

## THE NEW IMMIGRATION REGULATIONS

by

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### **Firestorm Over New Immigration Regulations**

Except arguably for decisions on our security, no decision is more important than the policies and practices we put in place that affect those who can and cannot join the Canadian club. Decisions on membership in the body politic determine the future of what will become of Canada. Decisions on who should be excluded, made inadmissible, deported or given a departure notice are not only of immediate interest in protecting Canadians, but the method of making such decisions reflects who we are as Canadians and our sense of procedural justice. Such decisions affect our identity, our economy and our ability to maintain the civility and quality of life for which Canada has become so justly renowned. Yet the new laws and regulations that affect our decisions on membership have received only the most superficial and sometimes misleading attention.

Immediately after the new immigration regulations were posted in Part I of the Canada Gazette on the 15<sup>th</sup> of December, they met a firestorm of criticisms. Media articles were filled with denunciations of the new point system. The alleged retroactivity was characterized as cruel and unfair to those already in the pipeline. The new admission requirements were labeled rigid and elitist. The increased financial guarantee requirement was said to create a barrier to immigration. Most painful of all to the Minister, Elinor Caplan was called anti-immigrant and anti-refugee though repeatedly on record as planning to increase the annual intake from 220,000-250,000 to 300,000. The Liberal party, long hailed as the champion of immigrants, was now being labeled as retrograde. One radio broadcaster in an interview with me suggested that the new regulations had been a knee-jerk reaction to the terror attack on Sept. 11, 2001, a sentiment echoed by Thomas Klein in his letter to the *Star* published a week after the regulations were tabled when he wrote, "That somehow this is a response to some vague threat of terrorism is an insult to the intelligence."

What is going on? Are the regulations as bad as the media reporters and columnists have suggested? Is the Minister anti-immigrant and anti-refugee? And has the Liberal Party betrayed its long pro-immigration record? And has this happened in response to 911?

Innovations and changes in immigration laws and regulations are important. They are not just opportunities to vent negative instant responses. Published regulations that replace procedures previously governed by administrative guidelines make the rules of admission much clearer and more transparent. The application of rules can be much more consistent and individuals are generally assured of much more uniform treatment. Finally, regulations in contrast to administrative rules bind not only applicants but bureaucrats as well. On that basis alone, they ought to be welcomed. At the very least,

they need to be studied and considered as carefully as legislative amendments to our laws. Small changes can have important and often unanticipated consequences. I recall that a very little known provision of the 1976 Immigration Act allowing five or more persons to sponsor refugees, intended originally simply to allow a few families of Russian Jewish dissidents to be sponsored by the Jewish community, was given a certain interpretation and used as the provision to bring tens of thousands of Indochinese refugees into Canada starting in 1979.

Examining the regulations is not easy to do since my version downloaded from the net printed out at 140 single-spaced pages of regulations and 112 pages of explanation, and these 252 pages did not even include the appendices. On the other hand, examining the regulations is also very timely since the new system of tabling the regulations has to be put before a Standing Committee of Parliament before they become operational. Such an examination is also important since these regulations largely replace the use of bureaucratically created administrative guidelines. As such, the immigration and refugee system becomes far more transparent. In fact, it is probably this transparency that is more responsible for the furor than anything else. Under the old system, the professional lawyers, immigration counselors and assorted immigration/refugee mavins would have known of the administrative guidelines, but the general public generally would not. However, inviting the public to comment often means that the criticisms come out first in an effort to score initial points in the court of public opinion. This initial response also fits into a propensity of the media to reinforce a self-declared role as the watchdog of the public interest against mindless and insensitive politicians and bureaucrats.

The terrorist attacks after 911, with much of the initial media-inspired erroneous speculations about terrorists coming to North America as refugees, may also have suggested that the regulations were anti-refugee if not anti-immigrant, propelled by the security threat from terrorist non-state actors. However, the regulations simply spell out the application of the five-part strategy that the Minister announced on 12 October and the provisions of the Immigration and Refugee Protection Act in response to 911 with respect to the pre-screening of refugee claimants, the requirement of a Permanent Resident Card, the detention provisions, the specification of the grounds for inadmissibility, and the increasing the number of countries from which visitors will be required to have visitor or what is now referred to as a Temporary Resident Permit (section 24 of the IRPA), either for a single entry or for multiple entries. The Temporary Resident Permits merge the old Minister's permits and discretionary entry authorizations. Eliminating the designation, "Minister's Permit" is sound; the vast majority of such permits were never issued by the Minister personally. The designation was misleading. For security reasons they may be restricted to an individual entry basis only. There is little new here except perhaps the new tools in the regulations for streamlining the removal process by setting forth the requirements for executing a removal order. Radio hosts frequently asked me whether terrorism was the source of the new regulations. The terror attacks simply were not the inspiration for the major innovations and changes in the regulations.

Of course, some of the provisions are unrelated to immigrants or refugees altogether or even, for that matter, those seeking entry into Canada. For example, we finally have a provision allowing air passengers to pass through Canada without going through customs and immigration. This will be an important assist to Air Canada to enable the carrier to compete for carrying connecting passengers from the States onto Europe, Asia or the Middle East.

Was the controversy that I did read and heard justified? In all the furor, nowhere could I find any mention that the regulations – including the higher educational criteria for obtaining points – are intended to streamline the process and allow the same number of immigration officers to process more actual immigrants, hence facilitating an increased intake. For example, with a huge backlog because of the lower standards in the existing regulations, there are simply too many applications in the pipeline making turnaround times longer and increasing the numbers who drop out along the way. The regulations set forth in detail what is required to make an application complete *before* it is processed. This means that processing is expedited and the litigation over applications is avoided at a great cost saving to taxpayers. Further, because applications must be complete before they are accepted for processing, applicants will also save money if they cannot meet the administrative requirements for processing.

Let me give other example of changes that can have a considerable impact. And I am not just referring to provisions that remove the bureaucratic hassle for refugee claimants seeking work permits, the 15,000 students coming to Canada to take courses for less than six months, performance artists and after-sales personnel working for global businesses seeking entry, frequent cross-border travelers using the new canpass system, or large businesses able to obtain blanket approvals for job offers under more generous conditions instead of having each individual job offer approved under a very restricted set of criteria. For example with respect to international firms, they often have to bring in after-sales service personnel; they can now bring them in as business visitors rather than obtain employment authorizations.

A main entry frame for immigrants, in addition to independent applications who come to Canada based on economic criteria, is the family class. This provision has a longstanding place in immigration policy, designed to facilitate family reunification. However, now it is an important consideration in attracting high-level applicants who need to know whether it will be easy to bring over other family members in addition to a spouse or same-sex or common-law partner. What is new, and seems to have been largely ignored in the media coverage, is the specific inclusion for the first time of same-sex and common law couples under the definition of a family. In fact, depending on the amount of education of an accompanying same-sex or common law partner – as well as a spouse – an applicant can earn up to 5 bonus points. Though I certainly favour the change on grounds of fairness and in opposition to discrimination, I also wonder about the impact on the Canadian demographic profile and our future economy when couples, that are far less likely to bear children if present trends continue, make up a larger part of our immigration intake.

The family class also includes provisions for sponsoring dependent children and grandparents. With respect to the latter, unfortunately, sponsors have too frequently reneged on their commitments to guarantee support. The new regulations allow for the use of collection agencies without going to court first in order to reduce the abuse by going after delinquents in early stages of default. However, to avoid couples being shackled together if a conjugal relationship falls apart, the guarantee period for spouses and partners is reduced from 10 to 3 years. On the other hand, convicted wife beaters need not apply. Another change switches bringing fiancés under the family class to the humanitarian and compassionate grounds, presumably to allow a detailed individual review and avoid the use of this provision for marriages of convenience. But why has this consideration not been applied to common law or same sex couple applicants since the same opportunities for abuse because of the absence of marriage licenses exist in these situations.

The major change, however, is in the definition of a dependent child who may now be 22 years old (previously, the maximum age was 19) as long as they are not married, living in a common-law relationship or with a same-sex partner. These children may even be older if they are full time dependent students (in recognition of desired longer education periods for children) or dependent on the support of parents because they are physically or mentally handicapped. The guarantee period has not been extended for the latter category, though for other children it extends to age 22 or for at least ten years. This extension in the age limit also gives due recognition that in some countries compulsory military service is required delaying the ability of students to either enter the labour force or continue their education. What is more, the provision that excessive demand for medical services, a provision that can prevent allowing a child to be sponsored, has been eliminated. Unless an immigrant is a dead-beat in default of previous support orders or on social assistance, the expansion of the child sponsorship provisions are probably the most important for many individuals contemplating immigration to Canada. Further, the help to balance out more evenly the increasingly distorted demographic profile of Canadians resulting from lower birth rates and greater longevity.

Some of the changes are potentially much more fundamental though they might not appear to be significant. The term “employment” has been replaced by “work” for purposes of defining those eligible to come on employment permits. Why the substitution? Partly to include the self-employed who do not have employers. But this can be a way for students from abroad to come to Canada to obtain work experience as interns and on practicums even though they are unpaid and do not have employment. This service will then provide points for work experience in Canada, qualify them for points under the point system and facilitate their obtaining job offers to further increase the possibility of their applying to come to Canada. When an officer can award ten points to an applicant working in Canada who has a promise of further employment, I suspect this will become a major entry point for educated immigrant applicants to test out whether they want to come to Canada and to enhance their chances of passing the minimum point grade by taking upgrading and language courses. In fact, I prophesy that we will have a large influx of visitors planning to become immigrants and that inland applications for immigration will eventually take over the old system. This may be a

significant improvement since the Australian experience and other studies have shown that skilled workers with previous work or educational connections to the country to which they are immigrating generally do better economically in comparison to those without these previous connections.

There is another provision for students that will create a much larger window of opportunity for entry into Canada. They will be able to study in Canada for six rather than three months without a permit. Here again, in addition to giving an advantage to Canadian schools attempting to compete in the international market for overseas students, we will find entrants taking advantage of this opportunity to acquire Canadian work experience and to make contacts in order to obtain job offers. As stated above, we can expect many more immigration applicants from within Canada, especially since the 10 points normally awarded for a job offer can be attained under the new system if you already have a job in Canada that is expected to last for another year. In turn, these opportunities will increase the business for schools catering to overseas students. Five points can be obtained for adaptability if either the principal applicant or his/her partner studied full time for two-years at a Canadian post-secondary institution or if they worked in Canada full time with an appropriate authorization for at least one year. With an additional five points for job offers and for family connections in Canada, expect a tremendous increase over time in inland immigration applications. These provisions will devastate those immigration lawyers who have invested considerable effort and monies in setting up overseas facilities to recruit clients and stickhandle their applications through the bureaucracy.

The provisions for permanent residents to leave Canada and not handicap their immigration status has been considerably loosened – they can be away for three of their first five years for any reason. Clearly the competition for business investors and top-level immigrants has become very intense. Canada is adapting its legislation to ensure this country remains an attractive destination to those genuinely seeking to make Canada a permanent residence. Based on what I read, there may not be enough protection to prevent abuse.

Thus far I have only suggested the larger impact of a number of ignored provisions. What about the new proposed point system that gave rise to much of the controversy?

### **Recruiting Human Capital**

In the new regulations, the old skilled class entry system of matching applicants to categories of employment needs in Canada has been gutted. This, along with the issue of retroactivity (see next section), has aroused the loudest hue and cry, especially from immigration lawyers and spokespersons for the immigration committee of the law society. Their argument is that we continue to need skilled tradesmen; they claim the support of industry for this. They argue that the new criteria discriminate in favour of college graduates and make it impossible for a skilled blue-collar worker to get into Canada. (I have not heard them mention chefs or other skilled service workers, but that

may simply be because of the selection of examples offered and may not at all be connected to the lobbying of concentrated large industries.) These advocates argue that we would be narrowing the pool of applicants from which we can draw immigrants and leading to shortages in Canada through the imbalance created and the appeal to too narrow a spectrum of skills.

Clearly a judgment was made in drawing up the new point system favoring high educational attainment versus skills suited to specific categories of workers. In fact, provision has been made to designate certain job categories as restricted thereby creating a negative effect when there is an oversupply. Are these changes justified?

The arguments for the change are numerous and persuasive if not absolutely definitive. First, we have entered the new information age where a higher level of skills will be required. Second, on the one hand, it is cheaper for us to train a tool and dye maker than a doctor or computer scientist; it takes fewer years and much of the training of the former can be done on the job. On the other hand, in the new economy where computers are increasingly being utilized in all kinds of positions that were traditional highly skilled blue-collar jobs, a higher level of education will be critical in the performance of such work if Canada is to achieve higher levels of productivity. One of the reasons for the low value of our Canadian dollar is that Canada has not kept up in our rate of increase in productivity with other western economies. Many economists estimate that the greatest source of improvement in productivity comes from the application of higher levels of education to enable the substitution of manual steps with automated ones. As long as we rely on immigrants at lower skill levels to make up for the majority of the net labour growth (now 70% and scheduled to go to 100% in ten years), there is a lower incentive for industries to automate or search for efficiencies. In any case, 70% of the new job opportunities require post-secondary education.

Other reasons for getting rid of the old system relate to efficiency of processing. For the old system depended on subjective judgments by visa officers with respect to language skills, suitability to an occupational class, or the demonstration of sufficient monies to support the immigrant family, but especially with respect to the personal suitability factor. The Auditor General of Canada had criticized the absence of enough objective and measurable factors in making such assessments so that there were too many variations in the application of these criteria among the various visa stations. The new system attempts to answer these criticisms. For example, 10 points under an objective adaptability scale will replace the discretion permitted allowing visa officers to give up to ten points for personal suitability.

None of these, however, are the main reason for getting rid of the old system of matching immigrants with specific immigrant categories according to occupational demand. The rationale provided by the department for scuttling this old system cites data from the last ten years that show that this type of skilled immigrant no longer was able to outperform a Canadian born worker one year after the immigrant arrived. In fact, it now takes over a decade for an immigrant to match the economic performance of the average Canadian taxpayer. Further, the explanation that introduces the regulations also cite a

1998 report of the Prime Minister's Advisory Council on Science and Technology Panel on Skills that found the present system too static and inflexible.

The fact is every academic study that I have read for twenty years criticized the old system as unworkable because by the time the occupational category got into the system, it was often obsolete and other methods had been found to make up for the shortage. People change jobs too frequently. And, in any case, resumes were always being shaped to fit the categories of need rather than reflect the actual training and experience of the immigrant applicant. No visa officer had sufficient time to verify the accuracy of all the contents of the resumes. Academic scholars have for decades called for the abolition of the system of awarding points based on specific sets of occupations. It is only since the regulations were tabled that I have finally understood one possible reason why the department failed to change the system – there is a vested interest among immigration lawyers and some businesses in the existing system. They constitute a powerful and articulate lobby very capable of influencing the media. However, if there is one certainty it is that the old system of listing specific job categories under which additional points could be awarded should have been scrapped years ago.

I have also heard other unfair assertions about the new system – that skilled blue-collar workers will no longer be able to get into Canada. While the new system clearly provides many more points for higher levels of educational achievement, the assertion that they will be unable to cross the threshold of eighty points is simply factually false, though the criticism was applicable to one of the past proposals. However, the proposed regulations have responded to that criticism. They provide for equating training in skills with an undergraduate education.

Further, the new point system can be applied far more objectively. It gives greater recognition for Canadian experience in particular and work experience generally. As I cited above, there are now new opportunities for gaining this experience, opportunities that will enable our visa officers to make better assessments and for the prospective immigrant to determine whether he or she wants to make Canada a permanent home. Applicants will receive 10 points for the first year of recent work experience and 5 points for every year thereafter to a maximum of 25 points if the applicant falls into the top three skill types needed in this country.

The latter point is very important. The new system is much more flexible and simpler. Applicants are rated on their skills levels and for the skill type relative to the degree of need for that general type rather than a specific type of occupation. In other words, instead of indicating that we need chefs or tool and dye makers, certain skill types will be given points - such as managers, on the one hand, or a skilled technical worker on the other hand. What is most important, and contrary to the member of the legal bar that I heard interviewed on CBC, the 25 instead of 16 points for education does not eliminate the possibility of a skilled tradesperson getting into Canada. Quite the reverse! Twenty rather than ten points can be awarded for trade certificates and diploma skills under the education category of the new system. A trade certificate based on three years of training is given the same value as an ordinary bachelor's degree at university.

In some senses the new system retains much of what has been learned in the past. The system awards 10 points if the applicant is between 21 and 44 if entering under the economic class and fewer points to the degree the applicant is older. However, if the system fully matched the recommendations of demographic economists, like David Foot at the University of Toronto, then the number of points for age would be directly correlated with the demographic age deficit to ensure we had a better age distribution in our working population to ensure there are enough workers to support retirees. The new system can be criticized for being too cautious and not making more adventurous changes in this area, perhaps in fear of Charter challenges because of age discrimination. However, awarding extra points for age may invite such challenges anyway. In any case, a more targeted age system to determine the composition of the independent class is more elegant in theory while almost impossible to implement purely in practice. Perhaps the new system was set up because the benefits of work or education experience may outweigh precise immigration age requirements to create a smooth demographic profile and reverse Canadian demographic trends. I myself think that it would be worth exploring giving additional points for families who immigrate who have children in the age bracket that would offset Canadian demographic trends.

What about the criticism that we still need unskilled labour? Many jobs will remain unfilled because Canadians are no longer willing to do the work. These positions may be filled by refugees or individuals who enter Canada under the family class. Nevertheless, the new system may result in a shortage in this area. But it is the one area where Canadian citizens are most vulnerable and subject to competition. So if a choice has to be made, and I believe we must and do choose, I strongly prefer upper end immigration entrants. Trying to use immigration selection as a means of achieving some ideal of distributive justice is akin to trying to stop a hurricane with a safety pin.

What about the criticism that this means that we are accepting members into Canada on conditions under which most Canadians could not gain entry? However, this is precisely the point. Whenever you want to raise standards, it means that the newcomers – whether entrants to university or prospective members of one's state – will be under requirements that the passable or even average existing member will be unable to fill. However, what about the issue that we are adding to the brain-drain from the developing world at the same time as we allow these highly skilled people to enter Canada, but then do not allow them to practice as doctors, dentists, pharmacists or even engineers because the regulations for entry into these professions is under the control of civil society organizations regulated by the provinces? As long as changes are not made in certification requirements and recognition of foreign credentials, the objective of the new system will be undercut.

One significant change is the increased numbers of points awarded for language proficiency – 20 instead of 15. Certainly this will mean that immigrants of forty years ago who came speaking only Italian or German and who have helped make Canada what it is today would have great difficulty getting in now. But unlike then, English is now the universal language of choice. There are many more opportunities abroad to acquire language skills, particularly English. And language mastery is much more critical to



adjusting to Canada than ever before. Finally, we have over 100,000 applications in the backlog representing 400,000 people – an approximately three-year supply according to present intake levels under the skilled immigrant class. If the demand/supply ratio is to be more closely matched, then, just as in entrance requirements to high demand courses at universities, the entry level needs to be raised. Recall, that the level for obtaining a pass mark has not been set in stone. Rather, depending on the number of applicants in the pipeline, the minister has the discretion to alter the pass mark up or down from time to time. In the published regulations, the pass mark is set at 80 for the old Independent and Assisted Relative classes (now combined under the new “Skilled Worker” class) as well as for independent applicants, *but only for new applications received after the Act comes into force*. Applications received after the publication of the regulations that have not received a selection interview will also be assessed against a pass mark of 80. [This is the controversial grandfather clause.]

There is one controversial shift in the language requirement that may be getting more play in the French media, especially in the French media with a readership outside Quebec since Quebec has its own selection system for skilled immigrants that gives points for French language proficiency. Currently, an immigrant applicant gets points for some knowledge of both English and French. Based on the needs of a knowledge-based economy, it makes economic sense to award more points for good communication skills in one language rather than partial knowledge of both languages. Under the new system, it is the degree of mastery of *either* official language, and not simply a smattering of both English and French, that will earn points, with the option of having the points awarded on the basis of evaluation by an independent accredited body instead of by a visa officer. Clearly, economic considerations have not only trumped but also swamped political ones in this change. I would be surprised if this proposal does not run into opposition in committee. We might expect additional points to be added back for some skills in the other official language while still awarding the main points for mastery in at least one official language. Otherwise, the provision reinforces propensities already underway that are creating a Canada where two language groups live side beside in harmony but under different political jurisdictions rather than moving towards the ideal of a bilingual Canada, and a system in which economic considerations alone rule to the exclusion of desirable political goals.

The old regulations provided a fixed amount of capital (say \$10,000 on average) that a family had to demonstrate they had in order to get them over the initial adjustment period. One would have thought that replacing this provision with an objective standard that will alter every year according to costs would have been welcomed. However, even the standard of a low income cut off, the minimum amount necessary to survive for a year in an urban area of at least 500,000 (currently \$27,805 for a family of three), has been greeted as too high, with sentimental appeals to historical allusions when our forefathers came with nothing on their backs but a willingness to work hard. But that was a time when Canada needed raw labour and before Canada had created its comprehensive social safety net. Immigrants are selected because of what Canada wants and needs. Canada does not offer membership as an equal opportunity player in a global world to permit a redistribution of the poor of the world.

In sum, long needed and desirable changes have been made to the point system for the admission of skilled immigrants. Is the controversy over retroactivity in applying the new point system any more justifiable?

### **The Controversy Over Retroactivity**

One of the most controversial provisions of the new immigration regulations tabled in the Canada Gazette on December 17<sup>th</sup> is the provision for grandfathering the requirements. Applying regulations retroactivity was characterized as not simply unfair to those who had previously made applications before the regulations were published, but were characterized as cruel. This is a quite separate issue than one arguing that the pass mark of 80 is too high for new applicants who apply after the new regulations come into force.

What is pro-active in the new regulations? They apply not only to new applications received after the regulations come into force but for independent and assisted relative applications received after the regulations were published in the Canada Gazette on December 15<sup>th</sup>. In other words, all those files that lawyers have been working on and for which they have been charging fees will have to be redone to suit the new regulations. Even though the lawyers have received notice months, even years in advance about the new point system, there is a small degree of retroactivity in any set of regulations for they affect those working on applications suddenly faced with new rules.

However, the important issue is true retroactivity in the new regulations. Independent and assisted relative applicants in the pipeline *that have not received a selection interview or had their interview waved*, before the regulations were published will be subject to the new regulations, except that the pass threshold will be set lower at 75 points. The rationale is that immigration officers should not have to be faced with applying two different sets of criteria at the same time. As the explanation states, the department would have to maintain two systems for several years. However, the main reason is that the mandarins are anxious to correct the problems in the old system sooner rather than later.

First, some applications in the pipeline were submitted even before the department clearly signaled that a new point system was being proposed. There was no opportunity for applicants to consider whether they would qualify under the new regulations when they not only paid money for the application but also often paid lawyers to help with the process. It is one thing to change regulations after a new system becomes official or even after a new system is published formally or even, perhaps, after a new system is suggested. It is quite another to apply regulations retroactively to applicants who had no idea that the system would be changed. It is patently unfair to use new regulations to assess applicants who applied when they could not have known about the new requirements. Offers to refund fees paid do not compensate for the injustice.

However, the paper that proposed the regulations to apply C-11 first appeared on the CIC website in October of 2000. Further, a draft consultation paper on skilled worker

immigration was even published earlier in July of that year. In fact, new selection criteria were proposed as long ago as October of 1997. Surely this was sufficient notice.

But there is a difference between notice for reflection and thought and notice of what will likely become the regulations applying the law of the land. How do we distinguish between those who received different types of notice and who are at different stages in the system? What about those who applied after the department proposed the new point system? What about applicants who apply after the regulations were gazetted but before they came into force? Should not all applications filed before regulations became law come under the old rules? Is this not the essence of the rule of law?

I myself think these are two very different lines. Deciding to apply for immigration to Canada takes time and the process of preparing an application takes even more time. Giving notice prepares those planning and in the process of submitting an application. However, applicants whose applications were received before the regulations were actually formally gazetted could not reasonably have been expected to take into account the new proposed point system within the context of the large number of regulations applicable.

The only firm and proper time date is December 15<sup>th</sup>. Applications received after that date should be processed under the new rules. Otherwise, there could be a huge influx of new applications to get under the deadline and ensure the application of the old rules. Then the economic goals of the new regulations could be seriously delayed. Applications received before that date should fall under the old rules *if the applicant so chooses*. Does this not open up a whole can of worms – in fact, cans of different types of worms - policy, administrative and legal ones.

If the issue of retroactivity is considered important enough to delay the application of the new regulations to applicants who apply after December 15<sup>th</sup>, then the new policy of recruiting immigrants for the new information age could be delayed several years. (The department argues that in some of the larger immigration offices overseas, the delay could be as much as five years.) This may impact on the Canadian effort to improve economic productivity and the value of the Canadian dollar. However, this can be offset by other factors. Since, under the new regulations there are many advantages to coming to Canada *before* applying to become an immigrant under many different options as discussed earlier, we can expect an influx of visitors, more individuals applying for student visas, and individuals coming on temporary work permits. These will provide an economic boost to the Canadian economy. These new provisions also open a window of opportunity to place a moratorium on new applications after the regulations come into force. At the same time, since there will be other avenues for gaining entry into Canada for prospective immigrants, there should be no worry that we will be drying up future recruits or prevent us from filling jobs in key sectors of the economy.

Will a moratorium on new applications repeat the effects of the early 1980s moratorium and create a public relations disaster that conveyed the message that Canada turns the intake spout off and on at whim and that Canada is even no longer interested in

economic immigrants? In other words, to be fair to those already in the system, we would be undercutting everything the new system is intended to achieve. However, if I am correct, most new economic immigrants will, in future, come from within Canada and not from overseas offices. So why not anticipate this and not pile up new applications overseas that will be at a comparative disadvantage relative to future applicants from within Canada. It is not only the overseas operations of immigration lawyers that are at risk from the new regulations, but also the number of overseas postings for immigration officers.

What about the headache that immigration officers will have in applying two sets of rules to different applicants at the same time? That has a simpler answer. If applicants already in the system are processed under the old rules first, then immigration officers are not administering two sets of rules at the same time. They are applying the rules sequentially. Further, the delay will provide time to train officers in the interpretation of the new rules. To argue for retroactivity in a system to reduce existing inventories may not be as bad as saying that the way to clear the backlog in the criminal justice system is to reduce the standards for proving a person guilty. But the principle of retroactivity behind such suggestions is the same; such changes cannot be justified by arguments for making up for backlogs.

Is an alternative available that is fairer and more effective in dealing with the issue of the backlog at the same time as it allows an improvement in our economic performance quickly rather than in three to five years, resolves the high inventory problem and also ensures that we do not increase our annual immigration levels? I argue that the combination of a moratorium, given the new provisions that benefit entry from within Canada, will both be fairer and encourage visitors to come to Canada on shorter work permits or student visas with the prospect of obtaining landed status. A system based on inland sourcing with a moratorium on new applications will bring a quicker economic improvement at the same time as it will be fairer to those in the process and prevent a new build-up of an inventory backlog that we will not be able to sustain because immigration from within Canada will, to a large extent, displace immigration of skilled applicants from abroad.

Does this answer the arguments for speeding up the benefits to Canada of the new system and not retaining the disadvantages of the old system unduly? Again, the matter is simply one of not allowing economic benefits to Canada to become the exclusive criterion at the expense of issues of fairness and equity. Such a system may not provide benefits quite as rapidly. But it would not have the disadvantages of inadequately trained visa officers, the potential build up of new unsustainable inventories, and, most of all, unfairness and a betrayal of a reputation for Canadian integrity. As I have suggested, we can have our economic cake and eat it as well, but not overstuff ourselves on cake at the expense of people already in the immigration pipeline.

What about the legal issues? After all, the new regulations are intended to reduce the amount of litigation that the old system of rules fostered in part because of the wide range of subjective factors that could be taken into account in processing an application.

But the issue of retroactivity is bound to give rise to considerable litigation in its own right. (I understand it already has.) Further, unless immigration officers have a chance to be trained in applying the new regulations, then initial stumbles might give rise to additional litigation.

In sum, I would argue that there will be no substantive delay in bringing about the intent of the new policy given the provision of alternative routes into the system in future. By making sure the new regulations are not applied retroactively, the introduction will be smoother not only politically but administratively as well. Finally, by eliminating the problem of retroactivity, not only will Canada deal with foreigners wanting to come here more fairly, but the government will avoid litigation. Why stir up a hornet's nest of opposition from immigration lawyers whose overseas investments in the existing system, will, I predict, eventually be detrimentally affected by the new system? These lawyers should be given time to adjust.

In fairness to the applicants already in the system, to the lawyers who guide those applicants and, most of all to ourselves, I suggest that we eliminate the retroactivity provision and complement that move by a six month or one year moratorium on new applications in the independent class until the bulk of the backlog is eliminated. The department admits that the new regulations will have a negative impact on applicants currently waiting assessment since increasing the qualifications for applicants under the skilled worker criteria necessarily means fewer will be able to meet the threshold even if the new regulations open the possibilities for other applicants who do not currently meet the present system of job categories.

The system of points is controversial on other grounds than its comparison with the system it proposes to replace and on its retroactivity provisions. The new regulations are also subject to debate on how the actual distribution of points proposed or, more radically, why the point system was not scrapped altogether in favour of another method such as the American lottery system. Should different models altogether have been considered? Could or should the points have been awarded other than in the way they have been proposed?

### **Alternatives to the Proposed Point System**

In getting rid of the old skilled class entry system of matching applicants to categories of employment needs in favour of an allegedly more efficient and objective system less prone to influence by the subjective preferences of immigration officers, one that promised significant economic benefits by betting on high quality human capital rather than specific sets of skills, would other alternative methods of dealing with immigrants have accomplished these goals better? Were other significant alternatives to existing programs for the intake of economic migrants given any in depth consideration?

For example, we could have gone back to an older privatized system in which employers and land developers were allowed to recruit whomever they wanted. After all, this is how the steamship lines and railroads served to recruit settlers for the west. This is

how the industrial economy of Canada received its boost forward. One might consider such thinking retrograde and inappropriate to new times and circumstances.

In fact, there are provisions in the new system of regulations that hark back to this older model. Employers will be allowed to recruit whole classes of workers and not just individual candidates as temporary workers. These temporary workers will be able to apply for immigrant status once they have attained Canadian experience. I hope that they take such a route and do not remain in Canada as long-term “guest workers”.

The United States of America avoids both the point system and the privatized arranged employment model for a lottery system based on the argument that a self-selection chance system of accessing citizenship empowers the immigrant and is more transparent and objective than any bureaucratic system devised. Arguably, such a lottery system would be just as effective as any bureaucratically managed system in meeting Canadian economic goals. The fact is, the tabled regulations provide no real hint of why such a system was not considered.

Let me suggest several reasons. First, Canadian identity is in good part measured by how we differentiate ourselves from Americans. If Canadians copied the American system in this very crucial area of identity formation, the selection of new members of the body politic, then Canada might have a true identity crisis. Second, Canada has a mandarin system of government overlaid by an elected parliament to which the executive branch is, in turn, regularly accountable as well as its periodically having to seek a mandate from the people. America has a much more politicized system in which the administration of government is much more heavily influenced by political interventions. There is a widespread belief, though without scholarly documentation as far as I know, that the lottery system was the byproduct of a specific Senator wanting an acceptable way to increase Irish immigration. In Canada, we trust our civil servants far more than Americans do. When civil servants are subjected to considerably more political pressure and are believed to be even more subject to political influence than is actually the case, then it suits America to create a chance system not amenable to influence by allegedly subjective factors, even if there is widespread belief that the lottery system itself was a byproduct of political manipulation.

There are other reasons for the differences. Family class immigrants make up a larger percentage of the American intake. Further, Americans are less worried about independent economic immigrants for other reasons – they have less concern about the costs being born by a government supported social safety net. However, whatever the motives and politically different circumstances behind the American versus the Canadian system, there is no objective evidence that I know of on whether a lottery system or a mandarin managed point system of selection works better in meeting Canadian goals of transparency, efficacy of operation and in delivering economic improvement, and of overall balance with family and refugee considerations under the very different Canadian conditions than those that prevail in the US. Is mandarin selection based on an objective system of points better than a random system based on chance?

Could transparency and objectivity have been better assured by allowing an independent body to assess whether individuals met the educational and work experience requirements of the Canadian selection criteria? In other words, as is partially the case in Australia, the actual allocation of points could be off-loaded to a specialized agency even if the actual selection was left to Canadian officials. Balancing the various categories of immigration could still be assured while the sense of detached processing could be enhanced. Here, I suspect inertia rather than independence was the reason for preserving a system in which mandarins allocated points rather than allowing an independent body to do so. I see nothing wrong in this unless there was clear evidence that the Australian system proved itself to be superior. What is needed is an updated comparative study of the Australian, American and Canadian systems for applying government criteria and what the results of each system are, though, admittedly, as evidenced by my edited volumes and past studies comparing the three systems, the Canadian and Australian systems are much more similar than either is to the American system.

What about changing the distribution of points rather than the system for allocating (or not allocating as the case may be) those points? For example, more points even than now proposed could have been allocated to education or language proficiency or even for an arranged position. Frankly, a judgment call has to be made based on experience and objectives. There is no correct allocation. Different weights produce somewhat different results. The issue is whether the proposed distribution is reasonable. My analysis suggests that it is. For example, it seems eminently reasonable to require only one year of work experience if we are determined to offset our demographic age imbalances with more youthful immigration. Further, as I indicated earlier, I believe that the more important changes are those dealing with who can apply and from where, especially once points are allocated for Canadian education and training and Canadian employment experience. For this will shift the proportion of inland immigrant applications, perhaps considerably.

However, there is a separate issue than the points awarded to skilled workers. For the economic intake as distinct from the family class and refugees consists not only of skilled workers but of business immigrants. And there has been considerable criticism in the past that the innovative Canadian system for attracting capital investment by entrepreneurs to Canada (now much copied by other jurisdictions) is simply a method of buying a Canadian passport. Should the method of attracting business immigrants have been scrapped?

First, business immigrants include not only investors but entrepreneurs and even the self-employed. The system is largely unchanged from the old one, but the primary target of criticism has not been the self-employed farmers, artists and even athletes, but the investor and entrepreneurial streams of this program. Entrepreneurs need only \$300,000 while investors with demonstrated business experience must have at least \$800,000 in net capital of which \$400,000 must be available for investment. Further, unlike the other categories of immigration where once selected, there is no further monitoring, business immigrants will continue to be monitored after arrival to ensure they comply with what they agreed to do.

What has changed in a minor way is the system of administration of the program now that the federal government has entered into bilateral arrangements with a number of the provinces and in order to limit the litigation over what constitutes business experience in relation to acquired net worth and the character of an appropriate investment. Details are now spelled out about the duration and the number of jobs, sales, net income and equity a businessperson had to have in the business which the entrepreneur or investor owned *or* managed (an important change). Additional details spell out the number of new jobs that have to be created, the percentage of ownership and the involvement in management and the variations among these three categories to qualify.

I personally welcome the changes that will go some way in mollifying critics who believe investors and entrepreneurs have taken advantage of the system to buy passports with no real intention of setting up a viable business in Canada, but these changes will do nothing to satisfy critics who object to this stream of immigration altogether. Further, though the department argues that administering such a more detailed system will not add to costs, I find the arguments totally unconvincing. The more rules, especially the more technical the rules, the greater the cost.

There is one other area of the immigration program that has received a great deal of criticism in the past – the caregiver program. Critics have contended for years that this live-in program is a system of economic exploitation of females and a system of indentured labour in which nannies or homecare workers are subject to exploitation and even abuse by employers. As anyone can tell who walks around an upper middle class area of Toronto or goes to the local park in such areas, many if not most of the children of the middle and upper middle class are being taken care of by nannies; the impression is that most come from the Philippines.

The rationale for the changes suggests that new requirements have been reduced. Instead of employer/caregiver contracts being recommended, caregivers and employers are now required to enter into a formal contract. My experience suggests this has largely been the practice, but it may not have been the practice where exploitation and abuse have been reported. So that requirement may be an improvement. Other than that, the regulations remain the same. Live-in caregivers have always had the right to change employers. During the required live-in period (2 years out of 3 to allow for periods of unemployment, illness, vacation or maternity leave), they have not been able to obtain new employment until they have received a new offer of employment, had the offer validated by HRDC, presented that offer to an immigration officer, and received a new work permit naming the new employer. (Current regulation 194(1)) This regulation should be interpreted loosely so that caregivers, while waiting for such approvals, may take that employment lest the individual caregiver not have a place to live. In such cases, the caregiver might be under terrible pressure and at risk from the existing employer if that employer was abusive.

I have left to the end the issue of the humanitarian side of immigration policy.



## **Refugees**

Immigrants are those who we Canadians choose to have join Canada, either because they will be an economic and social benefit, or because they are joining their families and Canadians place a very high value on family reunification. In contrast, by and large we do not choose refugees. They choose us. Refugees are those who are allowed to enter Canada by right, either under international agreements to which Canada is a signatory and/or our own Canadian Charter of Rights and Freedoms, or because we are a compassionate people and do not want people to live in countries where they will suffer at the hands of others.

Broadly considered, the refugee class includes refugees accepted overseas under either the convention or under relaxed immigration criteria, refugees who make a claim at an entry point to Canada or within Canada under the Convention Refugee provisions, and, finally, those accepted on humanitarian and compassionate grounds. I also include under the broad rubric of “refugee,” and not just the narrow legal definition of a Convention Refugee, those who are not sent back to their countries of origin because their lives would be at risk or they are at risk of persecution, torture or cruel and unusual punishment. Those who claim they would be at risk if they were to be removed, include not only rejected refugee claimants but also those accused of murder at risk of capital punishment if returned to the country where they allegedly committed the crime. The latter are also subjected to a new paper-based process for most applicants, a Pre-Removal Risk Assessment (PRRA) by CIC officials. If they are found to be at risk and do not belong to an inadmissible class (a criminal, torturer, terrorist, rejected refugee claimant), they gain the right to remain in Canada.

In contrast to such a situation where someone can claim to remain in Canada by right, humanitarian grounds provide a discretionary tool to enable the Minister to be flexible in admitting deserving cases to Canada. In fact, it has often been used as a backstop for those rejected by the Refugee Board but who receive widespread media attention as well as the support of the Canadian Council for Refugees because their cases are so deserving of our compassion. In effect, the new regulations are merely a reflection of the previous administrative rules imposed upon individuals as conditions for their staying in Canada when granted status on humanitarian grounds.

Refugees accepted overseas fall into three different categories: convention refugees generally referred to Canadian embassies by UNHCR; the Country of Asylum Class that includes individuals in refugee-like situations in countries of asylum (generally first asylum) who have been negatively impacted by a civil war or armed conflict or who are subject to serious human rights abuses, but do not necessarily meet the criteria of the refugee convention; and persons in the same situation as those in the Country of Asylum Class or who would fit under the refugee convention except that they still live within their country of origin. The latter Source Country Class only includes countries listed in the regulations by the government. Individuals in such Source Countries can only get to Canada if Canada can process their applications without endangering the applicant.

Other than minor alterations in clarifying definitions further and in modes of management of the program, the changes to the process of admitting individuals falling within any of these categories are also minor and all benefit the refugees. The criteria to determine whether the individual can successfully establish themselves in Canada is relaxed for urgent cases and for women who need not meet the criteria of proving previous employment, though they must be potentially employable; further successful establishment is defined socially rather than economically. Refugees in any of these categories can bring over dependents within a year of arrival *under the same application*. Finally, the sponsorship provisions allow an individual to partner with a corporation to bring over a refugee. Government sponsorships are restricted to Source Country Cases and Convention refugees and do not include the Country of Asylum Class.

Allowing individuals to enter Canada who have been determined to be refugees overseas enjoys wide support in Canada. Widening the band of our generosity slightly is unlikely to meet with any significant opposition. This is far less true of those who win claims to refugee status within Canada, those allowed to stay under the new Pre-Removal Risk Assessment procedure, and even perhaps those permitted to stay on compassionate grounds by the discretion of the Minister. So while we have become slightly more generous in the protection afforded to refugees overseas, under the new regulations we have, at the same time, allegedly become more aggressive in removing those who do not satisfy the refugee definition or who pose a risk to Canada. Thus, rejected refugee claimants have their risk assessed during their refugee claim period and not just after rejection, though they are entitled to a hearing under the new risk assessment procedures if new evidence is provided. The question is whether this increased effort to expedite removals will satisfy the critics of the inland procedures.

Let us look at the new procedures for removal when assessing risk – the Pre-Removal Risk Assessment (PRRA). First, under our interpretation of the Charter of Rights and Freedoms and our international obligations, the regulations obligate the government to notify anyone under a risk order that they may apply for protection under PRRA. So someone wanted for murder in the United States whom American law enforcement officials are attempting to extradite back to the United States (but is not yet subject of an authority to proceed under the Extradition Act which would make that individual ineligible to either make a refugee claim or access the PRRA according to s.112(2)(a)) is informed that he or she is entitled to a PRRA. Can you imagine any individual not taking advantage of such a provision. Under Canadian law, capital punishment has been eliminated and is now considered to be cruel and unusual punishment. So Canadian officials are not permitted to agree to an extradition if that individual is at risk of being tried and executed.

But if this is known in advance, why notify the individual of his right to apply for a PRRA, the time and manner of making such an application, the timeframe within which the case will be considered to ensure diligence in making such claims (even though there is no time limit to making a first claim), and even the conditions for re-applying after an initial application has been rejected or the time period expired? Why notify such an individual of the evidence raising questions of credibility and of the rules governing an

oral procedure for a hearing where the individual can be represented by counsel usually at the taxpayer's expense when the outcome is known in advance? Why not just state that Canada will not extradite individuals where they have committed a crime if they face capital punishment (or torture), but will be extradited if the countries to which they are returned agree that, if found guilty, such individuals will not be executed. This will still make Canada an attractive haven where murderers may seek to escape, but at least Canadians will not be subject to the long and unnecessary drawn out legal procedures whereby accused murderers and serial killers use our laws at our expense to delay the period when they will be brought before a court of justice. If we believe that some countries should be excluded from such conditional removals because the individual accused of a crime is at risk for other reasons than capital punishment, then such individuals should be entitled to a PRRA. The accounts of the regulations that have been gazetted do not explain why such cases will fall under this quasi-judicial proceeding. Instead, in the name of timely removals, those explaining the regulations reject the argument of rights advocates who argue that paper hearings are insufficient and all such parties should be offered oral hearings as a matter of right and not just at the discretion of the IRB.

The explanation accompanying the new regulations admit that proportions of applicants expected to flee or go underground are expected to increase upon even receipt of notice of a PRRA hearing if a negative result is expected, because such individuals would be immediately subjected to removal. As well as those who make misrepresentations, this inadmissible class includes criminals, torturers, human right abusers and those considered a risk to Canadians, though those convicted of summary offences and convicted criminals are considered rehabilitated five years after the completion of a sentence or deemed to be rehabilitated in sentences carrying a maximum period of ten years if 10 years passed since the sentence was served. The latter is a new rule so that time and money will not be wasted on those who really pose little if any risk to Canadians. The Canadian Council for Refugees (CCR) urged a narrower interpretation of the definition of a senior official held to be responsible for torture and human rights abuses, restricting the definition to those who were *personally* responsible. This request was based on their concern that a Minister might have belonged to a government involved in human rights abuses, but the Minister was not himself involved in such abuses. Similarly, the Canadian Bar Association argued that the inclusion within the class of such officials of those who benefited from the torture was too broad.

However, I suspect that Canadians at large share the conviction of department officials that someone who benefited from their position in government who took over the property of a victim of genocide or who "adopted" the child of someone who disappeared even if they did not directly participate in any decision to torture or act of torture, and where no *personal* responsibility could be traced, should be held to be inadmissible. Particularly because they are not assessed for risk under the Geneva Refugee Convention but under the more restrictive criteria of the Convention Against Torture, such inadmissible persons can be expected to go underground in large numbers. That means that those at risk of flight who have not gained status as a permanent resident

(and, therefore could not be detained on such grounds) must be detained while the PRRA takes place.

Persons, *including those who are permanent residents*, can be detained not only if they are deemed on reasonable grounds to be a security threat, a human rights violator or a danger to the public, but also if they do not satisfy an officer of their identity or are deemed unlikely to appear for examination, an admissibility hearing or for removal, or even if an officer considers it necessary to complete an examination. The regulations set down the factors and conditions to be considered in such cases - such as not divulging information to the governments in their country of origin lest such individuals or their families are put at risk.

By allowing removal orders to proceed if applicants do not exercise diligence in making refugee claims within the time frame offered, and by insisting that the IRB recognize any previous finding of fact in security cases and those found to have violated human and international rights, hopefully the use of such procedures simply to delay removal from Canada will be decreased. Is that also true of refugee claims referred to the IRB? Here again, strict timeframes have been introduced into the regulations. Unless a rare suspension is specifically made under subsection 100 (2) of the Act, officers have three working days after receipt of a refugee claim to determine eligibility and refer the claim to the IRB. Otherwise such claims are automatically referred. One major source of delay within the department will be avoided, but not delays because of the refugee claimant and his lawyer or adviser, or by the IRB.

However, the major problem of the whole immigration procedure is that people are not kicked out expeditiously. The largest part of the budget of the Immigration Department is used up in getting rid of people and not in taking them in. Yet only one very small part of the regulations deal with the manner of enforcement of removal orders, the circumstances under which individuals are allowed to leave voluntarily when they are under removal orders, and the places to which such persons can be removed. If such individuals are not criminals, terrorists, torturers or human rights violators, they are allowed to decide the country to which they will be sent provided such countries are willing to accept them.

Nowhere in the accounts of the regulations is an explanation proffered why removal takes so long and is so costly. The greatest deficiency in the gazetted regulations and explanations is what they do not contain.