CHAPTER ONE

INTRODUCTION

I. INTRODUCTION: THE CONTEMPORARY CONTEXT OF CANADIAN IMMIGRATION LAW

For many people who have grown up in Canada with its rich immigration history, the first step in approaching the study of immigration, refugee, and citizenship law is to unlearn some enduring mythologies. Immigration law is principally about discrimination, about asserting a nation's prerogative to be discriminating in immigrant selection. This overt discrimination means that citizenship law is freed to take a more neutral posture. Refugee law belongs to the international realm, and thus is not quite so simple, but it does have among its objectives a strong imperative towards limitations and exclusions. Understanding these core values about how this trio of legal frameworks structure national belonging goes a long way to explaining the contours of contemporary Canadian immigration law, as well as its historical evolution.

> The messy policing of the national boundary by inquiring into debt and disease, criminality and qualifications, is left to migration law. Most prosperous contemporary states would not tolerate a citizenship regime that excluded individuals from naturalizing because of having a child with an intellectual disability, being poor, or dropping out of high school. Migration law specializes in precisely this type of distinction.[1]

While this casebook deals with immigration, refugee, and citizenship law, the lion's share is dedicated to immigration. The aim of this chapter is to equip law students with information about the key building blocks of Canada's immigration law framework. The chapter accomplishes this goal through the following four sections. Section II describes the historical context of immigration to Canada and the central role that immigration has played in the project of colonization. In presenting this history, we focus on key legal landmarks and emphasize that there is a great deal of thematic continuity between the past and the present. Section III turns to the contemporary context for immigration law in Canada, introducing the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the IRPA) as the centrepiece of the study of Canadian immigration law. Section IV introduces the key actors and agencies involved in Canadian immigration law. The final section concludes the chapter by introducing seven themes that are important to the study of Canadian immigration law in the third decade of the 21st century and which have a role to play throughout this collection of cases and materials. Similar building blocks for the study of citizenship law are provided in Chapter 11, Citizenship.

During the decade ending in 2017, Canada admitted an average of approximately 257,000 immigrants and 29,800 refugees each year. Over the same decade, there were approximately 296,300 temporary residents admitted to Canada each year, although this number is misleading as an average because the number of temporary residents climbed sharply over this time. In 2018, 6,024,233 visas and electronic travel authorizations were issued to visitors, international students, and temporary workers, an increase of 5.2 percent from 2017.[2] In the five years spanning fiscal 2002-3 to fiscal 2006-7, an average of 11,200 people were removed from Canada each year under the provisions of Canadian immigration law. As of September 2007, there were 63,000 people in what could be called the "removal queue" because they had active removal orders against them or were subject to a warrant to

1 Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration Law* (Cambridge: Cambridge University Press, 2008) at 123.

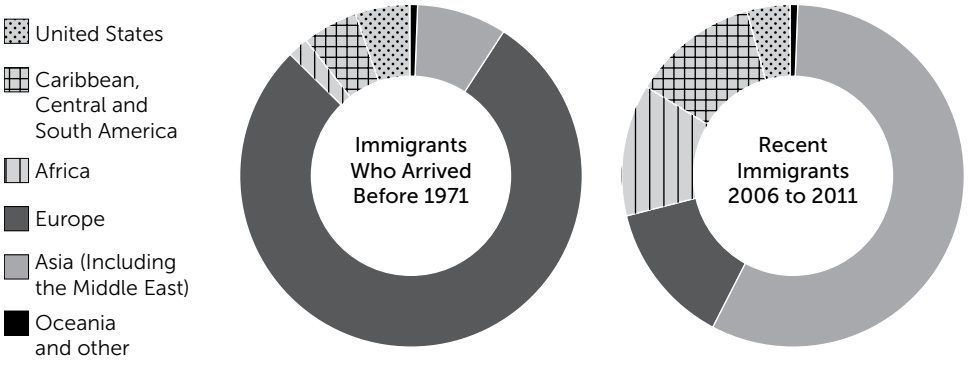
2 Data are drawn from Citizenship and Immigration Canada, "Facts and Figures 2016: Immigration Overview—Permanent and Temporary Residents," online (pdf): *Government of Canada* <https://www.cic.gc.ca/opendata-donneesouvertes/data/Facts_and_Figures_2016_TR_EN.pdf> (averages calculated by the authors); and Immigration, Refugees and Citizenship Canada, "2019 Annual Report to Parliament on Immigration," online: *Government of Canada* <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/annual-report-parliament-immigration-2019.html>.

be removed.[3] More recent removals data are not systematically made publicly available. In addition to permanent and temporary resident flows in and out of the country, immigration law also governs tourist entry. In 2018, over 21 million international tourists visited Canada.[4] Finally, there are a certain number of people currently living in Canada who do not have any immigration status and are hence considered to be "unauthorized," "undocumented," "irregular," or even "illegal," a term that is contentious but which situates the matter squarely where it belongs: with the legal provisions that generate this status. There is no recent and reliable estimate of the size of Canada's undocumented population.

In 2016, the Trudeau government announced that it was committed to a significant increase in the number of migrants admitted annually; and within two years, Canada admitted the highest number of permanent residents since 1913.[5] Policy shifts of this nature are designed at one level to appeal to the immigration mythologies that we need to penetrate in order to develop a clear understanding of the law. But this change also reflects a significant fact about Canada and most other Western liberal democracies: the population birth rate has fallen below the replacement rate and immigration is necessary to maintain the population. Moreover, traditional economic good health is premised on population expansion. For these reasons, 21st-century Canada needs immigration in a similar way to its 19th-century precursor.

The most significant difference between immigration in Canada's early colonial phase and current immigration is where people come from:[6]

Figure 1.1 Region of Birth of Immigrants by Period of Immigration



3 These data are drawn from Auditor General of Canada, "Chapter 7—Detention and Removal of Individuals—Canada Border Services Agency" (2008 May Report of the Auditor General of Canada), online: *Office of the Auditor General of Canada* <http://www.oag-bvg.gc.ca/internet/English/parl_oag_200805_07_e_30703.html>.

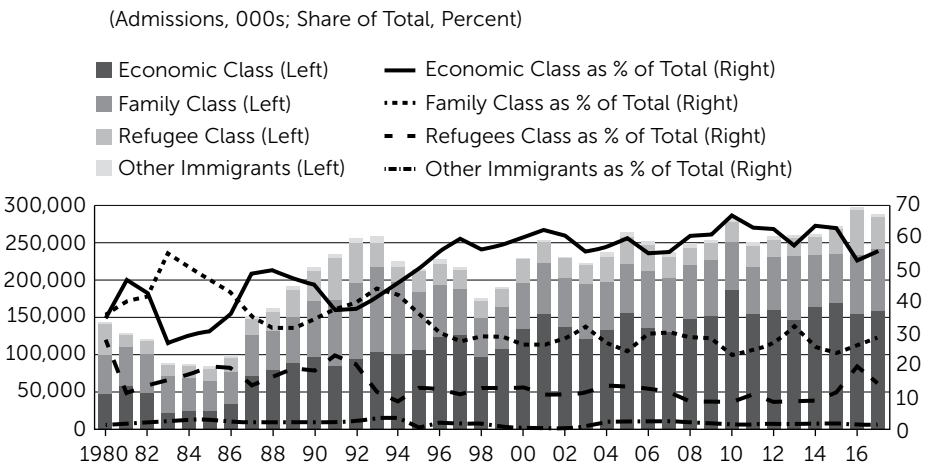
4 Statistics Canada, "Travel Between Canada and other Countries, December 2018" (Ottawa: Statistics Canada, 2019), online: *Government of Canada* <https://www150.statcan.gc.ca/n1/daily-quotidien/190221/dq190221c-eng.htm>.

5 Immigration, Refugees and Citizenship Canada, "Notice: Supplementary Information 2017 Immigration Levels Plan" (31 October 2016), online: *Government of Canada* <https://www.canada.ca/en/immigration-refugees-citizenship/news/notices/notice-supplementary-information-2017-immigration-levels-plan.html>; and "2019 Annual Report to Parliament on Immigration," *supra* note 2.

6 Windsor Star, "2013 National Household Survey Highlights," online: *Windsor Star* <http://www.windsorstar.com/news/household-survey/highlights.html>; Statistics Canada, *Immigration and Ethnocultural Diversity in Canada*, National Household Survey, 2011, Catalogue No 99-010-X2011001 (Ottawa: Statistics Canada, 2018), online (pdf): <https://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-010-x/99-010-x2011001-eng.pdf>.

It is also the case that the mix of newcomers whom the Canadian government permits to enter evolves over time. Here is a snapshot of change over nearly forty years:[7]

Figure 1.2 Immigrant Admissions by Class, 1980–2017



Source: El-Assal, Kareem and Daniel Fields. *Canada 2040: No Immigration Versus More Immigration*. Ottawa: The Conference Board of Canada, 2018.

Canadian immigration patterns are closely linked to worldwide trends. In the present era of globalization, it is easy to have the impression that immigration is an ever-increasing phenomenon. Although this is certainly true in terms of raw numbers, understanding immigration in the context of the rising global population is a more nuanced matter. A key starting point is to understand that the overwhelming majority of the people in the world live in the country where they were born. In 2019, the International Organization for Migration (IOM) estimated that 271.6 million people were living outside the country of their birth. This is a significant increase from the 173 million person estimate for the year 2000, but in percentage terms the change is less remarkable. In 2000, immigrants made up 2.8 percent of the world's population; in 2019, the percentage had risen slightly to 3.5 percent.[8] Another way to think of this figure is to consider that more than 96 percent of people currently in the world are living in their country of birth.

An important counterpoint to this data is the fact that a great many more than 3.5 percent of the global population would like to migrate if it were possible to do so. Gallup began polling about the desire to migrate in 2007 and started releasing its data in 2009. In 2017, about 15 percent of the world's population answered yes to the question of whether they would like to leave their home country permanently, but fewer than 0.5 percent were actually

7 The Conference Board of Canada, "Canada 2040: No Immigration Versus More Immigration" (May 2018), online (pdf): *National Immigration Centre* <https://www.conferenceboard.ca/e-library/abstract.aspx?did=9678>.

8 The IOM draws on data from other sources, most frequently the United Nations Department of Economic and Social Affairs, which in turn draws on World Bank estimates. International Organization for Migration, "Global Migration Data Portal," online: <https://migrationdataportal.org/?i=stock_abs_&t=2019>.

preparing to migrate.[9] We can assume that the 13.5 percent gap (which represents more than 600 million people) is accounted for primarily by legal barriers constructed in and through immigration law.

Refugees fit into the picture of both national and international migration awkwardly. Unlike migrants, there is an international legal framework that constrains state sovereignty and thereby allows refugees to move. Refugees are technically a subgroup of migrants because they must have crossed an international border to fall within the refugee definition. But refugees are not considered to be the object of migration policy in prosperous Western states because they are not the people that such states are seeking to attract to address their demographic and labour force deficits. Refugees make up a very small portion of those who migrate to Western states. Even Canada, with its immigrant intake averaging almost 260,000 over the past decade, has averaged less than 30,000 refugee admissions (both through asylum and resettlement) over the same time period. In comparison with the 258 million migrants globally in 2017, there were 26 million refugees in that same year, 83 percent of whom were outside their country of origin but remained in states of the Global South.[10] In Canada, refugees are sometimes treated by the law as migrants and at other times treated distinctly. It's no wonder that most people cannot discern the distinctions.

This book provides an overview of how Canadian immigration law regulates rights to enter and remain in Canada, how refugee law is embedded in immigration law, and how the law governs acquisition and loss of citizenship. Our focus is on the nuts and bolts of Canadian law. We also present readers with the tools to understand the law critically and contextually.

II. BUILDING A SETTLER SOCIETY AND INDIGENOUS RELATIONSHIPS

Contemporary Canadian immigration law is built on the country's history of treating immigration as a key component of the nation-building exercise. Canada shares this historical trajectory with Australia, the United States, and New Zealand, all of which have similar colonial pasts and broadly similar legal systems. These paradigmatic settler societies are distinguished by having immigrant populations that have overwhelmed the pre-colonization Indigenous populations of their territories so completely that these countries became independent of their formal colonial masters without undergoing a process of decolonization.

The linkage between nation building and immigration means that many core values of the Canadian nation are apparent in its immigration history, including some values many might want to disavow today. Many historians have exposed the role of racism in the history of Canadian immigration law.[11] According to Constance Backhouse, "immigration laws shaped the very contours of Canadian society in ways that aggrandized the centrality of white

9 See Neli Esipova, Julie Ray & Anita Pugliese, *Gallup World Poll: The Many Faces of Global Migration* (Geneva: IOM Migration Research Series, 2011), online (pdf): <http://publications.iom.int/bookstore/free/MRS43.pdf>; International Organization for Migration, *Global Migration Data Analysis Centre,* Issue No 9 (Geneva: Data Briefing Series, 2017), online: <https://publications.iom.int/books/global-migration-data-analysis-centre-data-briefing-series-issue-no-9-july-2017>.

10 United Nations Department of Economic and Social Affairs Population Division, "Population Facts No 2017/5" (December 2017) online (pdf): *United Nations Department of Economic and Social Affairs* <https://www.un.org/en/development/desa/population/publications/pdf/popfacts/PopFacts_2017-5.pdf>.

11 See Sherene H Razack, "Law, Race and Space: The Making of a White Settler Nation" (2000) 15:2 CJLS 1; Sharryn Aiken, "From Slavery to Expulsion: Racism, Canadian Immigration Law and the Unfulfilled Promise of Modern Constitutionalism" in Vijay Agnew, ed, *Interrogating Race and Racism* (Toronto: University of Toronto Press, 2007) at 55.

power."[12] Apart from the legacy of racist immigration laws, there remains the question of racism in current immigration and refugee law. In an era when both international law and the *Canadian Charter of Rights and Freedoms*[13] prohibit discrimination based on race, it is unlikely that one will find evidence of overtly racist laws and policies. Racial discrimination in immigration matters manifests systemically in practices, policies, and laws that appear neutral on their face but have a serious detrimental impact on people of colour.

As Valerie Knowles recounted, from the earliest days of immigration to Canada, a person's ethnic origin was significant to the conditions of his or her entry. Knowles notes that, in the 18th century, Black and Indigenous slaves formed a significant segment of the colonial population.[14] Moreover, among the 50,000 United Empire Loyalists (supporters of the British in the American Revolution who migrated north after the American victory) were about 3,000 "free Blacks," many of whom settled in Nova Scotia. Knowles notes that they were not offered the same inducements, such as land grants, that were awarded to the white Loyalists.[15]

In the early years after Confederation, ethnic origin remained relevant to both the federal and provincial legislatures (particularly in British Columbia).[16] The federal *Chinese Immigration Act* of 1885 introduced a head tax of $50 on Chinese immigrants, a sum that was gradually increased to $500 by the *Chinese Immigration Act* of 1903. Moreover, in most circumstances, Chinese men were proscribed from bringing family members to Canada. These immigration laws supplemented harsh working conditions—it is estimated that one in ten Chinese people died during the construction of the Canadian Pacific Railway[17]—and various other legal impediments aimed at discouraging Chinese and other Asian people from remaining in the country permanently.

The use of racial criteria as a means of classifying people posed a dilemma for at least some members of the judiciary. These judges clearly found the use of racial classifications to be objectionable and used the available legal tools to strike down provincial laws. These judges turned to ss 91 and 92 of the *British North America Act*, which allocate jurisdiction between the federal Parliament and the provincial legislatures, to strike down these laws. Other judges seemed to have no such compunctions and would search for reasons to recognize the validity of discriminatory laws. The following two cases are illustrative of these contrasting judicial approaches. These brief excerpts give a flavour of authoritative discourses concerning immigration and racialization in Canada's early decades. *Union Colliery,* a judgment of the Judicial Committee of the Privy Council, is one of several cases in which the federal government's power was used by courts to invalidate overtly racist provincial legislation. *Quong-Wing,* a ruling by the Supreme Court of Canada, is a decision in which the Court

12 Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: University of Toronto Press, 1999) at 15.

13 *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

14 Valerie Knowles, *Strangers at Our Gates: Canadian Immigration and Immigration Policy, 1540-1997* (Toronto: Dundurn Press, 1997) at 13 [Knowles]. According to Knowles, over a period of 150 years, 2,700 Indigenous and 1,400 Black slaves were recorded in Canada.

15 *Ibid* at 23-24.

16 See Bruce Ryder, "Racism and the Constitution: The Constitutional Fate of British Columbia Anti-Asian Immigration Legislation, 1884-1909" (1991) 29:3 Osgoode Hall LJ 619.

17 For more on those difficult early days of Chinese immigration, see the 1997 CBC documentary, *A Tale of Perseverance: Chinese Immigration to Canada* (2006), online*: CBC Digital Archives* <http://www.cbc.ca/archives/categories/society/immigration/chinese-immigration-to-canada-a-tale-of-perseverance/topic-chinese-immigration-to-canada-a-tale-of-perseverance.html>

upheld a discriminatory provincial law. It is also interesting to note the distinction in tenor of the *Union Colliery* and *Quong-Wing* decisions.

Union Colliery of British Columbia Limited v Bryden
[1899] AC 580 (JCPC)

LORD WATSON: The appellant company carries on the business of mining coal by means of underground mines, in lands belonging to the company, situated near to the town of Union in British Columbia. The company has hitherto employed, and still continues to employ, Chinamen in the working of these underground mines.

By s. 4 of the Coal Mines Regulation Act, 1890, it is expressly enacted that, "no boy under the age of twelve years, and no woman or girl of any age, and no Chinaman, shall be employed in or allowed to be for the purpose of employment in any mine to which the Act applies, below ground."

By the Act of 1890, the words "and no Chinaman" were added to the 4th section of the then existing Coal Mines Regulation Act, which was chapter 84 of the Consolidated Statutes of 1888, and now, as amended, is chapter 138 of the Revised Statutes of British Columbia, 1897. It is sufficiently plain, and it is not [a] matter of dispute, that the provisions of the Act of 1890 were made to apply, and so far as competently enacted do apply, to the underground workings carried on by the appellant company.

The present action was instituted in the Supreme Court of British Columbia by the respondent, John Bryden, against the appellant company, of which he is a shareholder. It concludes (1) for a declaration that the company had and has no right to employ Chinamen in certain positions of trust and responsibility, or as labourers in their mines below ground, and that such employment was and is unlawful, and (2) for an injunction restraining the company from employing Chinamen in any such position of trust and responsibility, or as labourers below ground, and from using the funds of the company in paying the wages of the said Chinamen.

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[T]he controversy has been limited to the single question—whether the enactments of s. 4, in regard to which the appellant company has stated the plea of *ultra vires*, were within the competency of the British Columbian Legislature.

[Discussion of the structure of the 1967 *British North America Act*—now known as the *Constitution Act of 1867*—is omitted.]

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There can be no doubt that, if s. 92 of the Act of 1867 had stood alone and had not been qualified by the provisions of the clause which precedes it, the provincial legislature of British Columbia would have had ample jurisdiction to enact s. 4 of the Coal Mines Regulation Act. The subject-matter of that enactment would clearly have been included in s. 92, sub-s. 10, which extends to provincial undertakings such as the coal mines of the appellant company. It would also have been included in s. 92, sub-s. 13, which embraces "Property and Civil Rights in the Province."

But s. 91, sub-s. 25, extends the exclusive legislative authority of the Parliament of Canada to "naturalization and aliens." Sec. 91 concludes with a proviso to the effect that "any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces."

Sec. 4 of the Provincial Act prohibits Chinamen who are of full age from employment in underground coal workings. Every alien when naturalized in Canada becomes, ipso facto, a Canadian subject of the Queen; and his children are not aliens, requiring to be naturalized, but are natural-born Canadians. It can hardly have been intended to give the Dominion Parliament the exclusive right to legislate for the latter class of persons resident in Canada; but s. 91, sub-s. 25, might possibly be construed as conferring that power in the case of naturalized aliens after naturalization. The subject of "naturalization" seems prima facie to include the power of enacting what shall be the consequences of naturalization, or, in other words, what shall be the rights and privileges pertaining to residents in Canada after they have been naturalized. It does not appear to their Lordships to be necessary, in the present case, to consider the precise meaning which the term "naturalization" was intended to bear, as it occurs in s. 91, sub-s. 25. But it seems clear that the expression "aliens" occurring in that clause refers to, and at least includes, all aliens who have not yet been naturalized; and the words "no Chinaman," as they are used in s. 4 of the Provincial Act, were probably meant to denote, and they certainly include, every adult Chinaman who has not been naturalized.

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Their Lordships see no reason to doubt that, by virtue of s. 91, sub-s. 25, the legislature of the Dominion is invested with exclusive authority in all matters which directly concern the rights, privileges, and disabilities of the class of Chinamen who are resident in the provinces of Canada. They are also of opinion that the whole pith and substance of the enactments of s. 4 of the Coal Mines Regulation Act, in so far as objected to by the appellant company, consists in establishing a statutory prohibition which affects aliens or naturalized subjects, and therefore trench upon the exclusive authority of the Parliament of Canada....

Their Lordships will therefore humbly advise Her Majesty to reverse the judgment appealed from; to find and declare that the provisions of s. 4 of the British Columbia Coal Mines Regulation Act, 1890, which are now embodied in chapter 138 of the Revised Statutes of British Columbia, 1897, were, in so far as they relate to Chinamen, ultra vires of the provincial legislature, and therefore illegal; and to order that the plaintiffs do pay to the defendant company the costs incurred by them in both Courts below as the same shall be taxed. The respondents, other than the intervenant, must pay to the appellant company their costs of this appeal.

Quong-Wing v The King

(1914), 49 SCR 440

[In 1912, the legislature of Saskatchewan enacted a statute entitled *An Act to Prevent the Employment of Female Labour in Certain Capacities*. It contained the following clause:

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

The appellant was convicted of this offence and appealed to the Supreme Court of Canada.]

DAVIES J: The question on this appeal is not one as to the policy or justice of the Act in question, but solely as to the power of the provincial legislature to pass it. There is no doubt that, as enacted, it seriously affects the civil rights of the Chinamen in Saskatchewan, whether they are aliens or naturalized British subjects. If the language of Lord Watson, in delivering the judgment of the Judicial Committee of the Privy Council in *Union Colliery Company of British Columbia v. Bryden*, [1899] AC 580, was to be accepted as the correct interpretation of the law defining the powers of the Dominion Parliament to legislate on the subject-matter of "naturalization and aliens" assigned to it by item 25 of section 91 of the "British North America Act, 1867," I would feel some difficulty in upholding the legislation now under review.

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If the

> exclusive authority on all matters which directly concern the rights, privileges and disabilities of the class of Chinamen who are resident in the provinces of Canada

is vested in the Dominion Parliament by sub-section 25 of section 91 of the "British North America Act, 1867," it would, to my mind, afford a strong argument that the legislation now in question should be held *ultra vires*.

But in the later case of *Cunningham v. Tomey Homma*, [1903] AC 151, the Judicial Committee modified the views of the construction of sub-section 25 of section 91 stated in the *Union Colliery* decision. Their Lordships say, at pages 156-157:

> Could it be suggested that the Province of British Columbia could not exclude an alien from the franchise in that province? Yet, if the mere mention of alienage in the enactment could make the law *ultra vires*, such a construction of section 91, sub-section 25, would involve that absurdity. *The truth is that the language of that section does not purport to deal with the consequences of either alienage or naturalization*. It, undoubtedly, reserves these subjects for the exclusive jurisdiction of the Dominion—that is to say, it is for the Dominion to determine what shall constitute either the one or the other, but the question as *to what consequences shall follow from either* is not touched. The right of protection and the obligations of allegiance are necessarily involved in the nationality conferred by naturalization; but the privileges attached to it, where these depend upon residence, are quite independent of nationality.

Reading the *Union Colliery Case*, [1899] AC 580, therefore, as explained in this later case, and accepting their Lordships' interpretation of sub-section 25 of section 91, that its language does not purport to deal with the consequences of either alienage or naturalization, and that, while it exclusively reserves these subjects to the jurisdiction of the Dominion in so far as to determine what shall constitute either alienage or naturalization, it does not touch the question of what consequences shall follow from either, I am relieved from the difficulty I would otherwise feel.

The legislation under review does not, in this view, trespass upon the exclusive power of the Dominion legislature. It does deal with the subject-matter of "property and civil rights" within the province, exclusively assigned to the provincial legislatures, and so dealing cannot be held *ultra vires*, however harshly it may bear upon Chinamen, naturalized or not, residing in the province. There is no inherent right in any class of the community to employ women and children which the legislature may not modify or take away altogether. There is nothing in the "British North America Act" which says that such legislation may not be class legislation. Once it is decided that the subject-matter of the employment of white women is within the exclusive powers of the provincial legislature and does not infringe

upon any of the enumerated subject-matters assigned to the Dominion, then such provincial powers are plenary.

What objects or motives may have controlled or induced the passage of the legislation in question I do not know. Once I find its subject-matter is not within the power of the Dominion Parliament and is within that of the provincial legislature, I cannot inquire into its policy or justice or into the motives which prompted its passage.

But, in the present case, I have no reason to conclude that the legislation is not such as may be defended upon the highest grounds.

The regulations impeached in the *Union Colliery Case*, [1899] AC 580, were, as stated by the Judicial Committee, in the later case of *Tomey Homma*, [1903] AC 151, at p. 157,

> not really aimed at the regulation of coal mines at all, but were in truth devised to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia and, in effect, to prohibit their continued residence in that province, since it prohibited their earning their living in that province.

I think the pith and substance of the legislation now before us is entirely different. Its object and purpose is the protection of white women and girls; and the prohibition of their employment or residence, or lodging, or working, etc., in any place of business or amusement owned, kept or managed by any Chinaman is for the purpose of ensuring that protection. Such legislation does not, in my judgment, come within the class of legislation or regulation which the Judicial Committee held *ultra vires* of the provincial legislatures in the case of *The Union Collier[y] v. Bryden*, [1899] AC 580.

The right to employ white women in any capacity or in any class of business is a civil right, and legislation upon that subject is clearly within the powers of the provincial legislatures. The right to guarantee and ensure their protection from a moral standpoint is, in my opinion, within such provincial powers and, if the legislation is *bona fide* for that purpose, it will be upheld even though it may operate prejudicially to one class or race of people.

There is no doubt in my mind that the prohibition is a racial one and that it does not cease to operate because a Chinaman becomes naturalized. It extends and was intended to extend to all Chinamen as such, naturalized or aliens. Questions which might arise in cases of mixed blood do not arise here.

The Chinaman prosecuted in this case was found to have been born in China and of Chinese parents and, although, at the date of the offence charged, he had become a naturalized British subject, and had changed his political allegiance, he had not ceased to be a "Chinaman" within the meaning of that word as used in the statute. This would accord with the interpretation of the word "Chinaman" adopted by the Judicial Committee in the case of *The Union Colliery Company v. Bryden*, [1899] AC 580.

The prohibition against the employment of white women was not aimed at alien Chinamen simply or at Chinamen having any political affiliations. It was against "any Chinaman" whether owing allegiance to the rulers of the Chinese Empire, or the United States Republic, or the British Crown. In other words, it was not aimed at any class of Chinamen, or at the political status of Chinamen, but at Chinamen as men of a particular race or blood, and whether aliens or naturalized.

For these reasons I would dismiss the appeal with costs.

[Anglin J agreed with Davies J. Concurring judgments of Fitzpatrick CJ and Duff J omitted. Idington J dissented.]

Janet Dench's summary of landmarks in Canada's immigration history shows the significance of racial criteria for immigration policy-makers and administrators in the 20th century. The excerpt below focuses on the years before the First World War.

Janet Dench, "A Hundred Years of Immigration to Canada, 1900-1999: A Chronology Focusing on Refugees and Discrimination"[18]

1900	41,681 immigrants were admitted to Canada.
1896-1905	Clifford Sifton held the position of Minister of Interior (with responsibilities for immigration). He energetically pursued his vision of peopling the prairies with agricultural immigrants. The immigrants he sought for the Canadian West were farmers (preferably from the US or Britain, otherwise (northern) European). Immigrants to cities were to be discouraged (in fact, many of the immigrants quickly joined the industrial labour force). "I think that a stalwart peasant in a sheepskin coat, born to the soil, whose forefathers have been farmers for ten generations, with a stout wife and a half dozen children, is good quality." Immigration of black Americans was actively discouraged, often on the grounds that they were unsuitable for the climate.
1900-1921	138,000 Jews immigrated to Canada, many of them refugees fleeing pogroms in Czarist Russia and Eastern Europe. There were also arrivals of Doukhobors from Russia, where they suffered persecution.
1900	The head tax on Chinese immigrants was increased from $50 (set in 1885 in the first *Chinese Exclusion Act*) to $100.
1901	*Census.* Of the 5,371,315 population in Canada, 684,671 (12.7%) were immigrants (i.e. born outside Canada). 57% of the immigrants were male. About a quarter of the immigrant population had arrived in the previous 5 years. 57% of immigrants were born in the British Isles, 19% in the US, 5% in Russia, 4% in Germany and 2.5% (17,043 people) in China. There were 4,674 people born in Japan, 1,222 people born in Syria, 357 people from Turkey, and 699 born in the West Indies. The only African country listed was South Africa (128 people). Of the 278,788 immigrants who were "foreign-born" (meaning born outside the British Empire), 55% were naturalized citizens. However, only 4% (668) of the Chinese-born were citizens. In terms of "origins," the census counted 17,437 "Negroes" in Canada. 42% of the population was of British origin, while 31% was of French origin. There were 16,131 Jews and 22,050 Chinese/Japanese (given as one category). 96% of the population was of European origin.
1903	Chinese head tax increased to $500. From 1901 to 1918, $18 million was collected from Chinese immigrants (compared to $10 million spent on promoting immigration from Europe).

18 Janet Dench, "A Hundred Years of Immigration to Canada, 1900-1999: A Chronology Focusing on Refugees and Discrimination" (2000), online: *Canadian Council for Refugees* <https://ccrweb.ca/en/hundred-years-immigration-canada-1900-1999>.

1906	*Immigration Act*. According to Frank Oliver, Minister of the Interior, the purpose of the Act was "to enable the Department of Immigration to deal with undesirable immigrants" by providing a means of control. The Act enshrined and reinforced measures of restriction and enforcement. The categories of "prohibited" immigrants were expanded. The Act also gave the government legal authority to deport immigrants within two years of landing (later extended to three and then five years). Grounds for deportation included becoming a public charge, insanity, infirmity, disease, handicap, becoming an inmate of a jail or hospital and committing crimes of "moral turpitude." Such deportations had occurred prior to 1905 without the benefit of law, but after 1906, numbers increased dramatically.
1906-1907	c. 4,700 Indians, mainly Sikhs from the Punjab, arrived in Vancouver. Arrivals of Japanese and Chinese increased (more than 2,300 Japanese arrived in BC in 1907). Reaction by white British Columbians was described by the Minister of the Interior as "almost hysterical." An "Anti-Asiatic Parade" organized by the Asiatic Exclusion League ended in a riot, with extensive damage done to property in Chinatown and the Japanese quarter.
1907	A government delegation to Japan resulted in an agreement whereby the Japanese government would voluntarily limit emigration of Japanese to Canada to 400 a year.
1908	Order in council issued imposing a "continuous journey" rule, prohibiting immigrants who did not come by continuous journey from their country of origin. At the time steamships from India and Japan made a stop in Hawaii. The "landing money" required of Indians was also increased from $50 to $200.
1908	Amendments were made to *Chinese Immigration Act* expanding the list of prohibited persons and narrowing the classes of persons exempt from the head tax.
1908	A border inspection service was created on the US-Canada border.
1910	*Immigration Act*. This Act gave the government enormous discretionary power to regulate immigration through Orders in Council. Section 38 allowed the government to prohibit landing of immigrants under the "continuous journey" rule, and of immigrants "belonging to any race deemed unsuited to the climate or requirements of Canada, or of immigrants of any specified class, occupation or character." The Act also extended the grounds on which immigrants could be deported to include immorality and political offenses (Section 41). The Act introduced the concept of "domicile" which was acquired after three years of residence in Canada (later five years).
1910	Black Oklahoman farmers developed an interest in moving to Canada to flee increased racism at home. A number of boards of trade and the Edmonton Municipal Council called on Ottawa to prevent black immigration. In 1911 an order in council was drafted prohibiting the landing of "any immigrant belonging to the Negro race, which race is deemed unsuitable to the climate and requirements of Canada." The order was never proclaimed, but the movement was nevertheless effectively stopped by agents hired by the Canadian government, who held public meetings in Oklahoma to discourage people, and by "strict

	interpretation" of medical and character examinations. Of more than 1 million Americans estimated to have immigrated to Canada between 1896 and 1911, fewer than 1,000 were African Americans.
1910-1911	First Caribbean Domestic Scheme: 100 Guadeloupian women came to Québec.
1911	*Census*. The population of Canada was 7,206,643, of which 22% was composed of immigrants (i.e. born outside Canada). Only 39% of those born outside Canada were female (2% of those born in China, representing 646 women). 49% of immigrants were born in the British Isles, 19% in the US, and 6% in Russia. 223 were identified as being born in Africa (outside South Africa), 211 in the West Indies. Of the 752,732 immigrants who were "foreign-born" (meaning born outside the British Empire), 47% were naturalized citizens. 9.5% (2,578) of the Chinese-born and 22.5% (1,898) of the Japanese-born were citizens. In terms of "origins," the census counted only 16,877 "Negroes," 560 fewer than in 1901. 54% of the population was of British origin (up from 47% in 1901), while 29% was of French origin. There were now 75,681 Jews, 27,774 of Chinese origin, 9,021 of Japanese origin and 2,342 were classified as "Hindu." 5% of the population had German origins and 1.8% Austro-Hungarian. 97% of the population was of European origin.
1912-1914	Dominion Iron and Steel Company sent two Barbadian steelworkers to Barbados to recruit steelworkers.
1913	Immigration reached a record level of 400,810 new arrivals (the highest level in the century). Taken as a proportion of the population at the time, it was equivalent to present-day Canada receiving about one and half million immigrants in a year.
June 1914	An MP in the House of Commons: "How can we go on encouraging trade between Canada and Asia and then hope to prevent Asiatics from coming into our country?"
1914	The [*SS*] *Komagata Maru* arrived in Vancouver, having sailed from China with 376 Indians[, mostly Sikhs,] aboard, who were refused admittance to Canada. After two months in the harbour, and following an unsuccessful appeal to the BC ... Court [of Appeal], the boat sailed back to India. Between 1914 and 1920 only one Indian was admitted to Canada as an immigrant.

The *Komagata Maru* controversy shows how the law was deployed to restrict non-white immigration within the context of empire and the myth of equality for all the Queen's subjects.[19] The story of this journey has become one of the most notorious events in Canada's early immigration history. Prime Minister Stephen Harper gave an official apology in a memorial park in Surrey, British Columbia in 2008. Following complaints about this location, Prime Minister Justin Trudeau apologized in the House of Commons in 2016.

One of the passengers on the ship, Munshi Singh, applied for landing, was denied, and was detained pending deportation. The following extract is from the BC Court of Appeal decision that upheld the denial of Munshi Singh's application for a writ of *habeas corpus*. It is particularly shocking over a century later to take note of the language of the legislative provisions at issue.

19 For more details see Hugh JM Johnston, *Voyage of the Komagata Maru: The Sikh Challenge to Canada's Colour Bar* (Vancouver: University of British Columbia Press, 1989).

Canada v Singh; Re Munshi Singh
[1914] BCJ No. 116 (CA)

[The substantive aspects of the two *Immigration Act* provisions and three orders in council relevant to this decision are reproduced here:

> *Immigration Act 1910*, s 37. Regulations made by the Governor in Council ... may provide as a condition to permission to land in Canada that immigrants and tourists shall possess in their own right money to a prescribed minimum amount, which amount may vary according to the race, occupation or destination of such immigrant or tourist, and otherwise according to the circumstances; and may also provide that all persons coming to Canada directly or indirectly from countries which issue passports or penal certificates to persons leaving such countries, shall produce such passports or penal certificates on demand of the immigration officer in charge before being allowed to land in Canada.
>
> *Immigration Act 1910*, s 38. The Governor in Council may by proclamation or order ... (a) prohibit the landing in Canada ... of any immigrant who has come to Canada otherwise than by continuous journey from the country of which he is a native or naturalized citizen, and upon a through ticket purchased in that country, or prepaid in Canada.
>
> PC 23. From and after the date hereof the landing in Canada shall be and the same is hereby prohibited of any immigrant who has come to Canada otherwise than by continuous journey from the country of which he is a native or naturalized citizen and upon a through ticket purchased in that country or prepaid in Canada.
>
> PC 24. From and after the date hereof no immigrant of the Asiatic race shall be permitted to land in Canada unless such immigrant possess in his own right money to the amount of at least two hundred dollars. ...
>
> PC 897. From and after the date hereof, and until after the thirtieth day of September, 1914, the landing at any port of entry in British Columbia, hereinafter specified of any immigrant of any of the following classes or occupation, viz:
>
> Artisans
>
> Labourers, skilled or unskilled, shall be, and the same is hereby prohibited.]

MacDONALD CJA: The appellant, Munshi Singh, who seeks to enter Canada as an immigrant, is a native of India, and a British subject. He is one of a large number of immigrants who have come to the Port of Vancouver in the *Komagata Maru*. He was denied permission to land, and after formal proceedings were had before a Board of Inquiry, he was rejected and an order was made by the Board for his deportation. He then applied to a judge for a writ of *habeas corpus* to test the legality of his detention, and from the refusal of the writ he now appeals to this court.

On the threshold of the case is the question of the constitutionality of *The Immigration Act*. That the King, with the advice and consent of the Imperial Parliament, has the power to make laws for the exclusion from British possessions of immigrants, whether British subjects or not, has not been questioned, as indeed it could not be doubted. By the terms of *The British North America Act* the Parliament of Canada is clothed with sovereign powers in matters relating to immigration into any part of the Dominion ... [subject only to disallowance of its Acts by His Majesty in Council,] and hence, subject to that power, which has not been exercised ... Canada's authority to admit immigrants of any or every race or nationality, on any terms she pleases, is complete,

> Authority as plenary and as ample ... as the Imperial Parliament in the plentitude of its power possesses and could bestow.

The next question is as to whether or not the three orders in council under which the immigration authorities have acted in rejecting the appellant conform to the authority given by *The Immigration Act* to the Governor in Council to make such orders.

• • •

The section [s 37] is not well drawn, but the manifest intention of its framers was to enable the Governor-in-Council to make regulations which would empower immigration officers to exclude from Canada an immigrant or a tourist not possessed of a specified sum of money, and that in making such regulation he might have regard to the race, occupation and destination of the immigrant or tourist. It contemplates that discrimination with respect to race which the order-in-council makes when it subjects the person of Asiatic race to the monetary test. The contention is that because the Asiatic race was singled out and the test not applied to other races, there was an unjust discrimination not authorized by that section. The proviso in P.C. 24 which excepts from the monetary test natives of Asiatic countries with whom we have treaties or conventions affecting immigration, or whose subjects are admitted under other statutory laws or regulations, was referred to as further supporting this contention, but in my opinion the conditions which made such a proviso necessary are important as showing that section 37 could not be and was not intended to have been made operative without discrimination in favour of some races whose legal status to be admitted to Canada was already fixed by statute or treaty.

• • •

Had the Board of Inquiry acted without jurisdiction or upon orders-in-council made without authority, or upon a statute which was unconstitutional, no doubt the court could and would interfere to prevent what in that case would be an illegal detention.

As, in my opinion, *The Immigration Act* is not unconstitutional, and the order in council, P.C. 897, is not *ultra vires*, and as the Board was legally seized of the subject of the inquiry, I think the court cannot review a decision upon a question which the Board was authorized to decide. The appellant if he has just cause of complaint is not without redress, as an appeal to the Minister of the Interior is given by this Act.

• • •

[McPHILLIPS CJA:] Irrespective, however, of this provision, *The British North America Act* intervenes, and there has been committed to Canada and the provinces thereof within the ambit of the respective powers, Imperially conferred—the sovereign power of legislation. It is true if the Parliament of Canada or the parliaments of the provinces transcend these powers, the courts have the power to declare any such attempted statute law to be *ultra vires*, and to this extent, and to this extent only, can it be that His Majesty's courts of law have any power to review.

It may be said to be well-settled law that whether there be concurrent powers conferred or not the Parliament of Canada is paramount in its legislation in respect of all matters not coming within the classes of subjects by *The British North America Act* assigned exclusively to the legislatures of the provinces. Further, it may now be stated to be settled law that the Parliament of Canada, acting under the power conferred by s. 91 of *The British North America Act*, in the making of laws for the peace, order and good government of Canada, is paramount in legislating

in respect to all matters coming within s. 91 of the Act, and the legislation of the Parliament of Canada is to prevail, although it may be that the Dominion Parliament may trench upon matters assigned to the provincial legislature.

This is the more definitely pointed out when s. 95, dealing with "Agriculture and Immigration" is considered, where concurrent powers are conferred. And it is to be observed that this is the only section of the Act where provision against conflict is made.

• • •

[C]an it for a moment be contended that it was not the intention of Parliament to enact a code complete in itself governing and controlling the coming to Canada of all persons irrespective of race or nationality, save those persons defined in the Act as being "non-immigrant classes" ... ?

That being so, it is not to be wondered at that a policy so well indicated would be set out in terms complete in themselves, and that the form for passing upon all applicants for entry and the tribunal of appeal should be such as would be peculiarly fitted to deal with all possible cases arising, no doubt calling for varying terms and conditions of entry, and in other proper cases calling for exclusion ... , and, where necessary, deportation.

It follows that the court must interpret the statute law in accordance with the intention and spirit of the enactment when such construction does no violence to the language used or distort its natural and customary meaning.

• • •

It has been argued that the appellant being a British subject by birth cannot be prevented from landing and cannot be deported, that he is now in Canada although still upon the ship, being in Canadian waters within the three-mile limit, and that it is an interference with his civil rights. ...

The *Immigration Act* is, as has been previously pointed out, an Act passed in pursuance of the power conferred by *The British North America Act*, and applies to all persons coming to Canada, irrespective of race and nationality, and, in my opinion, the British subject has no higher right than the alien in coming to the shores of Canada, nor does the Parliament of Canada in its enactment differentiate in any way; the only privileged persons are those who in accordance with natural justice should be allowed free entry by any nation, being her own Canadian citizens and persons who have Canadian domicile. Those are permitted to land in Canada as a matter of right ... .

Lord Atkinson, in *Atty.-Gen. v. Cain*, [[1906] A.C. 542; 75 L.J.P.C. 81], at p. 83, said:

> In *Hodge v. Reg.* (1883) 53 L.r.P.C. 1, it was decided that a colonial legislature has within the limits prescribed by the statute which created it "authority as plenary. and as ample ... as the Imperial Parliament in the plentitude of its power possessed and could bestow."

Proceeding from this proposition of law as laid down by their Lordships of the Privy Council, can it be at all contended that there is not the power to exclude immigrants whatever be their race or nationality?

• • •

Canada is a sovereign nation within and of the British Empire, all legislation being enacted by the respective Parliaments, Federal and provincial, in His Majesty's name.

Now, what is the extent of the authority that may be exercised by the Federal and provincial Parliaments? This may be said to be *all authority*.

• • •

The argument ... in effect is that the Imperial Parliament would be powerless to pass the *Immigration Act* and implement its provisions to the extent of excluding and deporting from Great Britain and Ireland any British subject, no matter from what part of the Empire he came; and similarly the Parliament of Canada is also powerless to exclude and deport from Canada—the mere statement carries its own refutation.

Were the power not to exist to exclude, and even after entry, the power to deport British subjects from the British Isles, Canada and all other portions of the Empire might be invaded by people of the undesirable class as specifically set forth in s. 3 of the Act, and further referred to in ss. 40 and 43, inclusive.

It is irresistible that self-government and a national status must attach to itself this power; it is a natural power of preservation of the nation, and no authority has been cited in support of the contention—the contention is one of mere platitude, devoid of reason or rationality.

The Immigration Act therefore does in its terms apply to British subjects as well as aliens and naturalized subjects and persons of all races without regard to nationality, subject to the exception in favor of Canadian citizens and persons who have Canadian domicile, and the appellant is not singled out in any way other than he must pass the requirements of *The Immigration Act* and the orders-in-council made in pursuance thereof, without which he cannot land, and as a matter of fact, at the present time there is existent, by reason of order-in-council, P.C. 897, an absolute prohibition against landing which not only applies to the appellant but to all artisans, laborers, skilled or unskilled, coming to Canada, irrespective of race or nationality.

• • •

Then it is argued that the appellant is not of the *Asiatic race*.

In my opinion this is in no way crucial, as there is the right to refuse the appellant permission to land, and the right to deport under the provisions of *The Immigration Act* and the orders-in-council, irrespective of race, and as I have also said, irrespective of nationality. It is somewhat interesting to know that that as early as 1784 an association was formed and named the Asiatic Society, in Calcutta, to extend a knowledge of the Sanskrit language and literature. ...

And in the *History of India* ... , we read of "the Asiatic races" including therein the people of India.

... We have Edward A. Frewen in his masterly Essay *Our Race and Language*, ... saying:

• • •

> ... If, then, we are to ever to use words like race, or even nation to denote groups of mankind marked off by any kind of historical as distinguished from physical characteristics, we must be content to use those words as we use many other words without being able to prove that our use of them is accurate as mathematicians judge of accuracy.

Therefore, it may well be said that when the words "Asiatic race" are used in the order-in-council, P.C. 24, the words in their meaning, comprehensive and precise enough to cover the Hindu race, of which the appellant is one.

It is plain that upon study of the question, the Hindu race, as well as the Asiatic race in general, are in their conception of life and ideas of society fundamentally different to the Anglo-Saxon and Celtic races, and European races in general.

Further, acquaintance with the subject shows that the better classes of the Asiatic races are not given to leave their own countries—they are non-immigrant

classes, greatly attached to their homes, and those who become immigrants are, without disparagement to them, undesirables in Canada, where a very different civilization exists; the laws of this country are unsuited to them and their ways and ideas may well be a menace to the well-being of the Canadian people. ...

The Parliament of Canada, the nation's Parliament, may be well said to be safe-guarding the people of Canada from an influx, which it is no chimera to conjure up might annihilate the nation and change its whole potential complexity, introduce Oriental ways as against European ways, Eastern civilization for Western civilization, and all the dire results that would naturally flow therefrom, and adopting the language of Mr. Justice Duff in *Quong Wing v. Rex*, ... with the one alteration of "national" for "local" and applying it to the provisions of *The Immigration Act*, and the orders-in-council passed in pursuance thereof, it may well be said that: "There is nothing in the Act itself to indicate that the legislature is doing anything more than attempting to deal according to its [r]ights (as it is its duty to do) with a strictly—national—situation," and in this it is in no way exceeding its legislative powers, and is in fact pursuing what is its bounden duty under s. 91 of *The British North America Act*, ...

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

... It is apparent that it will not conform with national ideals in Canada to introduce any such [Hindu or Mohammedan] laws into Canada, or give them the effect of law as applied to people domiciled in Canada, and this probably would be the germ of discontent that would be brought to this country within any considerable influx of people so different in ideas of family life and social organization. *Better that peoples of non-assimilative, and by nature properly non-assimilative, race should not come to Canada, but rather, that they should remain of residence in their country of origin and there do their share as they have in the past in the preservation and development of the Empire.*

In my opinion *The Immigration Act* and the orders-in-council referred to constitute full and justifiable warrant for the detention of the appellant by the immigration authorities, and for his deportation, the deportation order being good and sufficient in law even were the decision of the Board of Inquiry reviewable, and no grounds are made out for the appellant's discharge. But in so holding I am not to be understood as holding that there is any power of review or the right to invoke *habeas corpus* proceedings to effect the discharge of the appellant, as my opinion is that s. 23 is an absolute inhibition upon the court, and there is no jurisdiction in the court to grant a writ of *habeas corpus* and thereupon discharge the appellant from custody.

Appeal dismissed.

The race-based rules stayed in place for a long time. The continuous journey rule was not repealed until 1947. The laws imposing a head tax on Chinese immigrants, discussed above, continued in force until 1923. It has been estimated that between 1885 and 1923, $23 million was collected from 81,000 people. The head tax was replaced by even more draconian

legislation that blocked entry for virtually all people from China. This law was eventually repealed, also in 1947.[20]

Japanese immigrants received different treatment for diplomatic and political reasons. Under the 1908 *Hayashi-Lemieux Agreement*, Canada had agreed not to impose discriminatory laws in relation to immigration from Japan in return for a promise from the Japanese government to impose emigration controls. This agreement was renegotiated between 1922 and 1925 to reduce the number of Japanese emigrants allowed to leave for Canada.[21] An order in council in 1923 prohibited all other Asian people from entering the country (with very limited exceptions).[22] The reasons behind these laws were never concealed. As noted by Kelley and Trebilcock, "Prime Minister Mackenzie King voiced the sentiments of many of his colleagues when he stated that it was 'impossible ever to hope to assimilate a white population with the races of the orient.'"[23]

Ethnic origin was not the only criterion of exclusion found in early immigration laws. Legislation in 1872 denied entry to "criminal, or other vicious classes of immigrant." Also, as Dench identifies in *A Hundred Years of Immigration to Canada, 1900-1999*, excerpted above, the Immigration Acts of 1906 and 1910 contained a range of provisions aimed at a wide range of individuals defined in a way that accorded broad discretion to immigration officials. Over the years, other criteria were added, including chronic alcoholism, illiteracy, illegitimacy, and attempted suicide.

Moreover, deportations became more common. As Kelley and Trebilcock suggest, deportation for criminal acts such as being a nuisance, obstructing the police, and political subversion became "a powerful tool in silencing foreign labour agitators and political activists."[24] Naturalization certificates could also be revoked. The Winnipeg General Strike of 1919 was a flashpoint that prompted the exercise of the coercive powers found in the *Immigration Act*. Ten of the strike leaders were arrested and deported, as were 31 foreign nationals who had marched in the Bloody Saturday parade.[25]

Poor and disabled immigrants were also singled out for attention. Immigrants faced deportation for being a "public charge." Dench notes that the popularity of this ground for removal increased dramatically, to the point that between 1930 and 1934 it was applied to 16,765 people.[26]

Although Canada's economy began to recover in the mid-1930s, immigration laws and policies were not liberalized. Canada's notorious failure to respond to the pleas for asylum from Jews attempting to flee persecution at the hands of the Nazis is well documented.[27] Anti-Semitism played a role in Canada's refusal to provide a home for these victims of Nazism. Abella and Troper note:

> Like the other western liberal democracies, Canada cared little and did less. When confronted with the Jewish problem, the response of the government, the civil service

20 *Chinese Immigration Act, 1923*, SC 1923, c 38.

21 The number was reduced from 400 to 150. Ninette Kelley & Michael Trebilcock, *The Making of the Mosaic: A History of Canadian Immigration Policy* (Toronto: University of Toronto Press, 1998) at 204-5 [Kelley & Trebilcock].

22 Order in Council PC 1923-183 (31 January 1923).

23 Kelley & Trebilcock, *supra* note 21 at 203.

24 *Ibid* at 158.

25 *Ibid* at 182.

26 Janet Dench, *A Hundred Years of Immigration to Canada, 1900-1999: A Chronology Focusing on Refugees and Discrimination* (2000) at 1, online: *Canadian Council for Refugees* <http://ccrweb.ca/en/hundred-years-immigration-canada-1900-1999>.

27 See Irving Abella & Harold Troper, *None Is Too Many: Canada and the Jews of Europe, 1933-1948* (Toronto: Key Porter Books, 2000).

> and, indeed, much of the public wavered somewhere between indifference and hostility. In the prewar years, as the government cemented barriers to immigration, especially of Jews, immigration authorities barely concealed their contempt for those pleading for rescue. There was no groundswell of opposition, no humanitarian appeal for a more open policy.[28]

FC Blair, director of immigration from 1936 to 1943, was openly anti-Semitic and personally scrutinized all Jewish applications to Canada.[29] His inflexibility was supported by the position of the government of Mackenzie King. In 1939, Mackenzie King's government turned back the *SS St Louis* carrying 930 Jewish refugees, forcing them to return to Europe where many died in the Holocaust.[30]

During the Second World War, discrimination against Japanese Canadians intensified. Over 20,000 Japanese Canadians were evicted from their homes and sent to labour camps or detention centres until the end of the war.[31] After the war, thousands of Japanese Canadians, some of whom had been born in Canada and many of whom were citizens, succumbed to racist sentiments and government pressure and went to Japan.[32]

After the war, immigration laws continued to be restrictive and, as Kelley and Trebilcock document, reasons of national security—founded on the fear of communism—were frequently used to justify exclusion and deportation. Between 1946 and 1958, more than 29,000 applications to enter Canada were rejected on security grounds.[33]

Eventually, Canada agreed to accept refugees—between 1947 and 1962, nearly 250,000 displaced persons from Europe were admitted to Canada.[34] Nevertheless, Canada did not ratify the 1951 United Nations *Convention Relating to the Status of Refugees* until 1969. Canada was also slow to remove racially discriminatory criteria from its immigration laws: only in 1962 did then-Minister of Citizenship and Immigration Ellen Fairclough make regulations permitting the entry of independent immigrants regardless of ethnic or national origin. Nevertheless, provisions permitting Europeans to sponsor a wider range of relatives than others were retained until 1967. Also in that year, the points system for selecting independent immigrants according to their skills, education, and work experience was introduced. Although the criteria have been modified over the years, this model of assessing an applicant's desirability remains in place today.

Alongside these changes on the immigration front, a new attitude toward refugees developed in the 1970s. About 7,000 individuals expelled by the Amin dictatorship in Uganda were admitted in 1973 and, between 1973 and 1975, about 1,200 refugees escaping from the Pinochet regime in Chile were admitted. Between 1978 and 1981, 60,000 refugees from Southeast Asia were accepted—a figure that represents 25 percent of the number of immigrants admitted in these years.

Despite sustained attention to discrimination and racism in Canada's immigration history, little is written about the relationship between immigration law and Canada's Indigenous populations. Indeed, Canada's mythology as a nation of immigrants is one reflection of the

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28 *Ibid* at 280.

29 *Ibid* at 7-9.

30 Dench, *supra* note 26.

31 Jock Collins & Frances Henry, "Racism, Ethnicity and Immigration" in Howard Adelman et al, eds, *Immigration and Refugee Policy: Australia and Canada Compared* (Toronto: University of Toronto Press, 1994) at 530.

32 Knowles, *supra* note 14 at 124. See also Sally Ito, "Exiled," *Globe and Mail* (27 May 2006) F4.

33 Kelley & Trebilcock, *supra* note 21 at 314.

34 Valerie Knowles, *Forging Our Legacy: Canadian Citizenship and Immigration, 1900-1977* (Ottawa: Public Works and Government Services Canada, 2000) at 5.

silencing of Indigenous peoples in the national narrative. Dauvergne writes of this effect in her discussion of settler society identity and its influences on immigration law in a variety of states:

> The shared mythology of immigration also serves to mask the savage destruction of Indigenous peoples and ways of life that is also shared across these nations. The very idea of "settlers" suggests that there was a wild land in need of taming, of settlement. And thus in each of these places the founding mythology has included the intrepid frontiersman battling the savagery of land and people to transform the place into a terrain of fences and measures. And law. The idea of Canada, Australia, or the United States being a nation of migration is such a profound and effective silencer of the trajectory of Indigenous life that it is deeply challenging to bring Indigenous peoples into a story of the immigrant nation. While contemporary social justice politics often see allegiances between new migrants and Indigenous peoples as those at the margins of these societies, the claims of these groups are not articulated in the same terms, and the allegiance rarely reaches the level of shared demands or joint manifestos. Indeed, it is the reality that these states *are* nations of immigrants that is the most damaging fact to be overcome in the struggle for Indigenous justice and social inclusion.
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> This is the commitment of the settler society: we are all immigrants. This is reinforced by the perpetual "hyphenation" of Indigenous members. Indigenous peoples in settler societies are never signified by the mere omission of an adjectival modifier. The simple words Canadian or American postdate and erase Indigeneity so completely that it must be *re*-signified in some other fashion with labels that vary over time and place—Indian, First Nations, Aborigine, Maori. For several years when he was the Australian Minister of Immigration at the close of the twentieth century, Phillip Ruddock had a go at extending the "we are all immigrants" mantra to include the Australian Aborigines who had "migrated" to contemporary Australia some 50,000 years earlier during the last ice age when the sea crossing to Asia was considerably smaller. This conceit aimed to confront the emerging cracks in the settler society ethos brought about by the strengthening land rights claims of Indigenous peoples in all settler societies at that time. But it was transparent political posturing. The effects of the first wave of British colonists on the aboriginal population of the Australian continent are simply not comparable to the effect of subsequent waves of Europeans on the society established by those first settlers. To draw the comparison is beyond insult. We are not all immigrants, but the mythology of settler society eases our ignorance of this.[35]

Over the past decade, and especially following the work of the Truth and Reconciliation Commission that culminated with its final report in 2015, lawyers and scholars in Canada have begun working to consider Indigenous perspectives on immigration laws and politics. The erasure of Indigenous ownership and identities embedded in immigration mythology make this encounter particularly stark. In comparison with many other areas of Canadian law, this work is in a fledgling state, and we have yet to develop a road map of ways forward. Not surprisingly, Indigenous scholars have been far ahead in calling for a different way of imagining and labelling Canada's immigration mythology. In the following excerpt, for example, Anishinaabe legal scholar John Borrows questions how citizenship itself is conceptualized and the role and obligations of Indigenous peoples as citizens.

35 Catherine Dauvergne, *The New Politics of Immigration and the End of Settler Societies* (Cambridge: Cambridge University Press, 2016) at 12-14.

John Borrows, "'Landed' Citizenship: Narratives of Aboriginal Political Participation"
in Alan Cairns et al. eds, *Citizenship, Diversity and Pluralism: Canadian and Comparative Perspectives* (Montreal: McGill-Queen's University Press, 1999) at 72-77.

My grandfather was born in 1901 on the western shores of Georgian Bay, at the Cape Croker Indian reservation. Generations before him were born on the same soil. Our births, lives, and deaths on this site have brought us into citizenship with the land. We participate in its renewal, have responsibility for its continuation, and grieve for its losses. As citizens with this land, we also feel the presence of our ancestors and strive with them to have the relationships of our polity respected. Our loyalties, allegiance, and affection are related to the land. The water, wind, sun, and stars are part of this federation. The fish, birds, plants, and animals also share this union. Our teachings and stories form the constitution of this relationship and direct and nourish the obligations that it requires. The Chippewas of the Nawash have struggled to sustain this citizenship in the face of the diversity and pluralism that have become part of the land. This has not been an easy task. Our codes have been disinterred, disregarded, and repressed. What is required to reinscribe these laws and once again invoke a citizenship with the land?

Close to thirty years have passed since Harold Cardinal wrote his influential book, *The Unjust Society*. His work catalogued the troubling conditions Indians found themselves in during the late 1960s. Writing in response to the Trudeau government's plan to eliminate Indian rights, he described the denial of Indian citizenship. His message captured the feelings of Aboriginal people everywhere. He chronicled a disturbing tale of how Indians were marginalized in Canada through bureaucratic neglect, political indifference, and societal ignorance. He labeled Canada's treatment of Indians as "cultural genocide" and in the process gave widespread literary presence to the absence of Indian rights. In convincing tones he outlined thoughtful solutions to overcome threats to our underlying citizenship, organized around the central theme of Indian control of Indian affairs. Here was an approach to protect special connections with the land. He advocated the strengthening of Indian organizations, the abolition of the Department of Indian Affairs, educational reform, restructured social institutions, broad based economic development and the "immediate recognition of all Indian rights for the re-establishment, review and renewal of all existing Indian treaties." Cardinal's ideas resonated within Indian country and parallel proposals became the mainstay of Indian political discourse for the next three decades. He articulated a revolutionary message in a transformative time.

Fast forward to the massive five-volume report of the Royal Commission on Aboriginal Peoples, released in 1996. The story is unchanged. The report describes violation of Aboriginal rights and calls for their immediate recognition and renewal. It records the continued excision of Aboriginal relationships with their lands and demonstrates that the problems Cardinal profiled stubbornly remain. Despite some notable achievements in the intervening years, such as the recognition and affirmation of Aboriginal rights, it illustrates how Indigenous citizenship with the land is increasingly tenuous. In their broad outlines, Cardinal's and the Commission's messages are notable for their similarity. Aboriginal people are suffering, their rights are being abrogated, and the answer to this challenge is Aboriginal control of Aboriginal affairs. Like Cardinal, although to a more elaborate and expansive degree, the report recommends a series of legislative and policy

goals: the strengthening of Aboriginal nations, the abolition of the department of Indian Affairs, educational reform, restructured social institutions, broadly based economic development, and the immediate recognition of all Aboriginal rights for the re-establishment, review, renewal, and creation of treaties. Same story, same solutions. A revolutionary message in a reactionary time.

Why the same approach? If the message did not have the desired effect the first time, why repeat it? Does the call for Aboriginal control of Aboriginal affairs stand a greater chance now than it did in the late 1960s? Although there has been some reason for hope, there is also cause for concern. Despite the wisdom of its message, so far the reaction to the Commission has been as feeble as the response to Cardinal. All the while, Aboriginal citizenship with the land is being slowly diminished. The disenfranchisement of our people (and our spirits) from the land, water, animals, and trees continues at an alarming rate. Do we need a new story, new solutions? We do. We need a transformative message in a reactionary time.

To preserve and extend our participation with the land, it is time to talk also of Aboriginal control of Canadian affairs. We need an Aboriginal prime minister, an Aboriginal Supreme Court judge, and numerous Aboriginal chief executive officers. We need people with steady employment, good health and entrepreneurial skill. They should be joined by Aboriginal scientists, doctors, lawyers, and educators, and coupled with union leaders, social activists, and conservative thinkers. We need these people to incorporate Indigenous ideologies and perspectives into their actions, including ideas about the federation we should enjoy with the earth. They should stand beside Aboriginal elders, chiefs, grandmothers, aunts, hunters, fishers, and healers as bearers and transmitters of culture. For too long the burden of cultural transmission has been placed on these reserve-based teachers and leaders. Although their knowledge will always remain vitally important in the expansion of ideas, other Aboriginal people in different settings within Canada also have to shoulder some of this responsibility. Aboriginal people must transmit and use their culture in matters beyond "Aboriginal affairs." Aboriginal citizenship must be extended to encompass other people from around the world who have come to live on our land.

After all, this is our country. Aboriginal people have the right, and the legal obligation of a prior citizenship, to participate in its changes. We have lived here for centuries and will for centuries more. We will continue to influence its resource utilization, govern its human relationships, participate in trade, and be involved in all of its relations—as we have done for millennia. Fuller citizenship requires that this be done in concert with other Canadians—as well as on our own, in our own communities. Aboriginal control of Aboriginal affairs is a good message that has to be strengthened, but it only gets us so far. It is not consistent with holistic notions of Citizenship, which must include the land and all beings upon it. When we speak of Aboriginal control of Aboriginal affairs it is evident that Canadians feel they do not have much of a stake in that message, except, perhaps, with regard to what "they" think "we" take from "them" in the process. Canada's stake in Aboriginal peoples, and in the land, has to be raised at radical, liberal, and conservative levels.

Our world is bigger than the First Nation, reserve, or settlement. Approximately one-half of the Aboriginal population of Canada live outside these boundaries. Certainly our traditional lands and relationships lie outside these boundaries. Even if the reserve is where we live, national and international forces influence even the most "remote" or seemingly local time-honoured practice. In fact, an autonomous Aboriginal nation would encounter a geography, history, economics, and politics that requires participation with Canada and the world to secure its objectives. Aboriginal control through Canadian affairs is an important way to

influence and participate with our lands. Without this power we are excluded from the decision-making structures that have the potential to destroy our lands. This is a flawed notion of citizenship. Canadians must participate with us and in the wider view of polity that sustained our forebears for thousands of years.

If we pursue this notion of citizenship, what will its new narrative be? How will its constituent stories be arranged? How will they relate to the old narrative? What will be lost, and what gained? These questions need to be taken very seriously. The development of a new narrative may severely undermine the interests of those who have invested their aspirations and energies in the earlier one, even if the two messages are complementary. Some people have spent a tremendous amount of time and effort promoting an exclusive citizenship and measured separatism for Indians through a form of self-government. But this approach, however appropriate and helpful, is not rich enough to encompass the range of relationships we need to negotiate the diversity, displacement, and positive potential that our widening circles represent. The extension of Aboriginal citizenship into Canadian affairs is a developing reality, given the increasingly complex social, economic, and political relationships we are entering into. Intercultural forces of education, urbanization, politics, and intermarriage all have a significant influence in drawing Indigenous people into closer relationship with Canadian society. The impulse behind the call for this refocused narrative is suggested by these changing dynamics in the Indian population. Since 1961 our populations have quadrupled, rates of urban residency have climbed to 50 percent of the total Aboriginal population, and one in every two Aboriginal people has married a non-Aboriginal person. Moreover, our health has improved and incomes have expanded. From where I stand this change has been enormous. Although I am worried that these indicators hide the continuing individual and collective pain of Aboriginal people, I also participate with numerous other Aboriginal people who more frequently interact with Canadians in a significant way.

Borrows's call to Indigenize the meaning of "citizenship" is a deep and profound invitation to reorder Canada's immigration mythology. These issues are taken up again in Chapter 11.

Only one provision of Canadian immigration law refers in any way to Indigenous peoples, s 19(1) of the IRPA, which states that Canadian citizens and Indians under the *Indian Act* have a right to enter and remain in Canada.[36] As will be discussed in more detail in Chapter 5, Entry and Border Control, in discussing rights of entry, this provision means that, on arriving at the border, it is sufficient to demonstrate Indian status rather than Canadian citizenship to be admitted into Canada. The potential reach of this provision is significant, given that the Canada–US border passes through the traditional territories of Indigenous peoples across the country.

The Indian status referred to in the IRPA is itself a creature of Canadian federal law. To what extent, then, can a non-citizen rely on an Aboriginal right to cross the border? The following case, *Watt v Liebelt*, addresses that issue. Mr Watt was a member of the Sinixt or Arrow Lakes people, whose traditional lands include areas spanning the Canada–US border between British Columbia and Washington state. Mr Watt was not a citizen of Canada, nor was he registered under Canada's *Indian Act*. After being convicted of cultivating cannabis

36 Section 19(1) of the IRPA reads in full:

> 19(1) Every Canadian citizen within the meaning of the *Citizenship Act* and every person registered as an Indian under the *Indian Act* has the right to enter and remain in Canada in accordance with this Act, and an officer shall allow the person to enter Canada if satisfied following an examination on their entry that the person is a citizen or registered Indian.

under the *Narcotic Control Act*,[37] he was ordered deported to the United States. He argued that he could not be deported from his sovereign territory. On appeal from the judicial review ruling of the Federal Court's trial division, the Federal Court of Appeal held that there was not a sufficient factual basis to determine what Aboriginal rights existed for Mr Watt.

The court had the following to say about the relationship between immigration law and Aboriginal rights in a general sense.

Watt v Liebelt
[1999] 2 FC 455 (footnotes omitted)

• • •

[15] There is one issue of law with which we can deal. The respondent contends that the existence of a sovereign state is inconsistent with any fetters on the power of that state to control which non-citizens may remain in the country. Suffice it to say that while there is ample authority in international and common law for that proposition, a sovereign state may fetter itself as to the means by which, the circumstances in which, and the agencies of government by which, such power of control may be exercised. Canada has by its Constitution limited the exercise of governmental powers which may be inherent as a sovereign state. For example, the *Canadian Charter of Rights and Freedoms* prohibits any actions by any agencies of government which might otherwise be within the authority of a sovereign state such as the power to control the content of the press or the power to carry out unlimited searches and seizures of those within its territory. In the same vein, section 35 of the *Constitution Act, 1982* now guarantees existing Aboriginal rights not previously extinguished, and this carries the corollary that no agency of the state can, after 1982, extinguish those rights. As long as the Constitution remains unamended, Canadian authorities are subject to this limitation on what would otherwise be an incident of sovereign power. In fact, in adopting section 35, Canada has exercised its sovereignty by establishing a hierarchy of rights exercisable in Canada: a hierarchy which can only be altered by another exercise of sovereign power, namely the amendment of the Constitution.

[16] I therefore believe the matter must be approached in a more nuanced fashion. It is true that the abandonment of incidents of Canadian sovereignty should not be readily implied and pre-1982 laws which controlled the presence in Canada of non-Canadians should not be lightly set aside. But it must be recognized, in the light of the recent Supreme Court jurisprudence, that there are important assumptions to be applied against the pre-1982 extinguishment by Canadian laws of Aboriginal rights: our legal system at that time must be taken to have recognized that such rights could not be extinguished except by clear and plain measures to that effect. The fact that legislators and administrators at that time were not aware of such requirements nor indeed of the right now asserted does not validate the extinguishment. In fact it casts greater doubt on the alleged extinguishment because they could not have intended to extinguish that which they didn't know existed.

[17] This does not mean, of course, that proper control of the border may not be a justification for Canada to control or limit in some way the exercise of relevant and unextinguished Aboriginal rights.

[18] I am therefore of the view that the sovereign nature of Canada is not a legal barrier *per se* to the existence of the Aboriginal rights as claimed, but I believe that this Court can go no farther in answering question 1.

37 RSC, 1985, c. N-1.

[19] Instead there will have to be a number of findings of fact which have as yet not been made. Without attempting to list these exhaustively, they will include findings such as the following. Is the appellant a member of an "aboriginal people of Canada" in order to be entitled to assert a right under section 35 of the *Constitution Act, 1982*? There may be mixed questions of law and fact here as to the indicia for identifying an "aboriginal people of Canada." Does the fact that the appellant's ancestors once occupied land here entitle them indefinitely to a claim to be an Aboriginal people of Canada? What continuing nexus may be required if such "people" are no longer resident in Canada? Further, there will have to be difficult findings as to whether this Aboriginal right ever existed and if so, how it is to be defined. ... [T]he appellant himself has somewhat altered his description of the right asserted as between his written submissions and his oral submissions to the Court. He will have to demonstrate that the right, as described by him, was exercised in pre-contact times and has continued more or less constantly since that time. The appellant will have to show that this practice or tradition, however it is defined, was integral to the distinct culture of the Arrow Lakes people. As the appellant asserts the right to stay in a particular area, he must show that the practice or custom was one exercised in the area in question. One of the practices or customs which he asserts, because he testified that he has engaged in it in Canada on behalf of his people, is the protection of burial grounds. I believe he must show that the Aboriginal right asserted to maintain burial grounds, which presumably is a communal right, is one which is intrinsically infringed because he in particular is not allowed to carry on this activity. The same problem would arise if he were, for example, serving a prison term in Canada in respect to his offence and thus unable to tend the burial grounds.

[20] If an unextinguished right can be established, it will remain for the tribunal dealing with the question to determine if there has been an infringement of that right by sections 4 and 5 of the *Immigration Act*. And, if infringement is found, there may remain the question, if the Crown so asserts, as to whether such infringement is justified. According to the Supreme Court, infringements can be justified if they are in furtherance of a legislative objective that is compelling and substantial, and are consistent with the special fiduciary relationship between the Crown and Aboriginal peoples.

[21] These are all matters requiring findings of fact and arguments of law in relation thereto. As we indicated at the hearing, we are not in a position to make these determinations because we have very few findings of fact and very little evidence in the record, the adjudicator having declined to receive further evidence in the light of her view of her inability to determine issues of constitutional law and Aboriginal rights. ...

The question raised in *Watt v Liebelt* has never been fully addressed by an appellate-level Canadian court. A somewhat related question was brought before the Federal Court indirectly as part of an application for a stay of deportation. In *Sandy Bay Ojibway First Nation v Canada (Minister of Citizenship and Immigration)*,[38] the Court dismissed a stay application in which the underlying facts asserted that the First Nation had a right to adopt a person (in this case, a non-Indigenous non-citizen) into its membership and thereby bring them within s 19(1) of the IRPA. The Court commented in passing that if this legal proposition were found to hold, not only would the person in question have a right to return to Canada, but further: "[T]he proposition put forward if brought to its extreme is that each and every band (and there are more than 600) has the power

38 2006 FC 903.

to usurp the discretion of the Minister of Citizenship and Immigration by accepting non-residents as band members and thereby granting them permanent resident status."[39] While it is not clear that this is an accurate statement of the law (since even if such persons had a right to enter Canada, they would not thereby become permanent residents in a technical sense), it well illustrates the enormous gulf between immigration law and Indigenous rights in Canada. This terrain is only beginning to be mapped by scholars, and as yet is almost entirely beyond the reach of courts.

III. INTRODUCING THE IMMIGRATION AND REFUGEE PROTECTION ACT

The contemporary era of Canadian immigration law began with the *Immigration Act* of 1976. This legislation consolidated various changes introduced throughout the 1960s and made significant reforms that set the direction that Canadian law continues to follow. Three enduring features of Canadian immigration law were introduced at that time: (1) a complex and contradictory set of objectives; (2) a requirement for an annual report to Parliament on immigration; and (3) a three-part categorization scheme for migration that organizes all newcomers into family, economic, and humanitarian groups, and with this, a points system as the anchor for economic migrants.

The *Immigration Act* was replaced in 2002 with the *Immigration and Refugee Protection Act,* SC 2001, c 27. This legislation took effect in 2002 and remains in place today. Known by its acronym, IRPA, it retains many of the key features of the *Immigration Act*, including an extensive list of objectives, an annual reporting requirement (s 94), and three categories of immigration. Changes were introduced in each of these areas, but the basic formula was continued. Considerable public attention had been devoted to the question of whether to have one act governing immigration matters and a separate act governing refugee law. This idea, motivated by concern about the fundamental differences between immigration and refugee law, was ultimately rejected; however, the Act's new title and the establishment of a separate division of the legislation devoted to refugees reflect this concern.

The objectives of the IRPA read as follows:

OBJECTIVES AND APPLICATION

Objectives—Immigration

3(1) The objectives of this Act with respect to immigration are

(a) to permit Canada to pursue the maximum social, cultural and economic benefits of immigration;

(b) to enrich and strengthen the social and cultural fabric of Canadian society, while respecting the federal, bilingual and multicultural character of Canada;

(b.1) to support and assist the development of minority official languages communities in Canada;

(c) to support the development of a strong and prosperous Canadian economy, in which the benefits of immigration are shared across all regions of Canada;

(d) to see that families are reunited in Canada;

(e) to promote the successful integration of permanent residents into Canada, while recognizing that integration involves mutual obligations for new immigrants and Canadian society;

(f) to support, by means of consistent standards and prompt processing, the attainment of immigration goals established by the Government of Canada in consultation with the provinces;

39 *Ibid* at para 11.

(g) to facilitate the entry of visitors, students and temporary workers for purposes such as trade, commerce, tourism, international understanding and cultural, educational and scientific activities;

(h) to protect public health and safety and to maintain the security of Canadian society;

(i) to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks; and

(j) to work in cooperation with the provinces to secure better recognition of the foreign credentials of permanent residents and their more rapid integration into society.

Objectives—Refugees

(2) The objectives of this Act with respect to refugees are

(a) to recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted;

(b) to fulfil Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement;

(c) to grant, as a fundamental expression of Canada's humanitarian ideals, fair consideration to those who come to Canada claiming persecution;

(d) to offer safe haven to persons with a well-founded fear of persecution based on race, religion, nationality, political opinion or membership in a particular social group, as well as those at risk of torture or cruel and unusual treatment or punishment;

(e) to establish fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada's respect for the human rights and fundamental freedoms of all human beings;

(f) to support the self-sufficiency and the social and economic well-being of refugees by facilitating reunification with their family members in Canada;

(g) to protect the health and safety of Canadians and to maintain the security of Canadian society; and

(h) to promote international justice and security by denying access to Canadian territory to persons, including refugee claimants, who are security risks or serious criminals.

Application

(3) This Act is to be construed and applied in a manner that

(a) furthers the domestic and international interests of Canada;

(b) promotes accountability and transparency by enhancing public awareness of immigration and refugee programs;

(c) facilitates cooperation between the Government of Canada, provincial governments, foreign states, international organizations and non-governmental organizations;

(d) ensures that decisions taken under this Act are consistent with the *Canadian Charter of Rights and Freedoms*, including its principles of equality and freedom from discrimination and of the equality of English and French as the official languages of Canada;

(e) supports the commitment of the Government of Canada to enhance the vitality of the English and French linguistic minority communities in Canada; and

(f) complies with international human rights instruments to which Canada is signatory.

These objectives are significant both because they make plain the broad and potentially contradictory aims that the government is pursuing through the IRPA and because of the

statutory interpretation convention telling us that statements of objectives in legislation serve to constrain executive discretion in implementing the law. In the case of the IRPA, the objectives are so plentiful and far-ranging that they arguably serve to support any potential discretionary implementation choice.

The most significant shift signalled by the IRPA is that it demonstrates a marked security turn in Canadian immigration law. This is hardly surprising in legislation that was passed in the immediate aftermath of the September 11, 2001 attacks in the United States. This timing, however, tells only part of the story. The impulse to securitize immigration law both in Canada and around the world was well underway prior to 2001. Amendments to the *Immigration Act* beginning at least a decade earlier show this trend clearly. It is the case, however, that the political climate following 9/11 served to mute objections to some of the more security-oriented aspects of the IRPA.

The security context of the IRPA was outlined by the Supreme Court of Canada in *Medovarski v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51. This context is vital because it frames the way that s 7 of the *Canadian Charter of Rights and Freedoms* is to be interpreted in immigration law cases. The question before the Court in *Medovarski* was how to interpret transitional provisions of the IRPA that applied to certain non-citizens convicted of crimes in Canada. The Court approached this analysis by examining the s 3 objectives of the IRPA and concluded (at para 10):

> The objectives as expressed in the IRPA indicate an intent to prioritize security. This objective is given effect by preventing the entry of applicants with criminal records, by removing applicants with such records from Canada, and by emphasizing the obligation of permanent residents to behave lawfully while in Canada. This marks a change from the focus in the predecessor statute, which emphasized the successful integration of applicants more than security: e.g., see s. 3(1)(i) of the IRPA versus s. 3(j) of the former Act; s. 3(1)(e) of the IRPA versus s. 3(d) of the former Act; s. 3(1)(h) of the IRPA versus s. 3(i) of the former Act. Viewed collectively, the objectives of the IRPA and its provisions concerning permanent residents, communicate a strong desire to treat criminals and security threats less leniently than under the former Act.

As is evident from the wide range of objectives in s 3, the conclusion that the central focus of the IRPA is security is not self-evident. In reaching this conclusion, the Court considered the social and political context of Canadian immigration law during the lengthy public consultation period that preceded the IRPA. Canada is not alone in the "security turn" in immigration law. A shift toward more security-oriented immigration provisions is evident in the first decade of the 21st century across almost all Western liberal democracies. Further, while the introduction of the IRPA in 2002 is a convenient marker in the security turn, amendments to the Act since its initial introduction have continued this trend. Further discussions of securitization in Canadian immigration law are found in several later chapters.

Immigration law is as much about keeping people out as it is about letting people in to any nation. This has been true since its inception around the world. Arguably, immigration law was invented in order to keep people out, and only secondarily became a mechanism for letting people in. The principal reasons for keeping people out have shifted over time, and in the contemporary era security heads the list. This concern is very much part of the global context of Canadian immigration law.

Global context is a key consideration in immigration law matters. Although immigration law is domestic law, the phenomenon it regulates is global by definition, and it has some small but important points of intersection with international law.

International legal rules obligate states to admit their own citizens. This clear rule is tempered somewhat by the corollary that states have complete control over defining their own citizenship rules. There is only one other category of individual whom international legal

rules require states to admit, and that is someone seeking refugee status. Someone seeking refugee status must be admitted and her or his request must be examined.[40] International law also requires that states not return refugees to places where they face particular types of risks and specifically not return anyone to a place where they risk being tortured. These rules are the extent of international legal constraints on how states regulate the flow of people across their borders.

Given the inherent international nature of migration, it is almost curious that there is no international governance regime. Such a regime has been discussed from time to time but has never emerged as a serious possibility.[41] This is largely because this area of regulation has come to be viewed as a vital aspect of state sovereignty.

In December 2003, then United Nations Secretary-General Kofi Annan announced the establishment of an ad hoc Global Commission on International Migration (GCIM) with a formal mandate to examine gaps in current policy approaches to migration and linkages with other United Nations issue areas. The commission was composed of 19 high-ranking policy leaders from around the world—including, for example, former Canadian Minister of Immigration Sergio Marchi. The commission also had considerable resources at its disposal and a robust budget for commissioning research from around the world. Its work began in 2004 and its final report was issued in October 2005. The GCIM did not, in the end, lead to any change in international legal structure, but it did succeed in bringing sustained attention to immigration matters in the international sphere, and may have sowed the seeds for developments that followed.

In December 2018, the United Nations General Assembly (UNGA) endorsed two new agreements, known as "global compacts," on migration and refugees, respectively. The compacts can broadly be understood as responses to heightened international attention to migration politics in the wake of several events, including the massive increase in the number of asylum seekers and refugees worldwide in 2015 following the near collapse of the Syrian regime and the sharpened immigration politics deployed through both the Brexit drama in the United Kingdom and the election of President Donald Trump in the United States.

The key features of the global compacts are worth sketching. First and foremost: there are two. This reflects a persistent and troubling unwillingness to consider migration and asylum seeking in the same frame. Until the whole picture of global migration can be brought together, policy revolution is impossible. The upside of this approach, of course, is that it underscores the strength of international refugee law, and the global commitment to treat refugees as a distinct group of rights holders. In an imperfect world, this commitment is a vital bulwark.

The compacts do not stake out much significant new ground. The Global Compact on Refugees[42] focuses strongly on "burden and responsibility sharing," a theme that has been well and frequently articulated in the past two decades, and that is even embedded in the preamble of the 1951 *Refugee Convention*. The new agreement does include considerable detail on what burden and responsibility sharing could look like, which is welcome, even if its content is predictable. Discouragingly, the four central principles of this

40 See discussion in JC Hathaway, *The Rights of Refugees Under International Law* (Cambridge: Cambridge University Press, 2005) at 279-307.

41 See, for example, Jagdish N Bhagwati, "Borders beyond Control" (2003) 82:1 Foreign Affairs 98-104; Arthur C Helton, "People movement: the need for a World Migration Organisation" (May 2003), online: *Open Democracy* <https://www.opendemocracy.net/en/people-movement-need-for-world-migration-organisation/>; Bimal Ghosh, ed, *Managing Migration: Time for a New International Regime?* (New York: Oxford University Press, 2000).

42 GCR 2018 Global Compact on Refugees, UNGA res. 73/151, Part II (17 Dec 2018).

Compact focus (as ever) on state interests and the goal of eliminating any responsibility for refugees:

> The objectives of the global compact as a whole are to: (i) ease pressures on host countries; (ii) enhance refugee self-reliance; (iii) expand access to third country solutions; and (iv) support conditions in countries of origin for return in safety and dignity. The global compact will seek to achieve these four interlinked and interdependent objectives through the mobilization of political will, a broadened base of support, and arrangements that facilitate more equitable, sustained and predictable contributions among States and other relevant stakeholders. (para 7)

For its part, the Global Compact for Safe, Orderly and Regular Migration[43] reaffirms the principle of sovereign control over migration among its guiding principles:

> The Global Compact reaffirms the sovereign right of States to determine their national migration policy and their prerogative to govern migration within their jurisdiction, in conformity with international law. Within their sovereign jurisdiction, States may distinguish between regular and irregular migration status, including as they determine their legislative and policy measures for the implementation of the Global Compact, taking into account different national realities, policies, priorities and requirements for entry, residence and work, in accordance with international law. (para 15)

This statement emphasizes national sovereignty and highlights the fact that migrants are distinguishable from refugees primarily on the basis of not having any distinct international rights. The compact focuses on fresh commitments to international cooperation and lists 23 objectives for collaboration, with some specific ideas about how to move forward. There is little on these lists that Canada and other similarly situated states would not already claim to be doing.

The UNGA resolutions that accepted each compact in December 2018 were remarkably strongly supported. Only the United States and Hungary opposed the Compact on Refugees, and they were joined by the Czech Republic, Israel, and Poland in opposing the Compact for Safe, Orderly and Regular Migration.[44] The number of states in support, 152 for the compact on migration, is more than any previous international statement on migration, and notably is even more than have ratified the well-respected *Refugee Convention*. This was undoubtedly made possible by the non-binding character of the compacts, but is politically significant nonetheless.

The compacts together do contain some features to be optimistic about. One of these is that both compacts urge a greater commitment to gathering data about migration and making that data publicly available to ground policy-making. The compacts also both acknowledge roles for non-state actors in supporting migrants and refugees. This acknowledgment has some potential to contribute to dislodging the state from the centre of the framework, and there is much to celebrate both in the recognition that it is often not states that are doing vital support work, and in the possibility of diminishing state centrality in this policy realm.

IV. KEY ACTORS AND INSTITUTIONS

Two federal government executive agencies, the largest administrative tribunal in Canada, and an array of provincial and municipal services develop, support, and enforce Canadian

43 GCM 2018 Global Compact on Safe, Orderly and Regular Migration (GCM), UNGA res 73/195 (19 Dec 2018).

44 In addition, several states abstained from voting: Eritrea, Liberia, and Libya in the case of the refugee compact, and Algeria, Australia, Austria, Bulgaria, Chile, Italy, Latvia, Libya, Liechtenstein, Romania, Singapore, and Switzerland in the case of the migration compact.

immigration law. In addition, two federal ministers have specifically defined roles under the IRPA, while three others serve functions related to immigration. This section introduces the roles of these agencies and actors. It also explains the structure of judicial oversight for their actions. Only the actors and institutions most often encountered are covered. For instance, it is now possible to appeal to provincial superior courts for judicial review of decisions regarding applications to come to Canada under a provincial nominee program (discussed in Chapter 8, Economic Class) or to challenge lengthy detention pursuant to the writ of *habeas corpus* (discussed in Chapter 7, The Removal Process). These courts, however, are not discussed here.

A. IMMIGRATION, REFUGEES AND CITIZENSHIP CANADA

Immigration, Refugees and Citizenship Canada (IRCC) is the lead agency for developing immigration law and policy. A ministry responsible for immigration has been a key feature of Canadian government throughout most of Canadian history. IRCC was established in its present form in 2015. Immigration has sometimes been paired with employment or manpower, signalling subtle shifts in governmental priorities or the specific strengths or interests of individual ministers. The establishment of IRCC in 2015 marked the first time that "refugees" were explicitly named in the title of the department.

IRCC takes the lead in drafting immigration law provisions for Parliament to consider. Once new laws or regulations have been approved by Parliament, IRCC is then responsible for implementation. Of all the executive agencies, IRCC has the widest range of responsibilities for implementing immigration law—for example, processing applications for visas, issuing permanent resident cards, managing applications for Canadian passports and Canadian citizenship, and managing refugee resettlement from overseas for government-assisted and privately sponsored refugees.

As part of its implementation responsibilities, IRCC has developed the practice of issuing operational manuals, as well as other instructions and guidelines. Operational manuals are gradually being phased out in favour of online program delivery instructions and operational bulletins. These policy documents instruct immigration officers in how to apply the law. Because of this, these guidelines are an important resource for lawyers working in the area. Manuals and program delivery instructions are not legal text, and cannot be considered an authority for legal principles, but they are influential and courts look to them for guidance in interpreting the law. In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, the Court stated (at para 72) that these guidelines "are of great assistance to the Court in determining whether the reasons … are supportable" and that "guidelines are a useful indicator of what constitutes a reasonable interpretation of the power conferred by the section." In the more recent case of *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, the Court considered the guidelines to be part of the "context" for interpreting the *Immigration and Refugee Protection Act*, stating (at para 85):

> [T]he broader context of s. 34(2) of the IRPA also includes the Guidelines. Although not law in the strict sense, and although they are liable to evolve over time as the context changes, thus giving rise to new requirements adapted to different contexts, guidelines are "a useful indicator of what constitutes a reasonable interpretation of the … section" (*Baker*, at para. 72). The Guidelines were published in 2005, and they applied to applications for ministerial relief under s. 34(2) at the time the Minister reached his decision on the appellant's application. As is evident from the numerous considerations contained in Appendix 1, the Guidelines represent a broad approach to the concept of the "national interest." They do not simply equate the "national interest" with national security and public safety, as the Federal Court of Appeal did. Rather, they suggest that the national interest analysis is broader than that, although its focus may properly be on national security and public safety.

IRCC has framing legislation that sets parameters for some of its duties (*Department of Citizenship and Immigration Act*, SC 1994, c 31). Note that this legislation provides some guidance but sets few limits on the scope of the department's activities. In our Westminster system, the government of the day is free to organize the executive as it sees fit. IRCC is part of the executive.

Most IRCC employees work in Canada, but some are stationed overseas and carry out roles such as visa application screening at Canadian missions around the world.

Given this range of responsibilities, it is not surprising that IRCC is a large organization. In 2019, it employed over 7,000 people and had a planned budget of approximately $2.8 billion for the 2019-20 fiscal year, a steady increase from the previous year to address permanent and temporary immigration level increases.[45]

B. MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

The Minister of Immigration, Refugees and Citizenship has primary responsibility for administering the *Immigration and Refugee Protection Act* (s 4(1)).

Since the IRPA was passed in 2002, a series of amendments have been passed that progressively increased the specificity of duties for different ministers. The initial enabling authority statement first introduced with the legislation in 2002 stated only that the minister responsible would be designated by the Governor General in Council. By mid-2009, the enabling authority section of the IRPA had been amended four times and included specific references to the Minister of Public Safety and Emergency Preparedness, the Minister of Justice, and the Minister of Employment and Social Development, in addition to the general authority for the Minister of Immigration, Refugees and Citizenship. Indeed, the different responsibilities of the Minister of Immigration, Refugees and Citizenship and the Minister of Public Safety and Emergency Preparedness are also set out in an order in council, the *Ministerial Responsibilities Under the Immigration and Refugee Protection Act Order* (SI/2015-52). The responsibilities assigned to these ministers, and the increasingly tailored nature of the powers granted them, reflect two trends in Canadian immigration law: first, the shift toward securitization of immigration concerns generally; second, a move toward reducing the scope of discretionary decision-making.

In addition to primary responsibility for implementation, the IRPA assigns a number of specific duties to the Minister of Immigration, Refugees and Citizenship. The s 94 duty to provide an annual report to Parliament addressing named factors is the basis for Canada's annual immigration plan, which is typically tabled in Parliament in the autumn of each year. Section 94 states:

> 94(1) The Minister must, on or before November 1 of each year or, if a House of Parliament is not then sitting, within the next 30 days on which that House is sitting after that date, table in each House of Parliament a report on the operation of this Act in the preceding calendar year.
>
> (2) The report shall include a description of
>
> (a) the instructions given under section 87.3 and other activities and initiatives taken concerning the selection of foreign nationals, including measures taken in cooperation with the provinces;
>
> (b) in respect of Canada, the number of foreign nationals who became permanent residents, and the number projected to become permanent residents in the following year;

45 "Immigration, Refugees and Citizenship Canada Departmental Plan 2019-2020," online: *Government of Canada* <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/departmental-plan-2019-2020/departmental-plan.html#sec04>.

(b.1) in respect of Canada, the linguistic profile of foreign nationals who became permanent residents;

(c) in respect of each province that has entered into a federal-provincial agreement described in subsection 9(1), the number, for each class listed in the agreement, of persons that became permanent residents and that the province projects will become permanent residents there in the following year;

(d) the number of temporary resident permits issued under section 24, categorized according to grounds of inadmissibility, if any;

(e) the number of persons granted permanent resident status under each of subsections 25(1), 25.1(1) and 25.2(1);

(e.1) any instructions given under subsection 30(1.2) during the year in question and the date of their publication; and

(f) a gender-based analysis of the impact of this Act.

As in the case of the enabling authority under s 4, progressive amendments since 2002 have added specificity to the requirements for the Minister's annual report. It is notable that this report is primarily directed to what has happened in the previous year, a typical reporting function. Interestingly, s 94(2)(b) also requires that the government report on its projection for the number of new permanent residents in the upcoming year. The resulting list of requirements provides an insight into political priorities and pressure points in immigration politics over the past decade. Future amendments are likely to be similarly revealing.

C. CANADA BORDER SERVICES AGENCY

The Canada Border Services Agency (CBSA) is an agency with Public Safety Canada. The agency has responsibility for security along Canada's borders, including at-the-border enforcement of both customs and immigration matters.

The CBSA came into being late in 2003, as part of the security turn in border enforcement that came with the post-9/11 political climate. The creation of the CBSA closely followed the emergence of the Department of Homeland Security in the United States. Implementing legislation for the CBSA, the *Canada Border Services Agency Act*, SC 2005, c 38, came into force late in 2005, and provides, in s 5(1), that "[t]he Agency is responsible for providing integrated border services that support national security and public safety priorities and facilitate the free flow of persons and goods, including animals and plants, that meet all requirements under the program legislation."

The CBSA now has responsibility for a number of immigration law matters that were formerly within the Ministry of Immigration, Refugees and Citizenship Canada and its predecessors. The main immigration-related roles for the CBSA include security screening for immigrants and refugee claimants; and enforcement, including responsibility for immigration detention and removing people from Canada (see Chapter 7).

The agency has grown considerably since its inception. The CBSA employed approximately 14,000 people in 2020. The agency's spending more than doubled from the first year of its operation until 2012-13, when it totalled $1.7 billion. The CBSA's budget forecasts for 2019-20 and beyond remain at roughly similar levels.[46]

In addition to staff in Canada, CBSA employees called migration integrity officers work overseas, ensuring that individuals who are travelling to Canada have proper travel documentation. This relatively new role is also part of the securitization of Canada's borders, and effectively extends the border far beyond Canada's geography.

46 Canada Border Services Agency, "Part III-2019-2020 Departmental Plan," online: *Government of Canada*: <https://www.cbsa-asfc.gc.ca/agency-agence/reports-rapports/rpp/2019-2020/report-rapport-eng.html>.

D. MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Since 2005, the Minister of Public Safety and Emergency Preparedness oversees the CBSA and is given formal responsibility in the IRPA (s 4) for immigration inspections at Canadian borders and for enforcement matters. The Minister is charged with making decisions on whether to grant an exception to inadmissibility on security and certain criminality grounds. These powers are specified in the order in council on ministerial responsibilities mentioned above, which also specifies which enforcement-related decisions cannot be delegated. The Minister of Public Safety also shares responsibility with the Minister of Immigration, Refugees and Citizenship for initiating the security certificate process (discussed in Chapter 7). Finally, the Minister of Public Safety also has special policy development and administration responsibilities with regard to people who are inadmissible to Canada because of concerns related to security, organized crime, and breaches of international human rights. Since 2018, these policy-related responsibilities have been shared with a new Minister of Border Security and Organized Crime Reduction.

E. IMMIGRATION AND REFUGEE BOARD OF CANADA

The Immigration and Refugee Board of Canada (IRB) is the country's largest administrative tribunal. The board was established in 1989 by Bill C-55, amending the 1976 *Immigration Act*.

The IRB is a vital decision-making body for most non-citizens who are already in Canada. It makes decisions about refugee protection, hears refugee and sponsorship appeals, and has a limited jurisdiction to hear appeals of removal orders. It also conducts hearings to determine whether individuals are inadmissible to Canada and has a central role in monitoring immigration detention in Canada.

The legislative framework for the IRB is found in part 4 of the IRPA. The government has promulgated some regulations augmenting this structure—for example, to establish factors to be considered when assessing whether to release someone from detention and to require specific conditions when a person's removal is stayed. For the most part, the additional operating framework for the IRB is developed by the board itself through the promulgation of procedural rules for its divisions (IRPA, s 161), as well as guidelines (IRPA, s 159), instructions, practices, notices, and policies.

The IRB has four divisions: the Immigration Division (ID), the Immigration Appeal Division (IAD), the Refugee Protection Division (RPD), and the Refugee Appeal Division (RAD). Apart from the brief discussions below, specific aspects of the operating framework for each division are dealt with throughout the casebook. The ID and IAD are discussed in Chapter 7. The RPD and RAD are discussed in Chapter 10, Refugee Protection in Canada.

1. The Immigration Division (ID)

The ID is responsible for conducting detention review hearings and admissibility hearings. Its members are civil servants. For 2019, the ID reported 12,123 detention reviews and 1,652 admissibility hearings.[47]

47 Immigration and Refugee Board of Canada, "Total Detention Reviews Concluded: Detention Reviews Concluded by Region" (2019), online: <https://irb-cisr.gc.ca/en/statistics/detentions-reviews/Pages/detenCon.aspx>; and Immigration and Refugee Board Canada, "Admissibility Hearing Statistics: 2019 Admissibility Hearings by Region," online: <https://irb-cisr.gc.ca/en/statistics/hearings/Pages/AdmHReg.aspx>.

2. The Immigration Appeal Division (IAD)

The IAD hears appeals in three categories: (1) appeals by citizens or permanent residents whose applications to sponsor a family member to come to Canada as a permanent resident have been denied; (2) appeals by permanent residents or foreign nationals who have been issued a permanent resident visa who are faced with losing that status, and appeals by refugees against a removal order issued because of inadmissibility or failure to meet residency requirements; and (3) appeals by the minister in cases where the ID declined to issue a removal order. On a day-to-day basis, the IAD's caseload is dominated by sponsorship appeals and appeals from permanent residents faced with removal because of criminal convictions.

Perhaps the most interesting feature of the IAD is that it has a strictly defined power to grant some appeals, or deny appeals by the minister, on the basis of humanitarian and compassionate grounds (IRPA, ss 65 and 67). This is a vital feature of Canadian immigration law that allows for a particular type of discretion as an alternative to mechanical application of the rules. It is not possible to compel the IAD to exercise this discretion (see Chapter 7). As with other discretionary capacities in Canadian immigration law, this capacity has been narrowed through amendment of the IRPA in 2013.

Members of the IAD are appointed by the Governor in Council for a renewable term of seven years. This method of appointment provides greater independence for IAD decision-makers and is a key factor in assessing the IAD's jurisdiction as quasi-judicial.

3. The Refugee Protection Division (RPD)

The RPD is responsible for first instance determinations of claims for refugee protection. This is the largest and busiest division of the IRB. In 2019, the RPD finalized 42,491 claims while 87,270 cases were pending.[48]

In December 2012, the most significant changes to the RPD since its 1989 inception as the Convention Refugee Determination Division were introduced. One vital change is that RPD members are now ordinary civil servants rather than Governor in Council appointees. Other important changes included the introduction of timelines for RPD hearings and a concomitant array of rule changes to make this transformation possible.

4. The Refugee Appeal Division (RAD)

The RAD has jurisdiction to conduct merit appeals of RPD decisions. Most RAD appeals are conducted in writing, although there are provisions allowing for oral hearings when new evidence is submitted that raises credibility concerns. There are restrictions in place regarding which claimants can have access to the RAD and restrictions regarding presenting new evidence (IRPA, ss 110(2) and (4)). As with the RPD, RAD appeals are subject to strict timelines. RAD members are Governor in Council appointees.

F. FEDERAL COURT OF CANADA

The Federal Court of Canada is the principal court for immigration law matters in Canada. In the decade ending in 2012, the first decade of the IRPA, the Federal Court decided approximately 13,000 immigration and refugee law matters annually.[49] Since that time, the

48 Immigration and Refugee Board of Canada, "Refugee Protection Claims (New System) Statistics: 2019 Claims by Region," online: <https://irb-cisr.gc.ca/en/statistics/protection/Pages/RPDStat.aspx>.

49 The Honourable Luc Martineau, "Thoughts of a Federal Court Judge - Speaking notes on the occasion of the 2013 Integrated National Training Seminar - Immigration and Refugee Board (2013), online: *Federal Court* <https://www.fct-cf.gc.ca/en/pages/media/speeches/thoughts-of-a-federal-court-judge---speaking-notes-on-the-occasion-of-the-2013-integrated-national-training-seminar---immigration-and-refugee-board>.

number has dropped to approximately 5,500 to 8,000 matters annually.[50] As there are restrictions on appeals to the Federal Court of Appeal in immigration matters, the importance of the Federal Court in setting standards in the immigration area is greater than that of trial courts in most areas of Canadian law.

Judicial review of immigration and refugee law matters proceeds on the basis of leave. Challenges that this leave provision unduly restricts access to the courts have been defeated.[51] Since the IRPA, leave has been granted in approximately 15 percent of cases. This means that in about 85 percent of cases, judicial oversight of the IRB, as well as of bureaucratic immigration decision-makers, is limited to the application for leave for judicial review. A decision on leave is not reviewable and no reasons are given for granting or denying leave.

Even with the requirement that leave must be granted, by number of dispositions, the area of immigration and refugee law makes up a very substantial portion of the Federal Court's caseload. If each decision on an application for leave is counted as a matter disposed of by the court, approximately 80 percent of the Federal Court's dispositions over the past decade are in the immigration area.[52] Many of these cases are routine judicial reviews that take only an hour or two to hear and have relatively short written reasons; thus, the number of dispositions likely overrepresents the overall time that the Federal Court spends on immigration matters, but it is still indicative of the workload of Canada's immigration court.

Until 2003, there was one court, named the Federal Court, which had two divisions: the Trial Division and the Appeal Division. In 2003, two separate courts were established. Older cases will, therefore, often be labelled as Trial Division cases, and less commonly as Appeal Division cases.

The grounds of judicial review that may be argued in the Federal Court are set out in s 18.1(4) of the *Federal Courts Act*, RSC 1985, c F-7 as follows:

> 18.1(4) The Federal Court may grant relief under subsection (3) 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;
>
> (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;
>
> (e) acted, or failed to act, by reason of fraud or perjured evidence; or
>
> (f) acted in any other way that was contrary to law.

G. FEDERAL COURT OF APPEAL

In immigration law matters, appeal from the Federal Court to the Federal Court of Appeal is only possible when the judge at first instance has certified a question, as required by s 74(d) of the IRPA, which stipulates:

50 See Federal Court, "Statistics," online: <https://www.fct-cf.gc.ca/en/pages/about-the-court/reports-and-statistics/statistics>.

51 *Bains v Canada (Minister of Employment and Immigration)*, [1990] FCJ No 457 (QL) (FCA); *Huynh v Canada*, [1996] FCJ No 494 (QL) (FCA).

52 For 2019, 83 percent of the Federal Court's dispositions were in immigration and refugee matters. See Federal Court, "Statistics (December 31, 2019)," online: <https://www.fct-cf.gc.ca/en/pages/about-the-court/reports-and-statistics/statistics-december-31-2019>.

> 74(d) an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question.

This paragraph has been challenged on the basis that Parliament cannot have intended to shield serious errors from appeal. For example, in *Huntley v Canada (MCI)*, 2011 FCA 273 (paras 7-8), the Federal Court of Appeal stated:

> [7] We agree that, despite the apparently plain language of paragraph 74(d), Parliament cannot have intended to immunize alleged errors from appellate scrutiny which, if not subject to review, would undermine the rule of law and public confidence in the due administration of justice. However, in our view, the errors that the Judge is alleged to have committed in this case do not fall within this narrow category.
>
> [8] The principal so-called "jurisdictional" error invoked by counsel for Mr Huntley is that the Judge did not apply the reasonableness standard of review to the Board's findings of fact. Instead, counsel says, he substituted his own view of the evidence for that of the Board and made *de novo* findings of fact. Even if the Judge erred as alleged, failing to apply the appropriate standard of review is a run-of-the-mill error of law, and not a usurpation of jurisdiction falling outside paragraph 74(d).

This argument for skirting the certified question requirement has indeed proven narrow, and for the most part the requirement is successful in its aim of controlling access to the Federal Court of Appeal.

This requirement adds considerably to the other burdens—principally, cost and time—that mitigate against seeking appeals. The Federal Court of Appeal hands down comparatively few rulings in immigration matters, averaging about 16 decisions annually over the past few years.

H. SUPREME COURT OF CANADA

Appeal from the Federal Court of Appeal to the Supreme Court of Canada may proceed with leave of the Supreme Court, as is the case in most other civil matters.

The requirement to seek leave at the Federal Court, the certified-question procedure to reach the Federal Court of Appeal, and the generalized requirement to seek leave to appeal to the Supreme Court together mean that very few cases regarding immigration get to the Supreme Court. Thus, the intent and result of these various requirements has been to curtail the number of judicial reviews and appeals in this area. This approach has parallels in other jurisdictions, such as Australia, which attempted in the 1990s to reduce the grounds of judicial review that could be argued in judicial review proceedings.

To sum up, the organizations and agencies covered in this section are the actors in Canadian immigration and refugee law, policy, and decision-making that appear most frequently in Canadian immigration case law, as reflected in the remainder of this casebook. There are also two international agencies that play significant roles in migration matters internationally: the United Nations High Commission for Refugees (UNHCR) and the International Organization for Migration (IOM). The UNHCR is sometimes known as the UN's Refugee Agency and it has a vast purview, ranging from running refugee camps, to setting legal guidelines for interpreting refugee law, to taking responsibility for refugee status determination in many parts of the world. The UNHCR maintains offices in many countries, including in Canada where its role is primarily in advocacy and monitoring on behalf of refugees. The IOM is a non-governmental agency that was founded in 1951 and became formally part of the UN system early in 2016. Its primary mandate is focusing on the linkages between migration and economic and social development, assisting in orderly migration, and working to encourage policy development.

V. THEMES IN THE CONTEMPORARY STUDY OF IMMIGRATION LAW

Several themes unite the contemporary study of immigration law. First among these is state sovereignty. Control over who may enter a country and who must leave emerged over the course of the 20th century as a defining feature of sovereign power. In an era of globalization, where some other crucial aspects of sovereign control have been weakened, control over people crossing the border has remained in the hands of individual states. If anything, this control has strengthened over recent decades. Even in the European Union, where much attention is drawn to the opening of borders, there is a strong assertion of sovereignty. The so-called Fortress Europe arises from the contrast between open passage for citizens of European states, but increased restrictions for others. The logic of sovereignty has not changed in Europe; its location has simply shifted. By the early 21st century, it is possible to assert that immigration law has become the last bastion of sovereignty.

Two other contemporary themes are closely linked to sovereignty: securitization and criminalization. The idea that immigration and security are intertwined has a long history. As this chapter has demonstrated, it is possible to read the historical trajectory of immigration law as a portrayal of perceived threats to the nation. Canada's history shows that the threat was often defined in racial terms. Fears of disease and contamination have also been reflected in immigration laws in Canada and elsewhere with greater and lesser emphasis over time. At present, the security threat most evident in immigration law and politics is the foreign terrorist. Securitization of immigration laws in Canada has reached moral panic dimensions, with the legal responses to the threat far outstripping empirical evidence about the scope of risk. This trend will be seen throughout this book.

Criminalization, though not nearly as high profile as securitization, is related to it in important ways. At its most basic level, criminalization of immigration simply means that non-citizens are more likely to be viewed as presumptively criminal. There is strong evidence of this bias in Canada as well as in other Western liberal democracies. The criminalization theme shapes the law in at least two ways. At a straightforward level, provisions creating immigration consequences for criminal activity are ramped up, so that progressively lower levels of ordinary crime limit rights to enter, to remain, and generally to cross borders. At a more complex level, immigration law itself is transformed into a domain of criminalization. Breaches of immigration law that were formerly regarded as regulatory offences without true criminal morality are reinterpreted in society as criminal in and of themselves. This criminalization of border crossing has brought us a new vocabulary, where people are themselves illegal. The term "illegal" used as a noun to describe people has been widely accepted in English only since the late 20th century. The argument that people ought not be called "illegal," but rather "undocumented," "unauthorized," or "irregular" reflects the strong politics that come with this terminology.

Given these themes, it is not surprising that the 21st century sees increasing levels of hostility toward migrants. Canada is one of the only countries in the world where public opinion polling continues to show that a majority of the population is generally supportive of immigration, but the extent of this support is declining.[53] The idea that immigration was integral to Canadian identity and was a core national building principle is now fading into

53 The population survey, Zsolt Nyiri, "Transatlantic Trends: Immigration 2010" (4 Feb 2011), online: *The German Marshall Fund of the United States* <http://www.gmfus.org/publications/transatlantic-trends-immigration-2010>, showed that Canada was still more supportive of immigration across a range of indicators than all other countries in North America and Europe; however, the study also showed that the Canadian population was less supportive of immigration than in earlier years. See also Nicholas Keung, "Immigrants Fitting In Well (Mostly), Canadians Say; but Survey Shows Split over How Successfully Muslims Integrating into Society," *The Toronto Star* (4 February 2011) A16.

the historical background. It is difficult to untangle public from political opinion, and even more so to determine whether political rhetoric drives public opinion or vice versa. Regardless of which leads the other, the increasing hostility toward migrants is now imprinted in Canadian immigration law in a variety of ways. This shift in the law also means that over the past decade immigration law has become increasingly litigious in Canada.

The sharp increase in people seeking asylum that followed the Arab Spring events beginning in the 2010s, and especially following the protracted civil war in Syria, has led to a renewed sense of crisis in immigration matters. Crisis rhetoric spiked sharply after 2015, when more than one million migrants entered Europe, most seeking asylum. This theme has resonated strongly in the domestic politics of many states. It is undeniable that immigration has been a significant theme for President Trump in the United States, and that the long Brexit saga in the United Kingdom is significantly fuelled by immigration concerns. It is concomitantly true that strong state attempts to halt migration, and especially asylum seekers, generate crises.

Beyond these overlapping themes of securitization, criminalization, hostility, and crisis, Canadian immigration law also reflects other important and globally shared themes. Two key ideas in this regard are the feminization and temporization of immigration. An increasing number of women both immigrate and lead their families to immigrate with them. This trend is at least partially linked to the global rise in provisions to foster temporary labour migration, especially of people whose employment qualifications are categorized as low-skilled. Whether it remains meaningful to categorize migrants as temporary or permanent on the basis of actual outcomes or individual intent, it is undeniable that states continue to organize their migration laws on the basis of these categories.

These themes are reflected in various ways in Canadian immigration law and policy and can be seen in each chapter of this book. They are also the basis for critical analysis of immigration law by legal scholars and others. Chapter 2, Theoretical Perspectives on Migration, demonstrates how some of these themes are reflected in theoretical literature about immigration and provides a foundation for students to hone their own critical engagement skills.

QUESTIONS FOR DISCUSSION

1. If you or your ancestors were immigrants to Canada, research your family history to determine

- when you or your ancestors first arrived in Canada,
- from which country or countries,
- under what immigration policies, and
- when relatives were able to join you or your ancestors and over what time period.

You may wish to supplement your investigation by researching information available on the website of Library and Archives Canada at <http://www.bac-lac.gc.ca/eng/Pages/home.aspx>.

2. Why do you think international migration generates so much controversy and debate in view of the relatively modest numbers of people actually on the move? What are some of the positive or negative impacts of migration on immigrant-receiving countries versus immigrant-sending countries?

3. What role does public opinion play in the formation of Canadian immigration policy and in the reception of immigrants and refugees? What factors influence public opinion?

4. Canada's Indigenous peoples have largely been excluded from immigration policy-making. If the Canadian government wanted to change this policy trajectory, what would be useful first steps?

5. Consider the following scenario: The day before the immigration minister's planned announcement of a slight increase to annual immigration levels, a boat carrying approximately

80 undocumented migrants arrives in the port of St John's, Newfoundland. Devise a public relations strategy for the government to address this situation.

6. What is the optimal number of immigrants for Canada to accept annually? What factors do you think would be relevant in answering this question? In a democratic society like Canada's how should this number be determined?

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Greenwald, Barry (director), *Who Gets In?*, 1989 video (52 mins) (Toronto: National Film Board of Canada, 1989), online: *National Film Board* <https://www.nfb.ca/film/who_gets_in/>.

Kazimi, Ali (director), *Continuous Journey*, 2004 video (87 mins) (Toronto: Peripheral Visions Film & Video, 2004).