

Introduction

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Migration is an impossibly obvious and an obviously impossible theme for a journal about law and equality. It is obvious because the legislated statuses of citizen, alien, refugee, migrant worker, and the non-status “illegal migrant” are the mechanisms by which unequal treatment by the state is institutionalized and implemented. It is impossible because at the limit, what is at stake is a power inexorably linked to conventional understandings of state sovereignty, namely, the right of a nation-state to exclude non-citizens. The entire regime of immigration law is predicated on the immanent inequality of non-citizens, given a global system of nation-states. Section 6 of the *Canadian Charter of Rights and Freedoms*¹ entrenches this inequality by reserving to citizens the unqualified right to enter and remain in Canada. The *Immigration and Refugee Protection Act*,² the *Immigration and Refugee Protection Regulations*,³ and the *Immigration Manuals*⁴ together devote hundreds of pages to elaborating in byzantine detail the qualifications that non-citizens must meet in order to enter and terms upon which they may remain in Canada. Section 15 of the Charter, with its promise of equality before the law, has no traction when it comes to the exclusionary dimension of immigration law.

The obvious has been tackled, with mixed results. In *Andrews v. Law Society of British Columbia*,⁵ the Supreme Court of Canada ruled that citizenship constitutes an analogous ground of discrimination under

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¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [Charter].

² S.C. 2001, c. 27.

³ S.O.R./2002-227.

⁴ Citizenship and Immigration Canada, *Manuals*, online: Citizenship and Immigration Canada <<http://www.cic.gc.ca/manuals-guides/english/index.html>>.

⁵ [1989] 1 S.C.R. 143.

section 15 of the Charter. In *Andrews*, the Court struck down a provincial law society's exclusion of non-citizens. Fifteen years later, the Supreme Court of Canada upheld a legislated preference for hiring citizens in public service employment as a violation of section 15 that was justified under section 1.⁶

These cases demonstrate how the impulse toward equality strains against the privileges bestowed on citizens over other members of society. Veneration of national solidarity promotes formal citizenship as the highest form of membership. And membership must have its privileges. Otherwise, so the argument goes, why would anyone bother joining?

The apparent irreconcilability of these two perspectives may account for the general paucity of equality cases that directly involve immigration and citizenship law, and even the reluctance to confront the issue. In *Dunmore*,⁷ a union successfully challenged the legislated exclusion of farm workers from the protection of the labour relations regime—including the right to organize and bargain collectively—as a violation of section 2(d) of the Charter, freedom of association. Canada imports thousands of seasonal agricultural workers from Mexico and the Caribbean, who work on Canadian farms several months a year on temporary work permits, return to their home countries, and repeat the cycle the following year. As migrant workers, they are regulated under federal immigration legislation. Both before and after *Dunmore*, they have been denied the right to unionize and bargain collectively. Their inequality relative to other agricultural workers has yet to be litigated by unions or addressed by courts.⁸ The same is true of live-in caregivers, another occupational class comprised almost exclusively of non-citizens whose protection under employment standards and labour relations law is notably inferior to workers in other domains.

Moving away from direct confrontation between equality and the juridical citizen/alien binary, one can discern at least two oblique encounters between equality and migration. The first arises as an equality challenge within a juridical category constructed by immigration law. For example, the case of *Benner v. Canada (Secretary of State)*⁹ successfully

⁶ *Lavoie v. Canada*, [2002] 1 S.C.R. 769.

⁷ *Dunmore v. Ontario (Attorney-General)*, [2001] 3 S.C.R. 1016.

⁸ As L'Heureux-Dubé J. notes at para. 103 of *Dunmore*, "in these reasons we are not deciding on the rights, or lack thereof, of foreign seasonal agricultural workers and their families, who are regulated under federal legislation."

⁹ [1997] 1 S.C.R. 358.

challenged a pre-1976 Canadian citizenship law that allowed children born abroad to Canadian fathers to acquire Canadian citizenship automatically, but required children of Canadian mothers to pass a security check and swear an oath. In effect, the law discriminated against female citizens by imposing more onerous requirements on their children in order to acquire citizenship via *jus sanguinis*.

The *Guidelines on Gender-Related Persecution and Refugee Status*¹⁰ issued by the Chair of the Immigration and Refugee Board in 1993 (updated in 1995) represent an institutional response to gender-insensitive interpretations of the refugee definition. The Guidelines encourage decision-makers to take account of the gendered forms and reasons for persecution as they engage in the interpretive process¹¹. The Guidelines do not (nor could they) challenge inequality between refugees and others, or between female refugees and female citizens. Rather, they seek to redress potential sex inequality within the category of refugee. As the Note in this volume describes, the Guidelines and the outcomes they generate reflect the interaction of a particularized domestic legal culture and an ostensibly universal international human rights regime. The variability in conceptions of equality across national jurisdictions, between domestic and international realms, and between refugee claimants and those who judge them, can contribute to ongoing dialogue and positive evolution. As the authors contend, the voices of the women affected, and their ability to speak and be heard, are crucial to using equality to advance refugee protection.

The other typical interaction between immigration and equality concerns the socio-economic status of the foreign-born in Canada. A welter of evidence, both empirical and anecdotal, suggests that the educational attainments and/or work experience of the foreign-born are systematically devalued in the Canadian labour market. A recent Statistics Canada report indicates a “substantial deterioration in the entry earnings of more recent immigrant cohorts through the 1970s, 1980s and the first half the 1990s ... [and] relatively low employment and labour participation rates of more recent arrivals.”¹² The authors conclude that part of the

¹⁰ Online: Immigration and Refugee Board <http://www.irb-cisr.gc.ca/en/about/guidelines/women_e.htm>.

¹¹ The Guidelines also advocate gender sensitivity in the refugee hearing process.

¹² Abdurrahman Aydemir and Mikal Skuterud, “Explaining the Deteriorating Entry Earnings of Canada’s Immigrant Cohorts: 1966-2000”, Statistics Canada Analytical Studies Branch Research Paper Series, 11F0019MIE No. 225, May 2004 at 4.

deterioration is due to weaker language abilities among new immigrants, but also that “roughly one third of the overall deterioration in the entry earnings ... can be explained by declining wage returns to foreign labour market experience which has occurred almost exclusively among immigrants originating from non-traditional [non-European] source countries.”¹³ This “brain waste” of immigrants who acquire their work experience abroad constitutes a form of discrimination that disproportionately affects the highly educated, foreign-born professional adult that Canada claims it wishes to attract.¹⁴

Discrimination, negative relations with state authorities, racism, Islamophobia and social marginalization are common manifestations of the unequal status of many members of many minorities in Canada. The link between these phenomena and immigration is sometimes a matter of perception, which itself is symptomatic of the problem: Racialized and ethnicized Canadians, regardless of whether they, their parents, or their grandparents were born in Canada, are far more likely to face the question “yes, but where are you *really* from?” However innocent the question, it tacitly underscores an indelible foreignness attributed to non-white Canadians, a trait that transcends literal citizenship. At the same time, around 70 percent of new immigrants are classified as “visible minorities”. This potential convergence and synergy of nativism and racism render futile any attempt to dissociate and isolate the sources of unequal treatment and disadvantage reported by immigrants.

Another indirect linkage between immigration and equality arises in the literature on multiculturalism. Jacqueline Shaw’s article about female genital mutilation in this volume illustrates one aspect of this discourse. In general, multiculturalism scholarship addresses practices of some members of religious or cultural minorities, and considers the potential conflict between respect for culture and/or religion and Canadian law. Where the impugned practice targets women’s sexuality (as many do), the tension becomes telescoped into a struggle between particularistic culture and universal equality. Where the countervailing stakes are less dramatic, the problem may be posed as a problem of adverse effect discrimination that violates the equality rights of, for example, Sikh RCMP officers wishing to

¹³ *Ibid.* at 17.

¹⁴ For a recent synthesis of the evidence on this issue, see Conference Board of Canada, “Making a Visible Difference: The Contribution of Visible Minorities to Canadian Economic Growth”, April 2004, online: <<http://www.conferenceboard.ca/boardwiseii/LayoutAbstract.asp?DID=705>>.

wear turbans. Although these explorations of multiculturalism do not directly engage immigration law, the communities in question are presumed to be the product of relatively recent immigration. The label “immigrant” is used interchangeably with “visible minority” or “ethnic” to designate minority communities, with no regard to the actual legal status of the members. The equality issue—whether invoked in defence of or against a particular practice—is only tangentially related to immigration, but the politics of multiculturalism heightens its salience. In particular, for those who see multiculturalism as a “problem”, it is not unusual to tilt into immigration control as the “solution”. Of course, the securitization of immigration post-September 11 has accelerated this exclusionary trend.

From the obvious, to the possible, to the indirect interplay between immigration and equality, we arrive at the space of impossibility: the border. Here is where Attila Ataner’s article on refugee interdiction, by its very silence on the matter, exposes the territorial dimension of equality in a global regime of state sovereignty. Ataner sharply criticizes states’ attempts to evade their international legal obligations toward refugees by using interdiction to prevent access to state territory. He argues that the coercive power of a state over an individual is not co-extensive with the territorial boundaries of the state. Subjection to state power, not territorial presence *per se*, is what triggers the rights of a refugee claimant to assert her claim against a state that has committed itself to the principle of *non-refoulement*. Indeed, the seminal Canadian case of *Singh v. Minister of Employment and Immigration*¹⁵ is famously ambiguous on the reason why a refugee claimant qualifies as “everyone” for purposes of the Charter’s section 7 guarantee of “life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”¹⁶ Justice Wilson concludes that section 7 applies to “every human being who is physically present in Canada and by virtue of such presence amenable to Canadian law.”¹⁷

The issue of whether physical presence is a necessary or merely sufficient condition for the application of section 7 has never been squarely addressed by the Supreme Court of Canada. But Justice Wilson’s reference to human beings and Ataner’s article make it clear that equality really is the salient issue in conceptualizing the responsibilities of a state

¹⁵ [1985] 1 S.C.R. 177.

¹⁶ Charter, *supra* note 2 at s. 7.

¹⁷ *Ibid.* at para. 36.

toward non-citizens subject to state power beyond state borders. Can the state repel them, abandon them to perish at sea, or return them peremptorily to face persecution, torture, possibly death? Simply put, the question is this: Are aliens and citizens equally human?