

Current Legal Recourse Available to Unsuccessful Independent Applicants at Visa Posts Abroad: Justice for All or Entrenched Control and Bias?

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I. INTRODUCTION

A. Canada's Immigration Policy

ACCORDING TO EMPLOYMENT AND IMMIGRATION CANADA, Canada, in proportion to its population, accepts more immigrants than any other country in the world.¹ If this is true, then the number of people wishing to immigrate to Canada is considerable. For many, coming to Canada is an opportunity to escape persecution and perhaps start a new life in a country which these immigrants or refugees see as a safe and stable environment offering hope and opportunity.

Every year, many applicants are turned down. For the most part, it is because they fit neither the legal nor the policy requirements of the Canadian *Immigration Act*.² According to *Managing Immigration: A Framework for the 1990s*,³ Canada cannot accommodate the needs of everyone who wants to immigrate here.⁴ Hence, choices have to be made. What are these choices? Section 7 of the *Immigration Act* requires the Minister of Employment and Immigration to announce, annually, after consultation with the provinces, the number of immigrants and refugees to be accepted into the country. According to Employment and Immigration Canada, Canadian immigration policy has three basic goals:

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¹ *Managing Immigration: A Framework for the 1990s* (Employment and Immigration Canada, IM 199/6/92) at 4.

² 1976-77, c. 52, s. 1.

³ *Supra* note 1.

⁴ *Ibid.* at 2.

1. to facilitate the reunion in Canada of Canadian residents with close family members from abroad;
2. to fulfill Canada's legal obligation with respect to refugees and uphold its humanitarian tradition; and
3. to foster the development of a strong and viable economy in all regions of Canada.⁵

It is no secret that many potential immigrants and refugee claimants are turned down. Some are validly refused; many are not. Having spent a summer working with refugee claimants, I discovered that many applicants whom I felt had *bona fide* cases were turned down, their hopes and aspirations dashed, their fears rekindled. Analysing the reasons for negative determination by the Convention Refugee Determination Division (CRDD) infuriated and disappointed me on numerous occasions. Often, reasons given by the Immigration Refugee Board (IRB) members were patently unreasonable, biased, and uninformed. Many times, it seemed they were going out of their way to close their eyes to the persecution facing the claimants, motivated perhaps by ignorance, prejudice, or political reasons. I have seen decisions by the IRB based upon on the issue of credibility, and every lawyer working with refugees knows it is very difficult to obtain leave to the Federal Court when issues of credibility are challenged, unless the Board went completely astray in considering the evidence and testimony. What may at first glance seem a very generous immigration policy is, it seems, not so generous in practice.

B. Reasons for an Independent Class

At present, the *Immigration Act* recognizes three basic types of immigrants: family class, refugees, and independent class. One of the explanations given by Citizenship and Immigration Canada officials for having an independent immigrant category is that, despite high unemployment levels, Canada's supply of highly skilled workers is not satisfying the demand — there are not enough Canadian applicants to fulfil the vacancies in the marketplace.⁶ Moreover, Canada is interested in attracting successful investors and entrepreneurs into the country to stimulate and promote the economy. Given today's globalization of the economy, Canada can benefit from people who have the social, linguistic and cultural skills requisite for a successful penetration of foreign markets. Thus, the independent immigration category is not a response to a benevolent, humanitarian initiative by the Canadian government. Rather, it seems to be based on Canada's economic needs, and, as such, is carefully designed to ensure that only applicants likely to promote these "needs of the market place" goals will be admitted. The *raison d'être* of the independent class is, then, to provide employment for Canadians and make Canada more competitive globally.

⁵ *Ibid.* at 10.

⁶ *Ibid.* at 5.

However, the purpose is not limited to increasing competitiveness and productivity: the *Immigration Act* and *Regulations* also strive to ensure that no Canadian's chances of employment are diminished by the immigrant arriving into the country. After all, an independent applicant does get a definite ten assessment units if he or she has an approved job offer⁷ and up to another ten points if the applicant intends and is qualified to pursue a profession that is in high demand in Canada.⁸ That adds up to a total of 20 units out of the requisite 70 units. Unsurprisingly, the policy that Immigration Canada has devised for the independent class is based on the premise of "Canadians first."⁹

C. Scope of the Paper

Refugee claimants are not the only class of immigrants that are often mishandled by the immigration officials. Potential immigrants attempting to come to Canada under all other venues available under the *Immigration Act* of Canada are also subject to various forms of mistreatment. This paper will analyse one such venue— independent immigration — and will examine the present legal recourse available in Canada to unsuccessful independent applicants at visa posts abroad, consider their adequacy, and discuss whether other recourses should be available.

II. GENERAL INFORMATION

IN ORDER TO BE ALLOWED TO IMMIGRATE to Canada, independent applicants must overcome several major hurdles stemming from current Citizenship and Immigration Canada policy, the two most important being the selection criteria and the discretion available to the immigration officers at visa posts abroad built into the selection process. While the discretion is a direct result of the selection criteria they need to be separated to clearly understand the policy of Canadian immigration law *vis-à-vis* independent applicants and how it is implemented. To examine which remedies are available to unsuccessful applicants at visa posts abroad, it becomes necessary to understand: (i) whom the *Immigration Act* defines as an independent immigrant; (ii) exactly what the selection criteria are; (iii) the legal rights an independent applicant should be aware of when applying; and (iv) the extent of discretion available to immigration officers at visa posts abroad. Only once this task is accomplished can the remedies available to unsuccessful applicants at visa posts abroad be properly and critically evaluated.

⁷ Schedule I, Factor 5, *Immigration Regulations*.

⁸ *Ibid.*, Factor 4.

⁹ C.J. Wydrzynski, *Canadian Immigration Law and Procedure* (Toronto: Canada Law Book Limited, 1983) at 111.

A. Who is an Independent Applicant?

The independent immigrant class includes assisted relatives, skilled workers, entrepreneurs, investors, and self-employed persons. Assisted relatives are defined as relatives, other than members of the family class, who are immigrants and are an uncle or aunt, a brother or sister, a son or daughter, a nephew or niece, or a grandson or granddaughter of a Canadian citizen or permanent resident who is at least 19 years of age and who resides in Canada.¹⁰ If such a relative in Canada is able and willing to help an assisted relative become established in Canada, this willingness to assist is recognized by selection points being awarded.

Entrepreneurs must demonstrate to immigration officials that they intend and have the ability to establish, purchase, or make a substantial investment in a business in Canada which will contribute significantly to the economy. The business will have to employ or continue employment of at least one Canadian citizen or permanent resident, other than the entrepreneur and her dependents. The entrepreneur must also establish that she has the ability to provide active and ongoing participation in the management of the business or commercial venture.¹¹

Investors must have both a net worth of at least \$500,000 and a proven record of success in business. As well, the proposed investment must be of a significant economic benefit to the province in which it will be located.¹²

The self-employed category is comprised of immigrants who intend and have the ability to establish or purchase a business in Canada which will both employ that person and significantly contribute to Canada's economy, culture, or artistic life.¹³

B. The Selection Criteria of the *Immigration Regulations*

The selection criteria are set out in Schedule I of the *Immigration Regulations*. It is broken up into three columns: factors, criteria, and maximum units allowable. Column I lists various factors to be taken into account when assessing independent applicants, including education, specific vocational preparation, experience, occupational demand, arranged employment or designated occupation, the demographic factor, age, knowledge of French and English, and personal suitability.

Column II describes, in detail, criteria of how many points should be ascribed to each independent applicant for various attributes that he or she possesses. Essentially, the criteria prescribe the amount of units that should be awarded based

¹⁰ Section 2(1), *Immigration Regulations*.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.* The demand requirement of this category is discussed above.

on the degree of experience, training, skill, or education that corresponds to the factors with respect to which it is being assessed.

Column III lists the maximum units that can be allotted to an independent applicant based on each of the factors and the corresponding criteria. Each category of independent applicant has a minimum of selection units which needs to be satisfied in order to be successful. Entrepreneurs and investors require a minimum of 25 units of assessment.¹⁴ Skilled workers require a minimum of 70 units of assessment.¹⁵ Self-employed applicants require a minimum of 70 units, but that includes 30 bonus units for being in that category.¹⁶ Assisted relatives require a minimum of 70 points, including five bonus points for having a relative in Canada willing and able to assist them to become established in Canada.

C. Legal Rights of Potential Independent Applicants

Before recognising which legal rights inure to a potential independent applicant upon application, it is essential for an applicant to know what her obligations are. First and foremost, an independent applicant must satisfy an immigration officer that she meets the selection standards established by the regulations.¹⁷ The prospective immigrant shoulders the entire burden of proving that she has a right to come into Canada and that admission would not be contrary to the *Immigration Act* or the *Immigration Regulations*.¹⁸ As well, except for few prescribed cases¹⁹ and s. 9(1.1), every immigrant and visitor must make an application for and obtain a visa before appearing at a port of entry.²⁰ All immigrants will be assessed in order to determine if they are persons to whom landing may be granted.²¹ Additionally, each immigrant must undergo a medical examination by a medical officer.²²

¹⁴ *Immigration Regulations*: ss. 9(1)(b)(ii) and 9(1)(b)(iii), respectively.

¹⁵ *Ibid.*, s. 9(1)(b)(i).

¹⁶ Section 8(4), *Immigration Regulations*.

¹⁷ Section 6(1), *Immigration Act*. The *Regulations* are discussed above for this reason.

¹⁸ Section 8(1), *Immigration Act*.

¹⁹ As per s. 2 of the *Immigration Act*, "prescribed" means prescribed by regulations made by the Governor in Council. Moreover, as far as the above mentioned definition is concerned, s. 11.41 of the *Immigration Regulations* refers the reader to s. 11.2, which defines the "prescribed" classes as live-in care-givers in Canada and post-determination refugee claimants in Canada. For a more specific definition of these classes, see ss. 11.3 and 11.4 of the *Immigration Regulations*.

²⁰ Section 9(1), *Immigration Act*. Subsection 1.1 merely states that a person who makes an application for a visa may apply on behalf of that person and every accompanying dependant.

²¹ Section 9(2), *Immigration Act*.

²² Section 11(1), *Immigration Act*.

Since the *Immigration Regulations* provide a scheme whereby different units of assessment are given to different types of independent applicants, an applicant should be aware of her basic legal rights upon application. Indeed, as the Federal Court of Appeal held, s. 8(1) of the *Immigration Regulations* imposes a mandatory duty to assess the immigrant.²³ However, duty notwithstanding, it appears that there are few statute-entrenched legal rights vested in independent applicants. The legal rights bestowed by statute and case law are as follows: first, a duty of fairness is owed by the visa officers to the applicants. As described by Sara Blake,

the law has now evolved to impose the duty of fairness on those who make administrative decisions, and the "duty of fairness" has supplanted the rules of natural justice.²⁴

Second, by virtue of s. 8(1) of the *Immigration Regulations*, there is a duty owed by a visa officer to assess an independent applicant,²⁵ and that assessment is governed by strict regulations. Third, there is a duty on immigration officials to provide basic information and make available the appropriate forms.²⁶ Fourth — and some of this is conjecture — an independent applicant should be entitled to a interview, especially where the immigration officer is doubtful of the applicant's success. In *Lam v. Canada (Minister of Employment and Immigration)*,²⁷ it was held that in an application for permanent residence under the self-employed provisions, the immigration officer does not have a discretion to not grant an interview pursuant to Factor 9 of Schedule I.²⁸ Given the discretion a visa officer has by virtue of s. 11(3) of the *Immigration Regulations* — which can be positive or negative *vis-à-vis* the applicant

²³ *Uy v. Canada (Minister of Employment & Immigration)* (1991), 12 Imm. L.R. (2d) 172 at 175. See above for a discussion following the analysis of this case on whether there is or should be a duty on a visa officer to consider a category for which an applicant is qualified but did not apply for, and what the implications of such an assessment absent such a duty would be.

²⁴ S. Blake, *Administrative Law in Canada* (Toronto: Butterworths, 1992) at 13. See also *Syndicat des employés de production du Québec et de l'Acadie v. Canada* (CHRC) (1989), 62 D.L.R. (4th) 385 at 425 (S.C.C.); *Re Nicholson and Haldimand-Norfolk (Regional Municipality) Commissioners of Police* (1978), 88 D.L.R. (3d) 671 at 681 (S.C.C.); *Martineau v. Matuski Institution (No.2)* (1979), 106 D.L.R. (3d) 385 at 410-12 (S.C.C.), as cited *infra* at note 91.

²⁵ *Supra* note 23.

²⁶ See *Choi v. Canada*, *infra* note 61.

²⁷ (1991) 12 Imm. L.R. (2d) 172, [1990] 121 N.R. 248, (1990) 40 F.T.R. 80 (note) (Fed. C.A.).

²⁸ Factor 9 of Schedule 1 deals with personal suitability of the applicant, awarding a maximum of 10 units on the basis of a personal interview whereby the visa officer can evaluate the personal suitability of the applicant and his dependent to become successfully established in Canada based on the person's adaptability, motivation, initiative, resourcefulness, and other similar qualities.

— an applicant should not be refused without an interview.²⁹ Since s. 11(3) refers to the requisite amount of units of assessment for various types of independent immigrants contained in ss. 9 and 10 of the *Immigration Regulations*, it is arguable that an interview should then be a mandatory step of the process in independent immigration.³⁰

Since the entire application procedure is governed by the *Immigration Act* and the *Immigration Regulations*, which are primarily policy based and extensively detailed, the potential independent applicant is not, generally speaking, afforded many procedural or substantive rights at the outset. Despite the fact that the duty of fairness is owed to the applicant from the very beginning, the *Immigration Act* and *Regulations* are restrictive in their application. For instance, as previously discussed, a self-employed applicant, as opposed to a skilled worker at least, seems to be assured of an interview by a visa officer to determine the final status of his or her application; whether or not that same procedure will apply to a skilled worker or to an assisted relative will depend on the amount of points they have received upon review of their application and supporting documents, as well as further case law development.

Given this state of affairs, another right that the independent applicant should be aware of is the right to make application under the selection criteria which would maximize his or her chances of acceptance. Assuming the application is *bona fide* in terms of the applicant's intentions and qualifications, there is no legal reason why the applicant should not be able to present his or her case in the best legal light. This is probably overlooked by many potential applicants, especially if they had not retained counsel prior to application. The choice of a category chosen by the applicant prior to the presentation of the application to Immigration officials could be extremely important, depending, of course, on the particular applicant and his

²⁹ Section 11(3) gives a visa officer the discretion to issue an immigrant visa to an immigrant who is not awarded the requisite amount of units required by ss. 9 or 10, if, in his opinion, there are good reasons why the amount of units awarded does not reflect the chances of a particular immigrant and his dependants of becoming successfully established in Canada. These reasons have to be submitted in writing and approved by a senior immigration officer. That same section also allows a visa officer to refuse to issue a visa to an immigrant who was awarded the requisite units of assessment under ss. 9 or 10.

³⁰ Note, however, that given the language of s. 11.1(b) of the *Immigration Regulations*, if an immigrant is an entrepreneur, an investor, a provincial nominee (see above), or self-employed, an interview is required; but if an immigrant is a skilled worker, then pursuant to s. 11.1(a)(i) there is no such requirement unless the skilled worker has, upon review of his application and supporting documents, already amassed 60 requisite units. This seems rather peculiar, especially given the reasoning in *Lam*, *supra* note 27. Nonetheless, it means there is no *de facto* or *de jure* right to an interview. Subsection 11.1(a)(i) of the *Immigration Regulations* was first published in SOR/DORS 92-133, *Canada Gazette Part II*, Vol. 126, No. 6, February 20, 1992, probably in response to *Lam*. The result clearly limits the situations when an interview is a requirement.

or her intentions. For instance, whereas the skilled workers have numerous limitations placed upon them, the requirements for the entrepreneur category, the investor category, and the self-employed category are less stringent and perhaps an easier alternative for some potential applicants contemplating applying in the skilled worker category.³¹ Indeed, whereas an independent applicant requires 70 units of assessment, an entrepreneur requires only 25 units.³² While an entrepreneur is required to be involved in the day-to-day operation of the business, it still may be more advantageous for someone who may have contemplated applying as a skilled worker and who is *bona fide* in applying as an entrepreneur. It is essential to realize that, pursuant to s. 8(1)(c) of the *Immigration Regulations*, an entrepreneur is exempt from being assessed on items 4 and 5 of Schedule I, namely occupational demand and arranged employment or designated occupation. Thus, this category becomes very attractive, perhaps even more so than the self-employed category, which also has received its share of attention from practitioners.

Another business category that an applicant contemplating application under the skilled worker category should consider is the self-employed category, especially since the skilled worker category requires 70 assessment points.³³ As Howard D. Greenberg suggests, this category has been under-utilized by many prospective immigrants and has numerous advantages.³⁴ For instance, even though a self-employed applicant needs 70 units of assessment, he may be awarded 30 additional units if the visa officer is of the opinion that the prospective immigrant will be able to become successfully established in his or her occupation or business in Canada.³⁵ A practical drawback of applying in the self-employed category is that an applicant still has to be assessed on occupational demand, as will be discussed above. The result, however, is that a self-employed applicant need only obtain 40 units of assessment. Another advantage is that the self-employed applicant may not need to demonstrate that his or her intended occupation is listed on the approved list of occupations (CCDO). As well, the business which the applicant will establish need not create employment opportunities for Canadian citizens or permanent

³¹ In his article, H.D. Greenberg, "Strategies For Successful Business Immigration" (The Canadian Bar Association National CLE Program on Canadian Immigration Law and Policy, Montreal, February, 1990) [unpublished], suggests that while the independent category becomes more and more restrictive and specialized, some applicants contemplating application in that category may benefit from one of the business categories; it will depend on the specific category and the specific intention of a prospective applicant in establishing in Canada.

³² *Supra* note 14.

³³ *Supra* note 15.

³⁴ *Supra* note 31.

³⁵ *Supra* note 16.

residents.³⁶ An example of when the self-employed category may be advantageous could be that of a music teacher (artistic skill) who establishes a self-employed business giving lessons to students. While in essence doing the same thing as a teacher at a conservatory (skilled worker), the music teacher could significantly benefit from the 30 point bonus awarded under the self-employed category should his application be successful.³⁷ This example resembles very closely the fact situation in *Li Yang v. Canada (Minister of Employment & Immigration)*,³⁸ where the applicant applied as a self-employed music teacher. The Court found as a fact that the applicant, while an accomplished teacher, lacked self-employed experience. However, it concluded that placing undue emphasis on lack of experience as a teacher was a fundamental breach of the duty of fairness because it made it almost impossible for the applicant to succeed. So, lack of experience as a self-employed teacher was not a fundamental obstacle, and choosing to apply as such may well have been crucial in the final outcome of her application.

The self-employed category is not, however, without its drawbacks. As s. 8(1)(b) of the *Immigration Regulations* stipulates, the assessment of a potential self-employed applicant is to be on all the factors of Schedule I except for item 5 — arranged employment or designated occupation. Therefore, a potential self-employed applicant is still assessed on all the other factors, including item 4, occupational demand. Thus, occupational demand, worth 10 points, is a problem not present in the entrepreneur category. However, the 30 possible points may still be a significant factor. One thing becomes very clear, however, in light of the above discussion: the right to apply under the proper category becomes extremely important.

D. Discretion Available to Immigration Officers at Visa Posts Abroad

The amount of discretion available to immigration officials at visa posts abroad is alarmingly disproportionate to the rights afforded to a potential independent applicant at visa posts abroad. Given the present state of affairs, it is crucial to know what this discretion is so that any inappropriate use of such may be challenged by the potential immigrant.

³⁶ Given the way the definition of the self-employed category works, what a potential applicant under this category must do is provide a significant contribution to artistic or cultural life in Canada or a significant contribution to the Canadian economy. These requirements are not as restrictive, and thus provide for a rather large number of possibilities.

³⁷ This example was originally given by Greenberg, *supra* note 31. Conceptually, many other potential applicants could benefit in the same manner. Thus, they should be aware that it is within their legal rights to take full legal advantage of the different assessment units requisite in various categories.

³⁸ (1989) 36 Admin. L.R. 235; (1990) 8 Imm. L.R. (2d) 48; (1989), 27 F.T.R. 74 (Fed.T.D.).

Section 6 of the *Immigration Act* begins by stating that an immigrant *may* be given landing rights if it is established to the satisfaction of an immigration officer that the immigrant meets the selection standards of the regulations.³⁹ Another example of the discretion given to visa officers is that while there is a duty to assess by the visa officer in cases of independent applicants,⁴⁰ s. 9(1) of the *Immigration Regulations* provides the visa officer with the discretion to issue a visa.⁴¹ This sort of discretionary language permeates the *Immigration Act* and *Regulations*. More often than not, mandatory language is not in favour of the applicants but against them.⁴²

With respect to an interview based on Schedule I, Factor 9, discretion is also available to the visa officer.⁴³ The 30 extra units of assessment given to a self-employed category applicant are mandatorily awarded only if, “in the opinion of the visa officer, the immigrant will be able to become successfully established in his occupation or business in Canada.”⁴⁴

Probably the most significant amount of discretion vested in a visa officer is given by s. 11(3) of the *Immigration Regulations*.⁴⁵ This discretion can have serious

³⁹ Section 6(a) of the *Immigration Act*. As will be seen, that discretion is curtailed by a duty to assess an applicant in the manner prescribed by the *Act* and *Regulations*; nonetheless, the level of discretion available is still considerable.

⁴⁰ As per s. 8(1) of the *Immigration Regulations*, which states that “... a visa officer *shall* assess that immigrant, or at the option of the immigrant, the spouse of that immigrant...” (emphasis added).

⁴¹ Section 9 of the *Immigration regulations* provides the following: “[s]ubject to s. (1.01) and section 11, where an immigrant other than a member of the family class, an assisted relative or a Convention refugee seeking resettlement makes an application for a visa, a visa officer *may* issue an immigrant visa to him and his accompanying dependents if ...” (emphasis added). The use of the word “*may*” clearly indicates that satisfying the requirements of s. 9 is not sufficient; discretion still remains.

⁴² Consider, for example, s. 11(1) where it stated that “a visa officer *shall not* issue an immigrant visa ... unless the immigrant ... [numerous requirements follow]” (emphasis added). Given that the thrust of the *Immigration Act vis-à-vis* the independent applicants is to admit only those who are deemed “economically desirable,” based on the “Canadians first” principle, it is not surprising that mandatory language is first and foremost a barrier to immigration, unless various stringent criteria are met by the applicant.

⁴³ *Supra* notes 27–29.

⁴⁴ Section 8(4) of the *Immigration Regulations*. Once again, the use of words “in the opinion of the visa officer” provide for a certain level of discretion; only when that is overcome will the 30 points be given.

⁴⁵ A visa officer may:

- (a) issue an immigrant visa to an immigrant who is not awarded the number of units of assessment required by section 9 or 10 or who does not meet the requirements of s. (1) or (2), or
- (b) refuse to issue an immigrant visa to an immigrant who is awarded the number of units of assessment required by section 9 or 10,

if, in his opinion, there are good reasons why the number of units of assessment awarded do not

consequences to a potential applicant and will be discussed above. Thus, as aforementioned, the level of discretion available to visa officers is rather extensive. It is then crucial for a potential independent applicant at a visa post abroad to be cognisant of the fact that this discretion is subject to the duty of fairness and can be controlled, to some extent, via an application to the *Federal Court* should the circumstances warrant. If we take the jurisprudence at face value, an applicant at a visa post abroad should be aware that:

[t]he purpose of the Immigration Act is to permit immigration, not prevent it, and it is the corresponding obligation of immigration officers to provide a thorough and fair assessment in compliance with the terms and spirit of the legislation.⁴⁶

III. DISCUSSION

A. Grounds for Application to the Federal Court Under the *Federal Court Act*

Applications and Appeals to the Federal Court are covered by s. 82.1 of the *Immigration Act*. Essentially, the subsections relevant for our purposes are the following:

- (1) An application for judicial review under the *Federal Court Act* with respect to any decision or order made, or any matter arising under this Act or rules or regulations thereunder may be commenced *only with leave of a judge of the Federal Court - Trial Division* [emphasis added].
- (2) Subsection (1) *does not apply with respect to a decision of a visa officer* on an application under ss. 9, 10, or 77 or any other matter arising thereunder with respect to an application to a visa officer [emphasis added].

It follows, then, that decisions of a visa officer based on visa officer assessments governing the issuance of visas and all related matters thereto, are subject to judicial review by the Federal Court Trial Division without having to obtain leave first.

The grounds for an application to the Federal Court are covered by s. 18.1(4) of the *Federal Court Act*. In order to obtain relief, the grounds enumerated by that section need be established. Essentially, s. 18.1(4) of the *Federal Court Act* states that the Federal Court Trial Division may grant relief under subsection (3) (see above) if it is satisfied that the federal board, commission or other tribunal:

- (a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

reflect of the particular immigrant and his dependants of becoming successfully established in Canada and those reasons have to be submitted in writing to, and approved by, a senior immigration officer.

⁴⁶ *Supra* note 38.

- (b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
- (c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;
- (d) based its decision or order on an erroneous finding of fact that it made in a *perverse or capricious manner* or without regard for the material before it [emphasis added];
- (e) acted, or failed to act, by reason of fraud or perjured evidence; or
- (f) acted in any other way contrary to law.

Thus, if a refusal has been given to an independent applicant at a visa post abroad, his or her application for judicial review must be based on the grounds enumerated above. Whether or not these grounds are sufficient and whether different remedies should be available is discussed above.

B. Remedies Available Under the *Federal Court Act*

Section 18 of the *Federal Court Act* states that:

- (1) subject to section 28, the Trial Division has exclusive original jurisdiction
 - (a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or tribunal; and
 - (b) to hear and determine any application or other proceedings for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.
- (3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review under section 18.1. S.C. 1990, c. 8, s.4.

Section 18.1(3) of the *Federal Court Act* states that on application for judicial review, the Trial Division may:

- (a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or
- (b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision order, act or proceeding of a federal board, commission or other tribunal.

1. Time limitations under s. 18.1(2) of the F.C.A.

Section 18.1(2) of the *Federal Court Act* states the following:

[a]n application for judicial review in respect of a decision or order of a federal board, commission or other tribunal shall be made *within thirty days* after the time the decision or order was first communicated by the federal board, commission or other tribunal [emphasis added].

This limitation may be extended. However, in order for the extension to be granted, an applicant must “justify the delay and *establish a reasonable chance of success on the*

merits."⁴⁷ Establishing a reasonable chance of success seems to be an added hurdle, since such a requirement is absent in s. 18.1(4) of the *Federal Act* (see below). Therefore, it seems that the thirty day limit seems to be extremely important. Nonetheless, delays occur often. In a situation where a visa officer's decision is communicated to an unsuccessful applicant at a visa post abroad who is not represented by counsel, the applicant will have to retain counsel and get the refusal letter to her. Often, the applicant is not even aware of the 30 day limitation. Counsel will have to get all other requisite transcripts from the visa officer. In order for counsel to obtain material that is in possession of a visa officer, she has to file in the Registry and serve on the visa officer a written request for a certified copy of the material.⁴⁸ All this is time consuming, and according to some highly experienced counsel, sometimes two or more applications for a time extension are filed. Since chances of reasonable success on the merits have to be established as well, the 30 day time limitation raises the question of whether it constitutes reasonable notice to the applicant. After all, the 30 days are not really 30 days when counsel of an applicant in Bombay receives the refusal letter two months after it was sent out and further has to prepare written requests for certified copies of the material. Effectively, this procedure may be prejudicial to a potential applicant for judicial review. In my opinion, it is drafted on a presumption that counsel is already retained, which is clearly not always the case. At the very least, should an applicant wish to apply for judicial review, she should be given an adequate time frame to retain counsel, counsel should be given a reasonable time frame to obtain all the requisite materials, and *then* 30 days or another reasonable number of days should govern the application for review.

2. Appeal to the Federal Court of Appeal

According to s. 83(1) of the *Immigration Act*, a Federal Court decision may be appealed only if the Federal Court Trial Division has at the time of rendering judgment certified and stated that a serious question of general importance is involved.

In the event that an appeal is warranted from the decision of the Trial Division, s. 52 of the *Federal Court Act* states that the Federal Court of Appeal may:

- (2) (a) quash proceedings in cases brought before it in which it has no jurisdiction or whenever such proceedings are not taken in good faith;
- (b) in the case of an appeal from the Trial Division,
 - (i) dismiss the appeal or give judgement and award the process or other proceedings that the Trial Division should have given or awarded,

⁴⁷ D. Sguyias *et al.*, *Federal Court Practice 1994* (Toronto: Carswell, 1994) at 99 (emphasis added).

⁴⁸ Rule 1612 of the *Federal Court Rules*.

- (ii) in its discretion, order a new trial, if the ends of justice seem to require it, or
- (iii) make a declaration as to the conclusions that the Trial Division should have reached on the issues decided by it and refer the matter back for a continuance of the trial on the issues that remain to be determined in light of the declaration ...

The *Federal Court Act* is fairly explicit as to the remedies available under its jurisdiction. As it stands, most applications for judicial review will involve the writ of *certiorari* and the writ of *mandamus*.

C. The Canadian Jurisprudence

Given the level of discretion available to immigration officials at visa posts abroad, the assessment guidelines of Schedule I, as well as the various detailed procedural hurdles that an independent applicant has to overcome, it is not surprising that refusals given to independent applicants at visa posts abroad have been subject to litigation at the Federal Court. Both the legal and policy aspects of the decisions have been litigated, and a vast body of jurisprudence has emerged.

In order to properly understand the scope of judicial review, it is essential to understand the basic premises. First and foremost, processing and assessment of applicants for immigration visas outside of Canada have been held to be an administrative act.⁴⁹ As such, it is subject to administrative law guidelines and jurisprudence, whenever applicable.

Secondly, as already discussed, the *Immigration Act* and the *Immigration Regulations* provide immigration officials, in particular visa officers, with a wide scope of discretion. Discretion, as it will be shown, is not absolute.⁵⁰ The primary rule is that discretion should be used to promote the policies and objects of the governing Act.⁵¹

Thirdly, decisions of immigration officials generally, and for our purposes concerning independent applicants in particular, are subject to judicial review. It must be pointed out that the scope of judicial review is somewhat narrow. The Court does not re-try the matter decided by the tribunal. It does not concern itself with the merits of the case or with the merits of the decision. Instead, the Court is concerned whether the tribunal properly exercised the powers conferred upon

⁴⁹ Wydrzynski, *supra* note 9, quoting, among other decisions, *Bhadauria v. M.M.I.*, [1978] 1 F.C. 229 (T.D.).

⁵⁰ *Re Multi-Malls Inc. et al. and Ont. (Minister of Transportation and Communications) et al.* (1976), 73 D.L.R. (3d) 18 at 29 (Ont.C.A.), as quoted in Blake, *supra* note 24 at 87.

⁵¹ *Padfield v. Minister of Agriculture, Fisheries & Food*, [1968] A.C. 997 at 1030 (H.L.), applied in *Oakwood Development Ltd. v. St. Francois Xavier (Rural Municipality)* (1985), 61 N.R. 321 at 331 (S.C.C.); *Re Doctors Hospital and Minister of Health et al.* (1976), 12 O.R. (2d) 164 at 175 (Div.Ct.), as quoted in Blake, *supra* note 24 at 87-88.

it by statute.⁵² The Court reviews not the actual final decision of the tribunal but the reasons for the decision, in order to ascertain whether a reviewable error has been committed. Findings of fact are reviewable only if patently unreasonable.⁵³

As far as discretion is concerned, Courts review neither the wisdom nor the merits of discretionary decisions made by tribunals. A Court will not substitute its own decision for that of the tribunal simply because it would have exercised the discretion differently had it been charged with the responsibility. So long as the discretionary decision was made in good faith and on the basis of proper considerations, it will stand.⁵⁴ This sometimes frightening reality for independent applicants at visa posts abroad is largely attributable to the principle of curial deference.⁵⁵ As Mr. Justice La Forest wrote in "The Courts and Administrative Tribunals", this principle has led to the result that

despite an inevitable tension between claims of fairness and efficiency ... the [Supreme] Court has shown considerable reluctance to interfere with decisions of specialized tribunals within their area of expertise.⁵⁶

The rationale behind the principle of curial deference is clear — the Court feels that the administrative board or agency is better equipped and has more training, knowledge, and sensitivity in dealing with issues before it compared to a Court of law.⁵⁷ However, as Mr. Justice La Forest notes, this may not be a satisfactory standard of review, and opines that the type and scope of the expertise to which the Court defers may require refinement.⁵⁸ He goes on to cite a suggestion by Dean Wade MacLauchlan:

⁵² *Dee v. Canada (Minister of Employment and Immigration)* (1987), 17 T.R. 304 at 309, as quoted in Blake, *supra* note 24 at 173.

⁵³ Originally, per *Blanchard v. Control Data Canada Ltd. et al.* (1984), 14 D.L.R. (4th) 289 at 303–4 (S.C.C.), as quoted in Blake, *supra* note 24 at 179 and as seen below, this common law notion is entrenched in the *Federal Act*.

⁵⁴ *Maple Lodge Farms Ltd. v. Canada et al.* (1982), 44 N.R. 354 at 359 (S.C.C.); *Oakwood Development Ltd. v. St. Francois Xavier (Rural Municipality)* (1985), 61 N.R. 321 at 334 (S.C.C.), as quoted in Blake, *supra* note 24 at 180.

⁵⁵ The Honourable Mr. Justice G.V. La Forest, "The Courts and Administrative Tribunals: Standards of Judicial Review of Administrative Action" in *Administrative Law: Principles, Practice and Pluralism* (Toronto: Carswell, 1992) 1 at 2.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.* at 4.

⁵⁸ *Ibid.*

[t]he key to curial deference lies not in a reformulation or reiteration of the policy of judicial restraint, but in a shift of the debate more squarely from the “how” to the “who” of interpretation.⁵⁹

What is being suggested is a more complex review or assessment of the expertise and capacity of persons making these administrative decisions. Courts should intervene “in terms of deficiencies in the personnel or the process under review.”⁶⁰ As will be seen above, “personnel” (for our purposes the visa officers) are not always adequately trained to recognize when an applicant’s intention is *bona fide* in terms of taking on an “inferior” quality job and are not fully versed in the culture and other social and political realities of a country from which a potential applicant wishes to emigrate. The fact that the process itself is deficient is demonstrated throughout the present paper. If the Federal Court seriously considers these problems, perhaps in the future it will take a more active approach to judicial review, and hopefully intervene more actively in situations where wide discretion is given to an administrative body. Moreover, as will be shown, an appeal to the Immigration Appeal Division should also be instituted.

Though some of the jurisprudence analysed does attempt to be just and fair in the function of judicial review of actions of visa officers at visa offices abroad, it is insufficient. As it stands, despite the voluminous amount of jurisprudence, the remedies available to an unsuccessful independent applicant at a visa post abroad are still found to be wanting. With this in mind, it will be of interest to review some of the available jurisprudence.

1. Choi v. Canada (Minister of Employment and Immigration)⁶¹

In this case, an independent applicant was given a pre-application questionnaire (PAQ) and told that he could not make a formal application until the PAQ was filed. By the time the applicant filled out the application for permanent residence, the occupational demand for his intended occupation was reduced to 1 unit, down from 10. As a result, the applicant only received 65 units, falling short of the required amount of 70.⁶² What the applicant did not know was that he had the choice of proceeding by way of PAQ or immediately by formal application. The Court of Appeal held that immigration authorities have an obligation to provide basic information and to make available the appropriate forms.⁶³ The date when

⁵⁹ *Ibid.* at 5, cited from “Developments in Administrative Law: The 1989–90 Term” (1991) 2 Supreme Court L.R. at 51.

⁶⁰ *Ibid.*

⁶¹ (1991) 15 Imm. L.R. (2d) 265, [1992] 1 F.C. 763 (C.A.).

⁶² *Supra* note 15.

⁶³ *Supra* note 61.

the application process started should have been when the application duly initiated the process leading to the issue or refusal of the visa, and that was deemed to be the date when the PAQ was returned to the immigration authorities. Thus, it appears that the “lock in date” — i.e., the date as of which the existing units of assessment apply — should be the date on which the PAQ was returned. As a result, the matter was reassessed, with the occupational demand factor deemed to be 10 units of assessment. What this case demonstrates is that there is a duty on the immigration officials at visa posts abroad to make available the appropriate forms (the third right enumerated in part II(C) of this essay) as well as a duty on behalf of the immigration officials to provide basic information to the applicants. This seems to me a suggestion that they should not be treated as if they are being done a favour by the immigration officials. While I am glad that this duty is now entrenched, it is unfortunate that this came as a result of litigation rather than as a result of common courtesy and common sense.

2. *Uy v. Canada (Minister of Employment & Immigration)*⁶⁴

In this case, the appellant was a medical doctor and a medical technologist in the Philippines. He was not granted a visa because the visa officer refused to assess him in his proposed intended occupation — that of a medical technologist — because the applicant was also a doctor. The Court of Appeal held that s. 6⁶⁵ of the *Immigration Act* requires a visa officer to assess any immigrant who applies for landing in a manner prescribed by the Act and Regulations⁶⁶ (the second right described in part II (C) of this essay). The Court of Appeal went on to hold that s. 8(1) of the *Immigration Regulations* imposes a mandatory duty to assess, and that nothing in the Act or the Regulations allows a visa officer not to assess in respect of the intended occupations or alternative occupations of an immigrant (or his or her spouse). Thus, the refusal to assess is an error of law and the visa officer had exceeded his jurisdiction.⁶⁷ Moreover, it was held that the general discretion given a visa officer by s. 9(1) of the *Immigration Regulations*, whereby a visa *may* be issued if the independent applicant is awarded at least 70 units of assessment, *must be subordinated to the particular discretion given by s. 11(3)* where, notwithstanding the award of 70 units, a visa may not be issued if the visa officer is of the opinion that these units do not reflect the chances of the particular immigrant of becoming successfully

⁶⁴ (1991) 12 Imm. L.R. (2d) 173 (F.C.A.).

⁶⁵ *Supra* note 38.

⁶⁶ *Supra* note 64 at 176.

⁶⁷ *Ibid.*

established in Canada.⁶⁸ The Court went on to say that *such discretion cannot be exercised by the visa officer alone*; reasons for this opinion must be submitted in writing to a senior immigration officer.⁶⁹ There is, then, a duty to assess, and the general discretion of s. 9 should be subordinated to the specific discretion of s. 11(3). In this case, however, the visa officer did not assess the applicant on his intended occupation and refused the visa by s. 11(3). By doing so, the visa officer erred in law. By invoking s. 11(3) without submitting reasons in writing to a senior immigration officer, he exceeded his jurisdiction.

Despite the fact that the specific discretion mentioned in the case was of a negative nature, it must not be forgotten that s. 11(3) also has a positive side, s. 11(3)(b), which does the exact opposite of the negative discretion.⁷⁰

Of interest is the annotation to the case by C.L. Rotenberg, who suggests that the occupational assessment is not meant to protect Canadian jobs in other occupations. There is nothing preventing the applicant from taking any job once he comes to Canada. What the immigration officer should concern himself with is whether the applicant is prepared to work at a lower position in order to fight off starvation.⁷¹ In my opinion, the immigration officers often suffer from the same tunnel vision as the members of the IRB. They do not understand that applicants from many countries value the freedoms and potential possibilities afforded by living in a democratic country such as Canada, so much so that they have absolutely no problems with taking a job below their qualifications. The fact that eventually they may want to better themselves should not be a concern of a visa officer.

3. *Zeng v. Canada (Minister of Employment & Immigration)*⁷²

This case was decided on the same day as *Uy*. Here, as per his affidavit, the visa officer, when assessing the applicant under Factor 9 of Schedule I (personal suitability) gave the applicant an assessment of zero because he was unconvinced that the applicant could find a job in his field due to lack of demand in that occupation, absence of arranged employment, lack of fluency in English, and no knowledge of French at all, as well the absence of relatives in Canada. The Federal Court Trial Division ruled that the visa officer had exercised his discretion under both ss. 9 and 11 of the *Immigration Regulations* in a manner which did not permit judicial intervention. The Court of Appeal held, however, that this was not a proper exercise

⁶⁸ *Ibid.* Emphasis is my own.

⁶⁹ *Ibid.*

⁷⁰ *Supra* note 29.

⁷¹ *Supra* note 64 at 173.

⁷² (1991) 12 Imm. L.R. (2d) 167 (F.C.A.).

of discretion under s. 9 of the *Immigration Regulations*, because points for all these circumstances are given (or not given) in other Factors — thus, what the visa officer has done amounted to a “double jeopardy” of sorts. Factor 9 speaks of “persons adaptability, motivation, initiative, resourcefulness and other *similar* qualities” (emphasis added). The visa officer’s concerns were not “similar qualities” as contemplated in Factor 9.⁷³ Moreover, the Court found that in reference to s. 11(3) of the *Immigration Regulations*, the overriding discretion given by that section is not to be exercised by the visa officer on his own. First, he must make an assessment under s. 9(1), and *then* the one in subsection 11(3), providing both conditions exist (that is, the norms of assessment do not adequately express the chances for self-establishment). Reasons in writing are then communicated to the senior officer in charge and accepted by that officer.

Thus, a visa officer has to assess the applicant and then use the discretion of s. 11(3), which is not a discretion given *solely* to him. This case serves as an example of when misuse of discretion can actually be remedied; it is unfortunate, however, that it was only at the Court of Appeal level that the misuse of application was detected.

4. *Wang v. Canada (Minister of Employment & Immigration)*⁷⁴

This is another case concerning assessment for a “lesser” occupation. An electrical engineer from China was prepared to pursue the occupation of a tester, either systems or motors and controls. He was amply qualified for both occupations, and indicated that permanent residence in Canada amounted to freedom to him, which was paramount to being an engineer. He was refused. In the refusal letter, Mr. Wang was informed that he was assessed only in the first occupation and given zero assessment units for experience. In view of the zero units in experience, the visa officer used s. 11(1) of the *Immigration Regulations* as one of the reasons for the refusal.⁷⁵ The refusal letter was silent as to the occupation of tester, motors and controls. The learned trial judge held that since the refusal letter addressed the issue of experience, it should be interpreted that the visa officer had indeed carried out the required assessment in the intended occupation. The Federal Court of Appeal disagreed. The refusal letter was not found to be conclusive evidence of whether or not the visa officer had arrived at his conclusion in a manner required by law,

⁷³ *Ibid.* at 171.

⁷⁴ (1991) 12 Imm. L.R. (2d) 178 (F.C.A.).

⁷⁵ Section 11(1) states that: “subject to subsections (3) and (4), a visa officer shall not issue an immigrant visa pursuant to ss. 9 or 10 to an immigrant who is assessed on the basis of factors listed in column 1 of Schedule 1 and is not awarded any units of assessment for the factor set out in item 3 thereof unless”

particularly since it was silent as to the second intended occupation. Any presumption that proceedings were conducted fairly and in accordance with the law is rebuttable by extraneous evidence, which here was limited to the appellant's deposition. The officer's memorandum was not found to be evidence because it was not in a form of an affidavit. Unless the error said to vitiate the decision appears on the face of the record, the intended immigrant must depose his or her evidence, notwithstanding that he or she may not be conveniently located to do so, thereby incurring considerable expense. There would be no justice in according the one witness (the visa officer) an opportunity to present evidence in a manner which precludes testing by cross-examination. A respondent's suggestion of administrative inconvenience is flimsy. A disappointed applicant should have a right to cross-examine the visa officer.

This seems to be a victory for an unsuccessful applicant at a visa post abroad. However, the scope of the victory is narrow: the appeal was allowed because the finding that the visa officer assessed the appellant in respect of the alternate occupation was contrary to the evidence.⁷⁶ It is not difficult for a visa officer to produce a sworn affidavit, to assess the other intended employment, and then, even if all the 70 units are given, exercise the discretion of s. 11(3) properly. I am not convinced, even in light of *Uy*, that the applicant would be granted a visa. Just because the visa officer himself would not want to work at a lower position (as mentioned in the appellant's affidavit⁷⁷), does he, as a Canadian who has not lived in a country as repressed as China, truly understand what it may mean to a Chinese to be in Canada? Chances are he does not. It is one thing to say that being wrong in exercising discretion conferred by statute is not reviewable as long as the decision is not arrived at in a manner contrary to law; a question remains whether visa officers truly understand what is at stake for many applicants.

This brings us back to the abovementioned issue of curial intervention and deficiencies in the personnel of an administrative tribunal.⁷⁸ It is submitted that in order to avoid possible miscarriages of justice which could occur in light of cultural and other misunderstandings between a visa officer and an independent applicant, visa officers should be required, as much as possible, to undergo various training sessions in the culture as well as the economic and political conditions of the country of the potential immigrant. Perhaps if visa officers were more aware of the violations of human rights in China, they would not have been as doubtful of the applicant's intentions.

⁷⁶ *Supra* note 74 at 184.

⁷⁷ *Ibid.* at 181.

⁷⁸ *Supra* note 60.

5. *Lim v. Canada (Minister of Employment & Immigration)*⁷⁹

The applicant intended to be a personnel officer. He was refused. Unlike *Wang*, the visa officer's refusal explained that he had assessed the appellant's intended vocation as a personnel officer and personnel manager and concluded that he was not qualified for such positions. The officer also assessed the applicant for the occupation of Hotel Manager, but found the applicant would be inadmissible for lack of demand. Unlike *Wang*, there was no contention as to whether the duty to assess was actually carried out. The Court of Appeal held that

whether the appellant really was qualified to be a Personnel Officer in Canada was a pure question of fact entirely within the mandate of a visa officer to resolve.... It is clear from the refusal letter, that the visa officer directed his mind to the proper question and that his conclusion was not patently unreasonable.⁸⁰

Once again, this was an issue of administrative discretion. The finding was not disturbed. The fact that he had 20 years of experience managing two small hotels with a combined work force of 60 personnel was deemed insufficient, because the CCDO's restrictive definitions of a personnel officer and personnel manager did not apply to the applicant. Although never an issue, it was not entirely impossible that s. 11(3) could have played a role in a different result in the case, assuming there were grounds for it. As long as the visa officer had addressed his mind to the issues and was not patently unreasonable, the visa officer's decision was not reviewable. It is interesting to note that the visa officer had voluntarily assessed the applicant in the occupation of Hotel Manager, an occupation not put forward by the applicant. Whether there is a duty on the officer to do so, and what the implications of such an assessment are, is discussed above.

6. *Gaffney v. Canada (Minister of Employment & Immigration)*⁸¹

The significance of this case is that it extended the holding of *Uy* to hold that, beyond the visa officer's "duty to assess an application with reference to the occupation represented by the applicant (or his or her spouse) as the one for which he or she is qualified to prepare and pursue in Canada,"⁸² the duty extends "to each such occupation."⁸³ In this case, the applicant stated his occupation as manager of bottle yard operations, and also noted he was willing to pursue the occupations of manager, transport department, or manager, water transport. The visa officer deter-

⁷⁹ (1991) 12 Imm. L.R. (2d) 161 (F.C.A.).

⁸⁰ *Ibid.* at 163 (emphasis added).

⁸¹ (1991) 12 Imm. L.R. (2d) 185 (F.C.A.).

⁸² *Ibid.* at 189.

⁸³ *Ibid.*

mined that since there was no CCDO classification for manager, bottle yard operations, the applicant was to be assessed at the closest approximation: warehouse manager. Since that occupation was not in demand, the applicant was refused.

At the Federal Court Trial Division, the facts were not in dispute. However, since the applicant was claiming that he was not assessed in the other occupations he was capable and willing to pursue, the facts were very much a live issue. At the Court of Appeal, it was held that the Trial Judge erred in basing his decision on a letter and notes of the visa officer which purported to state that the applicant had indeed been assessed on his alternate occupations. The letter and notes were not in the form of an affidavit. The only evidence in such form was that of the applicant, indicating the contrary. It was also held that the visa officer erred in thinking that his duty to assess alternative occupations was limited to a category, and did not extend to occupations in other categories that the applicant was both qualified and willing to follow.⁸⁴ He did have a duty to assess such alternative occupations. Since the learned trial judge did not consider whether the officer has done that, the case was sent back to Trial Division. Once again, the duty of a visa officer is broadened. Not only is there a duty to assess, but all alternate occupations in which the applicant is qualified and willing to follow must be assessed as well.

7. Fong v. Canada (Minister of Employment & Immigration)⁸⁵

In this case, the applicant had many years of experience in the garment industry. He was offered a job as a production line manager. The visa officer assessed his experience factor as zero, despite the fact that he had an affidavit from an executive of the Canadian company to the contrary. He was denied permanent resident status. What is of interest in this case is that the Court of Appeal held that the visa officer erred in law in the manner in which he had conducted the interview by failing to sufficiently delve into the applicant's related experience. Moreover, a further breach of the duty of fairness was committed on the visa officer's part by

failing to apprise the applicant by appropriate questions of his immediate impression regarding the deficiency of proof of intended and related employment, and the likely consequences thereof, in order to afford the applicant some opportunity of disabusing the former's mind of that crucial impression.⁸⁶

This is very significant, because as C.L. Rotenberg points out in the annotation to the case, people in authority seem to be blind to the fact that, in an administrative interview, a visa officer or any other kind of administrative officer may have some

⁸⁴ *Ibid.* at 187.

⁸⁵ (1990) 11 Imm. L.R. (2d) 205 (F.C.A.).

⁸⁶ *Ibid.* at 216.

subjective thoughts about the application of objective principles. He may be quite within his discretion in thinking or deciding these matters. It is clear, however, that “in order to be fair to the applicant, he must give the applicant the opportunity to disabuse the officer of his mindset.”⁸⁷

All of the abovementioned cases seem to suggest that a visa officer is bound to assess and adhere to principles of fairness and to not to be too quick to invoke discretions afforded by sections such as s. 11(3) of the *Immigration Regulations*. The duty to consider alternate occupations stems in part from the decision in *Hajariwala v. Canada (Minister of Employment & Immigration)*,⁸⁸ where considering alternate occupations which an applicant is qualified for and prepared to follow was found to be “a very important expression of fundamental fairness to the applicant.”⁸⁹

8. *Hajariwala v. Canada (Minister of Employment & Immigration)*

The applicant had a partnership business with his brother and father in India. They were purchasing ready-to-wear garments and raw materials for resale to retailers. In his application, the applicant indicated that he intended to pursue the occupation of Materials Purchasing Officer or Garment Sales Representative in Canada. During the interview, the applicant informed the visa officer that his duties in the business were purchasing and selling garments and supervising employees and accounts. His application was refused. The visa officer concluded, based on the interview, that the applicant’s experience corresponded to the CCDO’s definition of supervisor, wholesale establishment. In light of this finding, the visa officer awarded the applicant zero units for experience in his two intended occupations. He did so because he did not believe that the applicant’s experience could be broken into separate components for the purpose of assessing and awarding units of experience.

The Federal Court Trial Division ruled that this was an error of law. The Court held that

there is no reason why the actual experience and time spent in each of various responsibilities in an occupation cannot be broken down to award units of assessment for experience in intended occupations.⁹⁰

It was further held that, as a matter of fairness, the record should indicate reasons which support the visa officer’s specific experience rating or refusal to do so. Since

⁸⁷ *Ibid.* at 205–6 (emphasis added).

⁸⁸ [1989] 2 F.C. 79; (1989) 6 Imm. L.R. (2d) 222; 34 Admin. L.R. 206; 23 F.T.R. 2441 (T.D.).

⁸⁹ *Ibid.*

⁹⁰ *Ibid.* at 230.

the applicant was not even assessed in the intended occupations for experience, this was a breach of the duty of fairness (the first legal right discussed in part II(C)).

D. A Question of Duty

The above mentioned cases raise an interesting issue: is there a duty on the visa officer to consider a category for which an applicant is qualified but does not put forward on his application? Furthermore, if such a duty does not exist but the visa officer does the assessment nonetheless, is he under a duty to do it correctly? As the above mentioned cases suggest, there is a duty to assess, and to do so on all alternate occupations that the applicant indicated she intended to follow, so long as she is qualified to pursue them. None of the cases suggest that a duty to assess on an occupation not put forward in the application exists. As far as the situation where the visa officer proceeds to do so anyway, he presumably would be under the duty to do it in a manner consistent with the duty of fairness. If we were to follow *Lim*, then the following statement by Mahoney J.A. should be considered:

[t]he assessment as a Hotel Manager (one not included on the list of intended occupations) cannot be said to have *prejudiced* the appellant; indeed, it was *reasonable* to have done so. Hotel Manager is an occupation which, it might appear to the visa officer, the appellant was qualified to pursue in Canada.⁹¹

Thus, a visa officer may consider an occupation not put forward by the applicant when it is “reasonable” to do so — when an occupation is a real possibility for an applicant, bearing in mind her qualifications. If such an assessment is not to “prejudice” the applicant, it can only be done in a manner consistent with the duty of fairness.

E. Application for Visas by Spouses

It is also worthwhile to mention that if spouses apply for a visa, they have the option to have either spouse assessed.⁹² It may be worthwhile for the spouses to retain legal counsel in order to determine which has a better chance of success, and have that particular spouse make the application, exercise the option, and go through the assessment. After all, as noted earlier, there is no reason why an application should not be presented in the best legal light, as long as it is *bona fide*. Moreover, if it is clear that one of the spouses has a more “attractive” portfolio, having only one spouse apply is also economically advantageous, as less applications have to be filed.

⁹¹ *Supra* note 79 at 163 (emphasis added).

⁹² Section 8(1) of the *Immigration Regulations*, *supra* note 40.

F. The Effectiveness of Judicial Review

The cases analysed above reveal only a few of the many problems facing independent immigrants. To include them all would necessitate more space than is presently available. However, it is hoped that they shed some light and highlight some of the problems facing independent applicants abroad who were refused a visa for permanent residence at a visa post abroad. Numerous problems, however, remain; one such problem is the issue of whether the discretion of a visa officer was lawfully carried out. It is not a question of whether or not he is right or wrong; it is quite within his discretion to be wrong. In my opinion, the fact that the Court will not, apart from very specific situations, substitute its own decision for that of the visa officer's leaves the immigrant with a severe problem. Here is someone who wants to change his or her entire life and wishes to come to Canada and could arguably do so if it were not within the visa officer's discretion to be wrong. This casts grave doubt on the question of whether judicial review is truly an adequate remedy for an independent applicant at a visa post abroad, or for any immigrant for that matter. It is hoped that the Courts, despite an increase in time, energy, and cost, will become more aggressive in interpreting the process undertaken by a visa officer to arrive at his or her conclusion and approach the review function in a different way: transfer their activities from curial deference to curial intervention. Moreover, as will be discussed, an independent applicant would be better served if an appeal from a visa officer's decision was available to the Immigration Appeal Division. Such an appeal would give the applicant an opportunity to challenge the very decision of the visa officer, not merely the way in which it arrived.

G. The Charter's Application

Section 3(f) of the *Immigration Act* states that a part of the objectives of the Canadian immigration policy is:

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

This subsection undertakes not to discriminate in a manner inconsistent with the *Charter*. Discrimination, of course, is dealt with in s. 15 of the *Charter*. However, this does not mean that the *Immigration Act* is subject only to that section. Section 52(1) of the *Charter* makes it clear that any law inconsistent with the *Charter* is of no force or effect to the extent of the inconsistency. Since the *Immigration Act* is an Act to which the *Charter* applies, it cannot be inconsistent with the *Charter*.

Upon reading the previous section, the question of whether the *Charter* should apply to applicants at visa post abroad seems almost redundant. The policy is not to be inconsistent with the *Charter*; hence, it is obvious that it should apply.

Unfortunately, this assertion is far removed from reality. The problem is not whether the *Charter* applies, but whether an independent applicant at a visa post abroad can avail him or herself of the *Charter* protection. Our Courts have not yet solved the "mystery" of *Charter* application, not just to visa independent applicants at visa posts abroad, but to anyone who is not a Canadian citizen or permanent resident, situated outside of Canada and comes into contact with Canadian law.

I suppose the correct question to ask, then, is whether the *Charter* should apply to any such person who comes in contact with Canadian law and is not geographically situated in Canada. A positive determination of that question will implicitly answer in the affirmative the more narrow question of application to independent applicants at visa posts abroad.

1. Current state of affairs

Despite the promise offered in *Singh*⁹³ that *Charter* application for aliens would be the same as for Canadian citizens and permanent residents, and perhaps expand to extend to people outside Canada who are subject to Canadian law, this hope has not yet materialized. In *Canadian Council of Churches v. Canada*⁹⁴, it was held that non-Canadians outside Canada, who have no claim to admission, are not covered by the *Charter*. It has been suggested, correctly in my opinion, that this is

grounded neither in authority nor in argument. Conspicuous by its absence is any attempt to align this holding with Wilson J.'s dictum. He made no reference to *Singh* in his opinion, and in fact cited no precedent on this point.⁹⁵

In *Ruparel v. Canada (Minister of Employment & Immigration)*,⁹⁶ where at issue was a s. 15 *Charter* challenge by an applicant refused a visa by an officer at a visa post abroad (London), it was held that he had no cause of action because he was not physically present in Canada, a requirement of Wilson J. in *Singh*. No argument was given for this interpretation of Wilson J.'s statement, and the Court went on to rely on MacGuigan J.A.'s decision in *Council of Churches* to support its position.⁹⁷ It has been suggested that this interpretation of Wilson J.'s judgment is erroneous

⁹³ See *Singh v. Canada (Minister of Employment & Immigration)*, [1985] 1 S.C.R. 177 at 202, (1985) 17 D.L.R. (4th) 422, where Wilson J. stated that "everyone" in s. 7 of the *Charter* "includes every human being who is physically present in Canada and by virtue of such presence is amenable to Canadian law" [hereinafter *Singh* cited to D.L.R.].

⁹⁴ [1990] 2 F.C. 534; (1990) 10 Imm. L.R. (2d) 81 (F.C.A.), per MacGuigan J.A., at 563.

⁹⁵ D. Galloway, "The Extraterritorial Application of the *Charter* to Visa Applicants" (1991) 23 Ottawa L. Rev. 335 at 337.

⁹⁶ [1990] 3 F.C. 615, 36 F.T.R. 140 (C.A.).

⁹⁷ *Supra* note 95 at 338-39.

because *Singh* did not deal with an extraterritorial application of the *Charter*. The proper interpretation of her statement should be that everyone covered by Canadian law, whether present in Canada or not, should be covered by the *Charter*.⁹⁸ If such a position is correct — and I submit that it is⁹⁹ — then *Ruparel* is wrong, because it interpreted Wilson J.'s decision incorrectly and relied on *Canadian Council of Churches*, which has no support in argument or jurisprudence on the relevant point.

Three questions come to mind at this point. How much weight should be given to MacGuigan J.A.'s statement that non-Canadians outside Canada who have no claim to admission cannot avail themselves of the *Charter*? How does the Supreme Court decision in *Canadian Council of Churches* impact on the aforementioned statement? How does one get around *Ruparel*? Let us deal with them one at a time.

a. *Canadian Council of Churches* at the F.C.T.D. and F.C.A.

At the trial level, this case dealt with the concerns of the Council of Churches regarding *Charter* violations of the proposed amendments of the *Immigration Act vis-à-vis* the procedures used in determining whether applicants come within the definition of a Convention refugee. The Attorney General brought a motion to strike out the claim, asserting that the Council did not have standing to bring forward such an action and had not demonstrated a cause of action. The Trial Court dismissed the application, as there was no other reasonable effective or practical manner to bring the question before the Court.

On appeal, the decision was set aside and standing was granted only with respect to four points of the original statement of claim. MacGuigan J.A. opined that the real issue in the case was whether there was another reasonably effective manner by which the matter could be brought before the Court. If that was the real issue, then MacGuigan J.A.'s comment about the extraterritorial application of the *Charter* was not on that very point; it is arguable that the statement was really *obiter dictum*.

b. *Canadian Council of Churches* at the Supreme Court¹⁰⁰

While most of this decision is beyond the scope of this paper, it is certainly worthwhile to address Cory J.'s comment about the review of the statement of claim in order to determine whether it disclosed a cause of action:

⁹⁸ *Ibid.* at 339.

⁹⁹ See note 129, *infra*, for Wilson J.'s clear indication of her intention to have the *Charter* apply extraterritorially.

¹⁰⁰ *Canadian Council of Churches v. R.* (1992), 16 Imm. L.R. (2d) 161.

[i]n light of the conclusion that the appellant has no status to bring this action, there is no need to consider the statement of claim in detail. *Had it been necessary to do so, I would have had some difficulty agreeing with all the conclusions of the Federal Court of Appeal on this issue... . A party who did have standing might well find in this vast broadside of grievances some telling shots that would form the basis for a cause of action somewhat wider than that permitted by the Federal Court of Appeal* [emphasis added].¹⁰¹

It is not clear which “conclusions” Cory J. would “have difficulty” agreeing with. Suffice it to say, this could be somewhat encouraging to a litigant who wants to challenge MacGuigan J.A.’s statement regarding extraterritorial application of the *Charter*.

c. The Problem of *Ruparel*

Let us remember that Muldoon J. was quite prepared to grant the applicant his relief. He stated:

[a]s mentioned, on the facts of this case the Court would be quite prepared to accord this apparently worthy applicant the relief he seeks In any event it does appear that paragraph 19(2)(a) of the [*Immigration Act*] is unconstitutional. Alas, the applicant cannot have the remedies which he so justly seeks MacGuigan J.A. in *Council of Churches* ... is reported as holding “This [pleading] could found a right of standing, but cannot constitute a reasonable cause of action since the claimants affected would be all non-Canadian citizens with no claim to admission, and therefore beyond the scope of the *Charter*.”¹⁰²

Certainly, *Ruparel* is an obstacle. However, if one argues that MacGuigan J.A.’s decision is *obiter*, that it misinterprets Wilson J.’s decision in *Singh*, and that it is simply wrong, it follows that *Ruparel* is also wrong, as it too relies on MacGuigan J.A.’s flawed decision in *Council of Churches*. Cory J.’s comment in the Supreme Court decision in *Council of Churches*, while *obiter*, is nonetheless encouraging.

2. Possible effects of *Charter* application

Section 32(1) of the *Charter* states:

This *Charter* applies

- (a) to the Parliament of Canada and government of Canada in respect of all matters within the authority of Parliament;
- (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Is there any extraterritorial application of matters within the authority of Parliament or the government of Canada? The answer is self-evident. Indeed, as early as 1906 it was clear that an Act of the Dominion Legislature which had

¹⁰¹ *Ibid.* at 177–78.

¹⁰² *Supra* note 96 at 629–30.

extraterritorial application was not *ultra vires* the government.¹⁰³ It seems almost absurd that a person subject to Canadian law does not have the same protections of the Canadian legal system as a Canadian citizen or permanent resident, as far as his particular "contact" with Canadian law is concerned. It also seems illogical and unfounded in principle that a visa applicant can avail herself of judicial review, a right given by the *Federal Court Immigration Rules*, and yet not have the statute under which the applicant's fate is determined examined for *Charter* violations. This would seem to directly contradict subsection 32(1) of the *Charter*, especially since it can be argued that subsection 32(1) of the *Charter* clearly covers the *Immigration Act* and the *Immigration Regulations*. Why is it that this point has not been argued more often and vigorously? The explanation is actually quite simple. As one author puts it, it is a result of "lack of scholarly guidance"¹⁰⁴ as well as "lack of any organizational assistance for practitioners seeking to launch *Charter* challenges."¹⁰⁵ The same author submits:

it is important to note that the Supreme Court of Canada in *R. v. Big M Drug Mart*¹⁰⁶ indicated that where the purpose of the legislation was found to be legitimate, the effect of the legislation had to be considered by the Court.¹⁰⁷

How does this square with *Ruparel*? The effects of the legislation were found to be illegitimate in *Ruparel*, yet the decision bowed to MacGuigan J.A.'s statement in *Council of Churches*. This is another reason why *Ruparel* is wrong and should not be followed. Hopefully, then, it is only a matter of time before an argument will be presented to the Courts to the effect that the *Charter* should apply extraterritorially and should apply to visa applicants at visa posts abroad. If "everyone" in s. 7 of the *Charter* and "every individual" in s. 15 of the *Charter* meant every Canadian, would it not have been easy to expressly state that?

There is no contradiction to the argument that immigration to Canada is a privilege.¹⁰⁸ But if it is a privilege whereby an applicant is put in contact with Canadian law and authority, the applicant should be treated in accordance to *all*

¹⁰³ A.G. (*Canada*) v. *Cain*, [1906] A.C. 542 (P.C.), as discussed by Galloway, *supra* note 95 at 341 and 369.

¹⁰⁴ B. Jackman, "Advocacy, Immigration and the *Charter*" (1990), 9 Imm. L.R. (2d) 286 at 294.

¹⁰⁵ *Ibid.*

¹⁰⁶ [1985] 1 S.C.R. 295; 18 D.L.R. (4th) 321; [1985] 3 W.W.R. 481.

¹⁰⁷ *Supra* note 104 at 294.

¹⁰⁸ Section 5 of the *Immigration Act*, as well as numerous cases. See, e.g., *Prata v. Ministry of Manpower and Immigration*, [1976] 1 S.C.R. 376 at 380.

Canadian standards. While entrance into the country is a privilege, the method by which this privilege is determined should be a right protected by the *Charter*.

The Supreme Court reasoned in *Martineau*:¹⁰⁹

[t]here has been an unfortunate tendency to treat “rights” in the narrow sense of rights to which correlative duties attach. In this sense, “rights” are frequently contrasted with “privileges” in the mistaken belief that only the former can ground judicial review of the decision-maker’s actions. One should, as it has been suggested, begin with the premise that any public body exercising power over subjects may be amenable to judicial supervision.¹¹⁰

Besides, since no untrammelled discretion is ever found, every privilege necessarily implies a right to be considered. As a result, what should be considered, especially when *Charter* guarantees are at issue, is not whether something is a right or a privilege, but rather what the merits and consequences are.¹¹¹ The proposition that the dichotomy between “rights” and “privileges” is not reflective of today’s reality and is unacceptable in light of the *Charter* was expressly mentioned by Wilson J. in *Singh*.¹¹²

If the *Charter* did apply to independent applicants at visa posts abroad, it is likely *Charter* challenges brought by them would be under s. 15 of the *Charter*.¹¹³ Even though it is understandable that Canada may want to be selective as to who may come into the country as an immigrant, what can be challenged is *the way* the selection process takes place. Such a process must be non-discriminatory, or, if discriminatory, upheld by s. 1 of the *Charter*.¹¹⁴

¹⁰⁹ *Martineau v. Masqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602.

¹¹⁰ *Ibid.* at 618–19, quoted in W.C.Y. Tom, *Equality Rights in the Federal Independent Selection Criteria* (1990) 31 C. de D. 477 at 488.

¹¹¹ *Ibid.*

¹¹² “The creation of a dichotomy between privileges and rights played a significant role in narrowing the scope of the application of the *Bill of Rights* ... I do not think this kind of analysis is acceptable in relation to the *Charter*”: *Singh*, *supra* note 93 at 461.

¹¹³ Section 15(1): “[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

¹¹⁴ Section 1: “[t]he Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free democratic society.”

If equality rights set out in s.15 of the *Charter* are applicable to extraterritorially situated individuals coming into contact with Canadian law, then s. 15 challenges will logically follow. In *Andrews*,¹¹⁵ it was pronounced that equality is:

[a] comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises.¹¹⁶

It is understandable that:

every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequalities.¹¹⁷

However, when does differentiation or distinction become discrimination? In *Andrews*, the following definition was given by McIntyre J.:

I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society.¹¹⁸

When analysing a provision in order to see if s. 15(1) of the *Charter* should apply, the following analysis should follow: it must be determined whether as a result of the provision a distinction results in being discriminatory in purpose or effect. Then, it should be seen whether the discriminative purpose or effect are a reasonable limit sustainable by s. 1 of the *Charter*.

Challenges using s. 15 of the *Charter* should be launched against the *Immigration Act* and *Immigration Regulations*, in particular Schedule I. For instance, Factor 7 (Age) and Factor 5 (Arranged Employment or Designated Occupation) are arguably discriminatory and violate s. 15(1) of the *Charter*. A s. 1 justification is unlikely.

Let us examine Factor 7 of Schedule I: it could result in an applicant possibly similar to other applicants in many other respects but older than 44 or younger than 21 being ineligible for a visa.¹¹⁹ There is no doubt that Factor 7 of Schedule I

¹¹⁵ *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

¹¹⁶ *Ibid.* at 164.

¹¹⁷ Tom, *supra* note 110 at 492.

¹¹⁸ *Supra* note 115 at 74.

¹¹⁹ Factor 4 of Schedule I in the *Immigration Regulations*.

violates an express provision of s. 15(1) of the *Charter*¹²⁰ — it certainly is discriminatory in its effect. The objective of the legislation covering the age factor is enunciated in s. 3(a) of the *Immigration Act*. It states as one of the immigration objectives the following:

to support the attainment of such demographic goals as may be established by the Government of Canada in respect of the size, rate of growth, structure and geographic distribution of the Canadian population.

The government would require some tremendously cogent evidence in order to pass the test established in *Oakes*.¹²¹

I do not believe the objective of the government can be justified in this situation; to be sure, it is not proportionate to the means when it results in possibly excluding someone from access to Canada simply because she is younger or older than a certain age. Even the discretion built into s. 11(3) of the *Immigration Regulations* cannot justify such a harsh measure.

The same argument applies to Factor 5 of Schedule I, whereby 10 units are given for a designated occupation or arranged employment. In this situation, people with similar characteristics, differing possibly only in that they do not have certified jobs in Canada, are clearly discriminated against by being denied the same chances as other independent workers in the same category who do have certified employment offers in Canada. The effect of Factor 5 of Schedule I is then, discriminatory in its effect. The purpose of the legislation here is outlined in s. 3(h) of the *Immigration Act*.¹²² Once again, without going into a lengthy analysis, it seems obvious that where the result is a denial of admission due only to the lack of a certified offer of employment, the means chosen certainly do not impair as little as possible. The

¹²⁰ *Supra* note 102.

¹²¹ In *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.), the following test was established and entrenched in further cases in order to see whether a limit passes s. 1 of the *Charter*:

- I. The objective must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. At minimum, *the objective must relate to concerns which are pressing and substantial in a free and democratic society.*
- II. The means chosen must be reasonable and demonstrably justified, which involves a “proportionality test,” achieved by the following 3 components:
 - (i) the measures adopted must be carefully designed to achieve the objective in question — they must be *rationally connected to the objective*;
 - (ii) it should *impair as little as possible* the right or freedom in question;
 - (iii) there must be *proportionality* between the effects of the measures which are responsible for limiting the *Charter* right or freedom and the objective that has been identified as of “sufficient importance” (emphasis added).

¹²² “[T]o foster the development of a strong and viable economy and the prosperity of all regions in Canada.”

designation of employment is, however, different — by virtue of being in a designated position, someone is not really equal in other aspects due to the special skill he or she may possess.

The above mentioned examples are but mere illustrations of possible *Charter* challenges which could be launched by independent applicants at visa posts abroad. I believe that immigration officials will instruct their counsel to oppose *Charter* arguments. They will not like the idea of “losing the grip” on the selection process and losing the independence afforded to them. The government has adopted a strict “Canadians first” policy and is holding on tightly to its reins. This policy, while generally reasonable in its goals, is often discriminatory in its effects, to the point of not being able to be sustained under s. 1 of the *Charter*.

The *Immigration Act*, a result of Canadian policy, is not drafted to fully and adequately reflect today's global realities. Just as the Convention refugee definition precludes many *bona fide* refugees from being considered as such, the efforts of many independent immigrants are curtailed by the Act. Professor David Matas, in his article “Racism and Migration,” discusses the problems facing voluntary and involuntary migrants.¹²³ He states that for voluntary migrants who do not seek family reunification, difficulty of access is extreme.¹²⁴ They are admitted on economic grounds and are faced with the fear of the acceptor country of nationals losing jobs to these migrants. Professor Matas cites the example of East Europeans who, with the end of the Cold War, are free to leave but find it almost impossible to be admitted in the West. This curtailing of the freedom of movement is inherently discriminatory. Independent applicants could be both voluntary and involuntary migrants. A Russian Jew wanting to leave because she fears potential persecution in the wake of growing nationalism may not be a Convention refugee because there may not be any persecution facing her directly. Rather, she must apply as an independent applicant. Her intention may be dual: escape potential persecution or discrimination and improve his or her economic conditions in a free and democratic society. The strict requirements of the independent applicants system may not be the answer, but unfortunately the only option. The discrimination that is built into the independent applicant provisions attempts to deny such a person entry to Canada.

It must be shown that immigration is healthy and may improve the economy. It must be shown that distinctions of the independent provisions are often too broad, amount to discrimination and often cannot be saved by s. 1 of the *Charter*. Despite the possibility of a *Charter* challenge, it will be an uphill struggle for extraterritorial applicants. After all, distinction often is not equal to discrimination,

¹²³ (1994) 13 *Refuge* No.8 at 18.

¹²⁴ *Ibid.*

and given the stakes, the battle will not be an easy one. Already, some authors who are proponents of the current legislation are gearing for battle.¹²⁵ Let us be cognisant of a very practical truth: if the *Charter* is to apply to inland refugees only, the sad outcome will simply be a rise in illegal immigration and claims of refugee status. After all, *Charter* protection is a great incentive. The irony of it is that those who are so worried about abuses will be encouraging them themselves. I submit that there is no rational reason to deny *Charter* protection to extraterritorial applicants. The rational underlying both policy and jurisprudence, while *prima facie* pragmatic, is ultimately suspect when scrutinized.

H. The Bill of Rights: a Factor?

Generally speaking, the question of extraterritorial application of the *Bill of Rights* has been answered in the negative until now, albeit with some criticism.¹²⁶ As far as the general impact of the *Bill of Rights* on the plight of an alien before the Canadian legal system, one author has suggested that:

[t]he *Bill of Rights* has failed to significantly impact on the common law in relation to aliens... . The *Bill of Rights* may be of some assistance in recognising rights for aliens in Canadian law, although given its sorry history in the Courts, it is unlikely to count for much, regardless of the reasons for judgment of Mr. Justice Beetz in the *Singh* case.¹²⁷

This is not entirely correct. It is indisputable that the *Bill of Rights* is still in effect in Canada. Indeed, as Mr. Justice Beetz opined in *Singh*, “the *Canadian Bill of Rights* retains all its force and effect.”¹²⁸ The *Bill of Rights* has been proven to be at times an effective remedy to a Canadian sponsor of a member of a family class. However, despite this statement, the question remains: would it be of any practical use as a remedy to an unsuccessful independent applicant at a visa post abroad? In order to answer that question, one major hurdle must first be cleared: that the *Bill of Rights* does have extraterritorial application. As mentioned above, that issue is not settled, and, unfortunately, there has not been much academic commentary as to whether

¹²⁵ For an article that justifies the selection criteria in the independent application process as being non-violative of s. 15(1) of the *Charter*, see A. Dobson-Mack, “Independent Immigration Selection Criteria and Equality Rights: Discretion, Discrimination and Due Process” (1993) 34 C. de D. 549.

¹²⁶ In *Dolack v. Minister of Manpower and Immigration*, [1982] 1 F.C. 396 (T.D.), Nitkman J. held that ss. 1(a), (b) and 2(e) apply only to persons in Canada. Note, however, that on appeal, Thurlow C.J. explicitly rejected this “broad statement” of the trial judge; see [1983] 1 F.C. 194 at 195, 45 N.R. 146 at 147 (C.A.), as commented on by Galloway, *supra* note 95 at note 9.

¹²⁷ Jackman, *supra* note 104 at 297.

¹²⁸ *Re Singh and Minister of Employment and Immigration*, *supra* note 93 at 430; Justice Beetz was referring to the fact that s. 26 of the *Charter* provides for this continuation of the force and effect of the *Bill of Rights*.

it should apply extraterritorially. It is noteworthy that Wilson J., when discussing the issue of extraterritorial application of the *Charter*, made an interesting suggestion:

[a]s Ms. Jackman pointed out, a rule which provided *Charter* protection to refugees who succeeded in entering the country but not to those who were seeking admission at a port of entry would be to reward those who sought to evade the operation of our immigration laws over those who presented their cases openly at first available opportunity.¹²⁹

An observation should be made here. A port of entry is Canadian territory. The only way to give effect to the distinction that Wilson J. is trying to put forward is to interpret the “port of entry” as territory situated outside of Canada. That is the only way to make the above quotation consistent in itself. If the statement is to be interpreted in that manner — and I submit that it should — then the statement seems to enforce the position that the *Charter* should be applied extraterritorially: the visa post abroad for an independent applicant is the first available opportunity to be under the auspices of Canadian law. However, it was used in relation to refugees at a port of entry, and it is debatable whether this reasoning should be extended to applicants at a visa post abroad. As argued above, I believe it should. If the reasoning in *Singh* based on the *Charter* and on the *Bill of Rights* by Beetz J. can be further extrapolated to apply to visa applicants abroad, the question still remains whether it could have a significant impact as a remedy to an unsuccessful applicant.

If the *Bill of Rights* does have extraterritorial application, then the sections that would be of most help would be s. 1(b) in Part I and s. 2 of the *Bill of Rights*.¹³⁰ There are no express provisions in the *Immigration Act* stating that it will operate notwithstanding the *Bill of Rights*, and the fact that numerous cases, pre- and post-*Singh*, have been decided based on it clearly indicates that the issue of its application *vis-à-vis* the *Immigration Act* has been decided in the affirmative. As discussed below,

¹²⁹ *Singh*, *supra* note 93 at 463.

¹³⁰ Part I and s. 1(b) of the *Bill of Rights* read as follows:

1. It is hereby recognised and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion, or sex, the following human rights and fundamental freedoms, namely,
 - (b) the right of an individual to equality before the law and the protection of the law;
2. Every law of Canada shall, *unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding of the Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge, or infringe or authorize to infringe or authorize the abrogation, abridgement or infringement of any of the rights and freedoms herein recognised and declared... (emphasis added).

several immigration regulations, particularly those referring to Schedule I of the *Immigration Regulations*, could be held to be contravene s. 15(1) of the *Charter* and possibly not saved by s. 1.

The discriminatory effect of those regulations should, therefore, be scrutinized under s. 1(b) of the *Bill of Rights*. Several obstacles arise: first one relating to the extraterritoriality issue, consisting of the wording of ss. 1 and 2 of the *Bill of Rights*. Essentially, while s. 2 starts with “every law of Canada shall,”¹³¹ section 1 states that “it is hereby recognised and declared that in Canada”¹³² The use of words “in Canada” is different from that in s. 7 (“everyone”) and s. 15 (“every individual”) of the *Charter*, which may make extraterritorial application difficult, but not insurmountable.

Secondly, s. 15(1) of the *Charter* provides a much broader protection than the *Bill of Rights* because it guarantees four basic equality rights — equality before the law, equality under the law, equal protection of the law, and equal benefit of the law — whereas s. 1(b) of the *Bill of Rights* only guarantees equality before the law. Indeed, as has been suggested, the three additional equality rights in the *Charter* were arguably enacted to remedy the shortcomings of the *Bill of Rights* in this respect.¹³³ If the *Bliss* and *Lavell* decisions accurately state the scope of s. 1(b) of the *Bill of Rights*, then the sort of challenges that were discussed above would be nearly impossible to launch, given that all potential immigrants over a certain age, for example, lose points for being in that age group. It is important to consider that the *Drybones* case has shown that s. 1(b) of the *Bill of Rights* can be used to battle discrimination.¹³⁴ But, consider the case of *Brar v. M.E.I.*¹³⁵ There, it was argued that s. 1(b) of the *Bill of Rights* should apply to a landed immigrant in Canada. At issue was s. 79(2) of the *Immigration Act*, which gave a right of appeal to Canadian

¹³¹ *Ibid.* (emphasis added).

¹³² Section 1 of the *Bill of Rights* (emphasis added).

¹³³ Tom, *supra* note 110 at 491. The author also cites the example of *Bliss v. A.G. Canada*, [1979] 1 S.C.R. 188, where a woman, who had lost unemployment insurance benefits due to her pregnancy, brought a sexual discrimination action under the *Bill of Rights*. No discrimination was found to have occurred, however, since all people in that category (pregnant women) were treated equally. See also *Attorney-General of Canada v. Lavell*, [1974] S.C.R. 1349, 38 D.L.R. (3d) 481, where it was held that sex discrimination against Indian women by s. 12(1)(b) of the *Indian Act* which was relegated to the reserves was not a violation of “equality before the law” of the *Bill of Rights* because it did not necessarily mean that administration and enforcement of this law before the Courts would affect these Indian women unequally.

¹³⁴ *R. v. Drybones*, [1970] S.C.R. 282, (1970) 9 D.L.R. (3d) 473, where it was held that s. 94(b) of the *Indian Act* could not be construed and applied without exposing Indians as a racial group to penalty in respect of conduct upon which the Parliament imposed no sanctions on other Canadians.

¹³⁵ [1985] 1 F.C. 914 (C.A.).

citizens only. It was held, as it was numerous times before, that s. 1(b) of the *Bill of Rights* cannot be used to strike down federal legislation made to attain a valid federal objective. Stone J. quoted the following from *R. v. Burnshine*:¹³⁶

... s. 1(b) of the *Canadian Bill of Rights* does not require that all federal statutes must apply to all individuals in the same manner. Legislation dealing with a *particular* class of people is valid if it is enacted for the purpose of achieving a *valid federal objective*.¹³⁷

Here, since the law applied equally to all non-citizens, and because the objective is valid (although no explanation for and of the validity was given), s. 1(b) of the *Bill of Rights* did not apply. If that is the state of the law, it seems like a case of deference to many federal statutes: how difficult is it to say that the objective is valid and all people of a targeted class are discriminated against equally? This is much more difficult to overcome than s. 1 of the *Charter* — not an easy task. I submit that, given this thrust of the jurisprudence *vis-à-vis* s. 1(b) of the *Bill of Rights*, s. 15(1) of the *Charter* would be a better alternative for unsuccessful independent applicants at visa posts abroad.

One final argument should be made before we leave s. 1(b) of the *Bill of Rights*. In *Ontario Human Rights Commission v. Simpson-Sears* it was held that the human rights legislation is of

a special nature, not quite constitutional but certainly more than ordinary... if its effect is to impose on one person or group of persons obligations, penalties or restrictive conditions not imposed on other members of the community, it is discriminatory.¹³⁸

If provincial human rights legislation is to be given quasi-constitutional effect, it can be argued that this clearly elevates the status of the *Bill of Rights* as well. Even though *Burnshine* was referring to federal legislation and *Simpson-Sears* dealt with provincial legislation, it can be argued that *Burnshine* is no longer good law in light of *Simpson-Sears*: if the Human Rights Code is to be interpreted in a manner that strikes down discriminative effects and is to be quasi-constitutional, it should be even more so for the *Bill of Rights*. If *Burnshine* is no longer good law, it can be argued that *Brar* should not be followed either, since it followed *Burnshine*.

¹³⁶ [1975] 1 S.C.R. 693, (1974) 44 D.L.R. (3d) 584.

¹³⁷ As quoted in *Brar*, *supra* note 135 at 923 (emphasis added).

¹³⁸ [1985] 2 S.C.R. 536.

1. Section 2(e) of the Bill of Rights

Before s. 2 of the *Bill of Rights* can be applied, a precondition must be met: namely, that a law in question must not expressly be declared by an Act of the Parliament to operate notwithstanding the *Bill of Rights*.¹³⁹

The application of s. 2(e) of the *Bill of Rights vis-à-vis* the *Immigration Act* has been tackled by the courts as well.¹⁴⁰ Mr. Justice Beetz opined in *Singh* that:

the ambit of s. 2(e) [of the *Bill of Rights*] is broader than the list of rights enumerated in section 1 [of same] which are designated as "human rights and fundamental freedoms," whereas in s. 2(e), what is protected by the right to a fair hearing is the determination of one's "rights and obligations" whatever they are and whenever the determination process is one which comes under the legislative authority of the Parliament of Canada [emphasis added].¹⁴¹

The problem arose later in the judgment, where Beetz J. stated that *Singh* is distinguishable from cases where a mere privilege was refused or revoked,¹⁴² citing the examples of *Prata*¹⁴³ and *Mitchell*.¹⁴⁴ The problem of distinguishing between right and privileges has been addressed by Wilson J. in *Singh* where she declared that such distinctions are not acceptable under the *Charter*.¹⁴⁵ Wilson J. continued that "the restrictive attitude which at times characterised the approach to the *Bill of Rights* ought to be re-examined."¹⁴⁶ She went on to expressly overrule *Mitchell* and adopt the reasoning of the minority, expressed by Laskin C.J.C.¹⁴⁷ The problem, however, is that she did this in relation to the *Charter*. No mention was made as to whether this line of reasoning should apply to the *Bill of Rights*. As mentioned above, Beetz J., in the same case, opined that rights and obligations should be distinguished from mere privileges when section 2(e) of the *Bill of Rights* is engaged. Thus, whereas the

¹³⁹ *Supra* note 130.

¹⁴⁰ Section 2(e): "[no law of Canada shall be construed or applied so as to] deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations".

¹⁴¹ *Singh*, *supra* note 93 at 433.

¹⁴² *Ibid.*

¹⁴³ *Prata v. Minister of Manpower and Immigration* (1975), 52 D.L.R. (3d) 383, [1976] 1 S.C.R. 376, 3 N.R. 384.

¹⁴⁴ *Mitchell v. The Queen*, [1976] 2 S.C.R. 570, (1975), 61 D.L.R. (3d) 77, 24 C.C.C. (2d) 241.

¹⁴⁵ *Supra* note 112.

¹⁴⁶ *Ibid.* at 463.

¹⁴⁷ Laskin C.J.C. focused on the *consequences* of the revocation of parole for the individual and concluded that parole could not be characterised as a "mere privilege," even though the parolee had no absolute right to be released from prison.

application of the *Charter* on the so-called "privileges" is no doubt a reality, it is still a question as to how it will affect the *Bill of Rights* in the future (or at least s. 2(e)).

Several family class sponsorship litigants were able to use s. 2(e) of the *Bill of Rights* successfully.¹⁴⁸ The cases presented here, argued by Professor David Matas, proved that s. 2(e) of the *Bill of Rights* can be very effective in attacking various sections of the *Immigration Act*. However, the sections at issue in those cases were dealing with rights of the sponsor, and the applicability of s. 2(e) of the *Bill of Rights* to the extraterritorially located member of the family was not at issue.

It is respectfully submitted that if the *Charter* application can be widened to include extraterritorial applications, then there is no reason why the *Bill of Rights* should not follow suit. The present reliance on *Horbas*¹⁴⁹ is problematic. As Strayer J. concluded, s. 2(e) of the *Bill of Rights* applies only to Canadians; it does not apply to non-Canadians.¹⁵⁰ He suggests that where the interests of the Canadian sponsor are at issue, the *Bill of Rights* applies. When the application concerns an extraterritorially situated non-Canadian applicant, the rules are different. As nothing in the section's wording suggests that it should apply strictly to Canadians, I must respectfully disagree with the learned judge's decision. With the above mentioned expansion of the *Charter* rights, it is useful, once again, to remind the Courts of the opinion of Wilson J. in the *Singh* case:

it seems to me that the recent adoption of the *Charter* by the Parliament ... has sent a clear message to the Courts that the restrictive attitude which at times characterised their approach to the *Canadian Bill of Rights* ought to be re-examined.¹⁵¹

Even though the comment was made in the context of the application of the *Charter*, there is no reason why the reasoning cannot be extrapolated to apply to the *Bill of Rights* itself. If anything, this comment, coupled with the fact that half of the Supreme Court based its decision on the *Charter*, should give more credibility to the *Bill of Rights* challenges. With that in mind, perhaps it will be possible in the future to convince the Court that both the *Charter* and the *Bill of Rights* should have extraterritorial application. If that is the case, s. 2(e) of the *Bill of Rights* could have

¹⁴⁸ See, e.g., *Rohan Gopaul Rajpaul v. M.E.I.*, [1987] 3 F.C. 257 (F.C.T.D.), findings regarding the application of the *Bill of Rights* upheld by the Federal Court of Appeal; *Pangli v. M.E.I.* (1987), 4 Imm. L.R. (2d) 266 (F.C.A.); and *Dianena Alvero-Rauert v. M.E.I.* [1988] 3 F.C. 163 (F.C.T.D.).

¹⁴⁹ *Horbas v. M.E.I.*, [1985] 2 F.C. 359 (T.D.).

¹⁵⁰ *Ibid.* at 363.

¹⁵¹ *Supra* note 93 at 462.

a significant impact on the determination status process of an independent applicant at a visa post abroad.¹⁵²

2. Extraterritorial Application

Could the *Bill of Rights* apply extraterritorially even if the *Charter* does not? While a complex issue, I submit that it probably could not. It would be much easier to persuade the Court to accept the *Bill's* extraterritorial application if the *Charter's* extraterritorial application was accepted as well. The *Bill* does have some judicial clout but it may not be sufficient to persuade the Court. As noted above, Beetz J. stated in *Singh* that the *Bill of Rights* retains all its force and effect. Thurlow C.J. rejected as "too broad" Nitikman J.A.'s statement in *Dolack* that ss. 1(a), (b) and 2(e) apply only to persons in Canada.

Aside from these points, most arguments in this paper regarding the extraterritoriality of the *Bill of Rights* are based on extrapolation of Wilson J.'s statements regarding the *Charter's* application and that the *Bill of Rights's* application in light of the *Charter* ought to be re-examined. I submit, therefore, that it will be extremely difficult, if not impossible, to convince a Court of the extraterritorial application of the *Bill of Rights* if the same argument using the *Charter* fails.

J. Invocation of the *Charter* and *Bill* by Willing Relatives and Employers

Could a relative willing to assist or an employer with a certified employment offer invoke the *Charter* or the *Bill* if the visa applicant is unsuccessful? Although case law does not seem to provide anything directly on point, some family class cases may be of assistance in answering this query. Perhaps a good starting point is Urie J.A.'s following quotation:

[i]n the case at Bar, the appellant, a Canadian citizen, sponsored an application for landing made by a member of the family class. Accordingly, she has a legal right to have the application granted where both the sponsor and the applicant fulfil the requirements of the Immigration Act and the Regulations promulgated thereunder ... in such cases the visa officer has not only the authority but the duty to grant a visa.¹⁵³

Although the *Charter* was not argued in this case, there is no reason to hold the *Charter* and the *Bill* cannot apply in situations where a certifier-employer or a family member demonstrate a desire to hire or assist an independent applicant and are capable of doing such. Even if the *Charter* and the *Bill of Rights* do not have

¹⁵² As that section refers to a right to a fair hearing in accordance with principles of fundamental justice for the determination of his rights and obligations.

¹⁵³ *Pangli v. M.E.I.*, *supra* note 148 at 271.

extraterritorial application, a certicator-employer or a family member should be able to have their concerns dealt with in a manner consistent with the *Charter* and the *Bill of Rights*.

1. The Charter

Sections that would most likely be at issue are s. 15 and s. 12. The *Charter* may be involved if the employer's rights were dealt with in a manner consistent with the aforementioned sections of the *Charter* by the immigration officials. In the case of *Alvero-Rautert*¹⁵⁴ the sponsor's rights were found to be infringed upon in a manner inconsistent with the *Charter*.¹⁵⁵

What can be learned from that case is that if the immigration officials treat the application by a relative who is willing and able to assist or by an employer who is in possession of a certified employment offer to an independent applicant in a manner inconsistent with the *Charter*, then the *Charter* can certainly be invoked.¹⁵⁶

2. The Bill of Rights

If we consider cases such as *Brar* and *Horbas* from the employer's perspective, then the answer is negative because the issue is the ineligibility of the independent applicants, not that of the employer. However, if the rights of a certicator-employer or a family member are at issue, the situation is different. In the cases of *Alvero-Rautert*,¹⁵⁷ *Rajpaul*,¹⁵⁸ and *Pangli*,¹⁵⁹ ss. 2(b) ("unusual punishment" in particular) and 2(e) of the *Bill* have been used successfully. In *Alvero-Rautert*, it was found that the applicant's right to sponsor her family was abrogated, abridged, or infringed by the immigration officer's personally negligent or officially indolent conduct in not transmitting the sponsorship with deliberate speed. That amounted

¹⁵⁴ *Supra* note 148.

¹⁵⁵ Section 12 of the *Charter* (cruel and unusual treatment) was infringed because applicant's right to sponsor was infringed by an immigration officer's personally negligent or officially indolent conduct in not treating the application with all deliberate speed (dependant in this case was approaching the age of 21, a cut-off age for a dependant in the family class). Section 15 of the *Charter* was violated as well, because the application was made close to the deadline and the immigration officer and departmental practice and policy did not regard the application worthy of urgent transmission. See *Alvero-Rautert*, *supra* note 148 at 178-79.

¹⁵⁶ I originally suspected that a s. 7 argument may exist, at least for the employer. I have since recanted, however; the argument that the employer's liberty to hire someone is infringed is not tenable since has been held that "liberty" is to be interpreted as "bodily freedom." See *Horbas*, *supra* note 149 at 363.

¹⁵⁷ *Supra* note 148.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

to unusual punishment and denied the applicant of the protection of the law *intended for her and those similarly situated*.¹⁶⁰ There was also an infringement of s. 2(e) of the *Bill* when the immigration officer caused the applicant's undertaking to be dated later than the date on which the applicant had done all she could lawfully do in order to submit her undertaking.¹⁶¹

In the case of *Pangli*, s. 2(e) of the *Bill* was held to be violated when an immigration official failed to clear up a patent conflict between two documents sworn by the appellant's father, the applicant. Thus, the appellant was not afforded a fair hearing in accordance with the principles of fundamental justice in this situation.¹⁶² In the case of *Rajpaul*, the sponsor's rights were violated contrary to s. 2(e) of the *Bill* when the applicant in the family class was not allowed a visitor's visa to come to Canada to testify before the Appeal Board.¹⁶³

These cases lead to the supposition that where an application is made by a relative who is willing to assist or by an employer who is in possession of a certified employment offer, the process followed must be consistent with the *Bill of Rights*. It is also my belief that if the immigration officials treat such applications in a manner inconsistent with the *Charter* or the *Bill*, the protections afforded by the documents may be invoked by the relative or employer.

K. Appeal to the Immigration Appeal Division

Should there be an appeal to the Immigration Appeal Division? This would be a great advantage to unsuccessful applicants at visa posts abroad. It is clearly more advantageous than mere judicial review. The ultimate situation would allow for an appeal to the Immigration Appeal Division and, if need be, an application for judicial review would follow. As will be discussed, an appeal to the Appeal Division will amount to a trial *de novo* and will allow the appellant to challenge the result, not simply the manner in which the decision was arrived. While at present there are no such appeals, I am confident it would prove to be an indispensable procedure.

Section 69.4(2) of the *Immigration Act* states the following:

[t]he Appeal Division has, in respect of appeals made pursuant to sections 70, 71 and 77, sole and exclusive jurisdiction to hear and determine *all questions of law and fact*, including questions of jurisdiction, that may arise ... [emphasis added].

¹⁶⁰ *Alvero-Rautert*, *supra* note 148 at 177.

¹⁶¹ *Ibid.*

¹⁶² *Pangli*, *supra* note 148 at 272.

¹⁶³ *Rajpaul*, *supra* note 148 at 266.

Also of interest is s. 69.4(3) of the *Immigration Act*:

[t]he Appeal Division has, as regards the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and matters necessary or proper for the due exercise of its jurisdiction, all such power, rights and privileges as are vested in a superior court of record and, without limiting the generality of the foregoing, may

- (c) during a hearing, receive such additional evidence as it may consider credible or trustworthy and necessary for dealing with the subject-matter before it.

As was held in *Singh v. M.E.I.*,¹⁶⁴ an appeal to the Appeal Division is a proceeding *de novo*. Indeed, as Stone J. mentions in the *Brar* case:

an appeal to the [Appeal] Board would, in fact, have amounted to a full hearing and reconsideration of the evidence that was before the immigration officer ... process would give [the sponsor] access to all the evidence thus considered, to cross-examine any witness of the respondent, to put in evidence and to make submissions. *It seems unnecessary to underline the advantages such a process would present for detecting error and for correcting it* [emphasis added].¹⁶⁵

It seems obvious, therefore, that it would definitely be advantageous for an unsuccessful independent applicant at a visa post abroad to be able to avail herself of an appeal to the Appeal Division. The powers of the Appeal Division are clearly wider than judicial review given by the Federal Court. As discussed above, judicial review is limited in its scope because it is largely motivated by curial deference to the decision of the administrative decision-maker. The Appeal Division will be clearly in a better position to determine both what took place during the entire processing of an independent immigrant's application at a visa post abroad and what sort of interaction occurred between the applicant and the Immigration representatives at a visa post abroad.

The problem of how an independent applicant could give evidence at such a hearing is not insurmountable either. One such way would be to adduce evidence by a telephone conference call. This proposition was supported by the Federal Court of Appeal in *Rajpaul*.¹⁶⁶ Another possibility, perhaps more objectionable to the Minister, would be to issue a temporary visa to the appellant and let him testify at his appeal. Should Courts finally accept that the *Charter* and the *Bill of Rights* do apply to extraterritorially situated individuals coming into contact with Canadian laws, then the issue of an appellant being able to enter on a temporary visa should

¹⁶⁴ (22 September 1992), Ottawa A-859-88 (F.C.A.).

¹⁶⁵ *Supra* note 135 at 922 (emphasis added).

¹⁶⁶ *Supra* note 148; and see *Canada (M.E.I.) v. Stuart*, [1988] 3 F.C. 157, 31 Admin. L.R. 161, (1988) 5 Imm. L.R. (2d) 97 (F.C.A.).

not be an insurmountable obstacle, especially given the application of s. 2(e) of the *Bill of Rights*. It is also worthwhile mentioning that s. 75 of the *Immigration Act* gives the Appeal Division discretion to allow entry into Canada of people against whom a removal order or a conditional removal order has been made and who have been removed from the country if they want to appeal the order. If the Appeal Division would also allow unsuccessful independent applicants at visa posts abroad to enter the country for the purpose of a hearing, this would clearly enhance the chance that justice would truly be served in most of the cases. If administered properly, appeals to the Appeal Division would be a very useful procedure to follow between the refusal and judicial review. It is also very likely that the interposition of such an appeal will diminish the amount of cases that would be heard by way of judicial review, thus perhaps reducing a possible cost argument that the Minister may put forward by way of objection to the entrenchment of such an appeal. In the interest of justice, an appeal to the Appeal Board should be given the utmost consideration.

IV. CONCLUSION

AS IT STANDS NOW, the *Immigration Act* and *Immigration Regulations* are fraught with inconsistencies, discriminatory practices, and a very wide and often negative scope of discretion. The practice of visa posts abroad, as it is now, is *prima facie* discriminatory.¹⁶⁷ The need for change is apparent. After all, many so called "economic refugees" claim refugee status *because* they are desperate and well aware of the naked truth: they stand no chance if they have applied as independent applicants. Canada is a country built by immigrants. The spirit and determination of immigrants is one of the major factors that push our country forward. Instead of subjective hypocrisy, what we need are Acts and Regulations which are fair and just. This is not to suggest that Canada should allow in anyone who wishes to immigrate, but political insensitivities and the perceptions of immigration officers must be re-examined. In the interest of justice, the *Charter* and the *Bill of Rights* should be given extraterritorial application. There is no logical reason for the current state of affairs *vis-à-vis* the application of the *Charter* and of the *Bill of Rights* to independent applicants at visa posts abroad. There should be the possibility of an appeal to the Appeal Board. In the interests of justice, an unsuccessful applicant at a visa post

¹⁶⁷ "[i]n fact, the immigration process is no more democratic than the market-place. It is subordinated to Canada's social and economic priorities so that those who are economically advantaged, either by their education, occupation, or even better, by surplus of money to invest, get priority over 'economic refugees.' A point system, which gives extra points for education, favours immigrants from developed countries, and the location of visa offices (11 in the United States, three in the United Kingdom, two in France and one each for all of Africa and India ...": *The Globe and Mail* (28 August 1988) A5 (emphasis added), quoted from M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thompson, 1992) at 181.

abroad should be able to present his or her case to an independent forum for a *de novo* hearing. The amount of discretion available to visa officers should be re-examined. Curial deference must also be scrutinized. The decision to come to a new country has tremendous ramifications for the future of an applicant. Consequently, applications must be processed in a truly just manner. Prejudice, ignorance, xenophobia and undue discrimination, real or apparent, should play no role in the proceedings.