteeing *non-refoulement.*

The third possibility was that the Minister might determine that the claimant was not a Convention refugee. In such cases, another informal procedure was followed before the decision was sent to the claimant. The claim was referred to the Special Review Committee (SRC), a committee of Employment and Immigration Canada Officers who reviewed the claim on humanitarian and compassionate grounds (Ratushny 1984, 7). If that Committee gave the claim favourable consideration, a Minister's Permit was granted and the inquiry concluded (Plaut 1985, 28).

If, however, the SRC did not come to a favourable conclusion section 70 of the Immigration Act 1976 provided for the Immigration Appeal Board (IAB) to re-determine the claim. The Act required such a claimant to make application under oath to the Immigration Appeal Board indicating the basis of the re-application and giving a summary of evidence and other material to be provided if a hearing were to be granted. Having reviewed the material, the IAB determined whether the applicant had made a case for an oral hearing of the claim. Section 71(2) provided that if the IAB refused to allow the application to proceed to a hearing and determined the applicant was not a Convention refugee, the applicant could apply to the Federal Court of Appeal for a review of this decision. If the IAB found that a hearing was warranted, the matter was heard by a three-member panel of the IAB. Such hearings were adversarial in nature, and the onus was on applicants to establish whether they were Convention refugees. The claimant witnesses testifying on behalf of the claimant and the Minister's representative could be cross-examined. The decision of the IAB was final although judicial review could be sought in the Federal Court of Appeal (Ratushny 1984 7-8; Plaut 1985, 30).

The 1976 legislation marked an important point in the evolution of Canada's refugee policy. For the first time, Canada had recognised the need for a formal process for the admission of refugees and for a continuing admissions policy - rather than one that operated in an ad hoc way. Canada's first annual global refugee plan was a result of these developments. When it was announced in December 1978, it included provision for an intake of 5 000 refugees from Southeast Asia in 1979 (EIC 1982, 18). Moreover, Canada had finally decided to adhere to international guidelines by including the UNHCR definition of a Convention refugee in its legislation, by

allowing UNHCR representation in refugee determination decisions, and by agreeing to abide by international principles such as *non-refoulement*.

In December 1984, identification documents for refugee claimants were introduced. In January 1985, job-specific employment documents were replaced with generic authorisations and manifestly unfounded "claims began to be reviewed by at least one member of the RSAC" (Plaut 1985, 46, 146, 151).

By 1985 it was apparent there were problems with the Act. One of the problems was section 71 which ordered the IAB, a court of record, to refuse to hear any case that did not first establish a probability of victory. The other was the problems created by the decision in *Singh v MEI* (1985) 1 S.C.R. 177. In Singh it was decided that the IAB must hear every case, notwithstanding section 71. The applicants argued that natural justice, the Canadian Bill of Rights and the Canadian Charter of Rights and Freedoms required that they be permitted to present their case before the IAB reached a decision. The Court's decision meant every applicant was guaranteed at least one oral, judicial hearing. The Court held that the claimant must have an opportunity to explain apparent inconsistencies or contradictions in his own testimony, or challenge Department of External Affairs reports about human rights conditions in the country fled which may (wrongly) contradict his testimony. However, the result of Singh was that the determination process for every claimant was lengthened further.

The Singh case raised another important matter. The Immigration Act 1976 restricted the right to claim refugee status to persons undergoing an immigration inquiry to determine they should be deported. In other words, individuals legally in Canada could not claim refugee status; they would need to commit some offence to trigger an immigration inquiry before they could claim refugee status. Such an inquiry ran the risk of an unsuccessful claim.

In his 1985 report "Refugee Determination in Canada" Rabbi Gunther Plaut (1985, 60-64, 85-86, 91-92, 100-104, 107-119, 120-129) made the following recommendations:

> "(1) All persons, regardless of their immigration status, have a right to make a claim to Convention refugee status either at a port of entry or while physically present in Canada;
> "(2) The exclusion and cessation clauses of the 1951 Convention be incorporated into the statutory definition of a refugee;
> "(3) The concept of inadmissible claims should be introduced (covering claims that are legally inadmissible, have passed the time limits or are repeats) and that these should not be pursued

through the complete refugee determination process. As safeguards, both a refugee board member and a representative of the UNHCR would have to agree that the claim was inadmissible and that the claimant would be entitled to appeal, with leave to the Federal Court of Appeal;

"(4) The refugee determination hearing would be a non-adversarial, co-operative inquiry;

"(5) The hearing before the Refugee Board should be public, subject to the right of the claimant to require that it be held in camera;

"(6) The UNHCR should have the right to be present, via its representatives, at all hearings or reviews, at all levels, in order to present evidence, make submissions or voice opinions during decision-making deliberations;

"(7) Claims should be determined by the Refugee Board in accordance with a procedure that provides for two oral hearings and an appeal, with leave to the Federal Court of Appeal. Such a procedure is estimated to take about five and a half months to complete;

"(8) The Refugee Board should have the power to recommend cases for humanitarian and compassionate consideration to the Minister; and that the claimant be advised of such a referral."

Matas (1989, 118 to 119) believed the Plaut report was commissioned because the Government did not like what two previous reports, namely the 1980 Task Force on Immigration Practices and Procedures and the Ratushny Report, had recommended. He states the Department felt no "workable" system had been devised.

> "Cabinet did not have a firm policy direction of the refugee determination process: it commissioned reports because it was casting about for a policy. The bureaucracy, on the other hand, had a policy that refugees should not be able to come to Canada on their own to claim status, but should be selected from abroad. At that point, however, the Immigration Department could not sell its policy to Cabinet. Instead the Department simply objected to all the policies proposed by others. Eventually the Government changed and the bureaucracy found a government receptive to its 'closing the door policy.'"

On 21 May 1986 the Minister of State for Immigration announced proposed changes to the refugee determination system. These changes were designed, first to "help those who genuinely need protection and discourage those who seek to use the system for purely economic reasons" and second, to respond to the 1985 recommendations of Plaut concerning weaknesses in the existing system (EIC 1986, 43). In addition to these major changes the Minister announced the introduction of "administrative review" and "fast-track" approaches to refugee status determination. Both were designed to eliminate the backlog of refugee claimants that had developed and thus enable a new determination system to be introduced once Parliament had passed the proposed legislation.

BILL C-55

On 5 May 1987 the Minister of Employment and Immigration the Hon. Benoit Bouchard introduced Bill C-55 known as the Refugee Reform Bill to establish a new refugee determination process for Canada. The Bill created an independent Immigration and Refugee Board. The Board had two sections - an Immigration Appeal Board to deal with immigration matters and a Convention Refugee Determination Board to deal exclusively with refugee claims.

The Bill proposed:

(1) Every person arriving in Canada claiming to be a refugee will first be seen by a panel of two people: one, a member of the Refugee Board and the other, an immigration adjudicator.

(2) People with refugee status elsewhere and people arriving from safe third countries who had a reasonable opportunity to claim protection will be returned to those countries. People with no arguable basis for their claims will be returned to their country of origin. A unanimous decision is required to remove such people, and they retain a right of appeal by leave to the Federal Court even though they are outside Canada. (This reverses the decision in *Hunt v M.M.I.* (1978) (2 F.C. 340) and ignores the reality that many countries bordering on crisis spots in Asia, Africa or South America, may be able to offer asylum in the strict sense but not means of substance or the opportunity of integration. Such asylum will not, in the long run, save the individual).

(3) Those people with an arguable claim will be referred to the Refugee Board for an oral hearing.

(4) The oral hearing will be before two members of the Refugee Board: claimants accepted by the Board can apply for landing. An unanimous decision is required to reject the claim. Decisions of the Board may be appealed by leave to the Federal Court.

In introducing the Bill the Minister stated that refugees faced delay and uncertainty because of abuse of the existing system. Increasing numbers of economic migrants were circumventing overseas selection by coming to Canada and falsely claiming refugee status. In 1980, 1600 claims to refugee status were made within Canada. In 1986, the number had risen to over 18 000. This abuse had to be constrained, not only for its negative impact on refugees, but because it jeopardised the integrity of the immigration program. The inefficiency of the existing system stimulated further abuse, compounding the delays in the system (cf. EIC 1987, 34).

The determination process of Bill C-55 was as complex as the system it replaced. A person first had to go through an immigration inquiry to determine if the Immigration Act had been breached. Counsel is not present. Next the claimant had to appear before a two-person panel, including an immigration adjudicator and Refugee Board Member. The panellists determined whether the person was eligible to make a claim for refugee status. Section 48(3) of the Act, inserted by this Bill, places the burden of proof on the claimant. This is particularly onerous as refugees do not usually arrive with witnesses, documentation and evidence to support their claim of persecution. If one panellist approved the claim, the claimant went onto the next stage. If both members rejected the claim, the person is ordered deported or given a departure notice. If the claimant came from a designated safe third country, the claimant would be held ineligible. The government would then try to remove the claimant to the third country from which the claimant came. The result might well be Canada may send some refugees into orbit, forcing them to wander from country to country seeking refuge.

Those refugees who passed the eligibility screening proceeded into the next stage: a credible-basis hearing. Again, the case was heard by two panellists - an Immigration Department adjudicator and Refugee Board member. If one of the two accepts the claim, the claimant was passed on to the full hearing.

After the credible-basis hearing, where the claimant succeeded, the adjudicator alone determined whether to issue a conditional departure notice (a notice which would allow a claimant to return to Canada provided normal immigration criteria were met) or a conditional deportation order (an order that would ban re-entry to Canada for life except with the Minister's consent). A conditional deportation order was more likely to be issued than a conditional departure notice because refugee claimants would be reluctant to agree to a departure notice after succeeding in establishing a credible-basis. The refugee's claim is based on fear of persecution and it would be inconsistent for the refugee to agree to voluntary return to country of origin. The decision is conditional because it takes effect only if the claimant fails at the full hearing. If at least one panellist accepts the claim, the claimant was passed on to the full hearing. It should be noted that the credible-basis provisions have been repealed by Bill C-86.

At the full hearing, two Refugee Board Members examine the claim. If at least one member accepts the claim, the claimant succeeds. The claimant must then apply for landed immigrant status. If both members reject the claim, the claimant may then apply for leave to appeal to the Federal Court if it is desired to remain in Canada. An

appeal lies to the Supreme Court of Canada. While the Act cuts off access to the Supreme Court when leave is denied to the Federal Court of Appeal, access remains where the Federal Court of Appeal grants leave. Access to the Supreme Court is also with leave. Mistakes are therefore virtually impossible to correct because there is no appeal on the merits; appeals are heard only by leave and claimants may be removed before the appeal is heard.

As I see this legislation, each case will be involved in a multi-year delay until it is decided. It is likely that considerable numbers of people who may not be declared refugees will remain in Canada for years waiting for their claims to be determined. If, in fact, the government's main concern with this legislation was to remove abuse and not deny protection, it could have shortened the lengthy, complex refugee determination process. The first priority of this legislation seems to be removing ineligible claimants from Canada.

The Immigration Act 1976 imposed a duty on carriers to pay removal and detention costs of passengers not in possession of valid documents at the time of arrival, and fine or imprisonment for knowingly contravening these provisions (ss86, 87, 93, 94, 99). In 1986, 541 airlines were each fined $CAN1000 for not demonstrating enough vigilance in checking passenger documentation. Clause 22 of Bill C-55 reduced to 72 hours, the period of detention for which carriers are liable for costs, but allows the Government to seize aircraft to guarantee payment of fines. The monetary penalty was increased to $CAN2000.

Canada and Australia as well as the United States have used visas to control the entry of migrants. Carrier sanctions serve to enforce visa regulations, and in turn to regulate migration flows. The Canadian amendment assumed a new role in controlling the arrival of asylum-seekers.

BILL C-84

On 11 August 1987 the Minister of Employment and Immigration, the Hon. Benoit Bouchard tabled Bill C-84 known as the Refugee Deterrents and Detention Bill designed to stop abuse of the refugee determination system through firm deterrent measures. Specifically the legislation gave power to:

* substantially increase penalties for smugglers and their accomplices to a maximum of 10 years imprisonment and $CAN500 000 fine;

* impose heavier fines and penalties on transportation companies that bring undocumented people to Canada. Transportation companies will be liable for a $CAN5000 penalty for each undocumented passenger;

* permit detention of a refugee claimant for seven days;

* detain people who arrive without proper documentation until their identities can be established; and

* remove people who pose a criminal or security threat. They will be detained until they can be removed from Canada.

Both Bills were assented to on 21 July 1988 and proclaimed to commence on 1 January 1989.

Bill C-55 in its final form included a contentious provision rejected in earlier forms twice by the Senate whereby the Minister could turn away ships carrying illegal migrants in Canada's contiguous zone i.e. 12 to 24 nautical miles offshore. Finally this was limited to operation for a period of six months from date of Proclamation of Bill C-84. This provision was proclaimed on 3 October 1988. While the Minister promised not to turn away any genuine refugee, it is impossible to conduct a proper refugee determination on the high seas. Once a ship is turned away, the government would never know whether those on board were real refugees or not. Fortunately the power was never used. It is worth noting that when Thailand was turning away Vietnamese boat people, Canada protested.

Nash (1989, 56-64) regards Bill C-55 as a good example of the Canadian refugee policy-making process in recent years. The landing of a boatload of Sikh refugee claimants in Nova Scotia caused public outcry. On 12 July 1987, 174 Indian Sikhs waded to shore at dawn on Nova Scotia's south shore. They were brought to the coast by a Chilean registered freighter *The Amelie*. The Sikhs were transferred to *The Amelie* the day the ship left Rotterdam. They had come from West Germany, Belgium and the Netherlands. The Sikhs were not given Minister's Permits. India was not on the list of eighteen countries. In any case, by that time the list had been abolished. They were initially detained, denied access to counsel, and not brought before an adjudicator within the time period required under the Act.

Refugees arriving by boat off Canada's shores create a dramatic situation that attracts attention no matter however the government reacts. The same situation applies to people arriving by boat off northern Australia. However, Australians and Canadians

inevitably draw conclusions from the event based on government response. The government could have used the Sikh landing to highlight the disincentive schemes that were driving refugee claimants from Europe and the need for more equitable sharing of the world's refugee problem. Instead, the government claimed there was an emergency demanding a general clampdown on refugees, a need to be tough with refugee claimants because they were abusers.

As a result of media activity the Parliament was recalled for a special session. Adelman (1991, 209-210) considers that the alarm about the Nova Scotia incident was used by politicians and senior immigration civil servants as a pretext for amendments which were already in the pipeline. As a result Bills C-55 and C-84 aimed at deterring arrivals by refugees were rapidly passed by the House of Commons. Bill C-84 leaves an impression of panic to prevent a repeat of the Sikh landing. The Senate referred the Bills to its Committee on Legal and Constitutional Affairs. During the public hearings many groups made known their opposition to the legislation. However, the government did not relent. Whilst accepting a few amendments the most important one, as noted above, the six month limitation the government held fast to the major provisions of the Bills.

While increasing the penalty on airlines the violation was changed to a strict liability offence. Such a breach is an offence where no intent is required to be proved. All the prosecution has to prove is that the act was committed. Even if the act was committed carelessly, inadvertently or unintentionally the accused must be found guilty. (s. 98.1).

It might be noted that the United Kingdom took similar action in respect of carriers with the introduction into Parliament in May 1987 of the Immigration (Carriers Liability) Bill. The Bill was retrospective to 4 March 1987. It imposed heavy fines on airline and shipping companies transporting people without proper visas or documentation. The legislation was an apparent response to an increase in the number of asylum applications received at British ports of entry, despite more rigorous visa requirements. The Home Secretary, Douglas Hurd, stated when introducing the Bill, that stricter visa requirements had not prevented people arriving without visas and resisting immediate return to their country of origin by claiming asylum. In the aftermath of the Bill's passage, there was an immediate reduction in the number of port asylum applications received weekly, from an average of about 60 to an average of 25 between 5 March and 26 April 1987. During the same period air and shipping lines incurred 600 fines of £stg 1000 under the new legislation (*Refugees*, July 1987, pp. 15-16).

It might well be impossible for a refugee to obtain a visa. Moreover, if a person managed to get to a third country, entry would be refused because the first country of asylum had to process the application.

In effect, carrier personnel are becoming the determining authority and thus responsibility is removed from the appropriate State authority. The interests of refugees are therefore likely to be subordinated to commercial interests. In this regard, the United Kingdom, Canada and Australia cannot be said to be acting in accordance with the recommendations of the Executive Committee of UNHCR (Conclusion No. 8 (xxviii) 1977), which set out to guarantee safeguards in procedures regarding determination of refugee status. In the light of Article 31(1) of the Vienna Convention on the Law of Treaties which states that a treaty must be interpreted in good faith, it could be argued these countries (and many others) are not acting in the spirit of the 1951 Convention. Strictly speaking, the principle of *non-refoulement* has only a territorial application, however, the basis of the principle is to protect individuals from the risk of persecution. The 1951 Convention states that a person cannot be classed as a refugee until the person has crossed an international border, but to prevent the flight of a potential refugee has the same effect as *refoulement*. Whilst it can be argued that visa regulations and carrier sanctions are not designed to prevent the flight of bona-fide potential refugees, I would argue that airline check-in clerks are not appropriate persons to decide who may or may not be classified as refugees.

Article 31 develops the principle in Article 26 which in turn provides that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith". The principles of "good faith" and "pacta sunt servanda" are declared in the Preamble to the Vienna Convention to have been "universally recognised".

The administrative structure created by the 1989 amendments to the Act is notable in two respects. First, it vested the responsibility for determination of refugee status in an independent agency, the Immigration and Refugee Board. Second, it provided for a non-adversarial hearing for all claimants. Especially impressive has been the sheer size of the resources that the Canadian Government has been prepared to devote to ensuring a high quality of administrative justice. The Board is by far the largest administrative agency in Canada, with a full-time membership of 250 (of whom all but 20 are assigned to the Refugee Division of the Board) and a support staff of 750.

BILL C-86

The Bill, effective from 1 February 1993, empowered the Minister to make Regulations to set quotas for all classes of immigrants in the annual immigration plan and specifically for the sponsorship of Convention refugees. In particular, the Minister would be able to limit the number of refugees privately sponsored. The Minister was authorised to enter into agreements with other countries for the purposes of co-ordinating immigration policies, including sharing the responsibility for refugee determination without further Parliamentary debate or public consultation. Immigration Officers were empowered to fingerprint, photograph and search all refugee claimants. This provision may appear draconian but was necessary to prevent fraud. The government can share this information with municipal authorities subject to privacy legislation. Fingerprinting will also help detect criminals trying to enter Canada as refugees. Detention provisions were strengthened, with a review after the first 48 hours, and then once every thirty days compared to the then seven day review. The provisions increasing the inadmissibility criteria were also amended, expanding the grounds on the basis of which a claimant may be detained.

The provisions of the Bill were to apply retrospectively to every application proceeding, or matter under the Act or Regulations that was pending or in progress.

If a refugee claimant was deemed inadmissible. then the claimant was refused the right to make a refugee claim before the Convention Refugee Determinations Division (CRDD) and was subject to removal from Canada.

The basis for criminal inadmissibility was broadened. According to the Bill, there need only be reasonable grounds to believe that there had been a criminal conviction outside of Canada, and not actual proof of that, for a person to be judged inadmissible. In some cases criminals sought refugee status in Canada because they knew by doing so they could impede efforts to extradite them for criminal prosecution in other countries. The amendment meant a system intended to protect refugees will not be abused. There was also a guilt by association clause. A person is inadmissible if there are reasonable grounds to believe that the person is a member of an organisation that, there are reasonable grounds to believe, is engaged in illegal or criminal activity. Furthermore, a person can be deemed to be inadmissible if there are reasonable grounds to believe the person will engage in acts of espionage, subversion, terrorism and so on. This is a very wide provision and could result in people being determined

inadmissible incorrectly. There is no guidance as to what reasonable grounds are in the legislation.

Terrorism is defined very broadly as "any activity directed towards or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political objective". This could apply to anyone involved in any type of insurrectional activity.

As was previously the situation, a person claiming refugee status will be deemed ineligible to have his claim heard by the Convention Refugee Determination Division if the person is a Convention refugee in another country to which the claimant can be returned; has come to Canada through a safe third country where a claim could have been made; has been determined to be a member of an inadmissible class.

A person who has come either directly or indirectly from a safe third country is considered ineligible (this does not depend on whether the person was in that country legally or illegally). Such a country is so designated for two years and the designation can be renewed. The safe third country test is whether a country complies with Article 33 (*non-refoulement* provision) of the Geneva Convention, with the government supposed (but not necessarily required) to take into account the country's human rights record, and whether Canada has a responsibility sharing agreement. The Minister may, in certain cases, waive the safe third country provision. However, the courts have decided that civil war, even on religious grounds does not constitute persecution (*Darwick v Minister of Immigration I.F.C.* 365 (Can 1979).

The single most important feature of the eligibility criteria in the amending legislation, is the safe third country provisions coupled with the new powers of the Senior Immigration Officer. However, this provision has not yet commenced. Canada has yet to secure bilateral agreements with safe third countries to ensure that they will take back refugee claimants who are denied access to Canada's refugee determination system. The Senior Immigration Officer, using a list of prescribed safe countries, will be able to determine in a very short time after a person's arrival at a port of entry that the person is ineligible and therefore not permitted to enter Canada. Thus, the country from which the person has just come will be required to take the person back, since the person is deemed never to have entered Canada. Under the new system, there is no requirement for an inquiry of any sort, and thus the determination of ineligibility will be made on-the-spot. Significantly, legal advice

will not be available. Discussions for bilateral agreements are continuing with USA, Western Europe, Australia and New Zealand.

The 1992 amendments are in some respects similar to the provisions of the German Constitutional amendments agreed to in December 1992 but effective from July 1993. Section 46.01 provides: "(1) A person who claims to be a Convention refugee is not eligible to have the claim determined by the Refugee Division if the person ... (b) came to Canada ... from a country ... that is a prescribed country under paragraph 114(1)(s) ..." Section 114(1(s) in turn provides: "The Governor in Council may make regulations ... prescribing, for the purpose of sharing responsibility for the examination of persons who claim to be Convention refugees, countries that comply with Article 33 of the Convention ..."

If the Senior Immigration Officer deems a claimant eligible, the claimant is referred to the CRDD for a refugee hearing. The burden of proof of eligibility is on the claimant.

The CRDD must start a hearing as soon as is practicable. Prior to the amendment, the hearing date had to be set within ten days of the conclusion of the inquiry which established the creditable basis and referred the claim to the CRDD. There is a provision for a member of the CRDD to determine that a claimant is a Convention refugee without a hearing, the rules for which will be established by the Chairperson of the IRB.

Refugee hearings will be public unless the CRDD determines that there are security risks. The onus is now on the claimant to show why the hearing should not be held in public and that the claimant would be adversely affected by a public hearing. Currently, the burden of proof is on those members of the public who want to attend to show that the person would not be adversely affected.

With the elimination of the initial hearing stage, all claimants to refugee status in Canada now go through a single refugee determination hearing. This hearing normally takes place before a panel of two members of the Refugee Division although a claimant may consent to have just one member hear the claim.

During the hearing, the panel applies the definition of "Convention refugee" to the evidence presented. In most situations, only one member needs to decide in favour of the claimant. However, a unanimous decision of the two-person panel is required where there are reasonable grounds to believe that the claimant, without valid reason

(which is not defined) has destroyed or disposed of his or her personal identity papers or that the claimant, in the period since having made the refugee claim, has visited the country from which he or she claims to have fled by reason of fear of persecution.

In some circumstances, claimants may have their claim determined by a single member without a hearing. This is called the Expedited Process and it is used where there is a high degree of certainty that a panel hearing would result in a positive decision for the claimant.

This represents a reversal of the previous legislation whereby all refugee claimants were given the benefit of doubt. The amendment may create a situation in which different groups of refugee claimants will be treated differently. Failure to appear, failure to submit the relevant forms and other failures to proceed as the CRDD deems relevant can result in the CRDD ruling the claim has been abandoned. The claimant can immediately apply for family reunification when the claim is approved.

The amendment limits the right to appeal. It did not alter the existing provisions that there is no right to an appeal on merits but simply leave to seek judicial review. However, instead of being heard by three judges at the Federal Court of Appeal, the leave petition will be decided by one judge in the Trial Division. No decision of the Federal Court-Trial Division can be appealed to the Federal Court of Appeal unless the Judge in the Trial Division has determined when delivering the judgement that a point of law needs to be determined or states a case to the Appeal Division.

Claimants ruled ineligible to make a claim and against whom a removal order has been made have seven days to seek leave in the Federal Court for judicial review, after which the removal order will be executed. In the case of a refugee claimant whose claim is judged to have been manifestly unfounded by both members of the CRDD panel, that claimant has only seven days in which to lodge an appeal and then will be removed from the country.

The limitations on the execution of a removal order before seven days do not apply to those residing or sojourning in the United States of America or St Pierre and Miquelon, (two French territories off the coast of Newfoundland) or those determined to be ineligible because they came from a safe third country and who are to be removed to a country with which Canada has a burden sharing agreement. A person judged by the CRDD not to be a refugee can be removed immediately to the USA or St Pierre and Miquelon if that person had been residing or sojourning there.

The amendments allow the Deputy Minister or a Senior Immigration Officer to issue an arrest warrant against someone who is subject to an inquiry or a removal order where, in the opinion of the Deputy Minister or Senior Immigration Officer, there are reasonable grounds to believe the person is a danger to the public or will abscond.

The person must comply with reporting conditions and must appear before an immigration officer at the time of leaving Canada, otherwise a departure notice will be treated as a deportation order, making it more difficult to re-enter Canada. A person who is under a departure order which is deemed to be a deportation order cannot return to Canada as long as the cost of removal has not been repaid to the Government.

The amendment provided for greater authority to confirm the identity of refugee claimants in order to stop multiple refugee claims and then multiple applications for welfare. The Minister cited one case where a refugee claimant was receiving seventeen separate welfare cheques at the same time. The number of people involved in such fraud is small but the problem is serious - these cases undermine public support for the immigration and refugee system.

SMUGGLING

There seems to be considerable concern in Canada about smuggling migrants (refugees). A number of Canadian Government officers have pointed out (personal communciations) that the potential profits from smuggling illegal migrants are large, the risks slight and penalties prior to the 1993 amendments (Bill C-86) an insufficient deterrent. Prior to 1 February 1993, the penalties for smuggling fewer than 10 illegal migrants were far less stringent then the penalties for people involved in larger operations. This encouraged smugglers to engage in smaller but far more frequent operations. The amendments provided for sanctions against smuggling migrants, regardless of the numbers. The new penalties range from a fine of $CAN10 000 or up to one year imprisonment, or both, to a fine of $CAN500 000 or up to ten years' imprisonment, or both.

It has been suggested (Personal Communciations) that smuggling of immigrants, including refugees, into Australia is rife. This is denied by the Department. The Department has a good record in tracking down illegal immigrants. It seems the Department would soon find out if smuggling was rife.

The Immigration Act 1976 allows equal access to resettlement to all refugees. However, the Canadian government can still exercise control over who is accepted while carrying out the policy. Interpretations of resettlement needs for various regions correspond to the Canadian foreign policy interests. For example, while Canada has been open to Indo-Chinese and East European refugees (both groups fled communist regimes) it has largely ignored victims of political crises in Africa, West Asia and the Middle East.

Indo-China was the main area for Canadian refugee selection between 1979 and 1981. Since then, there has been a considerable decline in the number of refugees actually resident in that region, and consequently, the numbers of Indo-Chinese refugees admitted by Canada have also declined. Up to 1986 Canada admitted some 6000 refugees from South East Asia annually (EIC 1987, 39).

One example of international co-operation endorsed by Canada is the UN's Comprehensive Plan of Action for Indo-Chinese (Vietnamese and Laotian) Refugees. In 1989 Canada provided a grant of $CAN5M to the UNHCR to help implement the plan. By the end of 1991 Canada had accepted 13 000 people under the plan.

Canada also works in the international political arena to maintain or restore stability in countries that might otherwise produce refugees. In addition, Canada supports the work of refugee organisations overseas, giving substantial financial and technical assistance. In 1991-92 the Canadian International Development Agency budgeted a total of $CAN111M for general international humanitarian assistance, of which 70 per cent was targeted to refugees. The UNHCR received $CAN38M, and the United Nations Relief and Works Agency received $CAN11.4M. Some of the $CAN13.4M awarded to the International Committee of the Red Cross, and of the $CAN5.8M granted to the Red Cross Federation, was also used for refugee relief. By 1993-94 humanitarian aid to developing countries (excluding Eastern Europe and former Soviet Union) had increased to $CAN232.7M.

Like Australia, Canada is moving towards what is known as "Fortress Canada". An example is the visa requirement introduced in 1987 under which citizens of countries requiring a visitor visa to enter Canada were required to obtain a transit visa when the purpose of their visit was to travel through Canada en route to a third country. The purpose of this was to reduce the number of non bona fide visitors who abuse the transit privilege to claim refugee status.

Then there was the attempt in Bill C-55 to empower the Minister to direct a ship carrying illegal migrants within 24 nautical miles of Canada's shores to leave or not to enter the 12 mile zone. Critics felt that turning ships around without allowing due process to any refugee claimants on board violated section 7 of the Charter of Rights and Freedoms by depriving them of a hearing. This proposal was later amended to require the Minister to take into consideration the state of the vessel and its passengers and the 1951 Convention. Eventually a further compromise as referred to previously was passed. However the mentality was best summed up by Minister Bouchard when he said that the removal of the ability to turn ships around would leave a significant gap in Canada's ability to control its borders.

Gordon (1989, 26-27) links "Fortress Europe" and racism. He wrote:

> "The creation of "Fortress Europe" closed to the outside world both reflects this xenophobia and racism and buttresses it. This racism will not only keep black people out of the countries of the European Community; it will fuel hostility towards black people already in the EC by conveying the message that black people and other Third World peoples are a problem."

It is claimed by some commentators that Canada's policy is racist. Of the total number of refugees Canada admitted in 1986, 31 per cent came from Eastern Europe, 35 per cent from Southeast Asia and 21 per cent from Latin America. Yet according to the United States Committee for Refugees (USCR) data on the sources of refugees in need of aid and/or protection, only 6 per cent of the world's total were from countries in East Asia and the Pacific, 3 per cent from Latin America and the Caribbean and 0.2 per cent from Europe. By contrast, the Middle East/South Asia region produced 64 per cent of refugees needing aid and/or protection in 1986, and Africa was the source of a further 26 per cent. (USCR 1987, 36-37). However, only 6 per cent of refugees admitted to Canada in that year were from Middle East/West Asia region and only 7 per cent were from Africa. Thus, Canada's pattern of admissions has emphasised regions that are not the major sources of refugees and has given relatively little attention to the regions that are responsible for 90 per cent of the world's refugees. These data combine Convention refugees and the Designated Classes. About 21 per cent were Convention refugees. As pointed out in this Chapter, refugees in Canada are seen primarily as immigrants. No doubt the controls which are in place to select suitable immigrants spill over to the selection of refugees. This is not being racist. I do not agree with the contention that Canada's policy is racist. Canada, as does Australia, consults with UNHCR each year to ascertain from which countries'

refugees should be accepted for resettlement and indeed which refugees should be accepted.

CONTROL

It is argued that Canadian refugee policy has been governed by the control concept. This concept has been built on three basic propositions. First, entry into Canada must be controlled. It is a country's sovereign right to control its borders and to control immigration. Second, those allowed to enter must be selected carefully to avoid undesirables or those considered unsuitable. Third, the selection should focus on those who will not be a drain on the Canadian economy and will make positive contributions to the economy. This has been a feature of Canadian immigration policy since farmers were brought over to open up the Prairies. These propositions act together to produce a refugee policy that no refugee should be able to select Canada and arrive spontaneously. This policy was firmly entrenched in law by the 1988 amendments to the Immigration Act 1976. Indeed the government's priority is controlling abuse, not protecting refugees. A similar situation occurs in Australia. However, as pointed out in the previous chapter Australia is obsessed with control. The difference is that as soon as a case goes against the Australian Department it seeks to overturn it either by appeal to a superior court or by legislation. As shown in this chapter refugee law in Canada is relative stable and the Department accepts decisions of the courts.

Those claiming to be Convention refugees posed a threat to control. Under international and domestic law it was illegal to return refugees who had managed to flee to Canada and claim refugee status no matter how "undesirable" they may be in their beliefs or abilities. The Singh decision added to the concerns of those obsessed with control for it stated the Charter of Rights and Freedoms applied to asylum-seekers, making it even harder to return them to their countries of origin. Bills C-55 and C-84 in their original forms together with the visa controls announced in 1986-87 formed a comprehensive package aimed at preventing would-be asylum-seekers even leaving the country they wished to flee for Canada.

The result of the over-emphasis on control measures and an under-emphasis on human rights-based protection concerns has led to a decided hardening of government attitude toward refugee claimants, reflected in the way that Government officers portray claimants to the Canadian public, and in the increasing number of deportations of claimants, including removals to countries suffering from serious civil strife and

human rights abuses. The Government is moving to deport unsuccessful claimants with greater speed and determination.

At the 42nd Executive Committee of the UNHCR in 1990 there was a common concern from Europe, United States and Canada - illegal migration of people seeking economic opportunity in the north. Canada stated:

> "We have a very real and immediate problem. It is the unrelenting pressure of growing numbers of people on the move. They are on our doorstep, both in the developed and the developing world ... Canada favours the development of an international strategy to deal with the linkage between refugee, asylum-seeker and irregular migrant flows ... Order and control must be re-established over migrating movements. Not to do so will result in the loss of the domestic public support which is so critical in our efforts to assist true refugees. To do this, we must work collectively to discourage irregular movements" (1990, 2-3).

There can be no doubt that Canada's refugee policy is aimed at preserving the integrity of the system which means exercising control over who comes to Canada and under what conditions. Moreover, the emphasis is clearly directed at refugee claimants. Whether it is at Geneva at the EXCOM meeting, or in the Minister's Annual Report to Parliament, or in the report of the Chairperson of the IRB, or in the statement of the objectives of Canada's refugee program, the same theme recurs: for Canada to retain control over its borders the government must keep in check the numbers of refugee claimants arriving in Canada and be able to deport those whose claims are found not to be genuine. Similar policies are in force in Australia and the United Kingdom.

This policy became evident in 1990. The Chairperson of the Immigration and Refugee Board, Gordon Fairweather, stressed in his 1990 annual report the need for increased removals. He wrote -

> "The key to the success of the refugee determination system is sending clear signals to the international community that Canada will not tolerate abuses to the system. Without the deterrent factor represented by timely removals, the caseload on the system will only continue to expand past the ability of the Convention Refugee Determination Division (CRDD) to cope, no matter what efficiencies are introduced in the system or new resources applied to it" (Immigration and Refugee Board, 1990, 21).

In testimony before the Parliamentary Standing Committee on Labour, Employment and Immigration, the Minister of Immigration the Hon. Bernard Valcourt confirmed this direction when he said:

> "You know, for a few years we have let deportation and removal take the back seat to our other concerns under immigration. Again, to quote Mr Fairweather in his annual report from the IRB, no immigration system can function unless you have removal and deportation. So, on that front, we intend to be quite proactive and to remove and deport those who have no business in this country" (Canada, *Parliamenary Debates*, November 25, 1991, 6:24).

Before the same Committee, Mr Fairweather reiterated the need for a new, get-tough policy:

> "Perhaps members of this Committee aren't as interested as I am in words like the integrity of the system. Perhaps they think that's overstating my concern, but the fact remains that saying no is not an easy thing for members, despite extensive training and despite the highest acceptance rate in the world and the best refugee determination system in the world. We need to know from our partners that removals, as contemplated by the Parliament of Canada, are being efficiently and effectively carried through" (Canada, *Parliamenary Debates*, 27 November 1991, 7:12).

Associate Deputy Minister Harder told the Committee:

> "We are committed to the integrity of the determination system. The determination system in Canada is one of which Immigration Canada is proud, but removals are an essential ingredient in that process" (Canada, *Parliamenary Debates*, November 27, 1991, 7:10).

The Law Reform Commission of Canada (1991, 119) drew attention to inconsistencies in decision-making by the IRB. For example, in 1991 the national acceptance rate of claimants from Guatemala was 75 per cent, whilst in British Columbia it was 28 per cent. Similarly, the acceptance rate for claimants from the USSR was 7 per cent and only 18 per cent in British Columbia. The problem of concern was that some Convention refugees had been rejected by Canada because of mistakes made in the process. Sixty-eight cases which had been rejected were reviewed in 1991. Of these the Minister granted a Minister's Permit in 31 cases. In 1990 almost one in five IRD decisions the Federal Court examined were found to be defective, while in 1991 the number declined to one in seven.

It must be of concern that Convention refugees are being rejected by mistake and being deported. The problem seems in part to lie in the IRB refusing to accept country condition reports other than those produced by IRB documentation centres which fail to reflect rapidly changing conditions. The question that must be raised is whether such return is proper.

Article 14 of the Universal Declaration of Human Rights provides a right to seek asylum. While this Declaration is not an instrument that imposes legally binding obligations on signatory States, nevertheless as a principle of interpretation of the UN Charter it does exercise indirect legal influence through the decisions of the General Assembly. Furthermore it enunciates the principles that are behind the international and regional human rights conventions which do have legal force. Some of the Universal Declarations provisions either constitute general principles of law or represent elementary considerations of humanity (cf. Corfu Channel Case, ICJ Reports (1949) 4 at 22). Brownlie (1990, 570) argues that perhaps its greatest significance is that it provides an authoritative guide, produced by the General Assembly to the interpretation of the provisions in the Charter. The declaration has been invoked by the European Court of Justice as an aid to interpretation of the European Convention of Human Rights (Golder case, ILR 57, 201 at 216-217) and by the International Court in relation to the detention of hostages [3]in conditions of hardship' (Case Concerning United States Diplomatic and Consular Staff in Tehran, ICJ Reports (1980), 3 at 42). Thus it is generally accepted that the Declaration is part of customary international law. As previously pointed out it is the Covenants annexed to the Declaration which reflect the Declaration. These are binding on signatory States, however they are not customary international law.

It is submitted that Articles 5 and 14 referred to above form part of customary intentional law. Article 38 of the Statute of the International Court of Justice refers to [3]international custom as evidence of a general practice accepted as law'. Judge Read in the Fisheries case (ICJ Reports (1951), 191) stated that customary international law is the generalisation of the practice of States. The right to seek asylum, and non-torture would appear to be practices generally recognised by States as obligatory. The elements of custom in international law are duration, uniformity, generality of the practice and opinio juris et necessitatis. In terms of decisions of the International Court particularly in the Fisheries case and the Asylum case (ICJ Reports (1950) at 276-277) it is argued that Articles 5 and 14 are part of customary international law. However, it is stressed the right of asylum is not an obligation under customary international law.

The most basic right shared by both Convention refugees and people fleeing generalised violence is the right of *non-refoulement*. Article 5 of the Universal Declaration of Human Rights states that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". The same principle is enhanced in the Covenant on Civil and Political Rights. Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment states that "no State Party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture".

In enacting the various instruments the international community has made clear its obligation to protect the human person. It is difficult to reconcile State practice and these instruments in the case of Canada.

On December 30, 1992, the government imposed visa requirements on persons transiting on their national airlines making refuelling stops in Canada. The government cited the Moscow/Havana flights, which refuel in Newfoundland, Canada, as a place where transiting passengers have sought asylum. Between April 1 and December 11, 1992, 1971 passengers had requested asylum there during refuelling stops (USCR 1993, 151).

The results of the Canadian Government's policies are shown as follows from information supplied by Canada Immigration:

TABLE 4

Enforced Removals from Canada

By All Classes of Immigrations and Refugee Claimants

Year	All Classes	Refugee Claimants
1989	2 408	160
1990	3 039	839
1991	4 408	2 807
1992 (Jan to Feb)	1 202	547

SOURCE: CANADA IMMIGRATION STATISTICS

On 7 April 1992 the Minister of Immigration issued a press statement (92/13) which read in part:

> "The Honourable Bernard Valcourt, Minister of Employment and Immigration Canada (EIC), today reported that since the implementation of the present refugee determination in 1989 and improved enforcement provisions, removals have more than doubled. 'We do remove people under due process of law who abuse our immigration and refugee determination systems. Protecting our borders and the Canadian society is a priority of Canada's immigration policy', Mr Valcourt said. Last year, EIC removed over 4400 people from Canada, 1600 more than were removed in 1990, and 2000 more than removed in 1989. Some 500 of those removed in 1991 were convicted criminals and several were known terrorists. During January and February 1992, a total of 1202 persons were removed, already half of the total for all of 1989,' the Minister added."

On 15 June 1993 the Canadian Prime Minister Kim Campbell announced a major organisational shuffle of federal departments. One change was the abolition of Canada Employment and Immigration. The refugee portfolio was split into two. The point of separation was the protection division. All matters after the protection decision (eg settlement, language, training) were allocated with immigrant settlement and employment programs to a new "super" Ministry of Human Resources. Those matters before the protection decision (eg overseas refugee selection, inland refugee determination) were grouped with immigrant selection, prisons, criminal programs and an on-coming border control program under the new Ministry of Public Security.

The Minister of Public Security, the Hon. Douglas Lewis, wrote:

> "Last winter we passed Bill C-86. The legislation updated Canada's Immigration Act for the first time since 1976. But through all those reforms, the least of Canada's immigration policy remains unchanged. Its primary objective is still to bring to Canada individuals who can contribute to our economic development and to reunite families and to protect refugees. At the same time, the series of new measures introduced with Bill C-86 will allow Canada to address the realities of the 1990s. These measures will assist us to more effectively select newcomers and to accelerate their processing. They allow us to better protect a vital national program and Canadians from those who would abuse our generosity or break our immigration laws, and they further streamline a highly regarded refugee determination system" (Refugees, July-August 1993, 18-19).

Referring to the new Public Security portfolio the Minister said:

> "Canada and Canadians will benefit from these changes through improvements in the management of our immigration policy and programs and through more effective control over the security of our borders.
>
> "I will not deny we have given extra weight to the issue of enforcement by placing key elements of the immigration program within a Public

> Security portfolio. This action is intended to preserve the integrity of a bedrock policy for Canada."

The Minister referred to a report by researchers for the Fraser Institute of Vancouver which found that Canada's main television networks in general cast news stories on immigrants and refugees in a negative light. He said an immigration policy is worthless without the ability to enforce removal or deny entry to a country's sovereign territory. He concluded:

> "By consolidating management of our border activities and our immigration enforcement activities, I am convinced that we can exercise more effective control over entry to Canada, ensure that we better protect all Canadians, and reduce abuse of Canada's generous immigration and refugee programs."

What was missing from the Minister's article was evidence of abuse. The Minister was not introducing new policies. All the re-organisation really did was strengthen border policy by bringing together customs officers, RCMP and immigration officers into the one ministry. One can, however, understand why many Canadians are outraged at the way the refugee system is operating. In an American case of Tenorio, I & N Dec No. A 72-093-558 (July 26, 1993) Immigration Judge Philip Leadbetter granted asylum to a homosexual man on the grounds that the respondent's sexual orientation constituted membership in a social group subject to persecution in his home country, Brazil. According to the report of the case in *the Georgetown Immigration Law Journal* (Vol. 7, 867) the Judge followed a decision by the Refugee Division of the Immigration and Refugee Board of Canada holding that a persecuted homosexual could be considered as a "Convention refugee" under the Immigration Act 1976. In that case, the Board ruled that homosexuality is so central to one's personality that those who identify themselves as such should be perceived as members of a particular social group. The Board does not seem to be adopting an inflexible, rigid approach as is the case in determinations by the Minister's delegates in Australia. The Board seems to be adjusting to changing circumstances which cause people to seek asylum. For example, in a recent case of Farah (*SMH*, 22 July 1994) it was reported that the Board "had granted refugee status to a Somali woman who fled her country with her 10-year-old daughter because she feared the girl would be genitally mutilated". The Board held the daughter's right to personal security would be grossly infringed if she were forced to return. The Board was satisfied that the authorities in Somalia would not protect the claimant from the physical and emotional ravages of female genital mutilation, given the evidence of its widespread practice in that country. Given the decision of the Australian Standing Committee of Attorneys General to introduce legislation in the Commonwealth and State jurisdictions banning

female genital mutilation (NSW has already introduced such legislation into Parliament) it would be hoped the Minister and the Refugee Review Tribunal would follow the Canadian decision.

The election of a Liberal Government saw the creation of the Department of Citizenship and Immigration.

1994 IMMIGRATION PLAN

On 2 February 1994 the new Minister for Citizenship and Immigration, Sergio Marchi, tabled the 1994 Immigration Plan in the House of Commons as required by section 7 of the Immigration Act. The Immigration Plan implemented election promises. These were stated in the Plan (1994, IV-V) as follows:

> "As stated in the "Red" Book (election campaign document), sponsorship of refugees for resettlement from abroad will be encouraged. The number of refugees resettled from abroad through government assistance will increase by 700 for a total of 7300, an increase of over 10 per cent. Private sponsorship will increase by 1400 for a total of 6000, an increase of over 30 per cent. These numbers represent the maximum ceiling if we are to tie refugee levels to predetermined budgets for settlement and integration programs. To increase or inflate refugee numbers without any correlation to integration financing would simply be irresponsible and misleading. The previous government made a habit of engaging in this exercise, something I will not do.
>
> "In addition we will accept 15 000 successful, in- Canada refugee claimants. I would like to emphasise this figure does not constitute a "cap" on the number of refugees who will be accepted. Genuine refugees will not be turned away from our refugee determination system in Canada.
>
> "The total estimated number of refugees for 1994 is 28 300.
>
> "This includes 15 000 successful refugee claimants who will be landed in Canada. The 28 300 also includes 7300 government sponsored and 6000 privately sponsored refugees, most of whom will fall into the category of being identified for resettlement by UNHCR. This means that Canada alone will accept about one-fifth of the 58 860 refugees who, according to the UNHCR, will require resettlement this year; which is consistent with Canada's resettlement policies. This is higher than in recent years, when actual refugee landings constantly fell far short of planned levels.
>
> "This government intends to meet its planning levels.
>
> "These adjustments to specific components of the immigration program respond to current needs and realities, both here in Canada and abroad.

> "They also reflect the commitments made to Canadians by the Prime Minister and the Liberal Party during the election campaign. The 1994 plan meets our basic commitment to support a dynamic immigration policy that balances humanitarian concerns, demographic and economic needs, and our capacity to absorb newcomers."

The Minister also announced a new style of consultation following which a new 5-year plan would be presented to Parliament, within the context of a 10-year strategic framework for immigration and citizenship. However, the Plan gives no joy to refugees seeking asylum in Canada. Control is still paramount. The plan (1994, 27) states:

> "The global phenomenon of irregular migration has become a political priority for the governments of all developed countries. Several European States, Canada, the United States and Australia have all recently passed or are considering legislation to tighten control of their borders to prevent entry by criminals or others wanting to enter illegally who would abuse social programs. But while these steps will impede the flow of irregular migrants, it does not offer a full solution to the problem. Increasingly, preventing the situations that give rise to the irregular movements of people is becoming an essential component in the management of international stability and security.
>
> "New legislative control measures have relieved the pressure on Canada's refugee status determination system for the time being. Before the implementation of the legislation in February, 1993, an average of 3000 people, most with improper documents, arrived in Canada and made a refugee claim each month. In the period following implementation, this number fell to approximately 1500, although it has since started to grow and is now approaching 1800 a month. It is anticipated that approximately 24 000 claimants have arrived in Canada in 1993.
>
> "The new system for ensuring that transportation companies assume their share of responsibility for passengers without proper documents has dramatically increased the effectiveness with which airline personnel checks travel documents on Canada-bound flights. Reductions in the number of improperly documented passengers are close to 50 per cent. But while movement through airports has been reduced, the same cannot be said for the land border. In fact, recent increases in the number of refugee claimants coming to Canada are due primarily to those who travel through the United States. Between February and December 1993, 58% of those making refugee claims on arrival came through the United States."

1995 IMMIGRATION PLAN

The 1995 Plan was submitted to Parliament in November 1994. It was the result of consultation with more than 10 000 people from every walk of life and from every part of Canada. It set out a policy direction which Minister Marchi stated the

government would pursue in the years 1996-2000 (*Canada, Citizenship and Immigration 1994*, iii). The Government proposes to encourage participation of the Canadian community in the refugee program. More emphasis is to be placed on collaborative efforts with the NGO community. The Plan noted (p. 18) that:

> "The relatively low number of refugee claimants determined by the IRB to be Convention refugees who are expected to be granted landing in 1994 is the result of the legislative requirement for refugees to provide proof of identity. This documentation is not always easy to obtain for individuals from some areas of the world. Measures will be taken in 1995 to deal with the impact of this provision, while ensuring the protection of Canadian society. As a result, it is expected that 12 000 to 18 000 successful refugee claimants will be landed in 1995 compared with 8000 in 1994."

This is an important policy change. It represents a loosening of control at a time when Australia is increasing control. The Plan notes that new policy directions will ensure that meeting the needs of refugee women continues to be a priority. This follows from the Minister's "Declaration on Refugee Protection for Women" by which CCI "... recognises the need to overcome traditional, male-oriented views of the potential of refugees for 'successful establishment' in Canada".

TABLE 5
THE IMMIGRATION PLAN

	1991	1992	1993	1994 (Plan)	1994 (Projected)	1995 (Plan)
Refugees landed in Canada	10 424	21 389	13 343	15 000	8 000	12 000-18 000
Govt assisted abroad	7 678	6 259	6 600	7 300	7 300	7 300
Privately sponsored	17 368	8 960	4 600	6 000	2 700	2 700-3 700
Dependents abroad						2 000-3 000
TOTAL	35 470	36 608	24 543	28 300	18 000	24 000-32 000

SOURCE: CANADA IMMIGRATION ANNUAL PLANS

Canada, in 1992, received a total of 37 720 asylum applications, compared to 30 533 in 1991 and 36 198 in 1990. The recognition rate under the 1951 Convention was 57 per cent in 1992, compared to 64 per cent in 1991 and 70 per cent in 1990. The five main groups of asylum-seekers during 1992 were Chinese, Iranians, Pakistanis, Somalis and Sri Lankans. In the first quarter of 1993, there were 5943 asylum-seekers who arrived spontaneously compared with 9960 during the same period in 1992. The recognition rate was 56 per cent. The main groups came from Sri Lanka, newly independent States, Somalia and China. The cost is quite considerable. It is estimated that an unsuccessful refugee claimant costs Canada from $CAN30 000 to $CAN50 000 in taxpayers' money.

Under the Voluntary Repatriation Programme founded by UNHCR 62 persons were repatriated in 1992 (29 to Chile, 26 to South Africa, 5 to Uganda, 2 to El Salvador). In the first quarter of 1993, 28 refugees were repatriated (22 to Chile, 6 to South Africa).

The quota for Government-assisted refugees accepted for re-settlement in Canada in 1992 was 13 000 places, out of which 8000 were allocated and the remainder comprised a management reserve. During 1992, the Canadian Government sponsored the resettlement of 5841 refugees. This included 1691 from Latin America, 1653 from South-East Asia, 1459 from the Middle East, 911 from Africa and 127 from Eastern Europe. Privately sponsored refugees were 6969. 111 persons were accepted under the women-at-risk program and six under the program for the disabled.

In 1993, 35 584 claims were referred to the IRB an increase of 4600 over 1992. Of the 25 549 claims completed during the year, 14 101 (55 per cent) were granted Convention refugee status while 11 448 (45 per cent) were denied. A further 5004 claims were withdrawn or abandoned. Principal source countries were Sri Lanka, ex-USSR and Somalia. From January to March 1994, 5488 claims were referred to the CRDD. Of the 6860 claimants for whom decisions were handed down, 4572 (67 per cent) were granted refugee status and 2288 (33 per cent) had their claims rejected. The number of claims pending at 31 March 1994 was about 17 000. The operating cost of IRB is in excess of $CAN90 million a year, while another $CAN30 million was spent on legal aid for claimants. In addition, the provision of welfare benefits to claimants pending the final disposition of their claims and the additional departmental staff required have made significant demands on public sector fiscal restraints and a

level of unemployment that might be expected to create a public opinion that is hostile to the admission of refugees. The workload of the Board and the time taken to process the claims indicate a high level of efficiency. Currently, the bold decision of the Canadian Government to set up a Tribunal to deal with the refugee determination process has made a significant contribution to administrative justice in Canada and is a beacon in an area of human rights that in many other countries is one of gloom.

TABLE 6

REFUGEE CLAIMS IN CANADA

1982-1994	
1982	3 300
1983	6 100
1984	7 100
1985	8 400
1986	18 000
1987	25 799
1988	34 498
1989	20 267
1990	36 198
1991	30 533
1992	37 720
1993	35 584
1994 (Jan.-March)	5 488

SOURCE: CANADA IMMIGRATION STATISTICS

The situation is little better in the United States where there is considerable backlash against immigrants. In the United States the Clinton Administration proposed the Expedited Exclusion and Alien Smuggling Enhanced Penalties Act of 1993. Officially the Act was proposed to countermand the increase in document frauds at airports and seaports and "alien" smuggling (Personal Communication, United States Information Service).

Under the proposed legislation, asylum-seekers would be summarily excluded from presenting their case to an Immigration and Nationality Service Officer if they were found to possess fraudulent documents. Yet, it is in the nature of a refugee experience for refugees to either have no documents or false documents so that they may escape

from their homeland. The Act also provided for an asylum-seeker to be immediately turned away if the asylum-seeker did not "directly depart" from their country of origin to the United States. This means that if the plane carrying the asylum-seeker touched down in another country which has a refugee program, the asylum-seeker could be returned to that "safe-country". The Act provided that when presenting a case to an INS Officer legal representation is not permitted. If asylum was refused there was no provision for review by an immigration judge. This was certainly a denial of procedural fairness.

To add insult to injury the United States Government in February 1994 imposed a $US80 fee for an asylum application. The *Guardian* headline (17 February 1994) was most appropriate - "What will they do next?" And what will they do next? From 28 February 1995 Canada imposed a $CAN975 Right of Landing Fee on all applicants for permanent residence including refugees. The federal government developed a loan option relating to the fee to assist those who had exhausted all other possibilities but who could demonstrate the ability to repay the loan.

The Clinton Administration, facing an anti-immigration backlash which has swept the United States planned to introduce major legislation on immigration in 1995. There was a call from Democrats as well as Republicans to reduce immigration (*SMH*, 29 March 1994). No doubt such legislation would contain further restrictions on asylum-seekers.

Compared with Australia, Canadian policy is quite clear and is spelt out in publicly available documents which are updated annually and submitted to Parliament. Annual plans are not required to be tabled in the Australian Parliament.

As will be noted there has been stability in the law. The Immigration Act 1976 has been amended on relatively few occasions when compared to Australia. This means officers of the Department and legal practitioners are able to keep up to date with legislative provisions and policies. Unlike Australia, Canada has not sought to codify policy. The Canadian system is certainly not as prescriptive as the Australian scheme.

Requests for refugee status can be made at Canadian ports of entry, at any Canadian Immigration Centre for those already in Canada or for those contravening immigration law, at the beginning of an immigration inquiry.

The Federal Court of Canada has a role in interpreting refugee law. The Canadian Government has recognised that every possible problem cannot be covered by legislation. The Minister has discretionary powers and the Courts have a role in ensuring this discretion is not abused. There is certainly no evidence of Canada, Immigration or the Minister seeking to amend the Act on each occasion a decision unfavourable to the Government is handed down.

Canada has a far greater problem than Australia. Refugees can arrive overland, by sea or by air. Yet Canada has not established a most severe regime as has Australia.