

IMMIGRATION: A PROVINCIAL CONCERN*

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Introduction

Immigration is a field of public policy which, by its nature, tends to be full of dilemmas large and small, partly because of the often diverging interests between individuals and the state, between governments with different objectives and priorities, and between individual states and the international community.¹

Policy development in the field of immigration is complex due to Canada's constitutional framework and lack of regional homogeneity. Both emotion and political sensitivity characterize the evolution of immigration law and public policy.

I. Other Federal States

Canada's approach to immigration has, at least theoretically, differed significantly from the approaches taken by Australia and the United States.

Section 51(27) of the Australian constitution gives the federal Parliament exclusive jurisdiction over "Immigration and Emigration." In addition, the federal government has jurisdiction over "Naturalization and Aliens". However, both academics and the judiciary are divided as to whether the central government can legislate solely on conditions for entry into Australia or whether it may also legislate with respect to the settlement and integration of immigrants.²

The constitution of the United States does not delineate an express immigration power. Case law appears to have given the federal government exclusive jurisdiction in this area due to its express powers over Foreign Affairs and Foreign Trade.³ In addition, it has been argued that the federal government controls immigration as a function of its status as an independent nation.⁴ It alone dictates the terms for the admission and expulsion of aliens.

II. Canada

Section 95 of the *British North America Act*,⁵ which outlines Canada's constitutional provisions relating to immigration reflects the perceived needs of Canada at confederation. Immigration, together with agriculture, was declared to be a concurrent jurisdiction with federal paramountcy. Section 95 reads as follows:

95. In each Province the Legislature may make laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time make laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any Provinces, and any Law of the Legislature of a

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1. F. Hawkins, "Dilemmas in Immigration Policymaking: The Problems of Choice, Political Will, and Administrative Capacity" in *Immigration* (B. Bonin ed. 1976) 41 at 49.

2. Brossard, *L'Immigration*. Montreal, 1976, unofficial translation 1982, para. 25.

3. *Id.*, at para. 20.

4. Schwartz, "Commentary on the Constitution" in *2 Rights of the Person* at 732.

5. 30 Victoria, c. 3.

Province in relation to Agriculture or Immigration shall have effect in and for the province so long and as far only as it is not repugnant to any Act of the Parliament of Canada.

This section in effect stipulates three separate provisions which arguably affirm federal primacy in immigration matters. Firstly, each province may make laws in relation to immigration into the province. Secondly, the federal Parliament has similar powers in any or all of the provinces. Thirdly, the last part provides for the resolution of conflicts of law by stating that an Act of Parliament will be paramount over any repugnant Act of a Provincial Legislature.

Constitutional case law which has evolved in this area appears to have rested, at least recently, more on the federal government's exclusive jurisdiction over naturalization and aliens found in s.91(25) than on primacy clause of s.95.⁶

In addition to their concurrent powers in s.95, provincial governments have exclusive jurisdiction over matters which affect the daily lives of immigrants and aliens within the province. Education,⁷ health,⁸ labour relations,⁹ social welfare,¹⁰ and private law¹¹ are provincial responsibilities. Thus, it can be argued that the provinces also have significant powers in the field of immigration. However, even though this legal framework suggests a shared jurisdiction, immigration has been managed almost exclusively by the federal government since these powers were bestowed more than a century ago. Canadian immigration law has developed with little or no consultation with the provinces.

III. Evolution of Canadian Immigration Policy

Historically, immigration policies were determined on the basis of prevailing economic and racial considerations. Management of immigration prior to World War II reflected the general policies of early federal governments. Decisions to develop eastern Canada as the nation's major manufacturing centre, to build a railroad across Canada, and to settle the prairies, influenced the pattern of pre-war immigration in Canada.

Canada's post-war immigration policies "reflect different phases of national development and administrative priorities. At all times they reflect the evolving character of Canada's political system, as well as the changing scene in international migration."¹²

Freda Hawkins, a well-known Canadian political scientist, maintains there have been four major developments in the evolution of Canadian immigration policy since the second World War. The first phase was the imple-

6. See e.g.: *Redline v. University of Alberta* (1979), 8 Alta. L.R. (2d) 313 (D.Ct.); aff'd [1980] 4 W.W.R. 133 (Alta. C.A.).

7. *Constitution Act 1867*, s.93 hereinafter and throughout the text referred to as the *British North America Act, 1867*, (abbreviated as *B.N.A. Act*).

8. *B.N.A. Act*, s. 92(7) and (16).

9. *B.N.A. Act*, s. 92(16).

10. *B.N.A. Act*, s. 92(16).

11. *B.N.A. Act*, s. 92(16).

12. *Supra* n. 1, at 44.

mentation of an "all-white"¹³ immigration policy, which remained virtually unchanged for the next fifteen years. It began when MacKenzie King announced the aims of Canada's post-war immigration policy in May 1947. In his carefully worded statement, King said: "It is not a 'fundamental human right' of any alien to enter Canada. It is a privilege. It is a matter of domestic policy."¹⁴

This statement reflected the Supreme Court's stance with respect to the power of a state to exclude certain classes of people. In *Vaaro v. The Queen*,¹⁵ Lamont J. stated:

It is generally considered that by the law of nations *the supreme power in every state has the right to make laws for the exclusion and expulsion of aliens and to provide the machinery by which these laws can be effectively enforced.*¹⁶ (emphasis added)

Prime Minister King's statement resulted in the establishment of a racially discriminatory immigration policy based on obscure economic and population goals. The first new *Immigration Act* since the 1920's was proclaimed on June 1, 1953.¹⁷ During this era, most of Canada's immigration law evolved via orders-in-council:

The new Act did not herald any significant conceptual advances, nor did it depart from the earlier tradition that admissibility to Canada was an administrative decision, resting in the first instance with immigration officers and in the final analysis with the Minister.¹⁸

It was not until 1962 that Canada began to abandon its discriminatory immigration policies. This year marked the beginning of the second major phase of immigration policy development. It was neither political nor public pressure that resulted in this major change taking place in Canada's immigration policy. Rather, it was recognized by those responsible for Canada's external affairs that such racial discrimination only fostered resentment towards Canada internationally, particularly, since Canada was the largest receiving country of immigrants in the world. By the mid-sixties, the composition of Canada's immigration movement began to shift in the direction of Third World countries, even though operationally Canada's immigration policy was still discriminatory. Overseas offices were, and still are, established in far greater numbers in "white" countries than in "coloured" countries. However, it was during this period that there was a move to base admission to Canada on humanitarian and labour market considerations.

For years Canadian governments had had to carefully balance the views of labour and management. The labour movement wanted to severely curtail immigration flow, whereas management promoted free immigration flow. It was within this context that Canada entered its next major period of immigration policy development — the manpower era.

13. *Supra* n. 1.

14. D.C. Corbett, *Canada's Immigration Policy* (1957) at 3.

15. [1933] S.C.R. 36. [1933] 1 D.L.R. 359. (1932), 59 C.C.C. 1; aff'g. (1932), 5 M.P.R. 151, 58 C.C.C. 161 (N.S.S.C.) (*sub nom Re Waroczyt*).

16. *Vaaro v. The Queen*, [1933] 1 D.L.R. 359 at 362 (S.C.C.).

17. R.S.C., 1952, c. 325.

18. J. Hucker, "A Synopsis of Canadian Immigration Law" (1975), 3 *Syr. J. Int'l. L. and Com.* 47 at 48.

One of the primary concerns enunciated by the Pearson government was the upgrading of the Canadian labour force. Studies completed in the mid-1960's indicated that the Canadian labour force was one of the least skilled in the industrialized world. In addition, Canada was relying heavily on the importation of skilled labour to meet its labour market demands. Prime Minister Pearson thus set Canada on a new course with respect to immigration policy when he disbanded the old Department of Citizenship and Immigration and established a new Department of Manpower and Immigration.¹⁹

The 1966 White Paper on Immigration was the government's first modern-day recognition of the "economic determinants of immigration policy."²⁰ The White Paper emphasized that:

Immigration policy must be consistent with national economic policy in general and with national manpower and social policies in particular.... It must be related to the conditions of national and international life in 1966 and the years ahead rather than to past events.²¹

As a result of this White Paper on Immigration, new regulations, containing for the first time, universally applied selection criteria, were introduced in 1967.²² In addition, amending legislation²³ also established the Immigration Appeal Board.

The manpower era naturally evolved into the next phase which Hawkins describes as "the deliberate association of immigration with population growth and other social and economic issues, as well as an equally deliberate effort to involve the provinces in future planning and development..."²⁴

IV. The Provincial Role

As has already been noted, immigration management has, historically, been an exclusive federal concern. Until recently, the only provincial legislation in this field was passed by British Columbia and other western provinces. The primary aim of this legislation was to restrict the rights of oriental immigrants and their offspring:

...[T]he federal government... failed to consult the provinces either in the formulation of policy or in immigration management. This applied to *all* the provinces, whether their immigrant intake was high or low.... In addition, the federal government made no real and sustained effort to encourage provincial initiative and participation.²⁵

Recent provincial involvement in immigration has mirrored the evolution of the French fact and the development of federal/provincial relations in Quebec. From Confederation onward, no steps were taken by either Canada or Quebec to preserve the essential equilibrium between Canada's two founding nations. Historically high rates of natural increase guaranteed the preservation of Quebec's separate cultural and linguistic identity. Quebecers were opposed to immigration into their province because the majority of immigrants arriving

19. This Department became the Canada Employment and Immigration Commission in 1978.

20. Green Paper. *Immigration Policy Perspectives* (1975) at 19.

21. White Paper. *Canadian Immigration Policy* (1966) at 10.

22. Stat. R. & O. 67-434, ss. 31-33 and Schedules A and B. (The norms of Assessment in Schedules A and B are commonly referred to as "the point system".)

23. *Immigration Appeal Board Act*, c. 90 (1966-67).

24. *Supra* n. 1, at 46.

25. F. Hawkins, *Canada and Immigration: Public Policy and Public Concern* (1972) at 224-225.

in Quebec (approximately 90%), settled in and identified with English speaking communities. Quebec constitutionalist Jacques Brossard states: "Il est à pline nécessaire de rappeler que l'immigration n'a quère servi dans ensemble le Canada français."²⁶

Federal immigration policies thus encouraged the recruitment of immigrants who would successfully settle in English speaking Canada, particularly Ontario and the western provinces, which were essentially built on the backs of immigrant labour. It has also been noted that this integration into the anglophone community has "ainsi contribué par la force des choses à noyer ou fortement affaiblir les minorités francophones."²⁷ Thus, it can and has been argued²⁸ that the federal government managed the immigration program in such a way that English speaking Canada was always favoured.

By the early 1960's birth rates in Quebec were declining rapidly. This fact, coupled with successive decreases in the number of immigrants choosing to settle in Quebec caused a great deal of alarm. Quebec's reaction was dramatic. In 1968, it became the only province to enact modern immigration legislation²⁹ and furthermore, it was the only government in Canada to establish a department to deal solely with matters of immigrant recruitment and settlement. The aim of Quebec's immigration law was the preservation of the French cultural identity. Many people in Quebec, at this time, saw that:

...[I]mmigration ...[was]...primarily a nation-building device for Quebec, whether within Confederation or outside it. Immigrants, properly integrated into the French community, would make a great contribution...to the "épanouissement" (flowering) of Quebec. Their numbers were important.³⁰

The governments of Canada and Quebec entered into formal immigration agreements in 1971³¹ and again in 1975.³² The latter agreement allowed Quebec to counsel and screen immigrants overseas so that prospective residents would "...know in advance that Quebec [was] mainly French-speaking and that it [had] an Official Language Act making French the working language and the priority tongue in business, industry, education, and public administration."³³

In 1975, a Green Paper on Immigration Policy was tabled in the House of Commons.³⁴ The Minister indicated that future immigration law was going to be developed to support the attainment of Canada's long term population goals.³⁵ A Special Joint Committee of the Senate and the House of Commons, which was appointed in March 1975, held fifty hearings throughout Canada on the Green Paper and Immigration generally. Its report to Parliament was

26. J. Brossard. *L'immigration: les droits et pouvoirs de Canada et du Québec* (1967) at 17.

27. *Id.*, at 19.

28. *Id.*, at 109.

29. Loi du ministère de l'immigration du Québec, 1968 c. 68.

30. *Supra* n. 25, at 223.

31. Usually referred to as the Lang-Cloutier Agreement.

32. Usually referred to as the Andras-Bienvenue Agreement.

33. *Winnipeg Tribune*, Oct. 24, 1975, at 13.

34. *Hansard*, February 3, 1975.

35. *Id.*, at 2819.

presented in November 1975.³⁶ This report was followed by the introduction of Bill C-24 in 1976. Upon introducing the Bill for second reading,³⁷ the Minister stated:

A highly significant aspect of this new arrangement will be its contribution to the creation of a new era of collaboration between the federal government and provincial governments in the immigration field. Immigration is a national program which must be responsive to the needs of all regions of Canada. Constitutionally it is a field which, while it has primacy of jurisdiction, the central government shares with the provinces. Annually announced immigration levels will be the visible end product of a regular and mandatory process of federal-provincial consultation which I am convinced will make the future administration of the program more sensitive than heretofore to the aspirations and requirements of all parts of the country.³⁸

What are the views of the provinces? Since the proclamation of the new *Immigration Act*³⁹ on April 10, 1978, six provinces have entered into federal/provincial immigration agreements.⁴⁰ However, with the notable exception of Quebec, none of the provinces took steps to become an active partner in the immigration process. It is essential that provinces moving into this field of public policy understand the legal parameters which will affect their jurisdiction. Such an understanding is necessary if appropriate local policies are to be developed. It is the purpose of this paper to analyze the existing parameters of provincial jurisdiction and to assess how provincial involvement in this field of public policy may affect immigrant's rights. No attempt will be made to examine all relevant legislation and policies of every province; the primary focus will be on Manitoba.

The Parameters of Provincial Jurisdiction

A. To what extent is the federal immigration power paramount?

Early federal immigration legislation was not aimed at limiting the intake of immigrants.⁴¹ However, in 1885 a *Chinese Immigration Act*⁴² was passed in response to anti-Chinese sentiments in the western provinces, particularly British Columbia. Comprehensive federal legislation was first passed in 1906. This *Immigration Act*^{42a} introduced a selection policy coupled with a general deportation power. In *A-G Can. v. Cain*,⁴³ the latter was challenged on the basis that the federal government had no extra-territorial jurisdiction to remove people to another country. In concluding that the legislation was *intra vires*, the Privy Council adopted with approval the following passage from Vattel's *Law of Nations*:

36. See: Appendix A for the recommendations of the Committee in relation to Federal/Prov. Co-operation.

37. Hansard, March 10, 1977, at 3862.

38. *Id.*, at 3864.

39. See: *Immigration Act*, 1976-77, c. 52 as am. by 1977-78, c. 22, s.3.

40. The six provinces are the four Maritime provinces, Saskatchewan, and Quebec.

41. J. Hueker, "Immigration, Natural Justice and the Bill of Rights" (1975), 13 *Osgoode Hall Law J.* 649 at 651.

42. 48 & 49 *Vict.*, c. 71.

42a. *Immigration Act*, R.S.C. 1906, c. 93.

43. [1906] A.C. 542 (P.C.).

One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests.⁴⁴

The provinces' early attempts to pass immigration legislation met with little success. In addition to having their statutes disallowed by federal government,⁴⁵ they also faced constitutional challenges before the courts in light of their ongoing attempts to restrict oriental immigration.

In *Nakane and Okazake*,⁴⁶ the British Columbia Supreme Court found that the province had exceeded its constitutional powers under s.95, by passing legislation which was contrary to a treaty the federal government had entered into with Japan. The Chief Justice concluded that:

...[A]s the power of the Province to pass immigration laws is conditional upon such laws not being repugnant to those passed by the Parliament of Canada, it follows that *to the extent to which* the Natal Act is inconsistent to the Canadian legislation *to that extent it is inoperative*.⁴⁸ (emphasis added)

While upholding the trial decision, the British Columbia Court of Appeal offered two somewhat different interpretations as to the operational parameters of s.95. Mr. Justice Irving reasoned that:

It is not possible that there can be two legislative bodies having equal jurisdiction in this matter, and where the Dominion Parliament has entered the field of legislation, *they occupy it to the exclusion of* Provincial legislation.⁴⁸ (emphasis added)

This broad view of the doctrine of paramountcy is tempered somewhat by the judicial pronouncement of Mr. Justice Morrison. In declaring the *British Columbia Immigration Act, 1908*⁴⁹ repugnant to the federal treaty, he adopted a narrower view:

Although the subject of immigration is in some respects and for some purposes falls within the jurisdiction of the Provincial Legislature, yet where there is already an enactment on the subject by the Federal Parliament, it must be shewn that the Provincial legislation is in furtherance or aid of the Federal legislation. And in doing so, regard must be had to the character, nature, and scope of the Federal enactment.

Since there was an express conflict in this case, it is difficult to determine the exact parameters the Court intended to adopt. An examination of the appellate decision in *Re Narain Singh et al*⁵¹ the same year, suggests that the Court intended to adopt the "occupied field" view of paramountcy.

In that case, a group of immigrants who had complied with the requirements of the federal Immigration Act were detained by the British Columbia authorities immediately upon landing. They were subjected to an educational test in s.4 of the *British Columbia Immigration Act 1908*,⁵² failed, and were

44. *Id.*, at 546.

45. *Supra* n. 41, at 651-652.

46. (1908), 13 B.C.R. 370 (B.C.C.A.).

47. *Id.*, at 372.

48. *Id.*, at 375.

49. S.B.C., 1908, c. 23.

50. *Supra* n. 46, at 376.

51. (1908), 13 B.C.R. 477 (B.C.C.A.).

52. S.B.C., 1908, c. 23.

charged and sentenced according to the Act. The provincial Act was declared *ultra vires* because federal legislation "occupied the field."⁵³ At the trial level Chief Justice Morrison concluded that "the Parliament of Canada intended to deal exclusively with the question of immigration into Canada."⁵⁴ In formulating his decision he relied on the propositions laid down by the Privy Council the previous year in *Grand Trunk Railway Company of Canada v. A-G Canada*:⁵⁵

First, that there can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires*, if the field is clear; and, secondly, that if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail.⁵⁶

In noting that these propositions had just recently been applied in another Canadian case,⁵⁷ he went on:

This last case goes very far indeed, for *the power to legislate there was inferential only*, whereas in the present instance, section 95, *supra*, gives the Dominion the power in terms, and in terms enacts that in a domain where the two legislations meet and the field is not clear the Dominion legislation must prevail.⁵⁸

The British Columbia Court of Appeal appears to have accepted this reasoning and decided that the regulatory power delegated to the Governor-in-Council clearly indicated Parliament intended to exclusively occupy the field. The Provincial Act was declared inoperative "so long as Parliament leaves the legislation in the position it is."⁵⁹

It is debatable whether Parliament intended to exhaustively deal with selection criteria to the exclusion of the provinces when it granted the Governor-in-Council the broad regulatory powers it did. The outcome of this debate could have a significant impact on current federal/provincial powers in this area. Section 115 of the present federal *Immigration Act* gives the Governor-in-Council the power to make regulations regarding every conceivable matter, including several matters directly related to exclusive heads of provincial jurisdiction.⁶⁰

The federal government can only explicitly or by necessary implication occupy the immigration field. Merely giving the federal Cabinet sweeping powers to make regulations does not occupy the field if the regulations are not made.

Recent academic thought indicates that the Courts will now narrowly construe the occupied field doctrine. After reviewing the history of jurisprudential thought in this area, including the statements made in the *Grand Trunk Railway* case, *supra*, Colvin suggests that "even if the implicit occupation of a field is theoretically available as a ground for invoking the

53. *Supra* n. 51, at 478.

54. *Supra* n. 51, at 479.

55. [1907] A.C. 65 (P.C.).

56. *Id.*, at 68.

57. *Toronto Corporation v. Canadian Pacific Railway*, [1908] A.C. 54 (P.C.).

58. *Supra* n. 51, at 479.

59. *Id.*, at 480.

60. See e.g.: s. 115(1) which deals with demands on health and social social services.

paramountcy rule, it is almost a dead letter in practice.⁶¹ Thus, unless the federal government expressly delineates its areas of operation, the provinces have a significant sphere in which to operate. As was noted previously, the Court came to the conclusion it did in the *Narain Singh* case because there was an express conflict. Therefore, even if one does not accept the example illustrated in the case, the requirement that there be an express conflict is still valid.

This approach is particularly important in the field of immigration where most policies and operational directives are contained in the *Immigration Manual* which has no legal status. As the Supreme Court of Canada noted in *Martineau v. Matsqui Institution Inmate Disciplinary Board No. 2*,⁶² administrative directives are not law. While the federal government could clearly enshrine such provisions in regulations, to do so would be exceedingly cumbersome, if not administratively impossible. In addition, existing federal laws and regulations are far from exhaustive. Knowledge of the federal dilemma significantly strengthens provincial bargaining power. The provinces obviously have much room in which to function.

Regardless, the interpretation of s. 95 in *Narain Singh*, at least with respect to entrance criteria and regulatory powers, is probably obsolete in practical terms when s. 3(c) of *Loi modifiant la Loi du ministère de l'immigration*⁶³ is examined. Before considering whether this section and/or the Act itself is *ultra vires*, it is necessary to examine a secondary aspect of the decision in *Narain Singh*, which at first blush might appear to be more valid.

The Court concluded that until the federal government determined otherwise, a person to which it granted entry had the unqualified right to enter any part of Canada. The present Canada/Quebec agreement appears to indicate that Quebec can not bar entry *after* the federal government has approved entry with respect to certain classes of people.⁶⁴ But, the agreement and the recent Quebec statute mentioned above, establish an operational framework whereby Quebec can establish its own selection criteria and bar entry to prospective immigrants on this basis. These provisions cover independent immigrants,⁶⁵ as well as a wide range of non-immigrant classes.⁶⁶ In addition Quebec has substantial authority over the establishment of criteria to be met by sponsors and even refugees and other displaced persons.⁶⁷

Overseas applicants rejected by Quebec may be considered for entry in another province.⁶⁸ The only qualification to this right of selection is that the persons Quebec chooses are still subject to regular federal medical and security

61. Colvin, "Legal Theory and the Paramountcy Rule" (1979), 25 McGill L.J. 82, at 93.

62. (1979), 13 C.R. (3d) 1; 50 C.C.C. (2d) 353; 30 N.R. 119 (S.C.C.).

63. S.Q., 1978, c. 82.

64. Canada/Quebec Immigration Agreement, Article III 2(B).

65. *Id.*, 2 (h).

66. *Id.*, 2 D(1)-(6).

67. *Id.*, 2(c).

68. *Id.*, 2(g).

clearance,⁶⁹ which are matters of exclusive federal jurisdiction under the constitution.⁷⁰ Furthermore, in the case of prospective immigrants who obtain less than 30 points on the basis of Quebec's criteria, federal officials are not even notified.⁷¹

Quebec's discretion can still be undermined by federal authorities. The Agreement recognizes "the right of every permanent resident of Canada to freedom of movement within Canada." Canada could grant entry to immigrants, land them in another province, and then neither Quebec nor Canada could prevent them from moving to Quebec if they still wanted to.

Although the Supreme Court of Canada, unlike its counterpart in the United States,⁷² has not had the opportunity to consider a provincial statute prohibiting interprovincial migration, attempts by the provinces to enact such legislation could clearly be rendered inoperative:

A likely basis for finding an invasion of the legislative power of the Dominion would be the introductory clause of s.91 of the British North America Act, ("peace, order and good government") and s.91(25) "naturalization and aliens". ...s.95 of the British North America Act must [also] be considered in dealing with a provincial enactment prohibiting interprovincial migration.... Whatever be the limits of provincial legislative power as to immigration, federal legislation, if passed in this connection, would be of paramount authority.⁷³

The *Canadian Charter of Rights and Freedoms* must also be considered in the context of interprovincial migration. Section 6(2)(a) guarantees the mobility rights of Canadian citizens and permanent residents within any province. Attempts by provinces to prohibit interprovincial migration for these two groups will be *ultra vires* once the *Charter* is in operation. Provinces can not even limit the movement of non-immigrants, since such legislation would be *ultra vires* the federal "naturalization and aliens" power.

A survey of recent immigrants to Canada might indicate whether Quebec's seemingly substantial powers are being undermined.

It could be argued on the basis of the case law already considered, that the Quebec statute is *ultra vires*. That statute is, as a practical matter, accepted by the Government of Canada, but that does not necessarily mean that it is legally valid. Quebec has been able to obtain major concessions from the federal government because of its unique status in confederation. Whether other provinces will be as successful remains to be seen. At the moment it appears possible for the provinces to refuse entry to prospective immigrants, at least while they are still overseas. In addition, it is probable that the federal government would not challenge provincial legislation similar to that enacted by Quebec. Not all provinces may wish to enter this field legislatively. Brossard notes that Ontario has successfully pursued its s.95 powers "in a totally different fashion: no Act, nor regulations" and "never has the legitima-

69. *Id.*, 2(h).

70. *B.N.A. Act*, s. 91(11) and (7).

71. *Supra* n. 64, 2(f).

72. *Edwards v. People of State of California (1941)*, 314 U.S. 160 (S.C.).

73. "State Legislation Prohibiting Interstate Migration: Applicability of the Problem to Canada" (1941), 19 C.B.R. 751 at 753; See also: *Winner v. S.T.M. et al.* [1951] S.C.R. 887 at 919.

cy of these activities been put in doubt.⁷⁴ He goes on to say "...on the contrary, the central government and the Ontario government collaborate in a very open fashion; without this collaboration the provincial activities would risk being in a great part, useless."⁷⁵ Federal government's refusal to consult with Ontario could render the immigration program inoperative since Ontario annually receives more than 50% of the total immigration flow to Canada. These observations suggest the federal government may only consider provincial views where it is politically expedient for them to do so.

Before leaving this topic, two additional points need to be mentioned. Firstly, the case law may in fact be accurate, but the federal government recognized that it was essential to help Quebec achieve its growing cultural and linguistic aspirations. Such an argument appears even more plausible when the following conclusion drawn by Brossard is scrutinized:

The present constitution, as it is interpreted by jurisprudence, undoubtedly permits Quebec to exercise at least the same powers as ... Ontario [has]. We underline that if Quebec desires, however, to legislate in the matter, rather than simply adopting the [informal] measures as ... Ontario [did], it will have to do [so] ...in a compatible fashion with the federal legislation and in a manner complimenting such (again, it is a question of the judicial point of view: *perhaps certain accommodations could be obtained by political means and account be given for the particular interests of Quebec in this domain*).⁷⁶ (emphasis added)

It must be remembered that in the cases discussed previously, the federal government itself challenged the offending provincial legislation. It is unlikely to challenge Quebec's statute or other similar provincial statutes.

The second consideration arises as a result of *dicta* in *A-G Can. v. Cain*,⁷⁷ where Lord Atkinson suggested that the extensive powers of Parliament with respect to aliens' entry could be delegated to "a local Parliament."⁷⁸ He went on to say that:

[i]f this delegation has taken place, the depositary or depositaries of the executive and legislative powers and authority of the Crown can exercise those powers and that authority to the extent delegated as effectively as the Crown could itself have exercised them.⁷⁹

The correctness of such an argument could be based upon the fact that Quebec entered into its agreement with Canada on February 20, 1978, nine months before legislation was passed to reflect the agreement in question. Therefore, while Quebec obviously has its own substantial jurisdiction over immigration matters, it is possible to argue that it has been given additional powers by the federal authorities. If such an approach is tenable, which it is submitted it is, then it is further argued that the decision of the Supreme Court of Canada in the *Nova Scotia Interdelegation case*⁸⁰ is inapplicable at least with respect to the concurrent immigration power under s.95. In that case the federal government intended to delegate some of its powers to Nova Scotia and

74. Brossard, *supra* n. 2, para. 166.

75. *Ibid.*

76. *Id.*, at para. 203.

77. *Supra* n. 43.

78. *Supra* n. 43, at 546.

79. *Supra* n. 43, at 546.

80. [1951] S.C.R. 31.

vice versa. In declaring the statutes invalid, the Court indicated that since the *British North America Act* established Canadian legislative jurisdiction, any tampering with this jurisdictional scheme by other statutes would be unconstitutional.

While it is recognized that this case has led to the suggestion that inter-governmental delegation is impossible, it is submitted this case does not apply in the immigration context because an express concurrent jurisdiction is involved. On the other hand, it is accepted that if the legislation is in pith and substance about "naturalization and aliens" it cannot be delegated, except perhaps to a provincial administrative agency.

It was noted in the introduction that the provinces have extensive jurisdiction over immigrants by virtue of the powers vested in them under s.92 of the *British North America Act*. The difficult question that arises is to what extent can the federal government infringe provincial jurisdiction to carry out its own immigration powers.

In *Re Munshi Singh*⁸¹ it was argued that the federal *Immigration Act* was *ultra vires* because its deportation provisions interfered with civil liberties, an exclusive provincial jurisdiction.⁸² In holding the *Act intra vires*, the Court applied the "necessarily incidental" doctrine. Mr. Justice Irving stated:

I would say that where power to prevent a prohibited immigrant from landing in Canada, or if landed, to expel him, is given to a legislative body such as the Dominion Parliament, *that power carried with it power to impose all things necessary* to carry out the prohibition or expulsion.⁸³ (emphasis added)

In the same decision, Mr. Justice Martin added:

...[T]here is one complete and final answer to the whole [argument], and it is that as a matter of fact, and of reasonable necessity in the carrying out, completely and effectively, of "laws in relation to immigration into all or any of the Provinces" (section 95), an immigrant is not immediately divested of that character and freed from the operation of laws relating to the subject-matter of immigration merely because he happens to come within the three-mile limit. Whatever else may be said of him, that character, and the Federal jurisdiction which controls it, continues in general to attach to him at least till after he is permitted to land in conformity with the Act. *Indeed, it cannot be doubted that he may be subject to such jurisdiction for an indefinite period of time....*⁸⁴ (emphasis added)

The Manitoba Court of Appeal examined this issue in *R. v. Hildebrand et al.*⁸⁵ Mennonites, experiencing religious discrimination in Russia, negotiated with federal immigration authorities to come to Canada. During these negotiations, federal authorities had written the group, promising them in part, that:

10. The fullest privilege of exercising their religious principles is by law afforded to the Mennonites, without any kind of molestation or restriction whatsoever; and the same privilege extends to the education of their children in schools.⁸⁶

81. (1914), 20 B.C.R. 243 (B.C.C.A.).

82. *B.N.A. Act*, s. 92(16).

83. *Supra* n. 81, at 262.

84. *Supra* n. 81, at 266.

85. [1919] 3 W.W.R. 286; (1919), 30 Man. R. 149 (C.A.).

86. *Id.*, at 289 (W.W.R.) and 153 (Man. R.).

This promise was later the subject of a federal order-in-council which significantly changed the arrangement made previously to read:

10th That the Mennonites will have the fullest privilege of exercising their religious principles, and educating their children in schools, *as provided by law*, without any kind of molestation or restriction whatever.⁸⁷ (emphasis added)

The defendants were charged with unlawfully neglecting to send their children to a public school as required by provincial statute. The accused parents argued that they were not bound by this legislation due to the promise they had received from the federal government. The Court rejected this argument and reasoned that the promise merely meant "that the Mennonites are to have the unhampered and unrestricted privilege of educating their children in the schools *provided by the laws* of the country in which they proposed to settle."⁸⁸ (emphasis added) The Court based its decision on the wording in the order-in-council rather than the letter, but it went on to consider the effect of the letter as it was interpreted by the accused. It had been argued that federal authorities could make such promises on the basis of a federal statute passed pursuant to s.95 of the *British North America Act*. The Court held that the federal government could not use its immigration authority "to bind or affect the province in educational matters, jurisdiction as to which is given the provincial Legislature alone...."⁸⁹

Although ambiguous, the Manitoba decision appears to contradict the British Columbia decision in *Munshi Singh, supra*. The proper interpretation would appear to be that alluded to by the British Columbia Court. Parliament's jurisdiction over "Aliens" would presumably allow it to interfere with any provincial matter, whether civil liberties or education. A plausible distinction may be that the British Columbia Court actually dealt with a federal statute which expressly pre-empted provincial powers, whereas the Manitoba Court of Appeal only dealt with a federal order-in-council. In addition, unlike the Manitoba situation, there was no direct contravention of any British Columbia statute in the *Munshi Singh* case.

A subsequent consideration is whether the federal peace, order and good government power applies to immigration matters. *Dicta* in the *Munshi Singh* case suggested that even if the federal *Immigration Act* was inoperative under s.95, it could be supported under the "peace, order and good government power".⁹⁰ Unfortunately, no reasons were given for this statement.

Although it is not clear when the federal government may encroach upon provincial powers under s.92 and presumably s.93 as well, it is undeniable that it can do so.⁹¹ But, it is equally evident that the provinces cannot trench upon federal powers. Chief Justice Laskin recently noted:

It cannot be said therefore that because a provincial statute is general in its operation, in the sense that its terms are not expressly restricted to matters within provincial competence, it may embrace matters within exclusive federal competence.⁹²

87. *Ibid.*

88. *Ibid.*

89. *Id.*, at 290 (W.W.R.) and 154 (Man. R.).

90. *Supra* n. 81, at 287.

91. See e.g.: *Reference Re Anti-Inflation Act* (1976), 68 D.L.R. (3d) 452 (S.C.C.).

92. *Natural Parents v. Superintendent of Child Welfare et al* (1975), 6 N.R. 491 at 497 (S.C.C.).

Thus, if for example, provincial legislation was passed to facilitate entrepreneurial immigration, it would be *ultra vires* if it purported to encourage the establishment of banks, an exclusive federal matter.

The point at which federal legislation ceases to be concerned with immigration will continue to present a thorny problem, but it is unlikely that the task will be any more difficult than in other areas of constitutional law. If the legislation is in "pith and substance" federal or "necessarily incidental" to the exercise of federal powers, the Courts will conclude it is federal.⁹³ The converse holds as well.

B. To what extent can the province regulate the activities of immigrants once they are in the province?

Answering this question necessitates probing into one of the most unsavory chapters of Canadian legal history. Although "Canada is the proverbial nation of immigrants,"⁹⁴ our treatment of immigrants has in many instances been anything but enlightened.

It is in this sphere that the federal government, in an effort to reduce more extreme forms of provincial discrimination against immigrants, has most frequently used its power of disallowance.⁹⁵ As noted previously, more than one provincial law directed at immigrants has been rendered null and void in this manner. However, it is important to understand that the use of such power does not necessarily mean the provincial statutes in question were *ultra vires*.

It has already been intimated that the federal government could use its exclusive jurisdiction over "naturalization and aliens" to ensure that its authority over immigrants is not extinguished immediately upon their landing in Canada. In fact, the Supreme Court of Canada upheld the federal *Immigration Act* on the basis of this power in *Vaaro v. The King*.⁹⁶

Various constitutional challenges have resulted in the judiciary delineating the possible scope of this clause. British Columbia was the most notorious culprit for passing legislation against particular non-white groups, presumably because its geographic location resulted in more Asiatic immigrants entering Canada through its borders than anywhere else. Irrational fears caused British Columbia politicians to take legislative steps not only to curb oriental immigration, but also to make life exceedingly difficult for such immigrants already living in British Columbia. The ignorance underlying these fears can be demonstrated by examining the generalized conclusions outlined in the preamble to an 1894 British Columbia statute called *An Act to Regulate the Chinese Population of British Columbia*.⁹⁷

93. See e.g.: Forsey, "The Prince Edward Island Trade Union Act, 1948", [1948] 24 C.B.R. 1159 (The author concludes that subjecting a foreign trade unionist to a fine for entering the province, when he had been granted non-immigrant status under the federal Act, would be to render the federal immigration power impotent.)

94. *Supra* n. 41, at 649.

95. See: *Supra* n. 2, at para. 64.

96. *Supra* n. 5; see also: *Re Yee Foo* (1925), 56 O.L.R. 669, at 672 (C.A.).

97. S.B.C., 1894.

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

This statute was held *ultra vires* in *R. v. Wing Chong*.⁹⁸ In applying the "naturalization and aliens" power, Mr. Justice Crease inquired as to the object of the *Act* and concluded that the preamble:

...looks like a bill of indictment as against a race not suited to live among a civilized nation and certainly does not prepare one for legislation which would encourage or tolerate their settlement in the country. Indeed, the first lines of the preamble sound an alarm at the multitude of people coming in, who are of the repulsive habits described in the last part of the preamble, and prepares one for measures which should have a tendency to abate that alarm by deterrent influences and enactments which should have the effect of materially lessening the number of such undesirable visitors.⁹⁹

With the added support of liberal use of the federal disallowance power, British Columbia Courts were able to bar such discriminatory legislation until the turn of the century. The earliest judicial criticism of provincial attempts to pass such legislation came in the case of *Tai Sing v. Maguire*.¹⁰⁰ The *Act* in question was purportedly passed to facilitate provincial tax collection from Chinese. In asserting that this was "social ostracism the Local Legislature has no power to enforce,"¹⁰¹ the Court found this was not the true intention of the statute:

From the examination of its enacting clauses, it is plain it was not intended to collect revenue, but to drive the Chinese from the country, thus interfering at once with the authority reserved to the Dominion Parliament as to the regulation of trade and commerce, the rights of aliens, and the treaties of the Empire.¹⁰²

Other notable early efforts included attempts to impose a differential tax on Chinese trying to acquire a Free Miner's Certificate,¹⁰³ a licence fee on laundry operators (who were almost exclusively Chinese) in excess of that charged other businesses,¹⁰⁴ and refusing Chinese the right to obtain pawnbrokers licences.¹⁰⁵

98. (1885). 1 B.C.R. (Part II) 150 (B.C.S.C.).

99. *Id.*, at 157.

100. (1978). 1 B.C.R. (Part I) 101 (B.C.S.C.).

101. *Id.*, at 111-112.

102. *Id.*, at 112.

103. *R. v. Gold Commissioner of Victoria District* (1886). 1 B.C.R. (Part II) 260 (B.C.D.C.).

104. *R. v. Mee Wah* (1886). 3 B.C.R. 403 (B.C.S.C.) per Begbie, J. at 408: "[I]f the Provincial Legislature can insist upon imposing licences upon everything and upon every act of life, and tax each licensee at any moment they please, there would be a very simple way of excluding every Chinaman from the Province, by imposing a universal tax, not limited to any nationality, of one of two thousand dollars per annum for a licence to wear long hair on the back of the head.... No Chinaman will shave the back of his head".

105. *R. v. Corporation of Victoria, Re Mock Fee*. (1888) 1 B.C.R. (Part II) 331 (B.C.S.C.); per Begbie, C.J. at 332 "*Prima facie*, every person living under the protection of British law has a right at once to exercise his industry and ability in any trade or calling he may select. The only instances in which some antecedent certificates of fitness or qualification is required are, I think, liquor dealers, medical men, and barristers and solicitors."

All of the legislation referred to in these cases was found to encroach federal jurisdiction over aliens. After the British Columbia Supreme Court upheld the validity of an anti-Chinese statute in 1896,¹⁰⁶ the federal government used its disallowance power to render inoperative Acts which prohibited individuals who could not read English from working on provincially licensed projects;¹⁰⁷ refused liquor licences to Mongolians and Indians¹⁰⁸ and prohibited persons other than British subjects from having any interest in British Columbia mining properties.¹⁰⁹

The *Coal Mines Regulations Act* was reconsidered three years later, this time by the Privy Council in *Union Colliery v. Bryden*.¹¹⁰ The Court concluded that s.4 of the *Act*, which prohibited any Chinaman from working underground in British Columbia mines, was beyond the competency of the British Columbia Legislature.

In construing the meaning of the term "aliens" Lord Watson made the following comments:

Every alien when naturalized in Canada becomes, *ipso facto*, a Canadian subject of the Queen; and his children are not aliens, requiring to be naturalized, but are natural-born Canadians. It can hardly have been intended to give the Dominion Parliament the exclusive right to legislate for the latter class of persons resident in Canada.... But it seems clear that the expression "aliens" occurring in that clause refers to, and at least includes, all aliens who have not yet been naturalized....¹¹¹

His Lordship suggested that the legislation would have been *intra vires* if its sole purpose had been to establish a "regulation applicable to the working of underground coal mines."¹¹² But he concluded, its real intention was to prohibit "Chinamen who are aliens or naturalized subjects" from working in these mines. The scope of s.91(25) was outlined in the following manner:

...[T]he legislature of the Dominion is invested with exclusive authority in all matters which directly concern the rights, privileges, and disabilities of the class of Chinamen who are resident in the provinces of Canada. ...the whole pith and substance of the enactments of s.4 of the *Coal Mines Regulation Act*, in so far as objected to by the appellant company, consists in establishing a statutory prohibition which affects aliens or naturalized subjects, and therefore trench upon the exclusive authority of the Parliament of Canada.¹¹³

The boundaries of this decision were clearly narrowed in a subsequent Privy Council decision just three years later. In *Cunningham v. Tomey Homma*,¹¹⁴ the latter, a naturalized British subject, attacked the validity of a British Columbia statute which denied any "Chinaman, Japanese or Indian"¹¹⁵ the right to vote in provincial elections. Their Lordships decided that the statute was valid because

106. *In Re The Coal Mines Regulation Amendment Act* (1896), 5 B.C.R. 306 (B.C.S.C.).

107. *An Act Relating to the Employment of Works Carried on lender Franchise Granted by Private Acts, 1900*: See: *supra* n. 41, at 652.

108. *An Act Respecting Liquor Licenses, 1900: An Act Relating to the Employment of Works Carried on lender Franchise Granted by Private Acts, 1900*. (By enacting this legislation, the British Columbia Legislature must have thought Mr. Justice Begbie meant that liquor dealers could not be non-white. However it must be remembered this statute was disallowed not declared *ultra vires*).

109. *Placer Mining Amendment Act, 1899*: see: Lefroy, *Canada's Federal System*, (1913), at 310.

110. [1899] A.C. 580 (P.C.) (hereinafter referred to as *Bryden*).

111. *Id.*, at 586.

112. *Id.*, at 587.

113. *Ibid.*

114. [1903] A.C. 151 (P.C.) (hereinafter referred to as *Tomey Homma*).

115. *British Columbia Provincial Elections Act*, R.S.B.C. 1897, c. 67, s.8.

...the language of that section does not purport to deal with the consequences of either alienage or naturalization. It undoubtedly reserves these subjects for the exclusive jurisdiction of the Dominion — that is to say, it is for the Dominion to determine what shall constitute either the one or the other, but the question as to what consequences shall follow from either is not touched. The right of protection and the obligations of allegiance are necessarily involved in the nationality conferred by naturalization; but the privileges attached to it, where these depend upon residence, are quite independent of nationality.¹¹⁶

The decision in *Bryden* was distinguished on the basis that the statute in that case was devised “in effect, to prohibit their [Chinese] continued residence in that province, since it prohibited their earning their living in that province.”¹¹⁷

His Lordship continued:

It is obvious that such a decision can have no relationship to the question whether any naturalized person has an inherent right to the suffrage within the province in which he resides.¹¹⁸

Are these decisions, with all their inherent ambiguities, reconcilable? The simplest conclusion is that one is right, the other wrong or put in another way, the *Tomey Homma* decision impeached the *Bryden* decision. The correctness of this assertion is doubtful since the *Bryden* decision was applied in subsequent cases to find offensive legislation *ultra vires*.¹¹⁹ In fact, one Judge emphatically stated: “The dictum in the *Tomey Homma Case*...reaffirms the decision in the *Bryden Case*.”¹²⁰

Others have concluded that the *dictum* in *Tomey Homma* is wrong.¹²¹ Any rationalization of the decisions must come from the emphasis Lord Halsbury placed on the fact that the legislation would prevent Chinese from continuing to live in British Columbia. As already indicated, this consideration was at the heart of earlier British Columbia decisions.¹²²

In a famous *dictum*, Mr. Justice Rand, distinguished the two cases by saying that “...incidents of status must be distinguished from elements or attributes necessarily involved in status itself.”¹²³ He went on to say that “...a province, cannot, by depriving a Canadian of the means of working, force him to leave it: it cannot divest him of his right or capacity to remain and to engage in work there...”¹²⁴

116. *Supra* n. 114, at 156-157.

117. *Supra* n. 114, at 157.

118. *Ibid.*

119. *In Re the Coal Mines Regulation Act and Amendment Act, 1903* (1904), 10 B.C.R. 408 at 416-417 (B.C.S.C.), (per Irving J.): “Now, in what respect does this differ from the legislation considered in the *Bryden Case*? The calling of the enactment...a rule or regulation can not affect its constitutionality.... Is not the pith and substance of this so-called rule to prevent Chinamen from working underground, regardless of their individual fitness or capacity to properly perform the work? ...there is in truth no real difference between this Statute of 1903 and the Statute of 1890 considered in the case of *Bryden v. Union Colliery Co.*” [*supra* n. 110]; see also: *R. v. Priest* (1904), 10 B.C.R. 436 at 437 (B.C.S.C.) and *Re The Japanese Treaty Act* (1920), 56 D.L.R. 69 (B.C.C.A.).

120. *Id.*, at 415.

121. Spencr. “The Alien Landholder in Canada” (1973), 51 Can. Bar Rev. 389, at 401. Further possible ways to distinguish the cases are outlined at 403-405.

122. *Supra* n. 99, 102, 104, and 105.

123. *Winner v. S.M.T. and A.-G. Canada*, [1951] S.C.R. 887 at 919; aff’d by [1954] A.C. 541 (P.C.).

124. *Ibid.*

Although caution must be used when relying on the British Columbia Court of Appeal decision in *Re Coal Mines Regulation Act and Amendment Act, 1903*,¹²⁵ since the statute in question was virtually identical to that in the *Bryden* case, the discussion of the two Privy Council decisions is worth noting:

I understand him to mean that the Provincial Parliament while at liberty to refuse to accord to a naturalized subject a privilege cannot deprive an alien of those fundamental rights to which every person living under the aegis of the British Sovereign is entitled. The power to legislate as to these rights is reserved to the Dominion Parliament...¹²⁶

The following analyses also bear consideration:

The net result, therefore, of these two Privy Council decisions seems to be, that provincial legislatures cannot legislate against aliens, whether before or after naturalization, merely as such aliens, so as to deprive them of the *ordinary rights* of the inhabitants of the province; although they might so legislate against them as possessing this or that personal characteristic or habit, which disqualifies them from being permitted to engage in certain occupations, or enjoy certain rights generally enjoyed by other people in the province. The Dominion parliament alone can legislate in relation to them merely as aliens.¹²⁷ (emphasis added)

and

The provincial statute in *Bryden's* case was *ultra vires* because it purported to regulate one of these "*essential rights*" — the right of an alien lawfully present in Canada to settle in what province he likes — which could only be altered by the Parliament of Canada. The statute in *Tomey Homma's* case, however, was not *ultra vires*, because the right which it affected — the right to vote in a provincial election — was not one of these "*essential rights*" with which only the federal Parliament could deal.¹²⁸ (emphasis added)

It seems clear that all of the above writers are referring to those rights which protect the preservation of a person's statutory right to remain and live in Canada once the federal government has granted status. It is important to recall that these decisions were rendered at a time when large segments of the population were precluded from voting. The franchise was not generally regarded as an "*essential right*" at this time. Votes for women were still in the future for most jurisdictions. Within this context, *Tomey Homma* was not denied anything in this category. The situation may have been different if a natural born Canadian of Chinese parentage had been refused voting privileges. That a different conclusion would possibly have been reached was alluded to by Lord Halsbury in the *Bryden* case. This entire analysis suggests that "*essential rights*" will probably be interpreted according to prevailing socio-economic considerations, as is the case in most areas of law.¹²⁹

Racial discrimination was to become the key in subsequent Canadian decisions for at least the next sixty years. Even federal immigration legislation

125. *Supra* n. 119.

126. *Supra* n. 119, at 416.

127. Lefroy, *supra* n. 109, at 308.

128. *Supra* n. 121, at 402.

129. *For example*, the evolution of heads of tortious liability has clearly expanded due to these considerations.

was upheld with reference to this concept.¹³⁰ In *Quong-Wing v The King*,¹³¹ a naturalized Canadian of Chinese extraction was prosecuted for hiring white women in contravention of a provincial statute which read in part:

1. No person shall employ in any capacity any white woman or girl or permit any white woman or girl to reside or lodge in or to work in or, save as a *bonâ fide* customer in a public apartment thereof only, to frequent any restaurant, laundry or other place of business or amusement owned, kept or managed by any Chinaman.¹³²

The accused argued that the intention of the *Act* was to deprive all Chinese of "the rights ordinarily enjoyed"¹³³ by other Saskatchewan residents. Therefore, he submitted it was *ultra vires*. In rejecting this contention, the Court held "the prohibition [was] a racial one."¹³⁴ The pith and substance of the legislation was purported to be for "the protection of white women and girls."¹³⁵ Although it is unclear why they required such protection the Court added that

...the right to guarantee and ensure their protection from a moral standpoint is, ...within such provincial powers and ... it will be upheld even though it may operate prejudicially to one class or *race* of people.¹³⁶ (emphasis added)

Their Lordships appeared to emphasize the fact that the legislation did not prevent Chinese from carrying on any of the businesses mentioned. Therefore they were not deprived "of the opportunity of gaining a livelihood."¹³⁷

Not giving up in its pursuit of racial purity, the British Columbia government passed an Order-in-Council providing

...that in all contracts, leases and concessions of whatsoever kind entered into, issued or made by the Government, or in behalf of the Government, provision be made that no Chinese or Japanese shall be employed in connection therewith.¹³⁸

Once again this secondary legislation was ruled *ultra vires* by its own Court of Appeal.¹³⁹ The reasoning in this case is unclear. The trilogy of cases referred to above was considered and said to apply. The only rational conclusion drawn was that the immigrants in question would be denied a means of earning a living.¹⁴⁰ It was however, clearly indicated that their decision was based on s.91(25) quite apart from any conflict with the Japanese Treaty.¹⁴¹

130. *Supra*. The following passages are quoted to show the judiciary were often as irresponsible as the rest of the populace:

Further acquaintance with the subject shows that the better classes of the Asiatic races are not given to leave their own countries — they are non-immigrant classes, greatly attached to their homes — and those who become immigrants are, without disparagement to them, undesirables in Canada, where a very different civilization exists. The laws of this country are unsuited to them, and their ways and ideas may well be a menace to the well-being of the Canadian people....

The Parliament of Canada — the nation's Parliament — may be well said to be safeguarding the people of Canada from an influx which it is no chimera to conjure up might annihilate the nation and change its whole potential complexity, introduce Oriental ways as against European ways, eastern civilization for western civilization, and all the dire results that would naturally flow therefrom....

In that our fellow British subjects of the Asiatic race are of different racial instincts to those of the European race — and consistent therewith, their family life, rules of society and laws are of a very different character — in their own interests, their proper place of residence is within the confines of their respective countries in the continent of Asia, not in Canada, where their customs are not in vogue and their adhesion to them here only give rise to disturbances destructive to the well-being of society and against the maintenance of peace, order and good government. (at 590-591).

131. (1914) 49 S.C.R. 440. Leave to appeal to P.C. refused.

132. *Id.*, at 444.

133. *Id.*, at 443.

134. *Id.*, at 449.

135. *Id.*, at 448.

136. *Id.*, at 449.

137. *Id.*, at 465.

138. *Re The Japanese Treaty Act* (1920), 56 D.L.R. 69 at 73 (B.C.C.A.).

139. *Id.*, at 76.

140. *Id.*, at 76-77.

When the British Columbia Legislature passed an Act to validate these orders-in-council, the Privy Council declined to ascertain the limits of s.91(25) for future reference,¹⁴² the *Act* having been disallowed in the interim.¹⁴³ Their Lordships did, however, feel compelled to declare the statute *ultra vires* because it conflicted with federal legislation implementing the Treaty.¹⁴⁴

However, just prior to this decision, their Lordships had an opportunity to make their last comments about s.91(25) in *Brooks-Bidlake et al v. A-G B.C. et al.*¹⁴⁵ Although the British Columbia Supreme Court had invalidated the *Act* on the basis of the Court of Appeal decision in *Re the Japanese Treaty Act*,¹⁴⁶ the government persisted in its endeavours. The appellant timber-cutters, who had been employing Chinese, were threatened with the cancellation of their licences if they did not cease and desist. In upholding the legislation their Lordships found that

...the Dominion is not empowered by [s.91(25)] to regulate the management of the public property of the Province, or to determine whether a guarantee or licensee of that property shall or shall not be permitted to employ persons of a particular race.¹⁴⁷

It was concluded there was "...nothing...to show that a stipulation against the employment of Chinese labour is invalid."¹⁴⁸ It is unclear how their Lordships reached this decision when the *Act* in *Bryden* merely prevented Chinese from working in one industry, i.e. coal mines. One would think that precluding employment in the timber business would be more likely to deprive the Chinese of any reasonable chance to earn a living given British Columbia's historical reliance on this resource rather than coal.

Canadian constitutional law in this area was devoid of any further judicial interpretation until recently. The Supreme Court of Canada considered these matters in *Morgan et al v. A.-G. P.E.I. et al.*¹⁴⁹ Whether it is indicative of growing Canadian libertarian attitudes or not, the Court did not have to deal with racially discriminatory legislation. Instead the property rights of non-residents was at stake. Basically no non-resident of the province could own more than ten acres of land without special permission from the Lieutenant Governor-in-Council.

The appellants argued interference with their general capacity to hold land. But the Court declined to accept this argument concluding there was no attempt to exclude or drive out aliens. The provisions applied to non-resident aliens and Canadians alike. While reaching this decision Chief Justice Laskin articulated his views with respect to the Privy Council decisions. His position was that "...the Privy Council receded from the literal effect of its language in the *Union Colliery Co.* case when it decided *Cunningham v. Tomey Homma*."¹⁵⁰

141. *Id.*, at 79.

142. *A.-G. B.C. v. A.-G. Can. et al.*, [1923] 4 D.L.R. 698 at 703 (P.C.).

143. *Id.*, at 702.

144. *Id.*, at 704.

145. [1923] A.C. 450 (P.C.).

146. *Id.*, at 452.

147. *Id.*, at 457.

148. *Id.*, at 458.

149. (1975), 55 D.L.R. (3d) 527 (S.C.C.) (hereinafter referred to as *Morgan*).

150. *Id.*, at 536.

While not directly over-ruling the *Bryden* decision, he implied that it was erroneous:

I would not myself have thought that the mere prohibition against employment of Chinese persons in underground mining could be taken to be a general prohibition against their earning a living in British Columbia and, however distasteful such legislation was, that it was beyond provincial competence.¹⁵¹

The contention by the Attorney-General of Canada that the *Brooks-Bidlake* case had reiterated the soundness of the *Bryden* decision was met with disdain by the Chief Justice. He commented:

I do not regard the reference by Lord Cave to 'general right' as going beyond Lord Haldane in the later case of *A.-G. B.C. v. A.-G. Can et al.*...referred to as 'the general status of aliens.'¹⁵²

He went on to outline the scope of the s.91(25) power in the following words:

I do not think that the federal power... may be invoked to give aliens, naturalized persons or natural-born citizens any immunity from provincial regulatory legislation, otherwise within its constitutional competence, simply because it may affect one class more than another or may affect all of them alike by what may be thought to be undue stringency. The question that would have to be answered is whether the provincial legislation, though apparently or avowedly related to an object within provincial competence, is not in truth directed to, say, aliens or naturalized persons so as to make it legislation striking at their general capacity or legislation so discriminatory against them as in effect to amount to the same thing.¹⁵³

Two recent Alberta decisions upheld the validity of provincial legislation restricting the rights of aliens. In *Re Dickenson and Law Society of Alberta*,¹⁵⁴ a landed immigrant, holding American citizenship, obtained a law degree in Alberta, but was refused admission to the Bar because she was not a Canadian citizen. In its judgement, the Alberta Supreme Court, Trial Division concluded there was no general employment restriction placed on Ms. Dickenson. She could remain in the province and earn her living in another way. Again it is hard to find a rational distinction between this case and *Bryden*.

Foreign students forced to pay higher tuition fees than Canadian students taking the same courses, challenged the validity of this action by the University of Alberta Board of Governors and the Minister of Advanced Education. In *Re Redlin et al and Governors of University of Alberta*,¹⁵⁵ they argued that the differential fee schedule was imposed to... "debar or make it difficult for foreign or alien students to attend [university in Alberta]".¹⁵⁶ The resolution in question was held not to infringe s.91(25) in any sense. The Court concluded "it comes clearly within the power of the Province as education under s.92(13) and particularly under s.93..."¹⁵⁷ of the *British North America Act*.

151. *Id.*, at 537.

152. *Id.*, at 538.

153. *Id.*, at 538-539.

154. (1978). 84 D.L.R. (3d) 189 (Alta. S.C., T.D.) (hereinafter referred to as *Dickenson*).

155. (1980). 110 D.L.R. (3d) (Alta. C.A.) (hereinafter referred to as *Redlin*).

156. *Id.*, at 149.

157. *Id.*, at 151.

These recent judgements by various Canadian courts all support the theory that provincial legislation will only be rendered inoperative if it strikes directly at an alien's right to remain within the province. Within the context of immigration it is interesting to note that this theory was equally applicable to non-immigrants,¹⁵⁸ permanent residents,¹⁵⁹ and naturalized Canadians,¹⁶⁰ all of whom come within the ambit of the term alien.

How far can the provinces regulate the activities of aliens within Canada? What is likely to be considered an essential right? The right to work seems to be the most important, but as the *Dickenson* case demonstrated, even this right is subject to qualification. Most provinces have established employment restrictions in other areas as well e.g. teaching, medicine, and the trades. In fact, one of the major problems facing immigrants is lack of provincial recognition for training and/or experience obtained overseas. The federal government could possibly establish national standards to recognise the training and experience of aliens. The Courts would then have to decide whether such regulations were in pith and substance related to education, an exclusive provincial concern, or were necessarily incidental to the federal power over aliens. At the moment, the primary losers are the thousands of underemployed immigrants.

But s.6(2)(b) of the *Canadian Charter of Rights and Freedoms* must also be considered. The section reads:

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right... (b) to pursue the gaining of a livelihood in any province.¹⁶¹

It is suggested that *Dickenson* is still good law since the section refers to "a" livelihood. The most plausible interpretation seems to be that employment in the field of a person's choice is not a right, and underemployment is acceptable.

On the other hand, provinces are free to establish affirmative action programs for a socially or economically disadvantaged group of individuals within the province. Since these programs are often directed towards native Canadians, it would seem possible for immigrant groups to receive similar special status. Although the Manitoba Human Rights Commission has adopted administrative procedures in the past to ensure the implementation of affirmative action programs, it is suggested that the Commission will now have to re-evaluate this area carefully. Unemployment and underemployment among certain groups within a province is often higher than the provincial rate and the Canadian unemployment rate, although the overall provincial rate may be lower than the federal rate. Yet the *Charter* indicates affirmative action programs can only be implemented if "the rate of employment in that province is below the rate of employment in Canada." Unfortunately, the broader and more rational approach taken by the Commission appears about to be narrowed considerably. Section 13(e) of the *Human Rights Act*¹⁶² indicates that it is the

158. *Ibid.*

159. *Supra* n. 153.

160. *Supra.*

161. *Constitution Act, 1982.*

162. *S.M. 1974, c. 65 (H 175).*

function of the Commission "to further the principle of equality of opportunities...regardless of status." Does the *Charter* preclude equality of employment opportunity? Does this mean affirmative action programs in Manitoba are obsolete until the unemployment rate here exceeds the national rate? If this is the case, then certain Manitobans at least are about to be the recipients of fewer opportunities which is surely not the intent of the *Charter*. Affirmative action programs are critically needed and if the *Charter* does in fact limit such programs, then the *Charter* should be amended as soon as possible.

The right to a public education might also be considered an essential right. However, the *Redlin* case suggests that it is possible to impose differential fees on aliens, at least in the case of non-immigrant aliens. It is doubtful however, that the Courts would be receptive to the imposition of such fees on permanent residents who already support the public school system by paying income taxes. The *Redlin* decision is also arguably limited to post-secondary education where all students, whether domestic or foreign must pay tuition fees. Education below this level is at least theoretically free.

But could a province refuse to provide language training in French or English, since this service is obviously fundamental to any aliens' ability to function within the community? It is doubtful that provinces could refuse to provide such services since all citizens would seemingly have the right to conduct their business in accordance with the provinces' official languages. It is submitted that language training would clearly be necessarily incidental to the federal power over naturalization and aliens, presumably even more so than in other areas since the federal *Citizenship Act* requires competence in one of the official languages.

The *Morgan* decision suggests that other social services such as housing, social allowances, and student aid may all be subject to residency requirements. The *Charter* only appears to recognize such requirements "as a qualification for the receipt of publicly provided social services."¹⁶³ Residency requirements related to housing, even public housing, seem to be prohibited by the general limitation provision in s.6(3)(a). It would appear that only persons not having Canadian citizenship or permanent resident status will be subject to residency requirements, e.g. foreign students, persons in Canada on temporary employment visas and other non-immigrants under the federal *Immigration Act*.

Would residency requirements be upheld where the denial of social allowances resulted in aliens being forced out of the province? For example, provinces could be faced with this problem in the case of non-sponsored refugees. Federal settlement assistance is only available until the refugee is placed in employment of a continuing nature, which has never been adequately defined. If a province refused social assistance, the alien refugee would be virtually forced out of the province. The federal government could invoke its naturalization and aliens power in accordance with the case law since social services in this context would probably be considered as necessarily incidental to the federal power. But the *Charter* allows residency requirements. It is not

163. *Constitution Act, 1982*, s. 6 (3)(b).

clear what the outcome would be since s.91(25) is presumably subject to s.6. Perhaps the Courts would construe the requirement "unreasonable"¹⁶⁴ in this context. However, prevailing socio-economic conditions would also have to be considered since people other than aliens are often driven out of a province for economic reasons.

The *Charter* does seem to indicate that the other rights guaranteed therein may be subject to discriminatory practices if in fact such laws or practices have general application within the province.¹⁶⁵ At this point it would appear *Tomey Homma* applies. However, its racial approach may soon be laid to rest. Section 15(1) of the *Charter* states:

15(1) Every individual is equal before and under the law and has the right of equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The only question that would arise is whether "all individuals" includes all aliens or only permanent residents, which is the only category of alien protected under s.6.

It is also not clear whether the federal *Human Rights Act*¹⁶⁶ is applicable to all aliens or only those aliens given status in Canada under the federal *Immigration Act*. In *Lodge v. The Minister of Employment and Immigration*,¹⁶⁷ the Federal Court of Appeal declined to deal with the application of the *Human Rights Act* to deportation hearings:

The Court can not make a finding that there has been a discriminatory practice within the meaning of the *Canadian Human Rights Act* for jurisdiction to make such a finding has been confined to the specialized agency and tribunals provided for by the Act.¹⁶⁸

Therefore, does the *Manitoba Act* apply to all aliens within Manitoba? While, it is probable that it does, it is presumed the Manitoba Human Rights Commission will have to determine the extent of its jurisdiction over aliens in the same way its federal counterpart must.

As can be seen, the *Charter* adds greater complexity to an area of law which was already far from clear. To end this section on a less ambiguous note, the case law suggests aliens can be refused the right to vote, to exploit provincial resources and to hold land.

Unfortunately the waters will probably be muddied further, until such time as the *Charter's* application to other parts of the constitution is considered. The most pragmatic course for provinces to follow is to ensure aliens are not denied services which could force them out of the province. It is submitted however, that aliens given permanent resident status under the federal immigration power probably are entitled to more rights than are non-immigrant aliens.

164. *Constitution Act, 1982*, s. 6 (3)(b).

165. *Constitution Act, 1982*, s. 6 (3)(a).

166. S.C. 1977, c. 33.

167. [1979] 1 F.C. 775 (C.A.).

168. *Id.*, at 776.

C. To what extent are provincial powers affected by federal immigration laws?

This final section will deal with the impact of federal immigration laws on several selected provincial powers. This analysis is far from complete, but an exhaustive survey of how all provincial powers are affected by federal legislation is beyond the scope of this paper.

The *Immigration Act* recognizes the increased interest of the provinces in the immigration process. Two sections of the *Act* require the federal government to consult with the provinces.

Section 7 states that:

The Minister, after consultation with the provinces concerning regional demographic needs and labour market considerations and after consultation with such other persons, organizations and institutions as he deems appropriate, shall lay before Parliament, not later than the sixtieth day before the commencement of each calendar year or, if Parliament is not then sitting, not later than the fifteenth day next thereafter that Parliament is sitting, a report specifying: (a) the number of immigrants that the Government of Canada deems it appropriate to admit during any specified period of time; and (b) the manner in which demographic considerations have been taken into account in determining that number.

Section 109(1) states that:

(1) The Minister shall consult with the provinces respecting the measures to be undertaken to facilitate the adaption of permanent residents to Canadian society and the pattern of immigrant settlement in Canada in relation to regional demographic requirements.

(2) The Minister, with the approval of the Governor in Council, may enter into an agreement with any province or group of provinces for the purpose of facilitating the formulation, coordination and implementation of immigration policies and programs.

While the sections clearly place a duty of consultation with the province on the federal Minister of Employment and Immigration, it is not clear what constitutes compliance with this legal duty. In *Port Louis Corp. v. A.-G. Mauritius*,¹⁶⁹ the House of Lords discussed the concept of "consultation" in the following manner:

The authorities indicate that, while the nature and extent of the communications between the consulting parties which are sufficient for "consultation" to have taken place will vary in each case, even under the same enactment, sufficient information must be supplied to the local authority to enable it to tender advice, and, on the other hand, sufficient opportunity must be given to the local authority to tender that advice. The statutory obligation is not fulfilled unless sufficient opportunity is given the local authority to ask the executive questions and to put inquiries to the executive, so that the questions and answers amount to a free and frank exchange of views on all the questions raised by the local authority....

Further, there must be some essential factor without which no consultation can be said to have taken place. It is not sufficient for the executive to inform the local authority of its intentions, but the local authority must be given an opportunity to make adequate representations and to tender advice. It is essential for the executive to approach that advice with an open mind, that is, to be open to persuasion and open to appreciate the advice tendered. "Consultation" connotes an exchange of ideas, information and views, in which each side has a full opportunity of contribution to such an exchange; it is not a one-way process but a two-way process.¹⁷⁰

169. [1965] A.C. 1111 (H.L.).

170. *Id.*, at 1116.

Most of the authorities suggest a *two-way* process is the key factor.¹⁷¹ This discussion therefore suggests the federal minister is often negligent in carrying out his duties under s. 7 and s. 109(1). The provinces must often make decisions in the absence of adequate information or notice. Furthermore, decisions are often made *before* the provinces are notified or have had time to respond.

However, the duty may be somewhat different depending which section is involved. It is submitted that consultation in s. 7 is a condition precedent to the Minister exercising his power to submit a report to Parliament. If he does not consult with the provinces then it is possible that he is acting illegally in laying his report before Parliament. It is mandatory that he consult with the provinces with respect to demographic and labour market needs. But, the section also gives the Minister the discretion to consult with others "as he deems appropriate". Recent federal Ministers in this portfolio have seemingly concluded that consulting with groups within a province, and not the government in a province, constitutes compliance with s. 7. Of course, such an approach is not only wrong, but also probably illegal. While this analysis may be legally correct, it is really meaningless unless the provinces assert their power. Provinces which do not develop the expertise necessary to ensure consultation is not only possible, but meaningful, can not later complain they were not consulted. This section also places an onus on interested provinces to become knowledgeable enough to tender advice.

Section 109(1) can be interpreted in two ways. A broad approach suggests it is mandatory for the federal government to consult with respect to all procedures related to permanent residents, from overseas selection, to landing, to actual settlement in the province. The Quebec agreement clearly adopts this view. The narrower view is that consultation only necessary with respect to the settlement of permanent residents after they have been chosen by federal authorities to live in a province. Federal practice has often followed this course, presumably because many provinces are not interested. It should be noted the section only applies to permanent residents, yet Quebec is consulted regarding various non-immigrant groups as well. In fact, Quebec has a virtual veto over these groups. However, since this Agreement provides the power, it appears s. 109(2) could give the provinces practically any powers they want, subject of course to the preceding discussion on s. 95 and s. 91(25) of the *B.N.A. Act*.

Section 109(2) also raises an interesting question which must be addressed by the provinces. The federal Minister has the authority to enter into an immigration agreement. But, in the absence of express statutory authority can the province enter into such agreements? The Quebec agreement is clearly subject to *Loi du ministère de l'immigration*. In *Reference Re Anti-Inflation Act*,¹⁷² it was argued that the Ontario government could enter into an agreement with the federal government, thereby subjecting Ontario citizens to the infamous federal wage and price controls, on the basis of "a common law

171. *Robinson v. Minister of Town and Country Planning*, [1947] K.B. 702; 63 T.L.R. 374; [1947] 1 All ER 851; *Fletcher v. Minister of Town and Country Planning*, [1947] 2 All ER 496; *Re Union of Benefices of Whippingham and East Cowes, St. James*, [1954] A.C. 245; *Johnson v. Glen* (1879), 26 Gr. Ch. 162.

172. (1976), 68 D.L.R. (3d) 452 (S.C.C.).

capacity and power to make agreements in the name of the Crown."¹⁷³ Chief Justice Laskin rejected this argument saying:

It is one thing for the Crown in right of a province to contract for itself; it is a completely different thing for it to contract for the application to its inhabitants, and to labour organizations in the Province, of laws to govern their operations and relations without statutory authority to that end. This would be, in effect, to legislate in the guise of a contract.¹⁷⁴

It is suggested that this is strong authority for saying that while a province can enter into a federal/provincial agreement without enacting supporting legislation, the agreement will not be able to alter the law in the absence of such legislation. All members of the Court concurred with this part of the Chief Justice's judgement. It is possible that an agreement determining how immigrants will enter a province, where they will settle, whether provincial employees will be limited to their quest for off-shore labour and a host of other questions integral to the immigration policy process could fall into this category.

The words health or public health do not appear in the *British North America Act*. The federal government's only express health jurisdiction is in relation to Quarantine and the Establishment and Maintenance of Marine Hospitals.¹⁷⁵ The provincial power arises from s.92(7)¹⁷⁶ and the fact that public health was a local matter at the time of confederation.¹⁷⁷ In addition, provinces have the authority to require health professionals be registered under s.92(9), their licencing power, and to meet certain educational requirements under s.93.

Section 19(1)(a) of the *Immigration Act* gives federal immigration authorities the power to deny admission to Canada on the basis of medical disability. While subsection (i) would appear to be clearly within federal jurisdiction under s. 91(11); such an interpretation of subsection (ii) is less clear. This subsection denies admission to any person if "(ii) their admission would cause or might reasonably be expected to cause excessive demands on health and social services."

Although federal monies are definitely transferred to the provinces for health purposes, the provinces are responsible for the operation of the health care system within their boundaries. An examination of inter-provincial correspondence on this matter indicates the federal government consults with provincial officials as to the admissibility of borderline cases, e.g. where people are likely to become self-supporting within a reasonable time after medical treatment, and invariably accepts provincial view.

The real problem lies in the equitable jurisdiction of the Immigration Appeal Board. An examination of the case law shows that this jurisdiction is

173. *Id.*, at 504.

174. *Id.*, at 506.

175. *B.N.A. Act*, s.91(11).

176. The Establishment, Maintenance and Management of Hospitals, Asylums, Charities and Elumosynary Institutions in and for the Province, other than Marine Hospitals.

177. McKall, "Constitutional Jurisdiction Over Public Health" (1975), 6 *Man. L.J.* 317.

frequently invoked to admit persons who would be otherwise legally inadmissible.

In *Ajit Singh v. M.E.I.*¹⁷⁸, the Board granted admission to the appellant's father on the basis that even if he had a chronic condition which might cause an excessive drain on the health system, one of the objectives of the *Immigration Act* was to facilitate the reunion in Canada of Canadian citizens with their relations from abroad. A strong dissent was also put forward in the following words:

If the father's health has not improved, it is certainly not the purpose of the law to impose a burden on Canadian society. The welfare of Canadians should prevail over the admission of sick relatives who may require extensive medical care and may endanger the health of Canadian citizens. This is in keeping with the words "...to promote the...interests of Canada..." in section 3 of the Act.¹⁷⁹

In another case, the Board granted admission to a woman suffering from organic brain syndrome even though her condition might reasonably be expected to cause excessive demands. Considerable emphasis was placed on the sponsor's age, financial circumstances and the fact that the woman would be "entitled to *free medical treatment under a provincial health plan*"¹⁸⁰ (my emphasis). The sponsor's sincere verbal undertaking also appears to have swayed the Board.

However, a month later a differently constituted panel refused admission to an appellant's father because "neither the Federal or Provincial governments in Canada have established any administrative system to make such a guarantee practical."¹⁸¹ As is often common practice the sponsors had agreed to sign an undertaking to be liable for any medical expenses incurred as a result of their father's health problems.

Although the provinces have been able to establish a consultative mechanism with respect to matters referred to them, it is equally clear the Immigration Appeal Board is usurping their power, probably without their knowledge. However, the federal government must be aware of this situation and should notify the provinces about these cases as well. Once again, if they are concerned, the provinces will have to assert their authority if they expect to be heard. There is obviously little obligation on the federal government to develop the provinces expertise for them.

The comments of the Board in the last case necessitates consideration of s. 120 of the *Immigration Act* which reads:

- (1) Where any person or organization gives an undertaking to the Minister to assist any immigrant in becoming successfully established in Canada, that undertaking may by notice in writing be assigned by the Minister to Her Majesty in right of any province and any payments of a prescribed nature made directly and indirectly to that immigrant that result from a breach of that undertaking may be recovered from that person or organization that gave the undertaking in any court of competent jurisdiction as a debt due to Her Majesty in right of Canada or in right of any province to which the undertaking is assigned.

178. Immigration Appeal Board Summary Service (May 22, 1981), n. 26.1

179. *Ibid.*

180. *Ulrich Weste v. MEI*, Immigration Appeal Board Summary Service (August 17, 1981), n. 29.2.

181. *Hing Kong v. MEI*, Immigration Appeal Board Summary Service (July 27, 1981), n. 28.6.

The parties to undertakings pursuant to the *Immigration Act* are the federal government and the sponsor. The law is clear that a person who is not a party to a contract cannot sue upon it. This legal principle was applied in *Bilson v. Kokotow*¹⁸² where an immigrant attempted to sue his sponsors on the basis of an undertaking the latter entered into with the Minister of Manpower and Immigration. The Ontario High Court concluded:

A stranger cannot sue on a contract. If any action is to be brought on this sponsorship declaration the action must be that of the Minister or the Government of Canada which has not been joined as a party to this action.¹⁸³

However, in certain instances the law does recognize the assignment of legal and equitable rights.¹⁸⁴ But not all debts are capable of assignment.¹⁸⁵ The problem is whether sponsorship undertakings constitute a debt capable of assignment. A bare right of litigation is incapable of assignment.¹⁸⁶ While it could be argued that the assignment of a sponsorship undertaking merely allows a province the right to sue the sponsor instead of the federal government, several alternative arguments could be presented by the provinces.

Firstly, the policy basis for a mere right of action being unassignable appears to be the Courts reluctance to allow a third party who has no interest in the contract to aid one of the party's to the detriment of the other.¹⁸⁷ In this case, the provinces themselves would clearly have an interest, in that they would be seeking to recover provincial monies paid out to an immigrant as a result of a sponsor's default.

A problem would occur however, if the same sponsors had defaulted on the undertaking in more than one province. The Supreme Court of Canada stated in *Beatty v. Best et al*¹⁸⁸ that "... an assignment of anything less than a whole chose in action does not entitle the assignee to sue...."¹⁸⁹ From this statement it would appear that the assignment would have to be in favour of only one province, the others then recovering from that one.

The second possible argument is that the sponsor will not be any more detrimentally affected regardless of which government brings the action. The rule seems to be that assignment "...[is] confined to those cases where it can make no difference to the person on whom the obligation lies to which of two persons he is to discharge...."¹⁹⁰

The validity of the section will be in doubt until the legality of the undertaking itself is judicially considered. If the federal Minister has the right to enforce it, then the provinces may have a chance to recover by way of assignment. A test case may be in order since the legal outcome is far from clear.

182. (1975), 57 D.L.R. (3d) 647 (Ont. H.C.J.); aff'd (1978), 23 O.R. (2d) 720 (C.A.). Although the trial decision was rendered under the old Act, the appeal decision was under the new Act. There was no difference mentioned as a result of the new Act being in force. It is assumed the same principle will apply.

183. *Id.*, at 653 (D.L.R.).

184. See e.g., *Cheshire and Fifoots Law of Contract* (9th ed. 1976) 493-515.

185. See e.g., *Cohen v. Webber* (1911), 24 O.L.R. 171 (Ont. Div. Ct.).

186. *Dawson v. Great Northern Railway Co.*, [1905] 1 K.B. 260 at 270 (C.A.).

187. *Supra* n. 184.

188. (1920), 61 S.C.R. 576.

189. *Id.*, at 581.

190. *Tolhurst v. Assoc. Portland Cement. (1900) Ltd.*, [1902] 2 K.B. 660 at 668 (C.A.).

Summary

In the past there has been a notable absence of writing on what is perhaps the most sensitive issue in immigration law: the constitutional division of power. The provinces have not until recently shown any interest in becoming partners in the development of immigration law and public policy. It is hoped this research will assist them in their endeavours.

It is clear that the provinces have substantial powers in this field and, as Quebec has ably demonstrated, provincial involvement is only constrained by the negotiating skill and bargaining strength of a province. But as Quebec has also shown, a province wanting to pursue its powers in this field must firstly develop its own constitutional and legal expertise. Unless provincial officials clearly understand what they can and can not do, the federal government will continue to consult with the provinces only when it is politically desirable for them to do so.

The legal framework suggests that a province can negotiate a provincial role in virtually any aspect of immigration, including the selection of immigrants.

Provinces wanting to exercise their substantial powers in this field would do well to begin enforcing their broad powers in fields such as health and education which affect the settlement, adaptation, and integration of immigrants into the mainstream of Canadian society. Ontario has successfully pursued this course for decades, once again demonstrating the constraints are those outlined above, rather than legal.

While the examples outlined in this paper are not by any means exhaustive, they do indicate that the provinces can enter federal/provincial negotiations confident that they have some leverage even with express federal constitutional paramountcy.