Restricting Rights, Losing Control:
Canadian Policies Towards Asylum Seekers in the 1980s

Christopher G. Anderson
(Doctoral Student, McGill University)

A Paper presented at the annual conference of the
Canadian Political Science Association

Winnipeg, Manitoba
June 2004

I. Introduction

The issue of border control has always existed as a basic and divisive dimension of liberal-democratic state politics, being deeply embedded in questions of national development and national identity. On the one hand, the right to regulate the entry of non-citizens has long been considered to comprise a core characteristic of a sovereign state. On the other hand, the controversy that seems coincident with the question of who should be allowed to enter into and to remain within the borders of a given territory (and under what conditions) predates by far the emergence of the modern nation-state itself. Alongside the various cultural, economic, medical, political, racial, and social arguments that can arise during the course of such debates, there have often been concerns expressed over any perceived divergence between the right of states to control their borders and their actual success in doing so. From the early 1970s onwards such a discrepancy seemed to many to be apparent in North America and Western Europe, and there emerged in the 1990s a comparative literature in the social sciences that sought to explain this "gap" between the authority and the capacity of states.

One of the major ideas developed in this body of work is that the recent rise of a domestic rights-based politics has severely limited liberal-democratic state control over international migration. This explanation seems to be based on a particular modeling of the relationship between rights and the ability of states to regulate their borders, where an emphasis is placed on the role that the former play as an external or independent check on the latter. It is the central contention of this paper that such a rendering of the *control-rights nexus* is insufficient, that it can distort more than it reveals in its representation of one of the most crucial dynamics in the politics of control.

As a corrective, the basic premise pursued below proposes that the denial of certain rights to non-citizens within a liberal democracy can itself lead to a decrease in a state's ability to control its borders, both by contributing to the creation of conditions under which opportunities arise for non-state actors to engage in rights-based politics, and by encouraging people to circumvent such measures in their efforts to enter into and to remain within the country. Thus, rights-restrictive policies can increase the risks of control policy failure for a liberal-democratic state to the extent to which they open up avenues whereby the authority of the state can be challenged. In this alternative formulation, then, more explicit and substantial recognition is given to the state's complicity in the emergence and the perpetuation of problems of control.

In order to appreciate this dynamic in more concrete terms, the control crisis experienced by the Canadian state with respect to asylum seekers during the 1980s is reviewed. At that time, a 1985 Supreme Court decision confirmed the right of people seeking refugee status within Canada to an oral hearing at some point in the determination of their claims, and by the end of 1988 the backlog of such requests had risen to around 85,000 from some 12,000 in 1984. In 1989, a new inland refugee status determination system was established but the backlog question continued to persist for several years to come. For many observers, these events constitute a classic case of the rise of a rights-based politics defined by the state being hindered by the courts in its efforts at border control.[1] What is often absent from this standard interpretation, however, and what this paper looks to provide, is a more ample understanding of the role of the state in having helped to create and to sustain this crisis through its pursuit of rights-restrictive policies.

Thus, while the comparative control literature has quite clearly signaled the importance of rights in the politics of control,[2] it has yet to detail the basic mechanics by which the two intersect – the *control-rights nexus*. This is most unfortunate, given the pursuit of a generally more rights-restrictive approach to border control amongst liberal-democratic states in recent years – especially following the September 11, 2001 attacks on the United States – in the face of the ever-increasing complexity and scope of international migration in the post-Cold War era.

As a step towards a correction of this situation, the arguments sketched above are drawn more fully below in four steps. In **Section II**, a brief review of how the literature on liberal-democratic state control has addressed the question of the *control-rights nexus* is presented, calling attention to its conceptualization of the part played by the state itself. The task of building an adequate historical framework within which to examine more recent developments in this policy area in Canada is taken up in **Section III**, where a necessarily selective tale of the history of the politics of control is told. It is against the backdrop established in these two sections that the development of Canadian policies towards asylum seekers during the 1980s is examined. Thus, **Section IV** details how the denial to asylum seekers of certain features of fundamental justice served as one of the major contributing factors behind the crisis of control that arose at this time. It is with this reconsideration of the *control-rights nexus* that some concluding remarks on the study of liberal-democratic state control policies at the outset of the twenty-first century are made in **Section V**.

II. The Study of Liberal-Democratic State Control

In the introductory chapter to their edited volume, *Controlling Immigration*, Wayne A. Cornelius, Philip L. Martin and James F. Hollifield report a significant level of support for what they call the "gap hypothesis," which anticipates that the distances between the control policy goals of liberal-democratic states and the actual outcomes of their efforts are increasing. They argue that several push-pull factors present in the international system of states (e.g., the end of the Cold War, increased international mobility, and growing economic inequality between countries), in the operation of transnational social networks, and in a domestic demand in the West for cheap labour, are "necessary but not sufficient" components in any explanation of the "crisis of immigration control" that this divergence has helped to produce.[3] In order to understand why it has proven to be so difficult for liberal democracies to control their borders, they contend, an analysis of domestic politics in receiving states is required.

Specifically, Cornelius *et al.* insist on the need to examine the effects of the emergence and the consolidation of a domestic rights-based politics in recent years on the ability of states to control their borders, to counter the various push-pull factors noted above.[4] They propose that a fundamental shift has taken place since the Second World War in which human rights criteria have become an intrinsic part of the standards of political behaviour used to judge actions both between and within liberal-democratic states. Their focus, however, lies primarily on politics at the national level, where they observe that a human rights discourse has been advanced through both judicial and legislative means, expanding the range of recognized rights possessed by non-citizens residing within liberal democracies. It is this process – especially the role played by the courts – that serves, the editors contend, to "constrain the executive authorities of democratic

states in their attempts to achieve territorial closure and to exclude certain individuals and groups from membership in society."[5]

While there is much more to *Controlling Immigration* than can be summarized here, the notion of the importance of the recent rise of a domestic rights-based politics has achieved a certain canonical status within the control literature, even as this work has been subjected to a variety of conceptual and empirical criticisms in other respects. For example, two prominent figures in the field – Gary P. Freeman and Christian Joppke – have suggested that the vital question is not why liberal-democratic states have lost control but rather why their policies have an "expansionary bias,"[6] why such entities "accept unwanted immigration"[7] despite having the capacity to act otherwise. Nonetheless, they, too, accord considerable explanatory value to rights–based politics. Thus, Joppke argues that the extension of civil rights protections to non-citizens has seriously limited the ability of liberal-democratic states to control their borders because once admitted "an alien enjoys the equal protection of the law, and the state has [thereby] 'self-limited' its capacity to dispose of her at will."[8]

Hollifield himself has since extended his work in this area to take up the question of "the limits of immigration control in liberal democracies," of the ways in which state actions are "constrained institutionally, ideologically, culturally, and ultimately by their civil societies."[9] In confirming the centrality of rights in giving shape to the politics of control, he stresses the need to develop "a clear understanding of the evolution of rights-based politics and of the way in which rights are institutionalized."[10] His work continues to share, however, a major problem with the control literature as a whole in that the emphasis remains more on the ways in which rights-based politics curtail the scope for state action and less on how rights-restrictive policies themselves can work to produce both rights-based politics and crises of control.[11]

The literature is quite correct, then, in highlighting the linkage between the liberal-democratic character of these states and their control capabilities, but it has not yet plumbed the depths of this connection. While the recent rise of a domestic rights-based politics is placed within a different concatenation of causal forces in particular works within the literature, the basic relationship between state control and liberal-democratic rights – the *control-rights nexus* – is consistently conceptualized as:

rights-based politics → loss of control

Laying aside the fact that the general focus on the loss of control has resulted in numerous instances of rights-based politics actually bolstering state efforts being overlooked,[12] there remain serious difficulties with the manner in which the left-hand side of this equation has been defined.

The greatest difficulty stems from the fact that this crucial stage of the politics of control has been treated most summarily, often being portrayed as consisting of little more than "judicial activism," "special interest politics," or some combination of the two. Absent is any extended discussion of the legal-institutional environment within which the courts and non-state actors function in a given political system. The incorporation of such information would bring to the fore both the liberal context and the democratic structure within which they operate. The judiciary, for example, does not work within a jurisprudential vacuum, and neither does it usually enter into the policy process of its own accord. Rather, it operates within a particular

universe of legal discourse and is most often called upon to act by non-state actors who, for their part, are responding to specific state actions. In each case, then, decisions are generally shaped by the policies instituted by the state in the first instance. To downplay or ignore this aspect of the *control-rights nexus* is to diminish the worth of both the policy and political insights that can be gleaned from the study of liberal-democratic state control over international migration.

To move beyond an emphasis on "judicial activism" and "special interest politics" not only establishes rights-based politics as a more complex political phenomenon but it also pushes the simple causal chain further by acknowledging the role that rights-restrictive policies play in fostering and structuring this phenomenon. In accordance with this line of reasoning, then, an alternative and more comprehensive reading of the *control-rights nexus* proposes that:

rights-restrictive policies → rights-based politics → gain or loss of control

Thus, in order to understand the effects of rights-based politics on state control it is necessary to examine the rights-restrictive policies enacted by the state, to gauge their place in the overall evolution of rights protections, to identify the actors who ensure that such policies are debated on a legal-political plane, and to appraise the relative strengths and weaknesses of the rights-based arguments made by each side before assessing the influence of state and non-state actors on policy outcomes.

The study of liberal-democratic state control policies in their rights dimensions requires, then, that adequate attention be paid to the historical foundations of the debate over the rights of non-citizens. There has been, however, a tendency in both the control and Canadian immigration literatures to view rights-based politics as being of relatively recent genesis. As will be seen in the pages that follow, such an understanding is misplaced. Indeed, a survey of the history of Canadian control policies reveals a long-standing debate over the rights of non-citizens that has revolved – like the events that led to the crisis of control in the 1980s – around the question of the meaning and practice of fundamental justice in a liberal-democratic state.

III. The *Control-Rights Nexus* in Canadian History

The rights of non-citizens have always been at the centre of the politics of control in Canada; moreover, the policy area has long been shaped by a rights-based politics conducted through both judicial and legislative means in response to the rights-restrictive policies pursued by the state. It is worth spending a little time on the unfolding of this dynamic in Canadian history as it is rarely – and never systematically – treated in the literature, and is generally left out of discussions of the crisis of control that beset the Canadian state in the 1980s.

In the immediate post-Confederation period, Canadian control policies were influenced by a form of liberalism inherited from Britain, where the idea of the country "as a refuge and haven for the oppressed and persecuted from other lands … [had] congealed as a widely-held tradition."[13] Such a belief in the importance of providing sanctuary to asylum seekers was extended to other groups in late nineteenth century Canada, as can be seen when Parliament began to debate the restriction of the arrival of Chinese migrants.

For example, Prime Minister Alexander Mackenzie argued in 1878 that one proposal would be "at variance with those tolerant laws which afforded employment and an asylum to all who came

within our country, irrespective of colour, hair, or anything else."[14] He did not "think it would become us, as a British community, to legislate against any class of people who might be imported into, or might emigrate to, this country."[15] The following year, he was joined in his defence of the equality rights of the Chinese by Samuel MacDonnell (Inverness), who argued that it would be

> a very unprecedented act on the part of the Dominion, and at variance with the policy of other nations to pass a law to prevent the immigration of people from any portion of the world. If some people came into this country, bringing with them practices or habits of immorality, or any other peculiarities which we could not tolerate, we should rather suppress such peculiarities by legislation than legislate for the exclusion of such people.[16]

Mackenzie, now leader of the Opposition, declared that exclusion could not be pursued "without at once giving up all [that Canadians] held sacred as to the rights of man in their own as in other countries."[17] As participants in the debate hurled racial abuse at the Chinese,[18] David Mills (Bothwell) protested that it brought no credit to the House to "give the Chinese a bad name, and then hunt them down like rabid dogs,"[19] a course that, he felt, would be "to deal with these people as [our] Christian ancesters [sic], to their dishonour, did with the Jews."[20]

Of course not long thereafter Parliament – under the leadership of John A. Macdonald, whose racism was only tempered by his business acumen – passed the *Chinese Immigration Act* in 1885, which instituted the infamous Head Tax on all Chinese migrants (bar a few select categories).[21] The debates surrounding this law are interesting on a number of counts, not the least of which being that Secretary of State Joseph A. Chapleau – who introduced the legislation – himself considered that it marked a betrayal of the country's liberal roots.[22] What is of even greater import here, however, and what is curiously ignored in the literature, is the fact that the move faced considerable opposition in the Senate to the point that it was only through some clever procedural maneuvering that the government was able to see its legislation passed and maintained.[23]

Indeed, a great many Senators lamented that the government should try to "prohibit strangers from coming to our hospitable shore because they are of a different colour and have a different language and habits from ourselves."[24] Although myriad arguments were put forward against restriction, their common thrust was that it conflicted with Canada's political foundations as a British (and Christian) liberal democracy. It was "such a gross violation of the law of nations, of the comity of nations, a law which we ourselves have been endeavoring to hold forth as being the true principle on which the nations of the world should trade."[25] Furthermore, it was so "utterly inconsistent with our professions as Christians and with the vaunted freedom we profess to cherish as a British people" that it undermined the basis on which Canada had originally been occupied by Europeans.[26] "In a free country," William J. Macdonald declared, "Chinamen as well as persons of other nationalities have their rights and privileges, so long as they conform to the laws of the land."[27]

The earliest control debates in Canada, then, were framed by the question of the rights of non-citizens, with a strong case being made for non-discrimination as a natural extension of the country's liberal political foundations. That this argument was not fully expunged of racism[28]

does not detract from the fact that the policy options that it supported stood in sharp contrast to those put forth by a radically different yet politically ascendant point of view.

Although this alternative interpretation of the *control-rights nexus* would eventually expand to cover all non-citizens, it began with an assertion of the sovereign right of the state to engage in racial discrimination in its border control policies in the name of the national interest. Thus, John Charlton (Norfolk North) argued in favour of restriction in 1885 on the grounds that

> We have purchased our own liberties as a race – everything we possess in the shape of liberty and privilege; we have shaped our own institutions as a race; it is our business to maintain these privileges and these institutions, and we can maintain them best by excluding races that we know cannot be assimilated, that will not become citizens, and will not aid us in building up and perpetuating our institutions.[29]

This was not a question of human rights, he averred, but one of self-preservation.[30] As George E. Casey (Elgin West) explained, "We have a right, as every other people inhabiting a country have, to object to the introduction among our population of any race whom we may consider hopelessly barbarian, or not capable of assimilating with our population."[31]

This linkage between racial discrimination and state sovereignty was not confined to politicians but also was promoted by officials. For example, W.D. Scott, who served as Superintendent of Immigration for many years, wrote disparagingly of most all immigration that was not of Northern European origin and proclaimed the country's sovereign right to keep out any group deemed to be undesirable on racial grounds.[32] Indeed, this attitude is generally considered to have defined the Department's outlook for at least the first 50 years of the twentieth century.[33] It certainly was evident in the formal rules governing immigration between 1910 and 1967, which were written so as to authorize discrimination on the basis of race.[34] Thus, the arguments used against Chinese immigration were soon applied to arrivals from Japan and India,[35] as well as to other people deemed to be "Asiatic," such as Syrians, Armenians, and Jews.[36]

State efforts to create a rights-restrictive system of control on the basis of race, however, were often challenged in the courts. In fact, taking as an example the East Indian community in Canada, it is possible to detect many of the characteristics at the outset of the twentieth century said to exemplify rights-based politics at its end.[37] Alongside lobbying the Department, the government, and individual parliamentarians to change the country's restrictive policies, community representatives sought redress in the courts. As a result of a series of East Indian legal victories between 1908 and 1913, however, the government responded by (among other actions)[38] incorporating a "somewhat radical provision" into the law to exclude the courts from overseeing the work of the Department under the *Immigration Act*.[39] It was, Immigration Minister Frank Oliver argued, a question of state sovereignty and the national interest, which he felt was better defined by Members of Parliament (MPs) than by judges.[40] To the extent to which non-citizens were able to use the courts to thwart the Department's will, he later maintained, Canada was made "a laughing-stock to the world."[41]

By erecting this wall between the Department and the judiciary, then, the government was able to curtail with severity the ability of non-state actors to challenge its actions. This not only provided a solid foundation on which to build a system of control based on racial discrimination, but it also facilitated its extension to circumscribe narrowly the rights of all non-citizens

irrespective of their race. However, as rights-restrictive policies came to encompass immigrants from Europe, a new rights-based politics emerged that revolved around due process protections for non-citizens in Canada. The focus of this debate during the first half of the twentieth century was on various laws passed between 1902 and 1919 to facilitate the deportation of people who had been in the country for many years but who were deemed to be undesirable on cultural, economic, medical, political, racial, and/or social grounds.

James S. Woodsworth (Winnipeg North Centre) led this charge between the two world wars, arguing that it went against the basic rights protections enshrined in the *Magna Charta* to deport people who had resettled in Canada without providing them with an impartial hearing at which the charges against them might be put to the test.[42] For his part, Andrew R. McMaster (Brome) maintained that it was "a principle of British law and British justice that a man should not have any untoward action taken in respect to him unless there is actual proof."[43] As the government stepped up the removal of those who sought state assistance after the onset of the Great Depression, John L. Brown (Lisgar) protested that "It may be that the procedure adopted is in harmony with the immigration law, but it certainly is not in harmony with what we understand to be the principle of British justice."[44] "[I]f this is the kind of thing that is going to be done in the name of democracy," E.J. Garland (Bow River) complained, "you have no real democracy at all; you are vitiating it and destroying the very principle on which this house was established."[45] Such admonishments only increased as the government restricted the rights of non-citizens (especially the so-called "enemy aliens") even further during the Second World War.[46]

On May Day, 1947, Prime Minister William Lyon Mackenzie King opened the next period of Canadian control policies by reaffirming the right of the state to discriminate on racial grounds, declaring that entry into Canada was "a privilege … a matter of domestic policy."[47] Although his speech would be recalled for many years by those who sought to maintain the status quo, it was really more of a defensive action in the face of the post-war discourse of human rights that would accompany the dismantling of much of the country's rights-restrictive immigration system.[48]

As some government officials began to recognize that "our immigration laws and regulations … have become a symbol of racial discrimination,"[49] the issue was brought to a head in 1947 when the Liberals moved to repeal the *1923 Chinese Immigration Act* and yet continue to discriminate against all Asian immigration through a 1930 Order-in-Council.[50] John G. Diefenbaker (Lake Centre) argued against continued racial discrimination on the grounds that "We accepted responsibilities under the united nations. We do not discharge them by lip service and then neglecting to act on its idealism. We do not practise its principles by intolerance."[51] Indeed, such a policy was held not to be consistent with Canadian political values: "If we are to build a democratic society in Canada," said Joseph W. Noseworthy (York South), "then we can ill afford to shut out from our country immigrants purely on the basis of their colour, creed or race."[52]

The question of the rights of non-citizens next arose with the passage of a new *Immigration Act* in 1952. This "poor and illiberal piece of legislation"[53] concentrated almost exclusively on keeping people out of the country by maintaining the rights-restrictive framework of the pre-war period. In support of the legislation, Immigration Minister Walter E. Harris referred to Mackenzie King's 1947 comments on the rights of states, arguing that non-citizens had few if

any rights in Canada until they had been in the country for five years.[54] Over time, the rights-restrictive nature of the law and its narrow interpretation by officials helped to foster an active and informed constituency both inside and outside of Parliament that looked to expand the rights protections provided to non-citizens.

From this point forwards, the denial of due process protections for non-citizens was continually raised in the House. For example, there was considerable discussion over the fact that the government did not disclose reasons either to those ordered deported or to anyone who had been sponsored by relatives in Canada but denied landing. "If a person has no chance whatever either of knowing the charge or of pleading innocent," Harold E. Winch (Vancouver East) protested, "I do not think it is following out the meaning of democracy as we have come to understand it in this dominion and the meaning of justice of which we boast in this dominion."[55] Without recourse to the courts, Diefenbaker concluded, it was not possible to ensure that the work of the Department conformed to "those principles that British justice has shown through the generations are necessary for the preservation of the fundamental freedoms of the individual."[56] The blunt response of Immigration Minister Jack Pickersgill was that there was "no question of justice or injustice at all in this matter. It [was] purely a matter of administration."[57] This was the repeated refrain of his ministerial successors right through until Jean Marchand admitted in 1966 that "Undoubtedly, discriminatory provisions remain in the act, and I believe there will shortly be means to eliminate such discrimination in a democratic country like ours."[58]

That a rights-restrictive policy could generate a problem of control for the state was made plain when it came to light in the late 1950s that thousands of Chinese had entered the country illegally over the years in a bid to circumvent Canada's racist laws.[59] In the House, Douglas Jung (Vancouver Centre; the first MP of Chinese-Canadian descent) expressed a common enough belief when he said that "it would be very difficult to make out a moral case against the majority of these Chinese, because the Immigration Act, as it stands, was, and is, unduly restrictive."[60] While Immigration Minister Ellen Fairclough took a Pickersgillian approach in claiming that there was no discrimination but merely administration, she nonetheless set up a program to land many of the Chinese and, in 1962, changed the regulations governing immigrant selection so that skills and not country of origin would be the defining criteria. Furthermore, she increased the powers of the until-then rarely used Immigration Appeal Boards (IABs) to provide greater appeal rights to non-citizens so that the actions of Immigration officials would more closely "follow the principles of natural justice and … the spirit of the bill of rights."[61] These moves, Harold E. Winch observed approvingly, would "better demonstrate what democracy means to our country, our peoples, our government and legislative bodies."[62]

They would also be but the first in a series that culminated with the passage of the *1976 Immigration Act*. As the government came under increasing pressure to act – from MPs, NGOs, non-citizens, foreign governments, and the press, among others – it removed the last traces of formal racism in Canadian immigration law with another change in the regulations. During that same centennial year – 1967 – it introduced the *Immigration Appeal Board Act*, which increased the independent jurisdiction of the IAB over immigration matters to ensure "not only that justice will be done but that it will be seen to be done, and to be done with humanity and compassion."[63] While there were complaints that the new law did not go far enough,[64] it was generally praised for bringing Canadian control practice closer to the basic precepts of fundamental justice: "It is

important in the interests of Canada, not just of immigrants, that our immigration procedures should be fair and in accordance with the best of our traditions," said Francis A. Brewin (Greenwood).[65] As a result of this change, the actions of the Department under the *Immigration Act* were made subject to meaningful judicial review for the first time in over 50 years.

This new law also marked the beginning of Canadian efforts to establish a more formal system for the processing of inland refugee claims. It was not really until the Second World War that the link between the provision of asylum and liberal democratic principles returned as a notable feature of the politics of control in Canada. For example, Senator Cairine Wilson reminded her colleagues that providing assistance to the refugees of Europe "might show our sympathy and support of democratic principles."[66] Bernard Sandwell, her co-worker at the Canadian National Committee on Refugees, went even further, arguing that, while not unlimited,

> the obligation to grant sanctuary still exists, [that] the need for sanctuary is greater than ever before in history, and [that] the nation which ignores this obligation will suffer as all nations ultimately do which ignore the fundamental moral obligation, the debt which man and nations owe to the human being at their gates simply because he is a human being.[67]

Although there were a few dissenting voices in the House, there was a more clearly expressed opinion voiced by those, such as Wilbert R. Thatcher (Moose Jaw), who claimed that Canada should respond to the needs of refugees in "the interests of justice and humanity,"[68] an essential part, Frederick S. Zaplinty (Dauphin) reminded his fellow MPs, of Canada's British heritage.[69]

However, while the country would put together an admirable if often self-interested record in resettling refugees from Europe through into the 1970s, it would be many years before a commitment to respond to asylum seekers at and within its own borders was institutionalized in Canadian law. The debate over the rights of asylum seekers in Canada really began with the government's decision not to sign the *1951 Convention Relating to the Status of Refugees* of the United Nations, which provides an international norm for the treatment of refugee claimants. Alongside a number of procedural protections that signatories agree to uphold for those seeking asylum, Article 33.1 places a limitation on state authority by securing that "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

In discussing the matter with his Cabinet colleagues, Immigration Minister Walter Harris argued against signing because the document "prescribed certain automatic rights which were to be granted to refugees, legally or illegally admitted, and also prohibited expulsion to territories where the life or freedom of refugees was threatened on grounds of race, religion, nationality or political opinion."[70] Even if this were not the case, he argued, to become a party to the *1951 Convention* would be to increase demands for such rights to be enshrined in Canadian law all the same.[71] As Canada became more cautious in its response to the emerging post-war international human rights regime,[72] political support for the *1951 Convention* diminished and the issue essentially disappeared from the political agenda until 1969, when the government finally deposited its signature with the United Nations.[73]

At first, the government chose to meet its obligations under the *1951 Convention* through the IAB structure. The Board, however, was increasingly constrained by a backlog of unheard cases, primarily of those who had applied for landed status from within Canada and been rejected. Although the government had been forewarned of this problem by the IAB Chair herself in 1968,[74] by the time that it took action in November 1972 there was a full-blown crisis as nearly 4,000 applications were being made each week. In a series of measures introduced in early 1973, the government accused non-citizens of abusing the generosity of Canadians and reduced the range of non-citizens who could access the IAB, limiting it to "those persons to whom Canada has some pre-established legal or moral obligation," such as refugees.[75] Furthermore, it instituted a special administrative review to clear out a backlog of 18,000 inland application cases by landing the majority on reduced immigration criteria. This pattern – warning, government delay, crisis, rights-restrictive response, backlog clearance – would be repeated in the 1980s, only this time with respect to asylum seekers.

While the state's rights-restrictive policies with respect to due process protections had, since before the passage of the *1952 Immigration Act,* led to the creation of an active and increasingly well-informed non-state sector on immigration issues, it was not until the Chilean refugee movement of the 1970s that a more explicit connection was made with the rights of asylum seekers.[76] From the very first days after the September 1973 coup in Chile, numerous non-state actors and MPs urged the government to respond positively to those fleeing the new military regime. Without any firm direction from Cabinet, however, Canada fell back upon a system of control geared towards rejecting people from the political left, such as those seeking sanctuary from Chile. In protest, churches, organized labour, Amnesty International, and a range of other groups began to coordinate their efforts to pressure the government to take a less stringent approach, which it subsequently did.

It was through this more intense experience with Canadian refugee policy that the non-state sector began to understand the limited extent to which the country had an inland refugee policy. As Chileans and other Latin Americans continued to arrive at the border in search of protection, their supporters and their lawyers came to appreciate in more concrete terms the importance of grounding certain procedural protections in law in order that refugee claims might be determined in a manner that was consistent with the principles of fairness that had been developing in Canadian administrative law during the post-war period. Their chance to see such a change realized would come just months after the onset of the Chilean coup, when the government initiated a complete overhaul of Canadian immigration and refugee law. Their efforts would be blocked, however, by an Immigration Department keen on preserving its discretionary powers with respect to who was allowed to enter into and to remain within Canada.

IV. Asylum Seekers in Canada: The Crisis of Control in the 1980s

While the question of the rights of non-citizens had long been part and parcel of the politics of control in Canada, then, its more immediate relation to the crisis of the 1980s stemmed from decisions made in the 1970s. Against the advice of non-state actors as well as MPs on both sides of the House, a rights-restrictive approach was taken in constructing the country's first inland refugee status determination system, one that was – critics charged – both "unnecessarily cumbersome" and "unfair to the claimant."[77] In contrast, then, to the position of the government

in 1987 (after it had essentially lost control over the inland process) that the system was simply the product of "a time which … [was] far more innocent and far less sophisticated than our own,"[78] the roots of the crisis lay in a conscious decision to restrict the rights of non-citizens in a bid to exert greater control over Canadian borders.

Although the replacement of the *1952 Immigration Act* had been promised for two decades, it was only with the publication of a *Green Paper on Immigration* in 1974 and the Special Joint Committee (SJC) hearings that it produced in 1975 that this eventually came to pass. In both instances, the government encouraged the public to participate in this process, and in doing so both tapped into and gave greater impetus to the increase in non-state actor interest in the country's response to the plight of the persecuted.[79] While the *1974 Green Paper* spoke only in vague terms about the establishment of an inland process, the subject quickly came to prominence in both the work of the SJC as well as the House's own 1977 examination of Bill C-24, which subsequently became the *1976 Immigration Act*.[80] While there was considerable consensus as to the need to enshrine Canadian refugee policy in law and, moreover, to ensure that the state was not restricted in its humanitarian endeavours to the *1951 Convention* definition of a refugee, the issue of the institutionalization of an inland refugee status determination system produced significant and irreconcilable differences between the government and its critics.

For their part, the Liberals essentially sought to provide the informal process then in operation with a more secure statutory foundation. Thus, a person claiming refugee status in Canada would be examined under oath by a Senior Immigration Officer (SIO), and a written transcript of that interview would then be forwarded to a Refugee Status Advisory Committee (RSAC), which would – based on the transcript and whatever other evidence that it wanted to consider – make a recommendation to the Minister. If the Minister's determination was positive, then the refugee would eventually become a landed immigrant (barring certain exceptions). If negative, then the claimant would automatically be assessed for landing on humanitarian and compassionate grounds by a Special Review Committee set up within the Department; otherwise the individual could apply for a redetermination before the IAB. If the Board decided to hear the case, then the claimant would be allowed an oral hearing. At this point, a negative decision was subject to appeal (by leave) to the Federal Court on points of law.

Based on their experiences in trying to get asylum seekers accepted through the old informal system, critics brought to the table certain core concerns about the rights of non-citizens in Canada under the proposed legislation, as well as an alternative inland model that they suggested would provide for a better balance between efficiency and fairness.[81]

In broad terms, it was argued that the RSAC system would not ensure that all of the relevant information would be available to decision-makers and that, as a result, claimants would not be guaranteed a fair hearing. For example, problems were anticipated with the written transcript that was to be prepared by SIOs, which could be faulty for any number of reasons, including fear on the part of claimants, their ignorance of the law, inaccurate translation of their testimony, and inadequately trained officials.[82] Moreover, as the effective decision-makers – the members of the RSAC – would "have no opportunity to observe the claimant while he is giving his statement, any determination of his credibility [would be] seriously affected. And, since credibility is often the most important aspect of the case, this imposes a severe hardship on the

claimant."[83] Such a process was not only unfair, it was said, but it was also inefficient as it meant that errors might only be corrected if a claimant was successful in convincing the IAB to hear their case.[84]

Critics came to the hearings with an alternative to the multi-level RSAC system, recommending instead one that recognized "the right to a personal oral hearing before [an independent] panel which would make the final decision, with appropriate opportunity to prepare for a hearing."[85] The first step would be the submission of a Notice of Claim to Refugee Status, which would be filed with a Refugee Claims Board, with a copy being sent to the Minister. If the Minister did not dispute the claim, then the board would be so informed and the person would be granted refugee status. Otherwise, the claimant would be scheduled to appear before the board, which would have jurisdiction to determine all points of fact and law concerning refugee claims, with a subsequent appeal (by leave) to the Federal Court on points of law. This would, proponents maintained, be both more fair and less time-consuming than the RSAC system.

In support of this model, MPs from both sides of the House referred to Canada's liberal-democratic heritage as well as its obligations under the *1951 Convention*. Indeed, Liberal MP Louis Duclos (Montmorency) introduced several amendments before both the Standing Committee and the House that would have substantially increased the due process protections afforded to refugees in the new law.[86] For his part, Opposition MP Francis Brewin maintained that "the right to a hearing is really a very fundamental part of our whole jurisprudence and fair play,"[87] while Jake Epp (Provencher) argued that with "the responsibilities Canada has accepted as a signatory of the Convention" comes "the responsibility to set up a procedure whereby that person can then fully explain his or her case."[88] Even if this produced a backlog, he said, this would not be too high a price to pay to ensure that asylum seekers were treated fairly. Moreover, an independent board with clear jurisdiction would, its advocates maintained, "be able to accumulate experience in dealing with refugee cases which would enable it to assess each case better. There would be clearer procedures for everybody concerned and it would also … be consistent with the spirit of the Canadian Bill of Rights."[89]

Although Immigration Minister Bud Cullen admitted that the proposal was "motivated by a genuine concern, a concern which I personally share, and which is supported by common sense and fair play,"[90] he nonetheless maintained that requiring an oral hearing "would create very great difficulties and inevitably overwhelm the system with non-bona fide claims and legal entanglements. The appeal system before 1973, which broke down because of unlimited access to the Immigration Appeal Board, is a signal warning of what would occur."[91] Instead, he proposed that the combined attention of the RSAC and the Minister would ensure that the requisite information would be canvassed in assessing claims.[92] Cullen had, in fact, for a time given serious consideration to the possibility of providing for an oral hearing, but he was turned against this idea by his officials, who suggested that this would "expose the system to the danger of being overwhelmed by non-bona fide claims, clogged by delay, and obstructed by legal entanglements."[93] In the end, the Minister fell in line with the Department view, justifying his stance by claiming that "It boils down, of course, to a conflict between the right of the individual to fair play and just treatment and the right of Canada to defend its legitimate interests and those of its citizens and residents."[94] Moreover, he said, by limiting the rights of asylum seekers within Canada, the government could focus its efforts on selecting refugees from overseas.

During its first few years the RSAC was able to find its feet while managing a minor backlog crisis, when unprocessed cases jumped from 213 (1979) to 2096 (1981-82) before dropping again to 1,479 (1982-83). While a few small but important adjustments to increase the fairness of the process were made during its first two years in operation,[95] it was not until Lloyd Axworthy was appointed Immigration Minister in 1980 that serious thought was given to the question of the rights of asylum seekers in Canada. Indeed, dissatisfied with the advice that he was receiving from senior officials, Axworthy appointed a Task Force on Immigration Practices and Procedures to examine various controversial questions, such as the Canadian inland system.

The Task Force finished its report in late 1981 and concluded that "the existing process is ripe for reassessment," that it did not "reflect Canadian standards of procedural fairness as they are manifest in our general understanding of a 'fair hearing.'"[96] Of central concern was the lack of an oral hearing – a written transcript, it was argued, was an insufficient evidentiary basis upon which to assess a refugee claimant's credibility because it did not provide decision-makers with an opportunity to clarify "apparent omissions or inconsistencies," or "to assess the sincerity of the claimant."[97] This was rendered all the more serious as the RSAC had not "received the stature and related resources to deal appropriately with the important function which has been assigned to it."[98] As a result, it had adopted a policy of having officials screen out so-called "manifestly unfounded" claims so that members would not have to read the full transcripts (indeed, this happened in about 50 percent of cases forwarded to the RSAC).[99] Not only was this unfair to claimants, the report argued, but "RSAC members should not be placed in the position of being tempted to weigh the injustice of an incomplete hearing against the injustice of delay."[100]

The problems, then, were legion, with the negative effects being potentially quite serious for both claimants as well as the integrity of the process. At worst, refugees faced rejection despite having genuine claims, while even those who were ultimately accepted often endured a considerable wait since the process, "with its fragmentation and reliance upon transcripts, is inherently slow."[101] As the backlogs grew and processing times stretched even longer, it became ever more difficult to remove those deemed not to be *Convention* refugees due to other, humanitarian considerations; as well, the more the system unraveled the greater the incentive became for people to apply in a bid to circumvent regular immigration channels. To counter these growing problems the Task Force recommended that an oral hearing procedure be inserted into the process until legislation could be passed "to replace the present refugee determination process with [an independent] central tribunal which would hear and determine refugee claims."[102] Such a system should be based upon "a very high standard" of procedural justice and a level of efficiency that would be fair to asylum seekers while deterring fraudulent claims.[103]

In response, Axworthy agreed "that a very high standard of fairness is appropriate for the refugee determination process," and he soon made several changes recommended by the Task Force.[104] For example, he issued guidelines to the RSAC to improve the consistency with which it interpreted Canada's *Convention* obligations, provided it with additional members, and relocated its offices to ensure greater institutional independence from the Department. Furthermore, on May 2, 1983, he announced a pilot project in Montreal and Toronto to test the viability of integrating an oral hearing component into the RSAC's work, a move that he hoped would

"substantially increase both the fairness and ... the speed" of the process.[105] Although no report was ever made public on its operations, several well-placed observers subsequently argued that it had improved the pace and the quality of RSAC decisions on credibility.[106]

One year later, Opposition MP Dan Heap (Spadina) introduced a Private Members Bill to institute an oral hearing for each refugee claimant. At Second Reading, he argued that the fundamental problem with the system as it stood was that a refugee "may be judged in such a way as to be sent to his or her death by people who never lay eyes on that person, never hear that person speak, never have a chance to ask that person questions or never give that person a chance to correct any misunderstandings."[107] This went against the basic idea in Canadian legal tradition that a person "has the right to stand before his or her judge and be seen directly."[108] Although this effort did not garner support from the government, its basic message was reiterated just weeks later when another government-solicited report on the inland system was made public.

Ed Ratushny (who had been appointed by Axworthy's ministerial successor, John Roberts, in mid-1983) argued that "Our present system is riddled with anomalies, inconsistencies and other shortcomings which have demonstrated that it is both cumbersome and susceptible to abuse."[109] This could be seen in the regularity with which appeals were undertaken to the courts as well as in the frequency with which critical judgments were handed down. While the government had taken some steps to increase the fairness of the inland system, these oftentimes were implemented with a degree of informality (and thus at least perceived arbitrariness) that served to elongate and obfuscate the process further.[110] As a result, not only was there a risk that genuine refugees might find justice either delayed or denied, but the general state of confusion that reigned encouraged the abuse of the process. Although there were many factors that contributed to this situation – including the absence of sufficiently qualified decision-makers[111] – the system exhibited one "central, glaring weakness [in] the absence of a satisfactory oral hearing."[112]

On the grounds that "Appropriate procedures are … crucial to the effective implementation and fulfillment of Convention obligations,"[113] Ratushny evaluated various ameliorative measures that might be taken. He concluded that the best balance between efficiency and fairness would be struck by having an initial decision rendered by an independent one-person panel (with "manifestly unfounded" claims being screened at this point as well), with an appeal to a three-person panel for rejected claims on points of both fact and law. Although this sequence might be institutionalized in a number of ways, he recommended that an oral hearing constitute an essential component of any changes made, preferably placed at the outset of the process.[114] Even as he called for additional public debate to shape the requisite legislative changes, Ratushny noted that while the system was not yet in crisis there was "no reason for any sense of complacency"[115] as it was unfair to genuine refugee claimants, encouraged abuse, created backlogs, and would, therefore, weaken public support for a positive response towards refugees.

Roberts' response, however, was to solicit yet another study,[116] this one to be carried out by Rabbi W. Gunther Plaut, to assess the possibilities of "improving the refugee determination process while safeguarding the principles of justice, fairness and humaneness."[117] Plaut subsequently wrote that Canada's response to refugees had – over time – accorded ever more attention to the need to treat asylum seekers with fairness. Indeed, this had evolved to such a point that "Declaring a claimant to be a refugee is … not [now] a privilege we grant, but a right

we acknowledge."[118] In signing the *1951 Convention*, Canada had, in effect, agreed that refugee determination was a human rights more than an immigration matter. With this as his starting point, he offered three possible models that might replace the RSAC system, each of which incorporated certain core principles of fundamental justice.[119] For example, they would each be staffed by impartial and sensitive decision-makers, be universally accessible to non-citizens in Canada, provide for an oral hearing in a non-adversarial setting at the initial stage, and incorporate an appeal on points of both fact and law.[120] He was, moreover, even more explicit than Ratushny in warning that the government would have to play a major part in ensuring that the public remained supportive of a generous response to the plight of the persecuted.

Although assigned his task in May 1984 by Roberts, with the landslide electoral victory of the Conservative Party in September, it was to Flora MacDonald that Plaut delivered his report at the end of the year. While it has been said that the Minister initially shelved the document, its author was asked to update it some months later after the Supreme Court released its landmark ruling in *Singh v. Minister of Employment and Immigration* (hereafter *Singh*) on April 4, 1985.[121] The case revolved around seven failed refugee claimants who argued that under Section 7 of the *1982 Charter of Rights and Freedoms* – "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" – they had the right to an oral hearing in the determination of their claims.[122] In a 6-0 decision that was split between two sets of reasons, the court ruled in favour of the appellants, with three judges arguing on the basis of the *Charter* and three by way of the *1960 Bill of Rights*.

In essence, the court maintained that the system should – "At a minimum" and in accordance with the requirements of fundamental justice – "provide the refugee claimant with an adequate opportunity to state his case and to know the case he has to meet."[123] The judges were, it was reported, "by degrees, perplexed, annoyed and astonished by the federal position" that Section 7 was not relevant since any persecution that might follow deportation would not take place in Canada.[124] In rejecting the contention that there might, all the same, be "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" placed upon this right to fundamental justice (in accordance with Section 1 of the *Charter*), the court noted with regret that the government had offered little more than a generic claim as to the financial costs and administrative difficulties that could be encountered if an oral hearing was required for every claimant.[125] The Immigration Department, for its part, seemed to be totally unprepared for the possibility that it might lose the case, and thus was left scrambling to craft a legislative response for the Minister.[126]

The need for quick action was underscored by the fact that, with the right to an oral hearing now confirmed for all refugee claimants at every stage in the system, the effective backlog had increased by perhaps 7,000 to some 20,000 persons. This total continued to grow, with both genuine asylum seekers as well as those seeking to circumvent regular immigration channels making refugee claims. In a time-honoured fashion, however, the government generally laid the blame for this situation on asylum seekers rather than the process.[127] This outlook extended naturally from the fact that those who ran the Immigration Department believed that Canadian refugee policy was defined by overseas resettlement and not by inland determination.[128] Indeed, Director of Refugee Policy Raphael Girard would maintain as late as 1987 that since most

refugees crossed a border on foot they should make their claims in a neighbouring country and not in Canada: "The whole idea of asylum by air is a dubious one."[129]

From a control perspective, overseas selection was attractive because it allowed the state to determine who should come in, from where, and in what numbers. This not only kept such decisions out of the public eye, but it also ensured that non-citizens could not challenge state policies – no matter how far they strayed from ensuring fundamental justice – through the courts. As was seen above, it was this same outlook – that Canada had a right to select its refugees – that had produced the rights-restrictive RSAC system. Critics, for their part, challenged this view on two main grounds. First, they rejected the idea that Canada was not a country of asylum. Not only had it signed the *1951 Convention* but it had also become a logical destination for asylum seekers, especially from Latin America, since the 1970s at least. Second, they noted that refugees selected overseas had to meet certain basic immigration criteria, rendering it an unequal alternative to the inland procedure.[130] As Stephen Foster of the Social Justice Committee of Montreal put it, "if I was a refugee I would find a way to get on a plane, destroy my passport and ask for status at the Canadian border, because abroad, your chances of being accepted are small or nil."[131]

As control over the inland system began to unravel during the early 1980s, and in conformity with the position that Canada was not a country of asylum, the government first sought to control the movement of asylum seekers through the imposition of visa requirements on visitors from select countries. These were introduced, for example, for El Salvador (1978), Chile (1979), Haiti (1980), India (1981), Sri Lanka and Bangladesh (1983), Guatemala, Guyana, and Peru (1984), and the Dominican Republic (1985), among other countries. The motivation behind this policy can be seen in the case of Guatemala. When asked why a visa had been imposed, Roberts simply declared that "Canada is not a country of first asylum."[132] Indeed, he claimed that Canada was better positioned to help those really in need in the region as opposed to being forced into accepting "those only seeking personal gain" by applying in Canada.[133] Raphael Girard was even more explicit in his dismissal of critics, stating that they had a "philosophic disagreement" with the government in thinking that Canada was a country of asylum; the problems that they highlighted were only "hypothetically true," he said, as Canadian officials would ensure that those truly in need of protection would be processed quickly in Guatemala.[134]

Critics, in turn, pointed to the fact that Canada was a logical safe haven for Guatemalan refugees and that, moreover, there had been no abuse by such asylum seekers – indeed, figures showed that some 70 percent of Guatemalan claimants during 1984 would be accepted as refugees.[135] By requiring a visa, Canada was forcing people to come out into the open to signal their desire to leave, which could put their lives in greater danger.[136] Indeed, this was underscored in a tragic manner when the "hypothetically true" became a reality in the case of Beatriz Eugenia Barrios, who had applied for a visa from the Canadian Embassy in Guatemala, been accepted as a refugee, but who was murdered before she was allowed to leave the country.[137] Finally, with a visa in place, it was predicted that more people would try to reach Canada illegally since, as one commentator observed, "These are desperate people. Desperate people do desperate things."[138]

Several other features of Canadian immigration policy at the time were seen to have had a similar effect. For example, since the early 1980s both the Liberals and Conservatives had

reduced family immigration by making it increasingly difficult for people to sponsor relatives.[139] For those who could still do so, the process often took a considerable amount of time, especially in parts of the world where Canada had few people staffing even fewer offices (often in Africa, Asia, the Caribbean, and Latin America). At the same time, the government had made a priority of attracting business immigrants, a focus that diverted scarce resources from the beleaguered family reunification system.[140] By shifting its focus to attracting wealthy immigrants, it was said, the government increased the pool of desperate people seeking an entry into Canada. It made no sense, former IAB member Charles M. Campbell complained, to "bar the front door and leave the back door off its hinges."[141] However, the back door – the RSAC system – would remain off its hinges for another four years.

In response to the Plaut Report, the *Singh* decision, and the ever-expanding backlog problem, MacDonald at first announced that she would introduce legislation before the year's end, but this was ultimately delayed for almost two years. Instead, the government engaged in a number of stop-gap measures that encouraged further abuse of the system and, as a result, decreased public support for Canadian inland refugee policy. Thus, in May 1985 it was claimed that the entire 20,000-plus backlog could not, without creating a severe administrative and financial burden, be granted individual oral hearings, and that there would, therefore, be a special administrative review that would see the majority landed.[142] At the same time, new cases would be determined through interim measures that would seek to streamline processing. It was not, however, until a year later that the programme was actually implemented, a period of delay that enticed thousands more to come in the hope of being granted landing through the backlog clearance process.

On the legislative front, even as the government maintained that "refugee claims have been determined in Canada fairly and objectively for about 13 years,"[143] it responded to *Singh* by introducing a bill ("minor in nature") to augment the IAB's staff so that it could hold oral hearings, and to increase its flexibility so that it could clear the backlog.[144] "Clearly it is important that we respond to the Supreme Court of Canada decision and do it quickly and not appear in any way to be questioning the validity of that decision," Junior Immigration Minister Walter McLean said.[145] Criticisms of the proposed legislation centred around the view that if justice was to be served to refugee claimants then a replacement of the system was required and not its adjustment. "When the first stage of a proceeding is marred by injustices, the situation will not be redressed at the second stage of the proceeding, no matter how extraordinary it may be," Lucie Pépin (Outrement) argued.[146] Rather, Michael M. Cassidy (Ottawa Centre) suggested, "instead of increasing our appeals capacity we should be thinking of reducing the need for appeals."[147] Furthermore, some protested that it would be unfair to try to clear the backlog through the IAB, which had been so roundly criticized in the Plaut report.[148]

In reaction, the government shifted its justification for the amendments, stating that they would help to ease the backlog of family reunification appeals before the IAB, and that only those claimants who requested it would be processed.[149] However, McLean continued all the same to urge that the amendments were necessary in order to prevent the further expansion of "an already serious backlog problem to the point where the present system would virtually collapse under its own weight and the new system would be seriously compromised before it ever got off the ground."[150] This confusion of purpose did little to convince his opponents that the government was being forthright in its intentions concerning the future of the inland system.[151] This wariness

was compounded as the government's strategy diverged from that put forward by the Standing Committee, which had reached all-party consensus on a number of key issues after having examined both the IAB legislation and Plaut's work. As Warren Allmand (Notre-Dame-de-Grâce) put it, "The committee's recommendations are substantial, well founded and the result of much consultation. On the other hand, this Bill is not the result of much consultation and is simply a confused half measure to deal with a serious problem."[152]

The Committee, chaired by Conservative MP Jim Hawkes (Calgary West), had studied the Plaut Report over the course of seven meetings, speaking with a range of witnesses (including its author), and had issued a report of its own. Expanding upon the level of protection suggested by Plaut, the Committee felt that its model would, if implemented, create "the system most likely to work in both an efficient and very human way" to meet Canada's international obligations.[153] Despite this all-party consensus, along with widespread support (if not total agreement) from the non-state sector, however, the government hesitated; indeed, after the mandated 120 days had passed Dan Heap rose in the House to complain that there had been no official response to the Committee's work.[154] This continued inaction in the face of such uniformity of advice since 1981 produced suspicions that the Department was trying to scuttle any changes to provide such procedural protections as universal access with a meaningful appeal before an independent board, waiting instead for a propitious moment to suggest more restrictive measures in keeping with the idea of Canada being a country of overseas resettlement.[155]

Meanwhile, the backlog situation continued to grow more dire. Indeed, in early 1986 evidence appeared of "an organized assault on the immigration system … organized by very unscrupulous travel agents and immigration counselors [and lawyers]" that was bringing thousands of Portuguese citizens claiming to be persecuted Jehovah's Witnesses into the refugee system.[156] Although the government recognized that such patent abuse could create a public backlash that would "place genuine refugees in great jeopardy," it was months before it took any effective corrective action.[157] The point had been reached, lawyer Fredericka Rotter complained, where the situation had become "almost an open invitation to abuse just because of the government's failure to do anything."[158] Although immigration officials reportedly pressed for a visa to be imposed to stop the flow, this option was twice turned back by Cabinet before finally being implemented in July, after almost 4,000 claims had been made.[159] At the same time, the government moved to limit the ability of refugee claimants to obtain work visas. The significance of this sequence was not lost on observers: "So in a sense, the Government used the abuse [that it had allowed to occur] to tighten up the system even more, and the only people who are going to suffer as a result are the genuine refugees."[160]

On May 21, 1986, Walter McLean rose to announce that the backlog clearance programme would finally be put into effect on July 15, with relaxed admissions criteria being used to land an estimated 75 percent of the claimants in two years. The programme would be open to those who had made a claim as of that date, as well as people who were in the country illegally but who had signaled a desire to make a claim by June 21. Asylum seekers who arrived from May 22 until the new inland system was in place would be dealt with through a "fast track" procedure aimed at weeding out abusive claims.[161] The Department found, however, that it was soon being inundated with refugee claims, leading it to suspect that lawyers were seeking to force a more general amnesty. Critics, however, responded that the government must take considerable

responsibility for this situation since it had announced the policy before it was ready to implement it.[162] Although the government expressed its concerns about continued abuse in the system, by the time the programme was finished, about 85 percent of some 25,000 claims had been approved. While this outcome doubtless pleased many, it did not satisfy those who had complained that the review would reward those who had purposefully cheated, such as the Portuguese "refugees," which could only serve to undermine an already tenuous public support for the inland process.[163]

McLean also revealed that the RSAC system would be replaced in April 1987 with one in which claimants would appear before a two-person panel (with split decisions being resolved in the claimant's favour) in a non-adversarial setting within an independent board, with negative decisions being subject to an appeal (by leave) to the Federal Court on points of law. He predicted that the whole process would take six months at most, with claims generally being heard within a week. In order to ensure that the needs of genuine refugees would be met, he said, there would be "limited access controls such as for those exceeding the time limits [to apply], for those granted protection already in another country, and for those … making repeat claims."[164] Although there was much there that garnered widespread support, critics felt that it was marred by the fact that access to the board would be limited and that there would be no appeal based on points of fact, on the actual merits of a claim. Indeed, in its bid to limit access to the system the government was charged with trying to subvert *Singh*, which had established the right to an oral hearing for all refugee claimants.

Although McLean tried to convince opponents that his plan was a reasonable reflection of their own ideas, and that any differences were minor in comparison to the areas of agreement, his arguments suffered to the extent to which he could not explain why the access and appeal limitations were necessary.[165] He could not say why it made sense to add an extra screening process rather than to have all claimants heard by the board.[166] He also could not reconcile his claim that no genuine refugee would ever be deported from Canada with the fact that an appeal by leave on points of law alone would not permit a review of the claimant's credibility, the most central aspect of the determination process. The unspoken answer that critics suspected lurked behind his difficulties was that officials were loath to give up control and therefore were crafting a system that would tip the balance in favour of efficiency over fairness.

Although he sought to justify the proposed measures on the grounds of urgency – "The present machinery has broken down and there's a great injustice being done to bona fide refugees. In the name of humanity we had to do something"[167] – the legislation did not appear until early 1987, and it did so under the banner of the new ministerial team of Benoit Bouchard and Gerry Weiner, who had replaced MacDonald and McLean the previous summer. By that time, the backlog issue had taken a new twist with the arrival of 155 Tamils off the coast of Newfoundland in August, claiming to have traveled from Sri Lanka by boat in search of refuge. While the government provided them with permits to remain for a year, it was quickly discovered that the migrants had in fact come from West Germany, where they had been granted temporary asylum but not refugee status. While many Canadians responded with anger at this deception, Prime Minister Brian Mulroney himself urged for calm, declaring that "if we err . . . we will always err on the side of justice and on the side of compassion.[168] The new Ministers were less enthusiastic, warning that this could be the "tip of the iceberg"[169] in a massive movement from

the Third World to Canada, and complaining that there was not much that they could do since they could not, at present, deport people to countries where there was general civil unrest.[170]

The Tamils constituted but a minute fraction of the 10,000 or so refugee claimants who had entered into the system since the May 21 announcement, a figure that continued to grow through into the new year with major movements from Turkey (some 1,200 before a visa was imposed in January) and Central America (around 2,900 during the first six weeks of 1987). As the numbers soared to 1,000 a week (bringing the post-May 21 total to some 20,000), the government reacted with a three-pronged strategy on February 20: it did away with a list of countries to which Canada would not deport people (thereby streaming them into the RSAC process), began to return refugees arriving via the United States to that country until their scheduled inquiry with a SIO, and imposed new visa requirements on 98 countries (some of them refugee-producing states) for people traveling through Canada. In announcing these moves, Bouchard explained them as being a reaction to "Population increases, global strife and reduced immigration opportunities" in other countries.[171] When it was suggested that government inaction was a more vital cause of the problems being experienced, Weiner responded by trying to make a virtue out of his government's two-year long delay on reform, declaring that "Canada will want us to do it right. Just to rush it through is not the answer."[172]

As well as not getting to the root of the problem, critics urged, these moves would reduce the number of genuine refugees who could access the inland system either by preventing them from getting on a plane to Canada or by increasing the risk of their coming forward from the United States.[173] Moreover, it was pointed out that the government's actions would both exacerbate the backlog problem[174] and put additional claimants on welfare,[175] thereby further undermining public support for asylum seekers. Despite the fact that the system had now been rendered still more likely to exclude people from making a claim in Canada, Bouchard continued to maintain that his government would "provide asylum to every genuine refugee who lands in Canada."[176]

This same message formed the cornerstone of his defence of Bill C-55, introduced on May 5, 1987, to replace the RSAC system. The proposed legislation largely resembled the model drawn by Weiner in early 1986, except that the access limitations were now significantly extended to include anyone who, on their way to Canada, could have made a refugee claim in a so-called Safe Third Country. In support of the bill, Weiner advanced four core arguments. First, he maintained that its restrictionist tone reflected the will of the people, and he made numerous references to their desires for it and their support of it.[177] Second, he suggested that the government's commitment to protect refugees would not be found in the letter of law but rather in its verbal declarations on the subject. Thus, on several occasions Weiner appealed for people "to look at the over-all intent before they judge the specifics."[178] Third, he argued that there were no real alternatives if Canada was to control its borders. Although universal access and an appeal on merit might look good on paper, he argued, "This is the real world, not a theoretical world. It needs commonsense solutions, not naivety."[179] Presumably placing himself in opposition to his critics, he declared that "We continue to maintain that the answer to the refugee problem is not to bring all the refugees to Canada."[180] Finally, he stated that many of those who would be turned back to Safe Third Countries might apply to be selected as immigrants to Canada if they were "educated people with good training and superior motives."[181]

These four justifications were opposed with some vigour over the months that followed. First, it was suggested that the government had not only helped to foster negative public opinion of waiting so long to act, but that it was now playing a dangerous game by legitimating such feelings through its statements and actions. Second, it was argued that it would be irresponsible to vote for the government's proclaimed intent when it was not found in the legislation. As Heap so colourfully put it: "I cannot vote for the twaddle I hear from the Minister. I am asked to vote for the law."[182] Third, by stringently limiting access and by denying claimants an appeal on merits, Marchi argued, "the Government is playing Pontius Pilate. It is washing its hands of responsibility."[183] In short, it was charged that the government "cannot say that no genuine refugee will be returned when [it] has not established a procedure that will inquire into whether a person is indeed a refugee or not."[184] Finally, with a measure such as the Safe Third Country provision, which was expected to prevent anywhere between 40 and 90 percent of claimants from being granted an oral hearing, critics once again saw the hand of a Department that wanted refugees to be selected overseas rather than determined inland.

With an exceptionally busy parliamentary agenda, and with Bouchard reportedly unable to "find a way to channel public support for the measure before the House recessed for the summer,"[185] progress on C-55 had stalled when, in early July, another boat arrived on the East Coast. In contrast to the sympathetic welcome given the 155 Tamils the year before, the government responded to the 174 Sikhs who arrived in Nova Scotia by "locking them up without a hearing, imposing enforced silence, keeping them under armed guard, denying them the right to a lawyer for five days …, refusing to allow a Sikh priest to visit them for prayers," and making repeated references to the potential health and security threats that they represented to Canadians.[186] In Lloyd Axworthy's opinion, these cases "could have been cleared up very quickly without the hue and cry. These people were simply kept as hostages to the government's desire to manipulate public opinion."[187] This view was given some support when Mulroney announced the emergency recall of Parliament late in the month to introduce Bill C-84 (a "Deterrents and Detentions" bill) and to pass Bill C-55, protesting against refugee claimants who were "jumping the queue unfairly [to] take other people's rights and other people's legitimate places."[188]

This move was often portrayed as being more of a manipulation to bolster the popularity of the Conservatives rather than a sincere response to a true national emergency.[189] After all, thousands of claimants had been arriving for years without anywhere near this level of reaction. Moreover, when Parliament eventually reconvened two weeks later, fewer than half of all government MPs appeared: "Members did not really consider it to be a national emergency and I think Canadians never perceived it as a national emergency either," said one MP.[190] Indeed, it would ultimately take a year to pass the legislation that the government had said that it wanted on the books in a week, and it was not until 1989 dawned that the Convention Refugee Determination Division (CRDD) of the new Immigration and Refugee Board was up and running. By that time, as claimants hurried to get into the system before its more restrictive replacement became operational, the backlog stood at 85,000 cases (involving over 100,000 people). If there was indeed a crisis, Charles L. Caccia (Davenport) suggested, then it was "a crisis because of the Government's mismanagement, delays, ineptitude and indecision over almost three years."[191]

Although some provisions of C-84 found general support, just as others provoked sharp criticisms, the one that became perhaps symbolic of the government's attitude for critics sought

to empower the state to prevent people from making refugee claims in Canada by turning back the ships on which they traveled. Sending a ship away "might make the Minister look tough," Margaret Mitchell (Vancouver East) conceded, "but is it sound?"[192] Not only did it contravene the spirit if not the letter of the *1951 Convention*, but it also was seen to deny fundamental justice to non-citizens in Canada by taking away their right to an oral hearing under the *Singh* decision.[193] Indeed, Joe Stern warned, by not providing for universal access and a decent appeal, "the proposed legislation is falling into the same trap that Members of Parliament fell into when they passed the Immigration Act, 1976,"[194] of taking a rights-restrictive approach to border control that would actually undermine its control efforts.

Bouchard and Weiner were, however, clearly now on the offensive, with the former opening the debate with a description of how "people steal their way in to Canada, confident that although they have broken our laws, we, the people of Canada, will not break our own laws. Not only has the basic generosity of Canada been abused, but the generosity of our entire system of justice has been abused."[195] As a result, a less merciful approach was required: "This government," Weiner announced, "believes that tough deterrents will bring results."[196] To those who complained about their proposals they replied that there really was no choice in the matter: "Those who say let us wait [i.e., those who oppose our legislation] are merely asking that the problem grow worse and the solutions more distant and hence more difficult."[197] Moreover, by acting firmly and quickly, Bouchard said, Canada could get back to its "first priority as a country" in its refugee policy: the assistance and resettlement of refugees overseas.[198]

While government backbenchers rallied to the cause of restriction,[199] Jim Hawkes eventually found himself amongst their midst (despite clear concerns with the legislation), proclaiming that "We cannot be the patsies of the world. It is time we toughened the immigration laws and took away the loophole that creates a wide-open door to potential terrorism in Canada."[200] In contrast, Fernand Jourdenais (La Prairie), who became Standing Committee Chair after Hawkes, was vocally critical of his own government's legislation, arguing forcefully that "if we want more orderly borders, we need more liberal borders."[201] With Jourdenais all but alone in his party with his public criticisms, the government moved its legislation through the House easily enough, but then found itself engaged in a months-long battle with the Liberal-dominated Senate over the fate of the two bills.[202] As a Senate Committee interviewed over 100 witnesses across the country through several months of hearings, much of its concern – as expressed in subsequent reports – revolved around the possible constitutional issues that the bills might provoke by denying refugee claimants an oral hearing. The impasse was broken, however, after Bouchard and Weiner were replaced and Barbara McDougall was brought in as the new Immigration Minister in early 1988. After making some minor changes (for example, she placed a six-month sunset clause on the authority to turn back ships), the bills finally were passed by the Senate and received Royal Assent on July 21, 1988.

What with all of this delay, by the following September the Immigration Department had ordered its officials to stop processing refugee claims as the system could no longer hope to do anything with them before the CRDD got underway on January 1, 1989. While this would result in thousands more people being denied work permits, Raphael Girard responded that "They'll just have to tough it out" or go on welfare.[203] Meanwhile, with the backlog set to pass the 80,000

mark and the press being rife with rumours of an impending amnesty, McDougall would say little more than that she was still considering her options.[204]

The government had predicted that its legislation would give it the requisite tools to "attack the very roots of the problem and give us the control we need over the process."[205] It had anticipated that some 66 percent of claimants would be turned away at the pre-screening phase, and that the overall numbers would drop some 60 percent to fewer than 18,000 for 1989. Moreover, it was said that the new system would see claims dealt with in a matter of 18 weeks, thereby keeping any backlog to a necessary minimum.[206] As the Auditor General noted in 1990, however, any deterrent effect seemed to have been short-lived, as the number of claims per month had climbed steadily from 1,360 in January 1989 to 3,750 in March 1990.[207] Furthermore, rather than being heard within a week, claims were taking five months to get before the CRDD, and another four months to get through this second stage. As a result, of the first 32,955 claims made since the beginning of 1989, 23,499 were still pending a final determination at one or the other of the first two stages. These sorts of outcomes, rather than marking a decisive break with the crisis of the past few years, seemed rather to signal its continuation for years to come. The government's rights-restrictive approach seemed, in short, set to fail to produce the promised control results.

V. Conclusions

The controversies surrounding the creation and the replacement of the RSAC system were, in their day, the latest installments of a long-standing debate over the rights of non-citizens in Canada. On the one hand, the state generally took the position that the national interest (officially defined as the acceptance of genuine refugees and the minimization of abuse of the inland process) was best served through a rights-restrictive approach that incorporated a high level of administrative discretion in the determination of refugee claims. This would see most refugees selected overseas and was justified on the grounds that sovereign states have the right to determine who should enter into and remain within their borders. On the other hand, critics drew upon the notion of fundamental justice in their efforts to see that refugee claimants were treated fairly. This outlook was grounded in a belief that Canada could not – as a liberal democracy – "deny justice and liberty to refugees without at the same time undermining and weakening the rights and liberties of Canadians."[208] As was seen in Section III, one can go back through more than 100 years of Canadian history to find the same basic arguments being made time and again, at least since restrictions on Chinese immigrants were first discussed in the 1870s. The dispute that emerged during the crisis of control in the 1980s, then, was indicative of a deeply embedded tension present in all liberal democracies between the concepts of state sovereignty and universal human rights.

A more modern dimension of this debate, however, has been the emphasis placed on the notion that rights-restrictive policies themselves can lead to a loss rather than a gain in control. As Nancy Nicholls of the Inter-Church Committee on Refugees accurately predicted in 1987, "Government attempts to short-circuit, to screen, will in the end complicate, will become time-consuming, and in the long run are even costly."[209] Thus, the denial of fundamental justice to refugee claimants was said to increase the likelihood that genuine refugees would be treated unfairly, which would expose the system to two particular challenges. First, it would foster a rights-based politics as individuals and groups mobilized against rights-restrictive policies on

both judicial and legislative fronts. Second, it would encourage people (both abusers and genuine claimants alike) to circumvent the rules in a bid to remain in the country. The cumulative effect would be to increase the likelihood of control policy failures. Alternatively, it was proposed that a system based in a commitment to the principles of fundamental justice could achieve a more viable balance between recognizing genuine refugees and minimizing abuse. As one observer put it: "I do not think a fair process means you are making the legislation easier. If anything, you are making it more difficult, because you cannot encourage abuse under a process that is fair and efficient."[210]

As was seen in Section IV, this perspective on the "gap" that can arise between the control policy goals of the state and its actual policy outcomes is given considerable support from an examination of the history of the RSAC system. Indeed, a conscious decision was taken in the late 1970s to pursue a rights-restrictive approach in a bid to maintain the provision of refugee status as more of a privilege to be granted through administrative discretion than a right to be held by non-citizens against the state. This proved, however, to be unsustainable. On the one hand, the effort to graft a procedure for the protection of refugees onto what was essentially an enforcement process, and to do so in such a way as to maximize state control, proved to be wholly inefficient in administrative terms, which encouraged considerable abuse. On the other hand, the process was inherently unfair to asylum seekers as it provided an insufficient mechanism by which to assess the credibility of their claims, which left it vulnerable to rights-based politics. As the integrity of the RSAC system came under attack on these two fronts, the government, while rejecting an alternative approach that was more closely aligned to the principles of fundamental justice, chose a path of extended delays and further restrictions that compounded the crisis, eventually introducing a new rights-restrictive approach that after just one year had displayed an inability to achieve its core control objectives.

Just as the Canadian government did not accept the idea that its rights-restrictive policies could be the source of some of its control problems rather than their solution, this notion has also not received much attention in the comparative literature on liberal-democratic state control. As was observed in Section II, while bringing the question of the *control-rights nexus* to the fore, the literature has tended to focus on rights as a form of external constraint on the actions of decision-makers. For example, Christian Joppke argues that "accepting unwanted immigration is inherent in the liberalness of liberal states"[211] because the actions of executive authorities are limited by the effects of "interest-group pluralism, autonomous legal systems, and moral obligations toward particular immigration groups."[212] Such an approach, however, places the actions of governments and their officials on the margins of the analysis rather than at its centre.

In contrast, this paper has sought to show that it is not just the liberalness of liberal-democratic states that can limit their efforts at border control, but that this can occur as well when such states act in an illiberal manner through the imposition of rights-restrictive policies. If it is true that "there can be no resort to the facile assumption that unbridled immigration control is an inherent aspect of a state's sovereignty,"[213] then actions undertaken by a liberal-democratic state that transgress any existing limitations will increase the chances of control policy failures. While the definition of such boundaries will vary according to the type of international migration under review and the institutional dimensions of the rights-based politics in the receiving state in

question, the study of the Canadian case in the preceding pages suggests that this facet of the *control-rights nexus* merits considerably increased attention.

Indeed, this is underscored by the shift in recent years towards a generally more rights-restrictive approach to border control – especially with respect to asylum seekers – amongst liberal-democratic states. The "rights rollback" that began in the early 1980s as such states responded to criticisms that they had lost control over their borders took on a new significance in the wake of the 2001 attacks on the United States as control policies were reframed to incorporate a more prominent national security dimension. In the case of asylum seekers, UNHCR Commissioner Ruud Lubbers has already warned of "the risk that some of the newly introduced measures will also end up penalizing refugees in flight from persecution, both in terms of their ability to access territory and procedures and in terms of their treatment in the country of asylum."[214] With this further tightening of the tension between state sovereignty and universal human rights, the need for answers to the questions surrounding the role that rights-restrictive policies may play in undermining liberal-democratic state control efforts becomes that much more of an imperative.

Endnotes:

[1] See, for example, Rainer Knopff and F.L. Morton, *Charter Politics* (Scarborough: Nelson Canada, 1992), 22-24, and Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* [Second Edition] (Toronto: Oxford University Press, 2001), 154. The casual way in which the court's decision is linked to the ensuing crisis of control can be seen in a number of texts on Canadian immigration and refugee policies, such as Valerie Knowles, *Strangers at Our Gates: Canadian Immigration and Immigration Policy, 1540-1997* [Second Edition] (Toronto: Dundurn Press, 1997), 182-84, and Charles M. Campbell, *Betrayal & Deceit: The Politics of Canadian Immigration* (Vancouver: Jasmine Books, 2000), 75, among others.

[2] "Rights must be considered in any theory of international migration… [T]he empirical and theoretical challenge for migration scholars is to find a way to incorporate rights, as an institutional and legal variable, into our analysis of international migration." James F. Hollifield, "The Politics of International Migration: How Can We 'Bring the State Back In'?" in C.B. Brettell and J.F. Hollifield (eds.), *Migration Theory: Talking Across Disciplines* (New York: Routledge, 2000), 149.

[3] Wayne A. Cornelius, Philip L. Martin and James F. Hollifield, "Introduction: The Ambivalent Quest for Immigration Control," in W.A. Cornelius, P.L. Martin and J.F. Hollifield (eds.), *Controlling Immigration: A Global Perspective* (Stanford: Stanford University Press, 1994), 8.

[4] This part of their analysis very much reflects Hollifield's earlier work, namely *Immigrants, Markets, and States: The Political Economy of Postwar Europe* (Cambridge, Massachusetts: Harvard University Press, 1992), especially Chapters 8 and 9.

[5] Wayne A. Cornelius, Philip L. Martin and James F. Hollifield, "Introduction: The Ambivalent Quest for Immigration Control," in W.A. Cornelius, P.L. Martin and J.F. Hollifield (eds.), *Controlling Immigration: A Global Perspective* (Stanford: Stanford University Press, 1994), 10.

[6] Gary P. Freeman, "Modes of Immigration Politics in Liberal Democratic States," *International Migration Review*, Vol. 29, No. 4 (Winter 1995), 882.

[7] Christian Joppke, "Why Liberal States Accept Unwanted Immigration," *World Politics*, Vol. 50, No. 2 (January 1998), 266-93.

[8] Christian Joppke, "Immigration Challenges the Nation-State," in C. Joppke (ed.), *Challenge to the Nation-State: Immigration in Western Europe and the United States* (Oxford: Oxford University Press, 1998), 19. Freeman's support of both Hollifield's and Joppke's work in this respect can be seen in an article co-authored with Bob Birrell, "Divergent Paths of Immigration Politics in the United States and Australia," *Population and Development Review*, Vol. 27, No. 3 (September 2001), 525-51.

[9] James F. Hollifield, "Ideas, Institutions, and Civil Society: On the Limits of Immigration Control in Liberal Democracies," *IMIS-Beitrage* (1999), Vol. 100, 59.

[10] James F. Hollifield, "The Politics of International Migration: How Can We 'Bring the State Back In'?" in C.B. Brettell and J.F. Hollifield (eds.), *Migration Theory: Talking Across Disciplines* (New York: Routledge, 2000), 164.

[11] For example, he writes of his focus on "how rights act, primarily through independent judiciaries, to limit the capacity of states to control immigration." *Ibid.*, 149.

[12] For example, at about the same time that this paragraph was written, the British Broadcasting Corporation reported (accessed at http://news.bbc.co.uk/2/hi/uk_news/politics/3568129.stm, on March 26, 2004) under the heading "Judge delivers blow to refugees" that "Asylum seekers' rights of access to the courts have been severely curtailed following a test case ruling" in Britain. A few days later, the *Guardian Newspaper* reported (accessed at http://society.guardian.co.uk/asylumseekers/story/0,7991,1182986,00.html, on April 6, 2004) in a separate case that "Lawyers lose fight against fast-track asylum claims." While many such examples can readily be found in any liberal-democratic state, this rights-based dimension of the politics of control is generally ignored in the literature.

[13] Colin Holmes, *John Bull's Island: Immigration and British Society, 1871-1971* (London: Macmillan Education Ltd., 1988), 67. On the influence of this outlook in holding back a more restrictionist immigration policy in Britain around that time, see John A. Garrard, *The English and Immigration 1880-1910* (London: Oxford University Press, 1971).

[14] Canada, *House of Commons Debates* [hereafter *HCD*] (March 18, 1878), 1209.

[15] *Ibid.*

[16] Canada, *HCD* (April 16, 1879), 1264.

[17] *Ibid.*, 1262.

[18] For example, Joshua S. Thompson (Cariboo) declared that "Everyone who had come in contact with that race must know its blighting influence on civilization, and that its presence on a large scale was an evil which it was necessary to crush out, if they wished to see their country flourish and progress … The jails on the Pacific coast were filled with [Chinese]; they were capable of every iniquity under the sun; they could not be believed on oath." *Ibid.*, 1261-62.

[19] *Ibid.*, 1263.

[20] *Ibid.* In 1290, King Edward I expelled all Jews (around 15,660 persons) from England. It would not be until 1657 under the rule of Oliver Cromwell that they were again officially allowed to settle in England.

[21] The law was amended many times over the years, with the Head Tax being raised from $50 in 1885 to $100 in 1900 and then to $500 in 1903; it was subsequently abandoned when a policy of near total exclusion was instituted with the *1923 Chinese Immigration Act*. Between 1924-25 and 1945-46 only eight Chinese immigrants were permitted to resettle in Canada; seven arrived in 1946-47.

[22] He began by expressing the surprise that he had felt when "a demand was made for legislation to provide that one of the first principles which have always guided the English people in the enactment of their laws and regulations for the maintenance of the peace and prosperity of the country, should be violated in excluding from the shores of this great country, which is a part of the British Empire, members of the human family." Canada, *HCD* (July 2, 1885), 3003. The tenor of his remarks led a supporter of restriction to declare that "one would almost imagine [that Chapleau] were in opposition to the Bill rather than in favour of it." (3013)

[23] In 1885, the legislation was pushed through Second and Third Readings on the same day, thereby scuttling an effort to have the latter delayed for three months; in 1886, a six-month hoist was successfully passed against amendments to the new law; in 1887, the Conservatives only managed to prevent the passage of a bill calling for the repeal of the *1885 Chinese Immigration Act* by asserting that the Senate had no authority over such a matter of taxation (i.e., the Head Tax). The fact that the Senate protested so vigorously against restriction, and the implications of this for both the politics of control and race relations in Canada, is ignored in such key texts as James Morton, *In the Sea of Sterile Mountains: The Chinese in British Columbia* (Vancouver: J.J. Douglas Ltd., 1973), Harry Con *et al.*, *From China to Canada: A History of the Chinese Communities in Canada* (Toronto: McClelland and Stewart Ltd., 1982), Patricia E. Roy, *A White Man's Province: British Columbia Politicians and Chinese and Japanese Immigrants, 1858-1914* (Vancouver: University of British Columbia Press, 1989), and W. Peter Ward, *White Canada Forever: Popular Attitudes and Public Policy Toward Orientals in British Columbia* [Second Edition] (Montreal and Kingston: McGill-Queen's University Press, 1990).

[24] James Dever, in Canada, *Senate Debates* [hereafter *SD*] (July 13, 1885), 1298.

[25] Richard W. Scott, in Canada, *SD* (May 26, 1886), 746.

[26] Alexander Vidal, in Canada, *SD* (May 21, 1886), 687.

[27] Canada, *SD* (January 30, 1885), 6.

[28] Indeed, those who praised the Chinese often worked within the same stereotypes as those who slandered them; see W. Peter Ward, *White Canada Forever: Popular Attitudes and Public Policy Toward Orientals in British Columbia* [Second Edition] (Montreal and Kingston: McGill-Queen's University Press, 1990), Chapter 1.

[29] Canada, *HCD* (May 4, 1885), 1588.

[30] "[I]t is useless," he said, "to tell us that we can permit the importation of any kind of people into the country and that we are guilty of infraction of human rights if we impose any restrictions upon these immigrants." Canada, *HCD* (September 16, 1896), 1352-53.

[31] Canada, *HCD* (June 25, 1900), 8203.

[32] See W.D. Scott, "Immigration and Population," in A. Shortt and A.G. Doughty (eds.), *Canada and Its Provinces: A History of the Canadian People and their Institutions by One Hundred Associates* [Volume 7] (Toronto: Glasgow, Brook & Company, 1914), 517-90.

[33] This can best be appreciated in Barbara Roberts, *Whence They Came: Deportation from Canada 1900-1935* (Ottawa: University of Ottawa Press, 1988), and Donald H. Avery, *Reluctant Host: Canada's Response to Immigrant Workers, 1896-1994* (Toronto: McClelland and Stewart Inc., 1995).

[34] Thus, Section 38 of the *1910 Immigration Act* gave Cabinet the authority to "prohibit for a stated period, or permanently, the landing in Canada, or the landing at any specified port of entry in Canada, of immigrants belonging to any race deemed unsuited to the climate or requirements of Canada, or of any specified class, occupation or character." Section 61 of the *1952 Immigration Act* granted the state the authority to discriminate on the basis of "ethnic group … or geographical area of origin," "peculiar customs, habits, modes of life or methods of holding property," "unsuitability having regard to the climatic" conditions in Canada, and "probable inability to become

readily assimilated or to assume the duties and responsibilities of Canadian citizenship within a reasonable time after their admission."

[35] Basic overviews of this trend can be found in R. Sampat-Mehta, *International Barriers* (Ottawa: Harpell's Press, 1972), and W. Peter Ward, *White Canada Forever: Popular Attitudes and Public Policy Toward Orientals in British Columbia* [Second Edition] (Montreal and Kingston: McGill-Queen's University Press, 1990).

[36] See, for example, Baha Abu-Laban, *An Olive Branch on the Family Tree: The Arabs in Canada* (Toronto: McClelland and Stewart Limited, 1980), Isabel Kaprielian-Churchill, "Armenian Refugees and Their Entry into Canada, 1919-30," *Canadian Historical Review*, Vol. 71, No. 1 (March 1990), 80-108, and Irving Abella and Harold Troper, *None Is Too Many: Canada and the Jews of Europe 1933-1948* (Toronto: Lester Publishing Limited, 1991 [1983]).

[37] Although no in-depth study of this aspect of East Indian immigration to Canada exists, a composite picture can be drawn from R. Sampat-Mehta, *International Barriers* (Ottawa: Harpell's Press, 1972), Sohan Singh Josh, *Tragedy of Komagata Maru* (New Delhi: People's Publishing House, 1975), and Hugh Johnston, *The Voyage of the Komagata Maru: The Sikh Challenge to Canada's Colour Bar* (Delhi: Oxford University Press, 1979).

[38] For example, the Department worked hard to ensure that its cases were prepared well enough to survive judicial scrutiny and even operated outside of the law at times to spirit people out of the country before any application might be made to the courts; see Barbara Roberts, *Whence They Came: Deportation from Canada 1900-1935* (Ottawa: University of Ottawa Press, 1988).

[39] Immigration Minister Frank Oliver, in Canada, *HCD* (March 14, 1910), 5504. For example, Section 23 of the *1910 Immigration Act* declared that "No court, and no judge or officer thereof, shall have jurisdiction to review, quash, reverse or otherwise interfere with any proceeding, decision or order of the Minister or of any Board of Inquiry, or officer in charge, had, made, or given under the authority and in accordance with the provisions of this Act relating to the detention or deportation of any rejected immigrant, passenger or other person, upon any ground whatsoever."

[40] Indeed, Oliver went so far as to argue that "if you so frame the law that the right or power of deportation becomes a subject of legal dispute, you might nearly as well not have the power." Canada, *HCD* (April 3, 1907), 5719. Striking a chord that would sound quite familiar in the mid-1980s when the question of asylum seekers was raised, he also argued that "To say that any person in all the wide world, let him be of whatever character he pleases, has the right to come into this country of Canada in the face of regulations designed to keep him out, designed for the well-being present and future of the people of Canada, and that he shall have all the protection of all the complicated machinery of law that is found to be necessary in the transactions of citizens of the country, is absurd, is unjust to the country and places a burden upon administration that should not be so placed." Canada, *HCD* (March 2, 1914), 1225.

[41] *Ibid.*, 1224.

[42] Woodsworth first sought to amend the *Immigration Act* to provide for greater due process protections for non-citizens in 1922, observing with dismay that they "can come into this country and they may live here for a certain period of time; but if they are declared to be undesirable; it is as if they were not living here; their residence here gives them no claim whatever, no right to trial in the courts of this country." Canada, *HCD* (May 3, 1922), 1389. "We believe that every man in this country ought to have the right of a trial by jury," he later said. "We believe that it is the inherent right of people living in British lands that they should be given a fair trial." Canada, *HCD* (June 7, 1926), 4118. He continued to protest the government's deportation policies on due process grounds through into the mid-1930s, introducing several Private Members Bills to increase the rights-protections of non-citizens in Canada.

[43] Canada, *HCD* (July 3, 1924), 4029. "The principle gets down to the very roots of our freedom," Railways and Canals Minister Charles A. Dunning suggested, "as to whether men who are charged with crime shall be equal before the law, shall all be treated before the same courts in the same way, or whether there shall be an arbitrary authority set up." Canada, *HCD* (April 30, 1928), 2507.

[44] Canada, *HCD* (May 6, 1932), 2685.

[45] *Ibid.*, 2688.

[46] For example, Thomas C. Douglas (Weyburn) was concerned about both due process and discrimination in the treatment of enemy aliens: "What we have objected to is, first, that the procedure set out for taking steps against persons who are enemies of the state is not such as to safeguard and protect the civil liberties of our people; and, second, that these regulations are so vague in their terminology as to make it possible … for discrimination to be shown against innocent persons." Canada, *HCD* (March 3, 1940), 1187. "[T]he fact that we are at war," Jean-François Pouliot (Témiscouata) observed, "does not change in the slightest degree the principle of law that a man shall be considered innocent until he is proven guilty." Canada, *HCD* (May 4, 1942), 2085.

[47] Canada, *HCD* (May 1, 1947), 2646. Certainly, his tolerance for racial discrimination was made clear through his government's policies towards the Japanese, first of internment and then (for many) of effective expulsion; see Ken Adachi, *The Enemy That Never Was* (Toronto: McClelland and Stewart, 1976). One of the few MPs to oppose such rights-restrictive policies during the war was Angus MacInnis (Vancouver South), who found himself "wondering what we are fighting for in Europe today" if such actions could be so readily taken by a liberal democracy; see Canada, *HCD* (February 25, 1941), 1022. As the Liberals began their policy of "voluntary departures" MacInnis fumed that this "violated every democratic tradition and every Christian principle." Canada, *HCD* (November 21, 1945), 2385. In this he was joined by Alistair M. Stewart (Winnipeg North), who stated: "I regard this policy as a direct negation of Liberalism and of decent, elemental, fundamental democracy." Canada, *HCD* (December 17, 1945), 3704.

[48] The history outlined in the paragraphs that follow stands in contrast to the commonly expressed opinion that prior to the 1970s there was "a relative absence of controversy over immigration issues" and that "Immigration policy rarely attracted serious parliamentary debate." Ninette Kelley and Michael Trebilcock, *The Making of the Mosaic: A History of Canadian Immigration Policy* (Toronto: University of Toronto Press, 1998), 311, 314.

[49] Acting Undersecretary of State for External Affairs Hume Wrong, "[Untitled]," in J.F. Hilliker (ed.), *Documents on Canadian External Relations, Volume 11, 1944-1945, Part II* (Ottawa: Minister of Supply and Services Canada, 1990), 1817.

[50] PC 1930-2115 essentially barred any person from Asia (interpreted quite broadly to include, for example, most of Africa as well as the Middle East) from being landed in Canada.

[51] Canada, *HCD* (February 11, 1947), 321. David Croll worked on the same theme: "We pledged ourselves to oppose discrimination not only in theory but also in practice when we signed the united nations charter, and unless we grant to these people a full measure of justice we shall have less reason to enjoy our own." (324).

[52] Canada, *HCD* (February 17, 1955), 1171.

[53] Freda Hawkins, *Canada and Immigration: Public Policy and Public Concern* (Montreal and London: McGill-Queen's University Press, 1972), 118. The legislation was, in the words of one of the top civil servants whose job it was to administer it, "extremely restrictive and control-oriented." John L. Manion, "The Hungarian Refugee Movement: Implementing the Policy," in R.H. Keyserlingk (ed.), *Breaking Ground: The Hungarian Refugee Movement to Canada* (Toronto: York Lanes Press, Inc., 1993), 53.

[54] "It is a matter of opinion, I suppose, as to how many rights a landed immigrant acquires on the first day, or the second day or the third day after landing; generally the Act says that he does not acquire many of these rights until he is here five years. That may be wrong in principle, but that is the principle on which the Act is based, and it is the basis on which most immigration Acts are written." Canada, *Special Committee to consider Bill No. 305, An Act Respecting Immigration* (1952), 112.

[55] Canada. *HCD* (February 17, 1955), 1292.

[56] Canada, *HCD* (April 29, 1955), 3321.

[57] Canada, *HCD* (August 8, 1956), 7211.

[58] Canada, *HCD* (March 7, 1966), 2327.

[59] Indeed, much of the history of Canadian attempts to restrict Chinese arrivals can be seen in this light: most of the amendments to the *1885 Chinese Immigration Act* contained an effort to close off avenues into the country (legal or otherwise) that Chinese migrants had opened up in response to the state's efforts to restrict their entry.

[60] Canada, *HCD* (May 25, 1961), 5390.

[61] Canada, *HCD* (January 19, 1962), 10. It's independence was limited by the fact that the Minister retained a final say over its decisions.

[62] *Ibid.*, 11.

[63] Parliamentary Secretary (Immigration) John C. Munro, in Canada, *HCD* (February 20, 1967), 13269.

[64] For example, there were complaints that landed immigrants were not provided with appeal rights equal to those of Canadian citizens in sponsorship cases, and that people ordered deported on national security grounds were not provided with an appeal before the Board.

[65] Canada, *HCD* (March 1, 1967), 13636.

[66] Canada, *Proceedings of the Senate Committee on Immigration and Labour* (1946), No. 9, 227.

[67] *Ibid.*, 239.

[68] Canada, *HCD* (April 3, 1946), 525.

[69] Canada, *HCD* (March 28, 1946), 352.

[70] "Extract from Cabinet Conclusions [June 29, 1951]," in G. Donaghy (ed.), *Documents on Canadian External Relations, 1951*, Vol. 17 (Ottawa: Minister of Public Works and Government Services Canada, 1996), 429.

[71] Thus, Harris argued at a subsequent meeting that "As it stood, the Convention was between countries that were parties and did not confer any rights on individuals. There would, however, almost certainly be a general feeling that it did confer individual rights or, alternatively, that legislation should be passed giving parallel individual rights under domestic law." "Extract from Cabinet Conclusions [July 5, 1951]," in G. Donaghy (ed.), *Documents on Canadian External Relations, 1951*, Vol. 17 (Ottawa: Minister of Public Works and Government Services Canada, 1996), 433. It is traditionally argued in the Canadian literature that the government did not sign because it wanted – with the onset of the Cold War – to maintain its ability to deport communists. See, for example, Gerald E. Dirks' classic work, *Canada's Refugee Policy: Indifference or Opportunism?* (Montreal and London: McGill-Queen's University Press, 1977), 180, and Reg Whitaker, *Double Standard: The Secret History of Canadian Immigration* (Toronto: Lester & Orpen Dennys Limited, 1987), 53. There is, it is argued here, sufficient evidence to suggest, however, that this was but one facet of a more general concern with the rights of non-citizens.

[72] For example, see John English, "'A Fine Romance': Canada and the United Nations, 1943-1957," and Denis Stairs, "Realists at Work: Canadian Policy Makers and the Politics of Transition from Hot War to Cold War," in G. Donaghy (ed.), *Canada and the Early Cold War 1943-1957* (Ottawa: Minister of Public Works and Government Services Canada, 1998), 73-116.

[73] At the same time, it added its signature to the *1967 Protocol* that expanded the scope of the *1951 Convention.*

[74] Janet Scott had testified before a parliamentary Standing Committee that there were "too few [Board members] to handle the workload." Canada, *Proceedings of the Standing Committee on Labour, Manpower, and Immigration* [hereafter SCLMI] (1968-1969), No. 6, 84. As MPs voiced complaints, the government commissioned an independent report on the subject, which was tabled in late 1970. While Immigration Minister Otto Lang promised in 1971 that ameliorative legislation would soon be introduced, it took two years to appear, by which time a full-blown crisis was underway.

[75] Immigration Minister Robert Andras, in Canada, *HCD* (June 20, 1973), 4952. Indeed, through an amendment to the *1967 Immigration Appeal Board Act* in 1973, the *Convention* definition of a refugee was given a statutory foundation in Canada for the first time. Previously, refugee claimants had generally been accepted through the considerable discretionary powers granted to the IAB to land people on humanitarian and compassionate grounds; see William Janzen and Ian A. Hunter, "The Interpretation of Section 15 of the Immigration Appeal Board Act," *Alberta Law Review*, Vol. 11 (1973), 260-78. As well, in 1974 the government established an informal interdepartmental committee to advise the Minister on determining individual refugee claims.

[76] The two central texts on this subject are George Hanff, "Decision-Making Under Pressure: A Study of the Admittance of Chilean Refugees by Canada," *North-South: Canadian Journal of Latin American Studies* (1979), Vol. 4, No. 8, 116-35, and Joan Simalchik, *Part of the Awakening: Canadian Churches and Chilean Refugees 1970-1979* (MA Thesis, Ontario Institute of the Study of Education, 1987).

[77] From a brief presented by the Inter-Church Committee on Human Rights in Latin America (ICCHRLA), in Canada *SCLMI* (1976-1978), No. 30A, 29.

[78] Junior Immigration Minister Gerry Weiner, in Canada, *HCD* (June 18, 1987), 7329.

[79] In reading the transcripts of these hearings it is clear that Canada's policies towards Chilean refugees had had a marked effect on the outlook of a great number of non-state actors and MPs, reinforcing their view that the rights of asylum seekers needed greater statutory protection.

[80] For example, towards the end of the C-24 hearings, David MacDonald (Egmont) observed that he did "not think there has been any other aspect of the bill in the last few weeks that has more attention than the whole refugee question." Canada, *SCLMI* (1976-1978), No. 37, 23. Immigration Minister Bud Cullen agreed, stating in the House during that "I think it is fair to say that it was a subject that concerned the members of the standing committee and the witnesses who appeared before it more than any other." Canada, *HCD* (July 25, 1977), 7978.

[81] For reasons of space, this review primarily takes into account those criticisms that revolved around the question of the right to a fair hearing; critics articulated a number of other concerns on such subjects as the RSAC's lack of independence from the Department, inadequate protections for asylum seekers with respect to detention and deportation (especially with reference to security certificates), as well as an insufficient definition of the rights of persons who had been recognized as refugees under the system. The best overview of these and other criticisms can be found in Canada, *SCLMI* (1976-1978), No. 32 and 32A, especially the "Report of the Students' Legal Aid Society and the Law Union of Ontario on Bill C-24" contained in the latter.

[82] See Frances Arbour of ICCHRLA, in Canada, *SCLMI* (1976-1978), No. 29, 25-27, and Richard Gathercole of the University of Toronto Faculty of Law, in Canada, *SCLMI* (1976-1978), No. 32, 7-12.

[83] ICCHRLA, in Canada, *SCLMI* (1976-1978), No. 30A, 54.

[84] Moreover, the IAB was required by law to employ a fairly high standard in judging which requests should be granted an oral hearing, one that made Board members prejudge whether the person had a "reasonable chance" of making a successful claim. The IAB itself had sought in the early 1970s to hold oral hearings in order to assess more adequately a claimant's application to have their case reviewed, but it had been told by the courts that it could not do so under the law. Appearing before the SJC in 1975, IAB Chair Janet Scott herself spoke out in favour of having an oral hearing, noting how difficult it was for her members to assess claims on the basis of a paper review; see Canada, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons on Immigration Policy* [hereafter *SJC*] (1975), No. 49, 51.
[85] ICCHRLA, in Canada, *SCLMI* (1976-1978), No. 30A, 23.
[86] In the Standing Committee he was joined in his concerns by fellow Liberal Charles L. Caccia (Davenport), who at one point informed the Minister that he had not given him sufficient reason to vote against an amendment to incorporate an oral hearing for all claimants.
[87] Canada, *SCLMI* (1976-1978), No. 49, 21. Earlier, IAB Chair Janet Scott had argued that the rights of non-citizens in Canada had evolved to such a degree that certain procedural rights had to be observed: "when rights of appeal and rights to claim equity are bestowed by Parliament they are obviously real rights with all that implies, and the tribunal charged with the responsibility of dealing with them must be so constituted as to deal with them properly and expeditiously." Canada, *SJC* (1975), No. 49, 13. "In my view, at our present stage of development in our legal system, the right of appeal or proceeding in the nature of appeal given to an alien, whatever his status, is an irreversible trend. He has that right, and I do not think there is any way you could ever take it away from him." (14)
[88] Canada, *SCLMI* (1976-1978), No. 49, 20.
[89] Richard Gathercole, in Canada, *SCLMI* (1976-1978), No. 32, 10.
[90] Canada, *SCLMI* (1976-1978), No. 37, 7.
[91] *Ibid.*
[92] He often fell back on the argument that the new system included certain procedural guarantees that were an improvement over the old informal system, a justification that tempted Senator Eugene Forsey to compare it to "merely saying that one is greater than zero." Canada, *SD* (August 2, 1977), 1209.
[93] From an internal memorandum, quoted in Gerald E. Dirks, "A Policy within a Policy: The Identification and Admission of Refugees to Canada," *Canadian Journal of Political Science*, Vol. 17, No. 2 (June 1984), 293.
[94] Canada, *HCD* (July 22, 1977), 7934. Such reasoning was, David MacDonald protested (Egmont), based upon a false dichotomy: "If he is saying that we will have to begin sacrificing certain rights before the law to have a fair and just hearing in order to protect the sanctity and survival of the state, then surely he is saying something that is not in the best tradition of a liberal democracy. There can be no Canada worth preserving, to put it bluntly, unless the right of the individual to a fair and just treatment is preserved." (7935)
[95] For example, in 1979 Bud Cullen announced that rejected claimants would receive the reasons for their being turned down in order that they might make a more effective appeal to the IAB (the change was actually brought in by the Conservative government of Joe Clark later in the year). On this and the continuing dissatisfaction with the RSAC system on the part of its critics, see Canada, *SCLMI* (1978-1979), No. 25.
[96] Task Force on Immigration Practices and Procedures, *The Refugee Status Determination Process* (Ottawa, 1981), iii, x. The report noted that other administrative bodies, while dealing with matters of a relatively mundane nature in comparison with refugee determination, incorporated significantly greater standards of procedural fairness.
[97] *Ibid.*, 26. "The present exclusive reliance upon the transcript process totally removes the 'give and take' of oral argument and the oral presentation of evidence which our systems of adjudication have long considered to be important to the defining of issues and the opportunity of the parties to respond to them." *Ibid.*, 49.
[98] *Ibid.*, xv.
[99] "The difficulties facing the RSAC members in having to assess credibility … are compounded when the member does not even read the transcript but relies on a summary of the transcript made by another." *Ibid.*, 41. Although this practice was not stopped after it was revealed, new guidelines were issued by Axworthy to give more definition to the meaning of "manifestly unfounded." Even with this screening practice, however, the RSAC was unable to stem the growth of its backlog.
[100] *Ibid.*, 103.
[101] *Ibid.*, xxii.
[102] *Ibid.*
[103] *Ibid.*, 43.
[104] Quoted in Charlotte Montgomery, "Report says advisory group hindered by refugee backlog," *The Globe and Mail* (November 19, 1981), CL9.

[105] Canada, *HCD* (May 2, 1983), 25048. Under this arrangement, a member of the RSAC sat in on the interview conducted by the SIO, held a separate discussion with the claimant, and then wrote a report to be used at the Committee stage.
[106] This was certainly the conclusion of Ed Ratushny (who was appointed in 1983 to study the inland system; see below), as well as MP Dan Heap (Spadina), who reported to the House on the general success of the project in reducing processing times; see Canada, *HCD* (March 16, 1984), 2200. Furthermore, RSAC Chair Joe Stern told the Standing Committee that the cost impact had probably not been very significant, with increased expenditures being roughly balanced by savings; see Canada, *Proceedings of the Standing Committee on Labour, Employment and Immigration* [hereafter *SCLEI*] (1984-1986), No. 11, 17. For her part, RSAC member Susan Davis went on record as finding that the oral hearings improved the determination of credibility; see Barbara Fryer, "New oral hearings offer clearer view of refugees' status," *The Globe and Mail* (December 5, 1983), 8.
[107] Canada, *HCD* (March 16, 1984), 2199.
[108] *Ibid.* Heap introduced a similar bill the following year; see Canada, *HCD* (April 23, 1985), 4039-46.
[109] Ed Ratushny, *A New Refugee Status Determination Process For Canada* (Ottawa, 1984), x. Indeed, he said that it was "difficult to envision a process which could be more wasteful of time, resources and good-will than that which presently exists." (59)
[110] For example, while the use of a Special Review Committee within the Department to evaluate all rejected claims on more general humanitarian and compassionate grounds was an admirable practice, Ratushny observed, it nonetheless resulted in people making refugee claims not because they met the *Convention* definition but because they hoped to be granted landing under this alternative standard.
[111] "[T]he highest of procedural standards may not be effective in avoiding injustice where the decision-maker is uninformed, ignorant, impatient, arrogant or foolish," he cautioned. *Ibid.*, 31.
[112] *Ibid.* Indeed, Ratushny spoke of "a now apparently well-established consensus that oral hearings should form an essential feature of a new refugee-determination process." (22)
[113] *Ibid.,* 28.
[114] In order to ensure that the inland process did not undermine Canadian control policies, Ratushny suggested that enforcement proceedings could be carried out in tandem, as long as the former was assigned a clear priority.
[115] *Ibid.,* 21.
[116] While observers generally held that Axworthy had made a personal commitment to improve Canadian immigration and refugee policies, there was much less confidence in Roberts. In the eyes of some, both inside and outside of Parliament, he was more concerned during his tenure as Immigration Minister with his (ultimately failed) bid to assume the leadership of the Liberal Party.
[117] W. Gunther Plaut, *Refugee Determination in Canada: Proposals For A New System* (Ottawa, 1985), 4.
[118] *Ibid.*, 17. The inland process must, therefore, "be forever responsive to our humanitarian impulses and obligations and wary of any encroachment that would seek to impose other considerations and concerns upon it."
[119] Plaut took some time to discuss the doctrine of procedural fairness as it had developed in Canada, laying out its basic features and relating them to refugee determination. See *ibid.*, 48-53.
[120] Aside from reiterating the basic point that the system at present encouraged abuse and created backlogs, Plaut emphasized the negative effects that it had on genuine refugee claimants: "Even as justice delayed often amounts to justice denied, so a refugee determination process delayed exacts its toll of human suffering." *Ibid.*, 11.
[121] The previous summer, Plaut had predicted that legislative changes might come as early as the beginning of 1985 and that they would incorporate an oral hearing. See CP, "Immigration changes possible next year," *The Halifax Chronicle Herald* (July 4, 1984), 22.
[122] There had previously been numerous efforts to get the Federal and Supreme Courts to consider the question of oral hearings, but, due to its limited jurisdiction, "Appeals to the Federal Court were invariably fruitless and the Supreme Court routinely refused every month to even consider such cases." Peter Calamai, "Would-be refugees must get a fair hearing, top court rules," *The Montreal Gazette* (April 6, 1985), A8. This changed after the *Charter* argument was introduced in February 1984.
[123] *Singh v. Minister of Employment and Immigration* (1985), [1985] 1 S.C.R. [hereafter *Singh*], 179. "[W]here a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing." (214) It is interesting to note that neither side contested either that the scope of the *Charter* reached non-citizens in Canada or what constituted procedural fairness in Canada.
[124] Peter Calamai, "Top court to rule on fairness of refugee law," *The Montreal Gazette* (May 3, 1984), B8. The reporter felt that "It was obvious that most of the judges were hearing for the first time about the Kafkaesque immigration procedures." In response to the government's claim, Justice Bertha Wilson wrote that "'security of the

person' must encompass freedom from the threat of physical punishment or suffering as well as freedom from such punishment itself." *Singh*, 207.

[125] "Certainly the guarantees of the Charter would be illusory if they could be ignored because it was administratively convenient to do so. No doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice but such an argument … misses the point of the exercise under s.1." *Ibid.*, 218-19.

[126] It was, Dan Heap would later recall, "stunned at being invaded by the forces of justice." Canada, *HCD* (September 28, 1987), 9402. In contrast, IAB Chair Michelle Fallardeau-Ramsay had warned in early 1985 of the need to be prepared for the possibility of a government defeat in *Singh*; see Canada, *SCLEI* (1984-1986), No. 10, 13. Lawyer Barbara Jackman stated that while the case had been argued before the Supreme Court some 11 months prior to the decision, officials "have done nothing, as far as I know, to anticipate and deal with the problem that would be created by the loss of that appeal … It is not that they have been blind to the problems. They have been told all along." Canada, *SCLEI* (1984-1986), No. 22, 12. In the summer of 1984, Plaut had anticipated that "The Supreme Court decision, if it says oral hearings must be held, isn't going to come as a shocking surprise to anybody because there seems to be general agreement that at one point or another the person who claims refugee status must be able to put forth his argument and also hear the objections." Quoted in CP, "Immigration changes possible next year," *The Halifax Chronicle Herald* (July 4, 1984), 22.

[127] For example, in a 1983 op-ed piece Lloyd Axworthy had written that people were "simply taking advantage of Canada's liberal claim procedure, buying time through appeals." See his "Refugee rules need tightening to help 'truly needy,'" *The Montreal Gazette* (May 9, 1983), B3.

[128] Thus, Roberts declared in 1984: "Canada is primarily a country of refugee resettlement rather than first asylum." Canada, *SCLMI (1983-1984)*, No. 5, 6.

[129] Canada, *Minutes and Evidence of the Legislative Committee on Bill C-55 An Act to amend the Immigration Act, 1976 and to amend other Acts in consequence thereof* [hereafter *LC C-55*] (1987), No. 2, 32.

[130] As lawyer David Matas observed: "It is a lot harder for a person simply to assert or establish that he or she is a refugee abroad. There is no oral hearing, there is no right to counsel, there is no right to interpreter, there is no right to make a claim, there is no right to reasons, there is no independent decision-making… If you look at the profile of people who have come from abroad, they are … the young rather than the old, the skilled rather than the unskilled, the healthy rather than the ill." Canada, *LC C-55* (1987), No. 8, 101-02.

[131] Canada, *SCLEI* (1984-1986), No. 26, 25.

[132] Canada, *SCLMI* (1983-1984), No. 5, 68.

[133] Quoted in Charlotte Montgomery, "Rights abuse cited in immigration law changes," *The Globe and Mail* (April 13, 1984), 4.

[134] Quoted in Charlotte Montgomery, "New visa rules called threat to refugees," *The Globe and Mail* (March 5, 1984), 8. Indeed, he said later in 1985, "a refugee, like anyone else who is intending to settle in Canada, [should] apply for and receive a visa before coming forward." Canada, *SCLEI* (1984-1986), No. 44, 28.

[135] Michael Schelew, "A plea to open the refugee door," *The Globe and Mail* (April 2, 1984), 7.

[136] "Theoretically they could go to the Canadian Embassy … and ask for a visa. They could then go home and wait for an answer, but they would also be waiting for the people who threatened them to come and do exactly what they have threatened to do because they were seen to be asking for refugee status in Canada." Dan Heap, in Canada, *HCD* (March 16, 1984), 2200.

[137] The case constitutes the starting point of Reg Whitaker's study of the intersection between Canadian immigration and security policies, *Double Standard: The Secret History of Canadian Immigration* (Toronto: Lester & Orpen Dennys Limited, 1987).

[138] Nick auf der Maur, "Reaction to refugees has depressing tone," *The Montreal Gazette* (August 20, 1986), A2.

[139] According to lawyer Mendel Green, "the roots for much of the motivation to abuse in the refugee determination process may be found in the inadequacies of our general immigration law in relation to family reunification and sponsorship." Canada, *SCLEI* (1984-1986), No. 38, 31. In a report on the backlog, the Standing Committee supported this view as a partial explanation for the problem of abuse: "It is interesting to note," the Committee wrote, "that the increase in refugee claims is in some ways a mirror image of the decline in planned intake levels announced by a succession of Ministers between 1980 and 1984." Canada, *SCLEI* (1984-1986), No. 50, 4.

[140] The numerous problems surrounding this programme have been documented in Victor Malarek, *Haven's Gate: Canada's Immigration Fiasco* (Toronto: Macmillan of Canada, 1987), Chapter 13, and Trevor Harrison, "Class, Citizenship, and Global Migration: The Case of the Canadian Business Immigration Program, 1978-1992," *Canadian Public Policy*, Vol. 22, No. 1 (March 1996), 7-23.

[141] Charles M. Campbell, "Canada's refugee door off hinges," *The Globe and Mail* (July 17, 1985), 7.
[142] Victor Malarek, "20,000 refugees get chance to stay," *The Globe and Mail* (May 25, 1985), 1, 2.
[143] Parliamentary Secretary (Fisheries and Oceans) Mel Gass, in Canada, *HCD* (June 6, 1985), 5515.
[144] Junior Immigration Minister Walter McLean, in Canada, *HCD* (September 25, 1985), 7039. McLean was brought on board to assist MacDonald in August 1985 when it had become clear that she already had too much work managing the employment side of her portfolio. The government introduced the bill in June as Parliament was set to rise for the summer, hoping for quick passage, but the Opposition refused to cooperate because the proposed legislation would have reduced the number of persons involved in IAB refugee hearings from three to one; the Conservatives later removed this provision while blaming the Opposition for obstructing its efforts. Dan Heap, however, maintained that such a radical change would have meant that "Refugee hearings would have been run through the system like sausages through a sausage machine." Canada, *HCD* (September 27, 1985), 7108.
[145] Canada, *HCD* (September 25, 1985), 7039.
[146] *Ibid.*, 7041.
[147] *Ibid.*, 7077.
[148] As Rivka Augenfeld of Le Table de concertation des organismes au service des personnes réfugiées et immigrantes put it: "If the present [IAB] system is reputed to be unfair to claimants, why expand it in the meantime in order to process a greater number of claims?" Canada, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-55 An Act to amend the Immigration Act, 1976* (1985), No 2, 8. In early 1986, the IAB came in for further criticism after it was alleged that it routinely engaged in a variety of practices that denied those before it a fair trial.
[149] As Warren Allmand (Notre-Dame-de-Grâce) noted, "what appears to have happened is that the bill having been presented in June and the original objections having been made by many refugee groups, now the government seems to be changing its justification for the bill." *Ibid.*, No. 4, 24.
[150] *Ibid.*, 7.
[151] At the time, the biggest concern was that the government would seek to use the enlarged IAB system to reduce the backlog on the sly: "It appears to many people on the outside that, by approving Bill C-55, there is an act of bad faith going on, that there will be attempts to use the facility to push people through the process." George Cram, in *ibid.*, No. 1, 43.
[152] Canada, *HCD* (February 25, 1986), 10923.
[153] Most prominently, the Committee advocated an "unqualified right" for people to make a refugee claim that would be determined through an oral hearing in a non-adversarial setting before two members of an independent board, with any split decision falling in the claimant's favour. Canada, *SCLEI* (1984-1986), No. 46, 15. While there was some disagreement over the type of appeal that should be made available, all parties felt that the grounds should be broad, even if they recommended different institutional mechanisms.
[154] The Standing Committee would again reach all-party consensus in December 1986, when it met with various non-state actors to shape an alternative recommendation to Cabinet than that which was about to be submitted by the Department through the Minister; this, too, was rejected, as the resultant legislation introduced in 1987 shows.
[155] As three immigration lawyers put it: "It seems odd that responsible senior officials have not been able to draft a new law when they have had years to work on it. It appears that these officials do not want any changes yet. They have allowed, even encouraged, a crisis to develop in order to be able to restrict refugees from seeking protection in Canada. What better way of convincing the public and politicians that we must not allow refugees to claim protection in Canada than by pointing to thousands of supposedly bogus refugee claimants who have come to Canada without prior screening, are using our health and social services, and are clogging up our claims process?" Barbara Jackman, Hart Schwartz, Terri Jackman, "Ottawa treating 20,000 refugees inhumanely," *The Toronto Star* (February 15, 1986), A13. Certainly, Ratushny and Plaut agreed that changes could be implemented readily enough if the will was present. Ratushny cautioned, however, that "one big difficulty has been an inertia on the part of immigration officials," whom he suspected of preferring that the system remain more firmly under their control. Quoted in CP, "Immigration changes possible next year," *The Halifax Chronicle Herald* (July 4, 1984), 22.
[156] RSAC Chair Joe Stern, quoted in Victor Malarek, "Phony 'refugee' applicants flooding immigration offices," *The Globe and Mail* (January 7, 1986), A2. For more details, see Victor Malarek, *Haven's Gate: Canada's Immigration Fiasco* (Toronto: Macmillan of Canada, 1987), Chapter 9.
[157] Walter McLean, quoted in Victor Malarek, "Immigration to begin tracking phony refugee claimants," *The Globe and Mail* (January 8, 1986), A15.
[158] Quoted in Elaine Carey, "Refugees exploiting cracks in the system," *The Toronto Star* (May 19, 1986), A1.

[159] Barbara Jackman noted that all three major parties were opposed to the imposition of a visa, a position, she felt, that was based purely on partisan interests in attracting votes from the Portuguese community in Canada. Victor Malarek, "Ottawa won't act on Portuguese visas," *The Globe and Mail* (July 15, 1986), A8. It was also pointed out that Canada had imposed a visa restriction on visitors from the Dominican Republic the previous November after only 300 nationals of that country had claimed refugee status.

[160] David Matas, quoted in Victor Malarek, "Refugee work-permit curb announced," *The Globe and Mail* (July 17, 1986), A8. A similar point was made by Barbara Jackman in support of her claim that the Department was blocking new legislation in an effort to convince the government of the need for more restrictive measures: "The longer we're left with (the current) inefficient and unfair system, the more abuse there is of that system. And the more abuse there is, the stronger the department's position in terms of trying to convince politicians that the (proposed) new system should be very restrictive." Quoted in Victor Malarek, "Immigration officials blocking legislation, lawyer urges," *The Globe and Mail* (December 4, 1986), A21.

[161] Claimants from countries to which Canada did not deport people were to be given Minister's Permits and taken out of the processing stream, while all others were to be put through the regular process. The intention, according to one immigration official, was "to present a visible and much quicker determination process that would send a signal to economic migrants that they would have little to gain by attempting to remain in Canada by" claiming refugee status. Immigration Department Project Leader D. Hall, in Canada, *SCLEI* (1986-1988), No. 15, 28.

[162] Victor Malarek, "Ottawa suspects plot to sabotage refugee-aid plan," *The Globe and Mail* (June 12, 1986), A1, 2. A similar complaint was made by Sergio Marchi (York West) in the House: "After months of delay why did the Minister one month ago put forward his program for clearing the backlog of 21,000 refugee claimants without having regulations prepared to guide claimants, their lawyers, and most important, the immigration officers, and without yet having hired the new staff which he promised five weeks ago to handle this great new load of applications and examinations?" Canada, *HCD* (June 26, 1986), 14906-07.

[163] For example, the government sent out thousands of letters advising known illegal immigrants that they could apply in Canada as refugees, including several who had criminal records. Joel Ruimy, "Refugee letter to criminals 'dangerous,' MP says," *The Toronto Star* (June 9, 1986), A8.

[164] Canada, *HCD* (May 21, 1986), 13483.

[165] See, in particular, his vague replies before the Standing Committee, in Canada, *SCELI* (1984-1986), No. 68.

[166] As Marchi would later state: If the board was to have "the integrity, the knowledge, the expertise and the structure to make a fair, effective decision," then why not let it do the job? Canada, *HCD* (September 21, 1987), 9120.

[167] Quoted in Susan Semenak, "Citizenship plan to aid thousands of city refugees," *The Montreal Gazette* (May 22, 1986), A3.

[168] "And it is not," he continued, "the presence of 155 frightened human beings searching for freedom and opportunity that is going to undermine Canada's immigration policy." Joe O'Donnell, "Show compassion for Tamil refugees, Mulroney urges," *The Toronto Star* (August 18, 1986), A1, 4.

[169] "The 152 [sic] Sri Lankan refugees could be 'the tip of the iceberg' – opening up the door to a flood of Third World castaways seeking entry to Canada by turning up on our shores, Immigration Minister Benoit Bouchard said." CP, "152 [sic]refugees 'tip of iceberg' – Bouchard," *The Globe and Mail* (August 14, 1986), A1.

[170] Weiner argued that it was more fair to treat claimants on a person-to-person basis rather than to have a blanket ban on deportations on a country-to-country basis; see Kathryn Young, "Minister will push for tougher policy on ousting refugees," *The Globe and Mail* (August 20, 1986), A1, 2.

[171] Quoted in Victor Malarek, "Ottawa acts to stop torrent of refugees," *The Globe and Mail* (February 20, 1987), A2.

[172] Quoted in Alexandra Radkewycz, "Weiner decries attitude of many toward refugee status claimants," *The Globe and Mail* (February 16, 1987), A12.

[173] Plaut weighed in on this issue (as he did right through to the replacement of the RSAC system in 1989), saying: "Shutting our borders may be a quick fix, but it produces no long-range policy that can stand moral scrutiny." See his "Ottawa morally wrong to shut door," *The Globe and Mail* (March 13, 1987), A7.

[174] Moreover, with the anticipated demise of the RSAC when the new system appeared, there was considerable difficulty in securing new staff for the Committee and in keeping on its experienced hands. On the trials and tribulations of that body in the post-May 21 period, see the testimony of RSAC Director of Operations G. Howell, in Canada *SCLEI* (1986-1988), No. 15, 51-62. There was also considerable tension between Joe Stern and Benoit Bouchard, especially after the former stated before the Standing Committee that the latter's policies would invariably turn back genuine refugees.

[175] This would happen in two ways. First, with more people entering into the system there would be greater delays in getting them to the point in the process where they could apply for a work permit; second, those who had previously been given a Minister's Permit if they could not be deported due to civil unrest in their home countries (which also allowed them to obtain a work permit) would no longer have that option. By the end of 1988, some 50,000 claimants could not get work permits.
[176] Quoted in Graham Fraser, "New rules to curb refugees called 'turning back clock,'" *The Globe and Mail* (February 21, 1987), A4.
[177] "There is a lot of understanding and sympathy for a government that, once and for all, is declaring clearly that it will protect those in need of protection." Canada, *HCD* (May 12, 1987), 5996. "Let none of us who is privileged to sit in this Chamber ever forget that it is the people of Canada, not we ourselves, who have built the great traditions of humanity which we all honour and in which we all take pride." Canada, *HCD* (June 18, 1987), 7331. In interviews leading up to the bill's introduction Bouchard had suggested that it would have to be restrictive due to the growing public backlash. This argument drew a sharp response from Barbara Jackman: "So it's not a system based on justice, it's a system based on what he perceives to be racism in Canadian society." Quoted in Graham Fraser, "Restrictions on refugee entry, appeals feared," *The Globe and Mail* (January 7, 1987), A3.
[178] Canada, *HCD* (June 18, 1987), 7331. He subsequently repeated this plea before the Standing Committee as well as at a major meeting of non-state actors concerned with Canadian refugee policies.
[179] Canada, *HCD* (May 12, 1987), 5996.
[180] *Ibid.*, 6000.
[181] Canada, *HCD* (June 18, 1987), 7330.
[182] *Ibid.*, 7342. Similarly, David Berger (Laurier) argued: "The Minister tells us to have faith in him because he is a good guy. I remind him that the basis of protection is in law, not in speeches of the Minister. We cannot pass a law on the basis of the Minister's good intentions. We have to study, judge and pass a law on the basis of the very clear language in which it is written." (7358)
[183] *Ibid.*, 7333.
[184] David Berger, in *ibid.*, 7357.
[185] Linda Diebel, "Asians test Tory refugee policy," *The Montreal Gazette* (July 18, 1987), B1.
[186] *Ibid.* On the various hurdles that counsel for the claimants faced, see Olivia Ward, "Treatment of migrants breaks law, lawyers say," *The Toronto Star* (July 18, 1987), B4.
[187] Olivia Ward, "Handling of East Indian migrants called case of bureaucratic bungling," *The Toronto Star* (July 27, 1987), B5.
[188] Martin Cohn, "MPs to be recalled over refugee threat," *The Toronto Star* (July 31, 1987), A14.
[189] Thus, Michael Cassidy (Ottawa Centre) asked: "To what extent is Parliament meeting right now because it is in the needs or interests of the Conservative Party, a Party which is desperate to find some way to get back into the good graces of Canadians, or to what extent is there a genuine emergency at this time?" Canada, *HCD* (August 11, 1987), 7924.
[190] Vic Althouse (Humboldt-Lake Centre), in Canada, *HCD* (September 10, 1987), 8809.
[191] Canada, *HCD* (August 11, 1987), 7964.
[192] Canada, *HCD* (August 14, 1987), 8086.
[193] The UNHCR itself wrote to Bouchard to express its concerns that genuine refugees could be turned back were this provision on the statute books; see Joel Ruimy, "Refugee bill endangers lives, U.N. says," *The Toronto Star* (August 15, 1987), A1, 4. The UNHCR had also raised concerns with respect to C-55.
[194] Canada, *LC C-55* (1987), No. 2, 58.
[195] Canada, *HCD* (August 11, 1987), 7911.
[196] Canada, *HCD* (August 12, 1987), 8000.
[197] Bouchard, in *ibid.*, 7989. Canada had to get tough, Weiner argued, lest Canadians riot in the streets in protest; see CP, "Tougher laws on refugees are essential minister says," *The Toronto Star* (December 3, 1987), A12.
[198] Canada, *HCD* (August 11, 1987), 7912.
[199] The remarks of Gordon Taylor (Bow River) – "Canadian sovereignty has been abused and the Canadian nation literally raped by foreigners arriving in our land, unannounced, and immediately demanding the rights accorded to Canadian citizens," *Ibid.*, 7973 – were, although some of the most extreme, not wholly atypical of the approach taken by Conservative backbenchers in this debate.
[200] Canada, *HCD* (September 20, 1987), 9109. His about-face did leave some with cause for wonder; for example, Don Boudria commented "I want to congratulate the Hon. Member from Calgary West for the views he held when

[the Standing Committee report on the inland process] was tabled in the House some time ago. I cannot help but wonder what caused him to change his mind and his convictions." Canada, *HCD* (September 21, 1987), 9151.

[201] Canada, *HCD* (August 13, 1987), 8047. He eventually abstained when the bills came up for a vote; another Conservative MP, David Kilgour (Edmonton-Strathcona), absented himself from the House rather than have to vote on C-84.

[202] In contrast to the standard government line, it was not only Liberal Senators who disliked the bills, for many Conservatives had their qualms as well; see John Douglas, "Senators face heavy pressure to break ranks," *The Winnipeg Free Press* (September 21, 1987), 8.

[203] Quoted in Victor Malarek, "Processing refugee claims shut down due to backlog," *The Globe and Mail* (September 10, 1988), A1.

[204] "For God's sake," Marchi fumed, "four years after (taking power), the backlog has multiplied seven times and they're still considering options." Quoted in Joan Bryden, "McDougall stonewalls on refugee questions," *The Toronto Star* (December 15, 1988), A7. Another special administrative review to clear the backlog was announced at the end of December.

[205] Richard Grisé (Chambly), in Canada, *HCD* (August 11, 1987), 7920.

[206] Parliamentary Secretary (Immigration) Benno Friesen, in Canada, *HCD* (June 10, 1988), 16345.

[207] Office of the Auditor General, *Report of the Auditor General of Canada: Fiscal Year Ending 31 March 1990* (Ottawa, 1990), Chapter 14.

[208] Dan Heap, in Canada, *HCD* (September 28, 1987), 9401.

[209] Canada, *LC C-55* (1987), No. 4, 8.

[210] Barbara Jackman, in Canada, *SCLEI* (1984-1986), No. 22, 27-28.

[211] Christian Joppke, "Why Liberal States Accept Unwanted Immigration," *World Politics*, Vol. 50, No. 2 (January 1998), 292.

[212] Christian Joppke, *Immigration and the Nation-State: The United States, Germany, and Great Britain* (Oxford: Oxford University Press, 1999), vii.

[213] James C. Hathaway, "Commentary: Three Critical Questions about the Study of Immigration Control," in W.A. Cornelius, P.L. Martin and J.F. Hollifield (eds.), *Controlling Immigration: A Global Perspective* (Stanford: Stanford University Press, 1994), 49; a similar observation is made by Rogers Brubaker, "Commentary: Are Immigration Control Efforts Really Failing?" in *ibid.*, 230.

[214] Rudd Lubbers, "After September 11: New Challenges to Refugee Protection," in United States Committee for Refugees, *World Refugee Survey 2003* (New York, 2004), 30-31.