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## The Constitution and Immigration: The Impact of the Proposed Changes to the Immigration Power Under The Constitution Act, 1867

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## I. Introduction

In the fall of 1991, the federal government of Prime Minister Brian Mulroney put forward to the nation a set of constitutional proposals (the "proposals") on reforming the Constitution.<sup>1</sup> Apart from the Keith Spicer Commission, the proposals were the first major initiative on constitutional reform since the failure of the *Meech Lake Accord*<sup>2</sup> in 1990. The suggested areas of reform included the *Canadian Charter of Rights and Freedoms*<sup>3</sup> ("the Charter"), property rights, the notwithstanding clause, Quebec's distinctiveness, aboriginal self-government, the Senate, appointing justices to the Supreme Court of Canada, the formula for amending the Constitution, inter-provincial trade barriers, the Bank of Canada, and several others. Immigration was dealt with as part of the economic union. Although the proposals on immigration have not attracted much attention, their probable effect would be profound. The objective of the government in this respect was set out as follows:

While recognising the federal role in setting Canadian policy and national objectives with respect to immigration, the Government of Canada is prepared to negotiate with any province agreements appropriate to the circumstances of that province and to constitutionalize those agreements.<sup>4</sup>

This principle is similar to the one that underlay the *Meech Lake Accord* on the issue of reforming the immigration power under the Constitution. In *Meech Lake* as well, specific legal language embodying the principle was provided. The section on "agreements on immigration and aliens"

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1. *Shaping Canada's Future Together* (Ottawa: Minister of Supply and Services Canada, 1991).

2. *1987 Constitutional Accord*, concluded following meetings of the First Ministers on the Constitution, April 30, and June 3, 1987, and the Schedule thereto, being suggested amendments to the *Constitution Act, 1867*. Annotated and reproduced Hogg, *Meech Lake Constitutional Accord Annotated*, (Toronto: Carswell, 1988).

3. *Constitution Act, 1982*, Part I.

4. *Supra*, note 1, at p. 57.

would commit the government to negotiate immigration agreements with the provinces upon request. The negotiated agreements could be proclaimed as law if there were resolutions to that effect from the Senate, the House of Commons and the legislature of the province in question. Once proclaimed as law, they would be governed by the *Charter*.<sup>5</sup>

The *Report of the Special Joint Committee of the Senate and the House of Commons on a Renewed Canada*, (the “Beaudoin-Dobbie Report”),<sup>6</sup> contains recommendations that are identical to those that had been advanced in *Meech Lake*. The Committee was set up as part of the proposals. Its report recommends amending the *Constitution Act, 1867* to include the following changes relating to agreements on immigration and aliens:

95B. The Government of Canada shall, at the request of any province, negotiate with the government of that province for the purpose of concluding an agreement relating to immigration or the temporary admission of aliens into that province that is appropriate to the needs and circumstances of that province.

95C. (1) Any agreement concluded between Canada and a province in relation to immigration or the temporary admission of aliens into that province has the force of law from the time it is declared to do so in accordance with subsection 95D (1) and shall from that time have effect notwithstanding class 25 of section 91 or section 95.

(2) An agreement that has the force of law under subsection (1) shall have effect only so long as it is not repugnant to any provision of an Act of the Parliament of Canada that sets national standards and objectives relating to immigration or aliens, including any provision that establishes general classes of immigration or relates to levels of immigration for Canada or that prescribes classes of individuals who are inadmissible to Canada.

(3) The *Canadian Charter of Rights and Freedoms* applies in respect of any agreement that has the force of law under section (1) and in respect of anything done by the Parliament of Canada or Government of Canada, or the legislature or government of a province pursuant to any such agreement.

95D (1) A declaration that an agreement referred to in sub-section 95C(1) has the force of law may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorised by resolutions of the Senate and House of Commons and of the legislative assembly of the province that is a party to the agreement.

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5. As to the text of the *Meech Lake* legal language, see Hogg, *supra*, note 2, at pp.21-22. *Meech Lake* as well committed the federal government to the negotiation of an agreement with Quebec in anticipation of the amendments to the Constitution.

6. *Report of the Special Joint Committee of the Senate and the House of Commons* (Ottawa: Queen's Printer, February, 1992). The Committee was struck in June 1991 to inquire into and make recommendations to Parliament on the government proposals for a renewed Canada. *Proceedings of House of Commons*, June 19, 1991.

(2) An amendment to an agreement referred to in sub-section 95C(1) may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorised:

(a) by resolutions of the Senate and House of Commons and of the legislative assembly of the province that is a party to the agreement.

(b) in such other manner as is set out in the agreement.

95E. Sections 46 to 48 of the *Constitution Act, 1982* apply, with such modifications as the circumstances require, in respect of any declaration made pursuant to sub-section 95D(1), any amendment to an agreement made pursuant to sub-section 95D(2).<sup>7</sup>

This article examines the impact that the suggested changes would have on the immigration power as presently set forth in sections 95 and 91(25) of the *Constitution Act, 1867*, and on Canadian immigration policy generally. First, it discusses how the present immigration power is allocated as between the federal government and the provinces, how it has been exercised or attempted to be exercised by the two levels of government and how it has evolved and been interpreted by the Courts. Secondly, it looks at the problems that could arise as a result of the federal government transferring some of its immigration power to the provinces and as a result of the diminution of the paramountcy of federal over provincial legislation in the area of immigration policy. Since the suggestion first appeared in Meech Lake, fears have been expressed, especially by immigrant organisations, that decentralisation of immigration policy might result in balkanized immigrant services and the provision of adaptation and settlement services that have provincial, as opposed to national, outlooks.<sup>8</sup> This article examines these fears. In looking at how the immigration power under the Constitution has been exercised by the provinces, I examine the experience of immigrants of colour during the period prior to the First World War, to see how the provinces behaved and to predict how they might behave if and when immigration power is ceded to them in a complete or even substantial way.

Pre-First World War is significant because this is the time when some of the provinces attempted to play an activist role in the area of immigration. It is also important because it was mostly during this period that the present immigration power evolved by way of judicial analysis and construction.

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7. *Supra*, note 6, at pp. 80-81 and 118-120.

8. On the effect of the *Meech Lake* proposals on immigration, see Kruhalk, "Constitutional Reform and Immigration," in Gibbins, et al., eds., *Meech Lake and Canada: Perspectives from the West* (Edmonton: Academic Printing and Publishing, 1988), p. 201.

As the proposals and the Beaudoin-Dobbie Report would make agreements a major feature of the federal-provincial immigration scene, I further examine those agreements that have been concluded between the federal government and at least seven of the provinces, since the 1970s. Quebec has been the forerunner and trail-blazer in negotiating the modern agreements. I therefore attempt to draw lessons from the Quebec experience and to prognosticate how arming other provinces with similar agreements may affect the existing balance of federal-provincial immigration power; how it might affect immigration policy generally; and how it might affect the nature and quality of the adaptation and settlement services dispensed to immigrants across Canada.

My position is that it is not necessary to amend the immigration power under the Constitution to achieve increased provincial participation in immigration. Indeed, amending the Constitution is no guarantee that the provinces would be out looking to negotiate agreements. If they so wished, provinces could become more involved under the frame work of the existing *Immigration Act, 1976*.<sup>9</sup> It is also my position that a constitutionalized amending process would be a rigid system and is not desirable in immigration matters.

It is my further position that the federal government should not cede most of its immigration power to the provinces by agreement whether negotiated under the Act or an amended Constitution. I argue that a balance be struck whereby the provinces could become more active than they have been hitherto without totally subsuming the role of the federal government. This argument is based on the fear of compromising national objectives and standards in the absence of an effective monitoring system. It is also based on the view that as seen from the experience at the turn of this century when those provinces that attempted to legislate in the area of immigration did so for reasons of racial prejudice, a substantial transfer of the administration and enforcement of immigration laws would create ten different systems which would have the potential of impacting very adversely on Third World and visible minority immigrants.

## II. *The Present Immigration Power Under the Constitution*

Contemporary immigration power is grounded in the provisions of sections 95, 91(25) and 91(11) of the *Constitution Act, 1867*. Section 95 is the basis for both the federal government and provinces having power to legislate concurrently in the area of immigration, as will be seen below.

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9. R.S.C. 1985, c. I-2 as amended. Originally enacted as S.C. 1976-77, c. 52. Proclaimed into force April 1978. (hereafter "*Immigration Act, 1976*").

On the other hand, under section 91(25), the power to legislate with respect to "naturalization and aliens", is allocated to Parliament exclusively. The latter section has, however, been interpreted in such a way as to uphold provincial legislation that is within the competence of the legislatures even if it may incidentally affect aliens. Section 91(25) has also been interpreted as to affirm that only Parliament may legislate with respect to aliens and with respect to the requirements for naturalisation. I shall revert to a full discussion of each of these sections below. Suffice it to say that the basis of Parliament legislating with respect to health and medical standards for immigrants and aliens, is section 91(11) of the *Constitution Act, 1867*,<sup>10</sup> which authorizes Parliament to legislate with respect to quarantine and the establishment and maintenance of marine hospitals.

### *Power to Legislate Pursuant to Section 95*

Under section 95, the federal government and the provinces have concurrent power to legislate with respect to agriculture and immigration.<sup>11</sup> Section 95 which grants this power provides as follows:

In each Province the Legislature may make Laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time make Laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any act of the Parliament of Canada.

There are three features to this section that should be discussed. The first one is that any provincial legislature may make laws in relation to immigration into that province. The second one is that Parliament may make laws in relation to immigration into all or any of the provinces. The third one is that federal legislation is categorically expressed to be paramount over provincial legislation. In the event of a conflict between a federal and a provincial law, the latter will be rendered inoperative. It

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10. McKall, "Constitutional Jurisdiction Over Public Health" (1975), 6 Man. L.J. 317.

11. All earlier immigration legislations on the part of the federal government and the provinces carefully and expressly recited this fact. See the preambles to both the *Immigration Act, 1869* and the *Immigration Act, 1872*. S.C. 1869, c. 10 and S.C. 1872, c. 27, respectively. Many of the Immigration Acts that British Columbia attempted to enact also alluded to this fact. The modern agreements signed by the federal government and some of the provinces also make this point.

is subordinate to Parliament.<sup>12</sup> A doctrine of repugnancy and paramountcy of federal over provincial legislation is thus specifically embodied in the section. Section 95 is the only section in the *Constitution Act, 1867* which at Confederation gave explicit concurrent power to both Parliament and the legislatures,<sup>13</sup> and at the same time articulated a repugnancy clause. The concurrence applies to both immigration and agriculture. As stated above, section 95 of the *Constitution Act, 1867* gave the power to legislate with respect to immigration matters to both Parliament and the legislatures. In exercise of this power, Parliament enacted the *Immigration Act, 1869*<sup>14</sup> as amended by the *Immigration Act, 1872*,<sup>15</sup> which are the forerunners to the present legislation. However, with the exception of British Columbia at the turn of the century, and Quebec since 1968, no other provinces have attempted to pass an immigration statute, even though Nova Scotia and Lower Canada (Quebec) had pre-Confederation immigration laws.<sup>16</sup> On the whole, the provinces have not been enthusiastic legislators in the area of immigration.

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12. See *In re Narain Singh et al.* (1908), 13 B.C.R. 477; *R v. Narain* (1908), 8 W.L.R. 790 (B.C.S.C.). The Court struck down a British Columbia Act on the ground that under the constitutional doctrine of paramountcy, the field it sought to cover, had already been occupied by Parliament. This doctrine was best articulated by the Privy Council, in *Attorney-General for Canada v. Attorney-General for British Columbia*, [1930] A.C. 111 (P.C.), at p.118:

“There can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires* if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail”.

13. In 1951, s. 94A respecting old age pension as revised in 1964, was added. In 1982, ss. 92A(2) and 92A(3) regarding natural resources, were added. The power conferred on the provinces by this section is concurrent with the federal power over trade and commerce. Ss. 92(2) and 92A(4) respecting taxation are also concurrent with the federal power under S. 91(3) even though this concurrence is not explicit.

14. S.C. 1869, c. 10.

15. *An Act to Amend the Immigration Act of 1869*, S.C. 1878, c. 28. First enacted as 1872, 35 Vic., c. 27.

16. Lower Canada had a statute known as *An Act Respecting Aliens, 1794*, and the Province of Nova Scotia had a statute known as *An Act Respecting Aliens Coming into This Province, or Residing Therein, 1798*, George III, c. 1 (N. S.). The Nova Scotia Act required aliens to be in possession of residence permits. Violators were liable to imprisonment and deportation if convicted. Nova Scotia as well had a statute known as *An Act to Prevent the Clandestine Landing of Liberated Slaves, and Other Persons Therein Mentioned, From Vessels Arriving in This Province*, S.N.S. 1834, c. 68, whose objective was to accomplish exactly what its title said.

Between 1871 and 1908, British Columbia enacted several immigration and immigration related statutes.<sup>17</sup> Unfortunately, the real motive behind British Columbia's legislative initiative was racism, bigotry and anti-Chinese sentiment and prejudice as opposed to being a desire to exercise legislative power under section 95. Even though most of the legislation was either disallowed by the federal government or invalidated by the Courts,<sup>18</sup> the invalidation was never based on the fact that the legislation was racist and discriminatory, but, in several instances, on grounds of lack of constitutional jurisdiction to pass the legislation. In the process, the Courts carried out an extensive analysis of section 91(25) of the *Constitution Act, 1867* and in a limited way attempted to define the scope of section 95.

One of the first cases to deal with the issues was *R. v. Narain*.<sup>19</sup> It involved determination of the validity of the so called "literacy test". These were tests that had been established by the provincial government pursuant to the *British Columbia Immigration Act, 1908*.<sup>20</sup> They made it unlawful for any one who could not read or write in the English or some other European language to immigrate to British Columbia. The constitutionality of the Act was put in issue on the ground that Parliament had already occupied the field. Under the federal *Immigration Act, 1906*<sup>21</sup> the Governor-in-Council had power to establish such a test although none had been established. The Province took the position that as there were no federal "literacy criteria", its Act establishing the tests was valid. The

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17. The attempts by British Columbia to legislate in immigration and related areas included: *The Labour Regulation Act, 1898*, S.B.C. 1898, c. 28; *British Columbia Immigration Act, 1900*, S.B.C. 1900, c. 11; *British Columbia Immigration Act, 1902*, S.B.C. 1902, c. 34; *British Columbia Immigration Act, 1903*, S.B.C. 1903, c. 12; *British Columbia Immigration Act, 1904*, S.B.C. 1903-4, c. 26; *British Columbia Immigration Act, 1905*, S.B.C. 1905, c. 28; *British Columbia Immigration Act, 1908*, S.B.C. 1908, c. 23.

18. For a list of the British Columbia statutes that were disallowed by the Governor-General, see La Forest, *Disallowance and Reservation of Provincial Legislation* (Dep. of Justice: 1955).

19. *Supra*, note 12.

20. *British Columbia Immigration Act, 1908*, S.B.C. 1908 c. 23. Section 4 of the Act provided as follows:

"The immigration into British Columbia of any person who, when asked to do so by the officer appointed under this Act, shall fail himself to write out and sign, in the English language, or any language of Europe, an application ... as well as read in English, or any language of Europe, any test submitted to him by the officer appointed under this Act, shall be unlawful."

In *Re Nakane and Re Okasake*, [1908] 8 W.W.R. 19 (B.C.C.A.) the Court held that federal treaty legislation whereby immigrants of Japanese nationality were entitled to enter and reside in any part of Canada without restriction, overrode the *British Columbia Immigration Act, 1908* which imposed literacy tests as a condition for admission.

21. *Immigration Act, 1906*, R.S.C. 1906, c. 93, originally enacted as S.C. 1906, c. 19. The *Immigration Acts* of 1869 and 1872 had been repealed and replaced by this Act.



Supreme Court of British Columbia rejected this view. It established the firm principle that under section 95 of the *Constitution Act, 1867* a provincial legislature could not legislate in an area of immigration where Parliament had already occupied the field. Parliament had occupied the field by virtue of the fact that it could at any time have promulgated such tests. The undoubted effect of this decision was to consolidate the supremacy of Parliament over that of the legislatures, and to discourage the provinces from taking legislative adventures in matters of immigration.

In reality, *Narain* was not about provincial concern with the level of literacy of immigrants crossing the borders of British Columbia. It was concerned about keeping immigrants of non-European origin, especially the Chinese, out of the province. The language test requirements were a vehicle calculated to eliminate Chinese immigrants and other immigrants of colour. It was bound to affect these immigrants more adversely than it would have affected immigrants from Britain and North-Western Europe whom British Columbia preferred. It is significant that the invalidation of the "literacy" legislation by the Supreme Court of British Columbia was based upon narrow constitutional grounds, notwithstanding the obvious and plain racism.<sup>22</sup>

In *Re the Immigration Act and Munshi Singh*,<sup>23</sup> at issue was the authority of Parliament to legislate deportation of a British subject from Canada under section 95. The case had to do with the removal of an East Indian immigrant from Canada. The British Columbia Court of Appeal held that the power to legislate in respect of immigration into Canada had been vested in Parliament. On that basis, it upheld federal regulations which discriminated against immigrants of Asian origin on grounds of race. It also upheld a regulation prohibiting the admission into this country, of persons whose journeys to the Canadian ports of entry had not been "continuous" from the countries of which they were native, on the theory that Parliament had the authority to enact legislation restricting immigration into Canada.<sup>24</sup>

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22. Edward McWhinney has called this "a judicial insensitiveness to racial out-groups and their special problems that almost implies judicially held policies of a ... 'racialist' character". See McWhinney, "Equality Before the Law", in T. Koopmans, ed., *Constitutional Protection of Equality* (Leyden: Sijthoff, 1975), p. 62.

23. (1914), VI W.W.R. 1347 (B.C.C.A.).

24. *Munshi Singh* involved alleged violations of three kinds of Orders-in-Council made pursuant to the *Immigration Act* of the time. Under the first Order (the continuous journey Order), immigrants who had not travelled to Canada by continuous journeys from their countries of origin were prohibited from landing in Canada. Under the second Order, all immigrants of Asiatic race were required to be in possession of money in their own right, in the amount of at least \$ 200.00, a quite large sum at the time. The third Order imposed a ban on skilled or unskilled artisans or labourers from landing in certain ports of Canada including Vancouver.

When one considers the level of technology and means of transportation that existed in 1914, it becomes obvious that only immigrants of European and American origin could have immigrated to Canada without offending the "continuous journey" regulations. It also becomes obvious that this was a racist regulation whose objective was to keep immigrants of non-European origin out of Canada. The *Munshi Singh* Court was not, however, prepared to confront this racism. It was content to simply hold that the regulations were *intra vires* of Parliament by virtue of section 95 of the *Constitution Act, 1867*.

Section 95 has also been used by the Courts to uphold federal legislation that has only had peripheral relevancy to immigration. In *Re The Soldier Settlement Act, In re McManus*,<sup>25</sup> a District Court judge in Saskatchewan upheld the validity of a federal statute dealing with the resettlement of returning veterans of the First World War.<sup>26</sup> The statute had been enacted as a post-war measure to enable the re-settlement of returning war soldiers and to facilitate the colonization of vacant land by these soldiers, and by soldiers from allied countries. The Court argued that the jurisdiction to enact the legislation was to be found in the peace, order and good government clause, and in section 95 of the *Constitution Act, 1867*. By allowing foreign veterans to resettle in Canada, the statute constituted an immigration scheme and was valid under section 95.

There is no provincial immigration Act that has been held valid or operative by virtue of section 95. There have not been many immigration Acts passed by provinces to be tested. One can only surmise that the provinces have refrained from enacting immigration laws for fear they would be ruled inconsistent with, and inoperative by virtue of the paramountcy of, the federal legislation.<sup>27</sup> Although this is not intended to cast doubt, the Quebec legislation<sup>28</sup> has never been tested for inconsistency with the federal immigration Act.

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25. [1939] 4 D.L.R. 759; [1939] 2 W.W.R. 199 (Sask. Dist. Ct.).

26. *The Soldier Settlement Act*, R.S.C. 1927, c. 188.

27. Peter W. Hogg describes the effect of inconsistency as follows:

"Once it has been determined that a federal law is inconsistent with a provincial law, the doctrine of federal paramountcy stipulates that the provincial law must yield to the federal law. The most usual and most accurate way of describing the effect on the provincial law is to say that it is rendered inoperative to the extent of the inconsistency."

Hogg, *Constitutional Law of Canada*, 2nd ed. (Toronto: Carswell, 1985), p. 367.

28. *Immigration Department Act*, R.S.Q. 1977, c. M-16, originally enacted as S.Q. 1968, c. 68.

*The Linking of Immigration and Agriculture in the Constitution*

The grouping together of immigration and agriculture was not an accident. It was dictated by considerations of the political-economy of the day. At Confederation, agriculture was the mainstay of the Canadian economy.<sup>29</sup> Canada was still in the pre-industrial stage and most of the immigrants coming to this country were either farmers or were destined to engage in agricultural activity. Therefore, it was inevitable that immigration policy would be linked to agriculture. The legacy of linking immigration policy to agricultural considerations is the continued linkage of immigration policy to the economy and the labour market conditions. However, while nineteenth century linkage involved agricultural considerations, mostly land resource, as the economy has become an intricate industrial complex, twentieth century linkage is between the skills of the potential immigrant, and the benefit to the economy that the immigrant would bring to Canada. As Wydrynski has written:

A labour and economic orientation has become the standard of success for immigration policy. Its basic aim has become the encouragement of domestic economic stability. To a large extent, immigration has become a legal framework for human resource development to benefit domestic economic considerations.<sup>30</sup>

This trend is not new. It has been developing from the time of the enactment of the first immigration legislation for Canada, the *Immigration Act, 1869*<sup>31</sup> as amended by the *Immigration Act, 1872*.<sup>32</sup> For most of the time in the history of Canada, immigration has fallen under the umbrella of the department or ministry in charge of the human resources needs of the domestic economy. This is what the history of the legislative and administrative frame work of immigration clearly reveals. For almost forty years, from 1869 to 1906, immigration was the responsibility of the Minister of Agriculture.<sup>33</sup> As has been observed, at the time, agriculture was the department in the greatest need of human resources. Between 1906 and 1918, it fell under the ministry of the interior.<sup>34</sup> In 1918, as the

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29. McConnell, *Commentary on the British North America Act* (Toronto: Macmillan of Canada, 1977), p.300:

"In 1867 agriculture was overwhelmingly the occupation of the great majority of Canadians and the concurrence of the agriculture power was inevitable."

30. Wydrynski, *Canadian Immigration Law and Procedure* (Aurora, Ontario: Canadian Law Book, 1983), p. 40.

31. *Supra*, note 14.

32. *Supra*, note 15.

33. See section 15(2) of the *Immigration Act, 1869*, *supra*, note 14, and section 4 of the *Immigration Act, 1872*, *supra*, note 15.

34. S. 2(f), *Immigration Act, 1906*, R.S.C. 1906, c. 93, originally enacted as S.C. 1906, c. 19, and s. 2(a), *Immigration Act, 1910* S.C. 1910.

First World War came closer to the end, a department of Immigration and Colonization was created.<sup>35</sup> It took over responsibility for immigration matters and for the settlement of the returning war veterans.<sup>36</sup> Interior was crucial to the management of the domestic affairs and the economy during the war. Immigration and Colonization was vital to the resettlement of the war veterans and the provision of the manpower needs of the post-war industrial economy. One of the effects of the war on Canada had been to spur industrialization. The Department of Immigration and Colonization was abolished in 1936. Immigration became a branch of the Department of Mines and Resources.<sup>37</sup> This was partly due to the inter-war depression and marked the first time that immigration was not associated with a leading economic department. As agriculture declined and became increasingly peripheral, the needs of the labour market became the prime factor in dictating immigration policy, and the linkage of immigration to agriculture became even more remote, except by Constitution only.<sup>38</sup> In 1949, a Department of Citizenship and Immigration was created and immigration was moved from Mines and Resources, to Citizenship and Immigration.<sup>39</sup> In 1967, immigration was once again transferred. Citizenship and Immigration was abolished and replaced by a Department of Manpower and Immigration.<sup>40</sup> Its creation formalized the linkage between immigration and the labour market demands and symbolized the culmination of the process that had begun immediately after Confederation. The new Minister of Manpower and Immigration became charged with responsibility for "the development and utilization of manpower resources in Canada, employment services and immigration."<sup>41</sup> 1967, however, was not only important for the formal marriage of immigration policy to the labour market conditions; it was also important because a completely

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35. *Department of Immigration and Colonization Act*, R.S.C. 1927, c. 96. Originally enacted as S.C. 1918, c. 3. The duties of the Minister in charge of this department were to administer the *Immigration Acts 1869 and 1872*, *supra*, notes 14 and 15, the *Chinese Immigration Act*, S.C. 1885, c. 71, and any other related matters.

36. Immigration was transferred to the new department of Immigration and Colonization, through an amendment to the *Immigration Act*, 1910, S.C. 1910, c. 27, by *An Act to Amend The Immigration Act*, S.C. 1919, c. 25. Under the amendment, the administration of immigration laws and concerns became the job of the Minister of Immigration and Colonization.

37. *The Department of Mines and Resources Act*, S.C. 1936, c. 33. The Minister of Mines and Resources became the Minister responsible for the enforcement of immigration policy.

38. In 1936, the Department of Immigration and Colonization was abolished. Immigration became a branch of the Department of Mines and Resources.

39. *Department of Citizenship and Immigration Act*, S.C. 1949, c. 16.

40. *Government Organisation Act*, S.C. 1966, c. 11. Became effective in 1967.

41. *Government Organisation Act*, 1966, S.C. 1966-7, c. 25, ss. 11-14.

new regime in the administration and enforcement of immigration policy was established. In addition to the setting up of the Department of Manpower and Immigration, a new administrative tribunal, the Immigration Appeal Board, was created to adjudicate immigration issues.<sup>42</sup> It was given exclusive jurisdiction to hear appeals in fact and law by sponsors, and appeals against deportation orders.<sup>43</sup> In addition, regulations establishing a system of selecting and recruiting immigrants to this country based on points<sup>44</sup> (the "point system") were promulgated. The point system awards units for criteria that include the level of education and age of the immigrant; his or her level of vocational preparation and job experience; demand for the intended occupation; whether or not employment has been designated or pre-arranged; the occupation of the immigrant; the demographic needs of the province or territory of destination; knowledge of the national languages; and personal suitability. All immigrants, with the exception of members of the family class and Convention refugees seeking resettlement, are admitted on the basis of the number of units scored during assessment. The regulations stipulate different minimum unit requirements for different categories of immigrants. They exist primarily to serve the interests and needs of the capitalist labour market of Canada. While they were promoted as a "neutral" system, they are not as "neutral" in practice as they are believed to be in theory.<sup>45</sup>

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42. The *Immigration Appeal Board* was established by the *Immigration Appeal Board Act*, S.C. 1966-7, c. 90.

43. *Pringle et al. v. Fraser*, [1972] S.C.R. 821; (1972), 26 D.L.R. (3d) 28.

44. The point system was established by P.C. 1967-1616 of August 16, 1967 which came into force on October 1, 1967.

45. There is no sufficient room here and it is not the purpose of this paper to critique the point system. That will be left for another occasion. On the issue, however, see, Law Union of Ontario, *The Immigrant's Hand Book: A Critical Guide* (Montreal: Black Rose Books, 1981), p. 40.

"The point system was introduced for a number of reasons. First, by 1967 racist ideology was under sufficient attack that governments were reluctant to openly endorse racism. Second, the requirements of Canada's employers demanded selection criteria which would identify and admit people with specialized skills. And third, European immigration to Canada had declined to the point that Canada was forced to admit non-European immigrants in order to meet the demand for labour.

The point system still exists today. Although discrimination is not clearly visible in the point system, the traditional white Anglo immigrants continue to be preferred. The criteria themselves are not 'neutral' in that all people don't have an equal opportunity to meet the criteria. For example, education is available for a greater number of years in some countries than in others. As well, the 'adaptability' of an immigrant is determined through a personal interview with an immigration officer so that a biased officer could easily prejudice an application by awarding no points for 'adaptability'. Racism is also manifest in the distribution of immigration offices, which are more numerous in the traditional source countries than in countries of the Third World."

The point system as established in 1967 was replaced with new revised criteria as part of the *Immigration Regulations, 1978*, SOR/78-172, which are presently in force.

In 1977, through another package of reform, the department of Manpower and Immigration that had been created in 1967 was changed to the department of Employment and Immigration, and a Canada Employment and Immigration Commission was set up within this department.<sup>46</sup> As part of this package, the *Immigration Act, 1952*, which had from time to time been amended but not replaced, was repealed and replaced with the existing *Immigration Act, 1976*.<sup>47</sup>

*Power to Legislate with Respect to Naturalization and Aliens*

The present immigration power under the Constitution includes the power allocated to Parliament by section 91(25) of the *Constitution Act, 1867* to legislate exclusively with respect to "naturalization and aliens". The phrase "naturalization and aliens" has been the subject of extensive judicial construction and analysis almost from the time of Confederation. Numerous attempts have been made by the Canadian courts to delimit the parameters of this phrase with no satisfactory results. Chief Justice Bora Laskin aptly stated some of the difficulties posed by an attempt to analyze this heading when he asked the following questions:

Is any special significance to be attached to the fact that Dominion power under s. 91(25) is in relation to "naturalization", not naturalized persons; and "aliens" not alienage? Or should the Courts read the terms as if they were "naturalization and naturalized persons and aliens and alienage"? What is the extent of Dominion power to legislate as to the consequences of citizenship or nationality or alienage, in the light of provincial legislative authority, especially in relation to property and civil rights in the province? How far can a provincial legislature regulate or limit the activities of or deny privileges to naturalized persons or aliens? Does the *B.N.A. Act* (now the *Constitution Act, 1867*) protect such classes of persons from discriminatory treatment only? Or, are they protected against provincial legislation even where a natural-born person would not be protected?<sup>48</sup>

With a Constitution that boasts an entrenched *Charter*, the analysis may take a different approach. This was shown to be the case in *Andrews v. Law Society of British Columbia*<sup>49</sup> to which I shall revert in due course.

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46. *Employment and Immigration Department And Commission Act*, R.S.C. 1985, c. E-5, originally enacted as S.C. 1976-77, c. 54.

47. *Supra*, note 9.

48. Laskin, *Canadian Constitutional Law, Cases, Text and Notes on Distribution of Legislative Power*, 3rd ed. (Toronto: Carswell, 1969), p. 991. On the status of aliens in Canada generally, see Head, "The Stranger in Our Midst: A Sketch of the Legal Status of the Alien in Canada", (1964) vol. II, *The Canadian Yearbook of International Law*, 107.

49. (1989), 56 D.L.R. (4th) 1 (S.C.C.).

To fully grasp the present immigration power, however, it still remains significant to analyze the cases in which the “naturalization and aliens” constitutional contradiction was battled prior to the advent of the *Charter* and prior to *Andrews*.

The beginning point is the celebrated decision of the Privy Council in *Union Colliery Company of British Columbia Limited, et al. v. Bryden and Attorney-General for British Columbia*.<sup>50</sup> At issue was the validity of the *Coal Mines Regulation Act, 1890*<sup>51</sup> of British Columbia which prohibited Chinese from engaging in underground coal workings.

It was impugned on the ground that it related to aliens within the meaning of section 91(25), the legislative authority which had been allocated exclusively to Parliament and was *ultra vires* of the provincial legislature. It was defended by the province as a valid exercise of its power over “property and civil rights” under section 92(13).

In actual fact, the Act had been enacted in response to pressure from organized white labour which wanted the Chinese excluded from competing for underground jobs in the coal mines. A series of explosions had occurred in the mines for which they had been made scapegoats. The white miners, who were resentful of the industry of the Chinese, used this as a pretext to demand they be excluded from the mines.<sup>52</sup> Bowing to their pressure, the provincial government had amended the Act to include the Chinese among the prohibited categories.<sup>53</sup>

As was to be expected, the mining interests did not favour the amendment to the Act. It sought to eliminate access to Chinese labour which was easier to exploit through lower wages than was white labour.

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50. [1899] A.C. 580 (P.C.). There are other cases, decided and reported before *Bryden*, such as *Tai Sing v. Maguire* (1878), 1 B.C.R. 101 (S.C.), and *R. v. Corporation of Victoria* (1888), 1 B.C.R. 331 (S.C.), which in a peripheral way touch on the issue of provincial legislatures legislating with respect to aliens. In *Maguire*, the Court struck down the *Chinese Tax Act, 1878* which imposed provincial taxes on the Chinese, and in *Corp. of Vic.* the Court declared that a provincial legislature and a municipality did not have the right to deny certain individuals business licenses on the basis of their nationalities. Both *Maguire* and *Corp. of Vic.*, however, were based primarily on the argument that the restrictions infringed upon the federal power to regulate trade and commerce under 91(2), even though 91(25), was alluded to.

51. R.S.B.C. 1897, c. 138.

52. Generally on the relationship between the White British Columbians and the Chinese, see: Ferguson, *A White Man's Country* (Toronto: Doubleday, 1975); Daniels, *Anti-Chinese Violence in North America* (New York: Arno Press, 1978); Ward, *White Canada Forever: Popular Attitudes and Public Policy Toward Orientals in British Columbia* (Montreal: McGill-Queen's University Press, 1978); Roy, *A White Man's Province: British Columbia Politicians and Chinese and Japanese Immigrants, 1858-1914* (Vancouver: University of British Columbia Press, 1989).

53. The amendment was carried out in 1890. *The Coal Mines Regulation Act, of 1888*, c. 138, did not contain the prohibition.

In the racial struggle that ensued between the Chinese and white labour, therefore, convenience and self-interest made capital and the mining interests an ally of the Chinese. John Bryden, who spearheaded the litigation to invalidate the Act, was both a shareholder in the Union Colliery Company and the son-in-law of Robert Dunsmuir who owned it. He sued the company in order to give it the opportunity to argue against the Act and get it invalidated. The Privy Council held that the Act was valid. Its opinion, delivered by Lord Watson, included the following statement:

Their Lordships see no reason to doubt that, by virtue of section 91, subs. 25, the legislature of the Dominion is invested with exclusive authority in all matters which directly concern the rights, privileges, and disabilities of the class of Chinamen who are resident in the provinces of Canada. They are also of opinion that the whole pith and substance of the enactments of section 4 of the Coal Mines Regulation Act, in so far as objected to by the appellant company, consists in establishing a statutory prohibition which affects aliens or naturalised subjects, and therefore trenches upon the exclusive authority of the Parliament of Canada.<sup>54</sup>

The Committee failed to allude to the fact that the impugned Act was a racist piece of legislation whose real objective was to exclude Chinese labour from the mines. It simply based its decision on the very narrow constitutional ground that under section 95 only Parliament could legislate with respect to aliens. According to the Committee, the function of a court of law is to determine the limits of jurisdiction between Parliament and the provinces: “. . .when that point has been settled, Courts of law have no right whatever to inquire whether their jurisdiction has been exercised wisely or not”!<sup>55</sup> Thus came into being one of the most enduring and judicially debated opinions in the history of the Privy Council Committee.

In 1902, only a few years after *Bryden*, the scope of 91 (25) was once again the subject of argument before the Privy Council. The occasion was *Cunningham and Att. Gen for B.C. v. Tomey Homma and Att. Gen for Canada*.<sup>56</sup> The issue: whether or not the legislature of British Columbia, purporting to exercise the power of a provincial legislature to amend its Constitution under what was then section 92(1) of the *Constitution Act*,

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54. *Supra*, note 50, at p. 587.

55. *Ibid.*, at p. 585.

56. [1903] A.C. 151 (P.C.).



1867, had the power to enact legislation excluding Chinamen, Indians and Japanese from the electoral franchise in the province.<sup>57</sup>

The federal government argued that the *Provincial Elections Act, 1899*,<sup>58</sup> by which British Columbia effected the disenfranchisement of the Chinese, Indians and Japanese was related to “naturalization and aliens”, a power reserved exclusively for the legislative authority of Parliament by virtue of 91(25). The Committee, however, rejected that contention. The legislation was valid as an exercise of the power it held to amend the Constitution of the province.

*Bryden* was referred to but distinguished. The racism and prejudice that were the obvious motivation for passing the innocuous legislation, were not a factor. According to the Committee, “the policy or impolicy of such enactment as that which excludes a particular race from the franchise is not a topic which their Lordships are entitled to consider”.<sup>59</sup> *Bryden* and *Cunningham* are irreconcilable. *Bryden* is clear that only Parliament may legislate with respect to aliens. It also suggests that perhaps only Parliament may legislate with respect to the consequences of “naturalization.”

*Cunningham*, on the other hand, is equally clear that:

The language of [section 91(25)] does not purport to deal with the consequences of either alienage or naturalization. It undoubtedly reserves these subjects for the exclusive jurisdiction of the Dominion—that is to say, it is for the Dominion to determine what shall constitute either or the other, but the question as to what consequences shall follow from either is not touched.<sup>60</sup>

Commenting on the two decisions, John Spencer has said that “within four years, the Judicial Committee seems to have erected side by side two similar sign posts, each pointing in opposite directions to what is supposed to be the same place.”<sup>61</sup> The confusion sowed by these contradictory sign posts continued to dodge the “naturalization and aliens” debate for a long time thereafter.

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57. Section 92(1) provided as follows:

92. In each province the Legislature may exclusively make laws in relation to matters coming within the classes of Subject hereinafter enumerated; that is to say,

1. The amendment from time to time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the office of the Lieutenant Governor.

S. 92(1) was repealed in 1982 and replaced by s. 45 of the *Constitution Act, 1982*.

58. S.B.C. 1899, c. 25.

59. *Supra*, note 56, at p. 155.

60. *Supra*, note 56, at pp. 156-7.

61. John Spencer, “The Alien Land Owner in Canada” (1973), Vol. LI, No.3, *Canadian Bar Review* 389, at 399.

In *Re the Coal Mines Regulation Act and Amendment Act, 1903* of British Columbia,<sup>62</sup> the issue was whether or not the province could prohibit the employment of the Chinese in positions of trust or responsibility in or at a mine, and whether it could prohibit their employment below ground. The province had argued they were "unsuited by certain idiosyncrasies from being safely employed below ground." The Court of Appeal for British Columbia, however, held the legislation to be a trenchment upon the exclusive authority of Parliament and invalidated it.

In *Quong Wing v. The King*,<sup>63</sup> on the other hand, the Supreme Court of Canada upheld a statute of the province of Saskatchewan that prohibited the employment of white women in restaurants, laundries, or other places of business or amusement, that were kept, owned or even simply managed by the Chinese, Japanese or other people of Oriental origin. It was held to be a valid exercise by the province of its legislative power over "property and civil rights" and in "matters of a merely local or private nature", whose object and purpose was "the protection of white women and girls." That it discriminated against the Orientals was irrelevant.<sup>64</sup> As the Court saw it, the question before it was "not one as to the policy or justice of the Act in question but solely as to the power of the provincial legislature to pass it."<sup>65</sup>

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62. (1904), 10 B.C.R. 408 (B.C.S.C.).

63. (1914), 18 D.L.R. 121 (S.C.C.).

64. Davies J., took the view that this case was different from *Bryden*, which had protected the Chinese. He said, *ibid.*, at p. 128:

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

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

65. Per Davies J., *ibid.*, at p. 125. He continued, at p. 27:

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

The Court does not state why the white women and girls needed protection. It does not say either why the Act singled out only white women and girls for this type of protection and excluded native and Black women and other women of colour. What is clear from the legislation and the analysis of the Court is that the federal-provincial struggle as to who had the most power to legislate discrimination and oppression for those that were not white was being disguised as a debate about constitutional legislative authority over "naturalization and aliens."

Several other cases have dealt with the issue of legislating for aliens. In *Re Oriental Orders In Council Validation Act, B.C.*,<sup>66</sup> the Supreme Court of Canada, on the principle in *Bryden*, held that a provincial legislature did not have the power to enact legislation that automatically attached to all contracts, leases and concessions between the government and private capital, a clause that prohibited employing Japanese and Chinese in connection with the contract or lease. This decision was, however, quickly overturned by the Privy Council on appeal in *Brooks-Bidlake and Whittall Ltd. v. Att. Gen. of British Columbia*<sup>67</sup> and in *Att.-Gen. of British Columbia v. Att.-Gen. of Canada*.<sup>68</sup> All the gains that had been made were once again lost.

More recently, section 91(25) has been raised in *Morgan et al v. Att.Gen. P.E.I.*<sup>69</sup> on appeal from the Supreme Court of P.E.I., in banco;<sup>70</sup> in *Re Min. of Revenue for Ontario and Hala et al*;<sup>71</sup> in *Re Dicknsen and Law Society of Alberta*;<sup>72</sup> and in *Redlin et al v. University of Alberta*.<sup>73</sup> As stated earlier, the section was tangential to the decision in *Andrews*. However, because of section 15 of the *Charter*, on the basis of which *Andrews* was decided, it was not necessary for the Court to engage in a section 91(25) analysis.

In *Morgan*, the issue was whether or not *The Real Property Act* of Prince Edward Island which prohibited non-residents from owning land save with the written consent of the province, conflicted with the federal

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66. (1922), 65 D.L.R. 577 (S.C.C.).

67. [1923] 49 S.C.R. 440, [1923] 2 D.L.R. 189 (P.C.).

68. [1923] A.C. 450, [1923] 4 D.L.R. 698 (P.C.).

69. [1976] 2 S. C. R. 349.

70. (1974), 5 Nfld. & P.E.I.R. 129 (P.E.I.S.C.).

71. (1977), 81 D.L.R. (3) 710 (O.H.C.J.).

72. (1978), 84 D.L.R. (3d) 189, 5 Alta. L.R. 920 136 (S.C.T.D.).

73. [1980] 4 W.W.R. 133 (Alta. C.A.)

jurisdiction over naturalization and aliens under 91(25).<sup>74</sup> Chief Justice Bora Laskin for a unanimous Court held that it did not, and that the legislation related to property and civil rights in the province. The test suggested by him was this:

The question that would have to be answered is whether the provincial legislation, though apparently or avowedly related to an object within provincial competence, is not in truth directed to, say, aliens or naturalised persons so as to make it legislation striking at their general capacity or legislation so discriminatory against them as in effect to amount to the same thing.<sup>75</sup>

In the analysis of the Court, the Act did not affect aliens *qua* aliens, but rather affected non-residents, citizen or non-citizens. The Act did not impose a total prohibition. It merely imposed a regulatory scheme. In the context of the history of the province and the scarcity of land as a resource therein, the discrimination imposed by the Act was justifiable.

*Morgan* represents a further erosion of the federal power under 91(25) and a further dilution of the ratio in *Bryden*. In *Re Minister of Revenue*,<sup>76</sup> the Ontario High Court of Justice upheld a statute of the province of Ontario that imposed a higher property transfer tax upon non-residents than it did upon residents. The Court argued the legislation related to the acquisition and holding of land in Ontario and did not offend section 91(25).

Likewise, in *Re Dicknsen*, an attack upon a provincial statute that stated that only Canadian citizens and British subjects were eligible for enrolment as members of the provincial law society, on the ground that it violated the principle of section 91(25) was dismissed by the Trial Division of the Alberta Supreme Court on the basis that the statute did not in pith and substance deal with either alienage or naturalization.

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74. *The Real Property Act*, R.S.P.E.I. 1951, c. 138, as enacted by S.P.E.I. 1972, c. 40. s. 1. Section 3 of the Act provided:

3 (1) Persons who are not Canadian citizens may take, acquire, hold convey, transmit or otherwise dispose of, real property in the province of Prince Edward Island subject to the provisions of sub-section two (2) here next following.

(2) Unless he receives permission so to do from the Lieutenant-Governor-in-Council, no person who is not a resident of the province of Prince Edward Island shall take, acquire, hold or in any other manner receive, either himself, or through a trustee, corporation, or any such the like, title to any real property in the province of Prince Edward Island the aggregate total of which exceeds ten (10) acres, nor to any real property in the province of Prince Edward Island the aggregate total of which has a shore frontage in excess of five (5) chains.

75. *Supra*, note 69, at p. 364.

76. *Supra*, note 71.

The last reported case in which a challenge to a provincial statute was founded on section 91(25) prior to the entrenchment of the *Charter* in the Constitution was the *Redlin v. Governors of the University of Alberta*<sup>77</sup> case. A resolution of the respondent university had established a fee differential for foreign students. This resolution was assailed on the ground it related to aliens and naturalization and the resolution and its parent legislation were *ultra vires* as offending section 91(25). The Court dismissed this claim holding that as the resolution did not prohibit foreign students from registering or taking instructions at the University it did not violate the section 91(25) principle and was a valid exercise of the provincial power in relation to education.

Following the incorporation of the *Charter* in the Constitution, the Supreme Court of Canada had occasion to consider a challenge to a provincial statute that prohibited the admission into a provincial bar society of applicants who were not Canadian citizens. The occasion was *Andrews*. The statute: the British Columbia *Barristers and Solicitors Act*.<sup>78</sup> The facts were identical to *Re Dicknsen*. The analysis in *Andrews* was, however, conducted in the context of the equality provisions of the *Charter* contained in section 15. The challenge was framed in terms of the citizenship requirements of the statute constituting discrimination within the meaning of section 15 and not in terms of the statute being legislation in relation to aliens, which offended the exclusivity principle of 91(25). In fact, the latter section was not even mentioned. Only Justice Wilson considered *Re Dicknsen*<sup>79</sup> and only Justice La Forest referred to *Bryden*.<sup>80</sup>

*Andrews* transformed the "alien" in Canadian immigration law from a mere object over which the federal and provincial governments would from time to time quarrel respecting competence to legislate or discriminate in relation thereto, to a human being with rights and benefits. Unfortunately, it took the *Charter*, and a privileged, Oxford trained, middle-class white male, to achieve what "aliens", most of them persons of colour, had been struggling to achieve over the decades without success: equality. This is only testimony to the fact that the English legal system can not be entrusted with the protection of minorities, short of special safeguards.

To sum up the discussion of the power to legislate with respect to naturalization and aliens, it may be suggested that the courts have interpreted this power to mean that only Parliament may legislate with respect to aliens and with respect to what constitutes naturalization. The

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77. *Supra*, note 73.

78. R.S.B.C. 1979, c. 26, s. 42. [am. 1983, c. 10, s. 21, schedule 2].

79. *Supra*, note 49, at p. 35.

80. *Ibid.*, at p. 39.

provinces may legislate with respect to the consequences of naturalization and alienage; incidental infringement of section 91(25) would not limit their power to legislate in areas of their specific competence.

### III. *Immigration and Federal Provincial Relations*

The proposal to constitutionalize immigration agreements will impact on both the balance of immigration power under the Constitution and on the political relations between the provinces and the federal government. In my view, the exercise of a concurrent power presupposes a degree of cooperation between the two levels of government and an interest and willingness to undertake joint complementary policy initiatives. In those circumstances, it becomes necessary that I examine how the federal government and the provinces have in the past dealt with immigration matters, and that I particularly examine the initiatives that have come forth from some of the provinces. This may be accomplished by briefly looking at four separate periods in the history of the evolution of immigration policy in Canada. These are: the period of close co-operation following Confederation (1867-1870); the era of confrontation, mostly with British Columbia (1871-1914); the provincial "hands off" period (1914-1960); and the period of revival of select, but in some instances persistent, provincial interest in immigration matters (1960-present). To this I now revert.

In the period immediately following Confederation, there was recognition by the federal and provincial governments of the need to coordinate their respective policies and to collaborate in the use of the concurrent power under the Constitution. At a meeting held shortly after Confederation, the two levels of government concluded a federal-provincial agreement which established the contours of their respective responsibilities. The federal government would establish immigration offices in London, England and in such other places in the United Kingdom and the European continent as it saw fit. It would also maintain quarantine stations in several parts of Canada. The provincial governments would determine policy respecting the settlement and colonization of uncultivated land. They would also be entitled to set up agents in Europe who would be accredited by the federal government.<sup>81</sup> Furthermore, the federal government and the provinces agreed to meet annually on immigration matters and, until 1874, met regularly. The essence of immigration, at the time, was to regulate the conditions of travel of the immigrants and to settle the vast vacant lands.

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81. *Journal of New Brunswick Legislature*, 1869, pp. 59-63.

This co-operative effort seems to have changed when British Columbia entered Confederation. As a colony of Britain, British Columbia had a sizable Chinese presence. For as long as it was part of the British imperial fold, it was willing to tolerate the Chinese and to limit their harassment and oppression. When it ceased to be a colony, however, and became a province within the Canadian Confederation, racism came to the fore. It led to a period of confrontation and protracted legal and political battles between the two levels of government. In some cases, outright disallowance of statutes by the federal government was the outcome. On the other hand, there is no evidence to suggest that the relations between the federal government and the provinces during this period were anything but passive and normal.

Provincial passivity was also the norm with all the provinces including British Columbia from the period 1914 to around 1960. It has been suggested that the provinces have shied away from immigration notwithstanding the concurrent power under section 95, in order to leave a politically sensitive and controversial area of public policy to the federal government.<sup>82</sup> The area has foreign policy and national security implications which are better handled by the federal government. One additional reason for the absence of provincial enthusiasm was the severe economic depression in the period between the World Wars. The provinces felt, and have continued to feel, that they do not have the resources necessary to assume financial responsibility for the settlement and integration needs of the immigrants.

Whatever the causes of lack of interest, by the 1960s, some provinces, notably Ontario and Quebec, were becoming more active in immigration matters. The government of Prime Minister Mackenzie King had adopted an aggressive, albeit restricted and racist, immigration policy<sup>83</sup> and the numbers of immigrants arriving were increasing dramatically when

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82. Dalon, "Immigration: Federal-Provincial Co-operation", in Bonin, ed., *Immigration: Policy-Making Process and Results* (The Institute of Public Administration of Canada: 1974).

83. See statement by Prime Minister MacKenzie King to the House of Commons on May 1, 1947, with respect to immigration. The Prime Minister said in this statement:

"With regard to the selection of immigrants, much has been said about discrimination. I wish to make it quite clear that Canada is perfectly within her rights in selecting the persons whom we regard as desirable future citizens. It is not a 'fundamental human right' of any alien to enter Canada. It is a privilege. It is a matter of domestic policy."

See *Debates of the House of Commons*, Thursday May 1, 1947, p. 2644 at 2646.

Mackenzie King was defending the policy of prohibiting immigrants from Asia, the Chinese, the Japanese and the East Indians from immigrating to Canada. Even though his government eventually repealed the *Chinese Immigration Act*, the restrictions on Asian immigration continued until 1962. The statement "served as the official formulation of Canadian immigration policy, until 1962." See Hawkins, *Canada and Immigration: Public Policy and Public Concern* (Montreal: McGill-Queen's University Press, 1972).

compared to those that had landed during the period between the World Wars. By the 1960s as well, Quebec had come to realise that natural reproduction alone would not be enough to maintain the demographic-linguistic balance between herself and English-speaking Canada. Quebec had also realised that federally controlled immigrant selection and settlement would not be sufficient to provide adequate compensation for its declining population.<sup>84</sup> Action was required. Quebec responded by establishing in 1960, a Quebec Immigration Service within the provincial Ministry of Cultural Affairs. In 1968, it passed its own immigration legislation,<sup>85</sup> establishing a provincial department to disseminate information and facilitate immigration into the province. Ontario also increased its activities in the recruitment of skilled employees but without passing a provincial immigration law. The present era of revived interest in immigration by some provinces had started.<sup>86</sup>

### *The Quebec Initiative With Immigration Agreements*

#### (i) *Immigration Agreements, 1971-78*

Three years after it passed the *Immigration Department Act*,<sup>87</sup> Quebec signed a bilateral agreement with the federal government relating to immigration. This was the 1971 Accord, also known as the Lang-Cloutier agreement. The main achievement of Lang-Cloutier was the agreement by the federal government to allow Quebec orientation officers to be stationed in overseas Canadian immigration offices. Their function would be to provide immigrants who had chosen Quebec as their province of destination, with further information about the living and working conditions in that province beyond that which the federal recruiting officers would have supplied. The stationing of orientation officers overseas was not the first time Quebec was represented abroad in immigration matters. Quebec had always maintained an agent general in Paris.<sup>88</sup>

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84. Bonin, "Immigration: Policy-Making Process and Results-Summary of Discussions", in Bonin, ed., *supra*, note 81, at p. 22.

By the 1960s, it had been predicted that without intervention most of the immigrants to that Province would have continued to be mostly English speakers and that four-fifths of those would have been established in Montreal.

85. *Immigration Department Act*, *supra*, note 28.

86. On the history and activities of both Ontario and Quebec in immigration, see Hawkins, *supra*, note 83, chap. 7 and 8.

87. *Supra*, note 28.

88. Vineberg, "Federal-Provincial Relations in Canadian Immigration" (1987), 30 *Public Administration* 299, at p. 302.



There had been two major developments in Canadian immigration policy during the ten years immediately preceding the 1971 agreement, both of which would have had an impact on Quebec. In 1962, changes had been made to the immigration regulations, limiting the scope of the racist policy that prohibited the immigration into Canada of non-European immigrants.<sup>89</sup> And in 1967, the point system had been introduced as the basis for recruitment and selection of immigrants coming into Canada.<sup>90</sup> While these "liberal" policies had worked well for English Canada by allowing the admission of English speaking immigrants of varied origin, they had not been as positive for Quebec. They had adversely affected, almost undermined, the substratum of Quebec's linguistic and cultural vitality. Most of the immigrants who became eligible to immigrate as a result of this reform were mostly Anglophones destined for Ontario and British Columbia, or, if they went to Quebec, they were destined principally for the City of Montreal.<sup>91</sup>

The Lang-Cloutier agreement was superseded by the Andras-Bienvenue agreement of 1975. The latter recited the fact that Canada and Quebec had concurrent constitutional responsibility for immigration and that it was necessary to encourage immigration into Quebec, of immigrants who either spoke French or had the potential for speaking French. It created a framework within which Quebec and the federal government would consult each other and exchange information prior to selecting and recruiting temporary workers and immigrants into Quebec. The Canadian immigration official would be required to provide to his Quebec counter-part, all information pertaining to applications from immigrants

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89. The immigration regulations of September 17, 1954, made by Order-in-Council P.C. 1954-1351 were abolished and replaced by the regulations made by Order-in-Council P.C. 1962-86 of January 18, 1962. The latter regulations broadened the acceptable source countries to include Turkey, North, Central or South America, Egypt, Israel and Lebanon, in addition to Europe.

90. The point system in its initial form was introduced by regulations made by Order-in-Council P.C. 1967-1616, of August 16, 1967. Those regulations have been repealed and replaced by the current *Immigration Regulations*, 1978, *supra*, note 44, as amended.

91. Quebec's concerns at the time towards immigration were best stated by Bonin, *supra*, note 83, at p. 22, summarizing the discussions at a seminar of the Institute of Public Administration on Immigration, held June 1976. He said:

"Since 1960, there has been a collapse of Quebec's birthrate and the relative impact of foreign immigration on the evolution of the Quebec population is greater, much is therefore at stake because of that impact. Two thirds of foreign immigrants entering Quebec each year do not speak French. Over four fifths of these immigrants will live in Montreal, an area where the balance is not 80% Francophones for 20% Anglophones as is the case for Quebec as a whole, but much nearer 60-40. If these trends continue, what will become of the Montreal region in 25 or 30 years? That is certainly a question Quebec is entitled to ask".

intending to settle in Quebec. The Canadian official would also take into consideration the opinion of the Quebec representative before making a decision to accept or reject such an application. It broadened Quebec's role from that of giving information to applicants per excellence, to that of active participation in the selection decision making. It was a major improvement over the first agreement.

In 1978, a third agreement, the Cullen-Couture agreement was concluded. In addition to granting Quebec the right to participate in the selection of immigrants to that province, it created a joint federal-provincial committee whose mandate was to ensure continued future cooperation. As well, it gave Quebec a virtual veto as to which immigrant would be landed in that province under the "independent category."<sup>92</sup> In effect, immigration became expressly recognised as a tool that Quebec could employ to strengthen its French language and cultural heritage. Quebec, in return, agreed to allow indigent immigrants access to its social assistance services. This was an important concession especially for refugee claimants. It symbolised a willingness by at least Quebec to contribute toward immigrant assistance settlement and integration as some kind of *quid pro quo*.<sup>93</sup>

## (ii) *Canada-Quebec Accord on Immigration, 1991*

The 1978 Cullen-Couture agreement has now been repealed and superseded by the Canada-Quebec Accord on Immigration, concluded by the federal government and Quebec on February 5, 1991, and which came into force on April 1, 1991 (herein after the "Accord").<sup>94</sup> The Accord is based on twenty years of experience by Quebec with immigration agreements and is a perfect model of what the *Meech lake* proposals had anticipated. It was inspired by the Cullen-Couture agreement. Like its

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92. The term "independent immigrants" generally refers to immigrants who are neither members of the family class, nor Convention refugees, or Convention refugees seeking resettlement, or members of designated classes the admission of members of which would be in accordance with Canada's tradition with respect to the displaced and the persecuted.

93. Article V(2) of Cullen-Couture stipulated that "Immigrants acknowledged by Quebec to be indigent will also have access, from their arrival, to Quebec social assistance". At the time this agreement was concluded, a lot of uncertainty existed about the eligibility of indigent immigrants, especially Convention refugee claimants, for provincial social assistance, and this was a major concession on behalf of Quebec. See Plaut, *Refugee Determination in Canada* (Ottawa: Supply and Services, 1985), pp.144-149. Unfortunately the Canada-Quebec Accord that has replaced Cullen-Couture, does not commit Quebec to any contribution to the cost of immigrant integration. Instead Quebec gets compensated for all the costs of providing the reception and the linguistic and cultural integration of immigrants into Quebec. See Annex "B" to the Accord.

94. *Canada-Quebec Immigration Accord Relating to Immigration and Temporary Admission of Aliens* (Ottawa: Employment and Immigration Canada, February, 1991).

predecessors, its main objective is to uphold Quebec's demographic, linguistic and cultural integrity and to preserve its distinct identity.

It reaffirms the mobility rights of permanent residents under the *Charter* and purports to reaffirm the guarantee of the equal protection and equal benefit of the law to everyone without discrimination. It also reaffirms the principle of family reunification in Canadian immigration law. The determination of national standards and immigration policy objectives remain the responsibility of the federal government and so does the eventual admission of immigrants and control of aliens.

However, it has several features that are unprecedented and are bound to have a profound impact on the formulation, implementation and administration of immigration policy in this country. The federal government, for example, undertakes to pursue an immigration levels policy that every year is expected to result in Quebec taking a percentage of the total number of immigrants coming to Canada, that corresponds with the percentage of the population of Quebec to that of Canada. These would include Convention refugees determined to be such within Quebec and those resettled from overseas in accordance with the *Immigration Regulations, 1978*.<sup>95</sup>

The federal government also agrees to withdraw from the provision of immigrant settlement, adaptation and language training services which are transferred to Quebec, and agrees to pay compensation to Quebec for providing the service. The compensation for 1991-1995, amounts to the sum of three hundred and thirty-two million dollars (\$ 332 M). A formula is provided in the Accord for the adjustment of this figure in the years to come. Furthermore, the Accord gives as one objective, "the preservation of Quebec's demographic importance within Canada and the integration of immigrants to that province in a manner that respects the distinct identity of Quebec."<sup>96</sup> This is a clear attempt to implement what is an obvious feature of "distinct society" status that Quebec has been seeking and that has been recommended by the Beaudoin-Dobbie Committee, even before the constitutional proposals are implemented.<sup>97</sup> The federal government has explicitly agreed in writing that Quebec use immigration as a tool to maintain a French-speaking majority in that province and to enhance its culture and civil law tradition. It is difficult to visualize how Quebec can fulfil these objectives without setting admission standards that discriminate against immigrants who are not French in language and culture, in favour of those who are. Yet in my view, until the Constitution

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95. *Immigration Regulations, 1978*, *supra*, note 44, as amended.

96. Clause 2 of the Accord.

97. *Supra*, note 6, at pp.26-7.

is amended to allow for a distinct society status for Quebec, any immigration admission standards by Quebec to that effect would be inconsistent with the *Charter* and would be contrary to objective (f) set out in section 3 of the *Immigration Act, 1976*. The latter objective seeks "to ensure that any person who seeks admission to Canada on either a permanent or temporary basis is subject to standards of admission that do not discriminate in a manner inconsistent with the *Canadian Charter of Rights and Freedoms*."

While the Accord allocates the responsibility for determining national standards and objectives relating to immigration to the federal government,<sup>98</sup> the Accord contains no mechanism by which compliance with those standards and objectives may be monitored. Neither the joint, nor the implementation, committees are given the mandate to monitor compliance by Quebec with the national standards and objectives.<sup>99</sup> In many other respects, the Accord maintains the features of Cullen-Couture.<sup>100</sup>

### *The Initiatives of the Anglophone Provinces*

In section two of this paper, I discussed some of the initiatives that British Columbia took in the area of immigration before and at the turn of this century. Unfortunately, most of these, as shown, were motivated by racial prejudice. Even though British Columbia has historically been one of the largest recipients of immigrants, it has not had a written or articulated provincial immigration management policy. It has no immigration legislation and, like Ontario and Manitoba, has not signed any immigration agreement with the federal government. Ontario, while interested in immigration, has had a narrow focus: selecting and recruiting skilled workers for its employers. It has not taken any of the legislative or aggressive immigration agreement techniques that Quebec has. The only Anglophone province that has legislation that in a peripheral way deals with immigration matters is the province of Alberta: the *Department of Manpower Act*.<sup>101</sup> The Act assigns the Minister of Manpower the

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98. See clause 3 of the Accord, which states that:

"Canada shall discharge these responsibilities...by defining the general classes of immigrants and classes of persons who are inadmissible into Canada, by setting the levels of immigration and the conditions for the granting of citizenship, and by ensuring the fulfilment of Canada's international obligations".

99. See annex "A" to the Accord setting out the modalities for implementation.

100. The Accord is a product of the *Meech Lake* process. It may be said to be the only component of *Meech Lake* that has been implemented. What is laid out above, however, and the provisions I allude to below are just its bare features and are not exhaustive. For a well argued critique of the accord based on the proposals as they were in *Meech Lake*, see Kruhlak, *supra*, note 8.

101. R.S.A. 1980, c. D-24.5, first enacted in 1985.

responsibility for provincial services connected with immigration into Alberta, and empowers the Minister to conclude agreements with either the federal or other provincial governments in relation to immigration services or demographic policies. Pursuant to this Act, the Alberta Minister of Manpower concluded, in 1985, a three-year agreement on immigration with the federal government. The agreement deals with the creation of joint consultative and implementing committees, exchange of information, and the establishment of general principles for the selection and settlement of immigrants, including Convention refugees and members of designated classes under the *Immigration Act, 1976*.<sup>102</sup> It also commits the parties to joint responsibility for the settlement and adaptation of permanent residents. This is in sharp contrast with what Quebec has under the Accord at the moment whereby the federal government pays compensation to Quebec with no contribution from the province.

Saskatchewan signed an immigration agreement in 1978. It creates a federal-provincial consultation committee and reaffirms the commitment of both governments to collaborate in the provision of settlement services. It further talks about the necessity to encourage and fund private sector settlement agencies that would assist in the provision of settlement services to immigrants.

Each of the Atlantic provinces, Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland, has an immigration agreement. These agreements set up joint committees of cooperation and consultation but do no more. The selecting, recruiting and settling of immigrants remain the responsibility of the federal government. The only responsibility that has been assumed by all the provinces, with or without agreements, is the review and approval of business immigration proposals submitted by entrepreneurs and investors under the business immigration program.<sup>103</sup>

#### IV. *Effect of Proposed Amendments to the Immigration Provisions of the Constitution*

The discussions in the foregoing sections attempt to bring out what is thought to be the *status quo* of both the constitutional power and the federal-provincial relations in immigration. This includes the status of existing immigration agreements. It also attempts to highlight some of

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102. *Supra*, note 9.

103. Interview with Frances De Wolfe, Business analyst, Nova Scotia Department of Economic Development, Halifax, N.S.

the contemporary issues and concerns associated with these two areas. It is this ordering of things that the federal government has proposed to amend during the current round of constitutional debate. The substance of the amending proposals as initially outlined in *Meech Lake*, and recently put in the Beaudoin-Dobbie report may be summarised as follows. Upon a request by any province that is interested in doing so, the federal government would negotiate with that province, for the purpose of concluding an agreement in immigration that is appropriate to its needs. Any such agreement would have the force of law if it were declared to do so by resolutions of the House of Commons, the Senate and the legislature of the province involved. It would, however, only be valid as long as it were not repugnant to, or incompatible with, any national standards and objectives set by Parliament, and would be subject to the *Charter*. Unless stated otherwise in the agreement, its amendment could not be effected, except with resolutions from the House of Commons, the Senate and the legislature of the relevant province. For purposes of this paper, we may call any agreements that would be signed by virtue of any such provision in the Constitution, "constitutional immigration agreements."

### *The Government's Rationale for the Proposals*

It would appear that the proposals for constitutional immigration agreements were put forward first in *Meech Lake* and now in the Beaudoin-Dobbie report for two reasons. The main one, in my view, is that they were the means of fulfilling the demand for greater control over immigration policy which the government of Quebec had made as one of the conditions for accepting the Constitution. The second one is that the federal government hoped it would entice the remaining provincial governments, most of which have been reluctant to take any concerted interest in immigration matters, into playing a more active role in the formulation, implementation and management of immigration policy. It must have reasoned that the best way to accomplish this was to enshrine in the Constitution a standing offer to negotiate agreements on demand and to constitutionalize those agreements. It had conceded a similar demand to Quebec. These two reasons, however, are not what the government has articulated in its justification and rationalization of the proposals. The argument has instead been that the Constitution ought to be the basis of all immigration agreements so that they become more safeguarded and secured from unilateral termination by either the federal

government or the provinces.<sup>104</sup> There is no doubt that in comparison with immigration agreements made pursuant to the *Immigration Act, 1976*, any agreements pursuant to the proposed amendments to the Constitution, would be harder to change or terminate especially if they acquired the force of law in the manner suggested by the proposals. However, there is equally no doubt that the reasons for the proposals go beyond the argument of security alone as put forward in justification.

There is, in fact, already in existence a framework under which immigration agreements with the provinces may be, and have been, negotiated in the past. This framework is to be found in section 108(2) of the *Immigration Act, 1976* which reads as follows:

108.(2) The Minister, with the approval of the Governor-in-Council, may enter into an agreement with any province or group of provinces for the purpose of facilitating the formulation, coordination and implementation of immigration policies and programs.

In my view, this subsection creates a positive duty upon the federal government to conclude immigration agreements with provinces in the same way and to the same degree and effect as would be the case if this duty were to arise by virtue of a provision in the Constitution. The first two agreements that were signed in 1971 and 1975 with Quebec were in fact concluded before the *Immigration Act, 1976*, and before the provision cited above ever existed. The 1978 Cullen-Couture agreement and the 1991 Accord were signed pursuant to this provision. Similarly, all the other six provinces that have concluded immigration agreements with the federal government, Nova Scotia, New Brunswick, Prince Edward Island, Alberta, Saskatchewan and Newfoundland, negotiated and signed their agreements by virtue of the *Immigration Act, 1976*.

In order to fully appreciate the effect of subsection 108(2), it is necessary to read it in conjunction with section 7 and subsection 108(1), both of the *Immigration Act, 1976*. Section 7 requires the federal Minister of immigration to annually lay before Parliament a report specifying the number of immigrants that the Minister proposes to allow in the country during a stated period. The report has to be "after consultation with the provinces concerning regional demographic needs and labour market considerations." Furthermore, under subsection 108(1), the Minister has to consult with the provinces respecting the measures to be taken to

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104. The Beaudoin-Dobbie Report, *supra*, note 6, states, at p. 80:

"The main objective of the federal government's proposal is to give immigration agreements stability by preventing them from being amended or revoked without the agreement of all governments that are parties to them. The Committee considers that this objective is commendable."

facilitate the adaptation of immigrants to Canadian society. The section provides:

108(1) The Minister shall consult with the provinces respecting the measures to be undertaken to facilitate the adaptation of permanent residents to Canadian Society and the pattern of immigration settlement in Canada in relation to regional demographic requirements.

Section 108(2) allowing agreements to be concluded between the federal government and the provinces is, therefore, not just an isolated provision. It is part of a comprehensive programme under the Act intended to foster federal-provincial consultation, policy coordination and cooperation. As agreements signed pursuant to the *Immigration Act, 1976* come about as a result of an Act of Parliament and not the Constitution, we may, for purposes of this article, call them "statutory immigration agreements."

### *Constitutional Immigration Agreements versus Statutory Immigration Agreements*

As has been seen from section 108(2) of the *Immigration Act, 1976*, statutory immigration agreements are subject to the approval of the Governor-in-Council. This means that they have to be approved by Cabinet and that they are totally dependent upon the political will of the federal government. A province anxious to conclude an agreement may find itself unable to do so when it wishes. On the other hand, constitutional immigration agreements would be negotiable on demand by a province. One important point to note, however, is that under the proposals, the right to demand negotiations would belong to the provinces and not to the federal government. The federal government would not be able to force an unwilling province to the negotiating table. This being the case, amendment of the Constitution in this respect may not necessarily mean much unless a change occurs in provincial attitude towards immigration.

Statutory immigration agreements can be revoked by either party. Constitutional immigration agreements, if declared to have the force of law, would be subject to a special amending formula, and would be more difficult to change.<sup>105</sup> While this is an advantage, it is also a disadvantage. It is an advantage because it would eliminate frivolous and irrational amendments and prevent unilateral revocation. It is a disadvantage

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105. Sections 95D and 95E proposed in the *Beaudoin-Dobbie Report* would require that an immigration agreement that were declared to have the force of law by virtue of resolutions of the House of Commons, the Senate and the Legislature of the province concerned, be amended only either as may be set out in the agreement, or by resolutions of the House of Commons, the Senate and the Legislature of the province that is party to the agreement. See text to note 7, *supra*.



because it would remove the flexibility inherent in administratively negotiated deals. By its very nature, immigration policy is constantly changing and in a state of flux. There may be times when for legitimate reasons, it may be desirable to have an agreement amended. This could be the time when the necessary consent is withheld. Rigidity, therefore, may end up working hardship for both parties to an agreement, and may thus be a double edged and dangerous weapon.<sup>106</sup>

Furthermore, a constitutional immigration agreement, if it had the force of law, would be subject to a special amending formula. It would also be binding upon Parliament and the legislatures. Acquiring the force of law would necessitate a declaration to that effect by the Governor-General based on resolutions of support and consent from the House of Commons, the Senate and the legislature of the province affected. By contrast, statutory immigration agreements are not binding upon Parliament or the legislatures and do not enjoy the protection of a special amending process.

If the major criticisms against statutory immigration agreements are that they are not protected against unilateral action, create uncertainty, and are not binding upon Parliament and provincial legislatures, the proposal by the Beaudoin-Dobbie Committee respecting approval of intergovernmental agreements, may be the solution. The proposal would see an amendment to the Constitution allowing approval of intergovernmental agreements by one of two methods. Either legislation, or resolutions of the House of Commons, the Senate and the legislature of the province in question. Revocation of, or amendments to, these agreements would require the same process unless stated otherwise by the agreement.<sup>107</sup> Such a process would give all intergovernmental agreements, including statutory immigration agreements, the desired degree of stability and protection against unilateral revocation.

### *National Standards and Objectives versus Provincial Agenda and objectives.*

One of the reasons advanced for the proposals is that an amendment to the Constitution would enable any province to negotiate an agreement "appropriate to the needs and circumstances of the province." As we have

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106. For a supporting view, see the discussion in Canadian Bar Association, *Rebuilding A Canadian Consensus: An Analysis of the Federal Government's Proposals for a Renewed Canada* (Ottawa: Canadian Bar Association, 1991), pp. 299-300.

107. For a discussion of the proposal to amend the Constitution to permit approval of intergovernmental agreements, see the *Beaudoin-Dobbie Report*, *supra*, note 6, pp. 68-69. For the text of the proposed amendments, see *ibid.*, pp. 116-117.

seen, this is not the language that is used in sub-section 108(2) of the *Immigration Act, 1976*. It is believed that the suggested amending language is intended to result in constitutional agreements that address regional concerns, and address unique concerns of provinces such as Quebec, whose main objective since the mid-1960s has been to use immigration policy as a tool to maintain its demographic-linguistic balance and cultural integrity. Yet it is significant that the absence of this language did not prevent the conclusion of the 1978 Cullen-Couture agreement, or the 1991 Accord.

Accepting, however, that agreements that are appropriate to the needs and circumstances of the provinces would enhance the amelioration of regional disparity and concerns, the question that still remains is the extent to which redress of regional grievances can go without compromising national standards and objectives and without undermining immigration policy and services. This question is not mere conjecture. History has shown the provinces to be irresponsible wielders of immigration power towards minorities, especially people of colour. This was the case with British Columbia and Saskatchewan, as we have seen in the earlier discussion in this paper. It was also the case in Nova Scotia and Ontario before Confederation. The anxiety that has been expressed about the proposals among visible minority Canadians is to be attributed to this experience.<sup>108</sup> It is, of course, true that the federal government has been as guilty of racism and discrimination in immigration as the provinces have been. In comparative terms, however, it has practised a more subtle form of racism than the provinces.

In order to ease these fears and concerns, the proposals suggest Parliament retain its paramountcy in setting national standards and objectives. These would include establishing general classes of immigrants, setting levels of immigration, and prescribing classes of inadmissible individuals. Any constitutional immigration agreement that had the force of law would be valid only and for as long as it was not repugnant to those standards and objectives.

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108. It is this experience that frightens minority communities about the proposed decentralisation of immigration policies, especially immigrant settlement and adaptation services. The *Report of the Select Committee of the New Brunswick Legislative Assembly on the 1987 Constitutional Accord*, (1989), noted that groups representing cultural minorities that had appeared before it, had expressed fear "about the possibility of discrimination if the provinces gained more autonomy over immigration policy." See Select Committee, Legislative Assembly of New Brunswick, *Final Report on the Constitution Amendment 1987* (Fredericton: Legislative Assembly of New Brunswick, 1989), p. 52.

While this provision would offer some comfort, it would not provide full and adequate protection against abuse of immigration power by the provinces. Repugnancy becomes effective only if Parliament has set national standards and objectives but not otherwise. Under the *Immigration Act, 1976* and the *Immigration Regulations, 1978*, Parliament has set the objectives of Canadian immigration policy, the principles thereof, and categories of admissible and inadmissible individuals.<sup>109</sup> Parliament has not, however, set national standards or levels in the area of integration of immigrants. There are no language training standards, no prescribed minimum levels of economic or adjustment assistance, and no minimum levels of assistance that the provinces would have to offer in connection with job hunting, counselling or other forms of immigrant settlement and integration service.

Even if the paramountcy of national standards and objectives may be effectual, there still remains the issue of monitoring. Who is to monitor the policies of the provinces especially where they are not translated into legislation, to ensure compliance with the national standards and objectives? Can resort to judicial review alone be seen as adequate protection against this potential for provincial checker-board immigration policies? And if so by who; the immigrants or the federal government? It is significant that the joint and implementing committees that were established under the Canada-Quebec Accord on immigration do not have as a specific mandate the monitoring of compliance by Quebec, with the national standards and objectives. Was this Accord not supposed to be the model that future agreements would follow?

## V. Conclusion

Immigration power under the *Constitution Act, 1867* is grounded in sections 95 and 91(25) of that Act. Section 95 grants Parliament and the legislatures the concurrent power to pass laws in immigration and agriculture. Under section 91(25), on the other hand, the power to legislate with respect to "naturalization and aliens" is allocated to Parliament alone. The historical analysis and interpretation of section 91(25) has affirmed the exclusive role of Parliament to legislate with respect to aliens and with respect to the requirements for naturalization. But the section has also been interpreted as to uphold provincial legislation that is within the competence of the legislatures even if it may incidentally affect aliens.

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109. *Supra*, note 9, ss. 3, 4, and 19.

Even though the Constitution allows the provinces to legislate in the area of immigration, in modern times only Quebec has passed a comprehensive immigration law. There was some provincial legislation in immigration at the turn of the century most of which came from British Columbia. Most of that legislation was enacted for reasons of racial prejudice and not to promote immigration. The effect of the experience with British Columbia has been to create a lack of confidence in the provinces by many visible minority Canadians. They do not trust the agendas that the provinces would have in the event they wielded effective power in immigration as the proposals would in effect do.

There is, however, room for all the provinces to play a more active role in immigration than they have done hitherto. They could assume some selection and recruitment functions as they have done with the business immigration program. They could also assume the provision of the linguistic and economic integration services, including language training and general counselling. The impact of immigration policy on provincial areas such as education, employment, housing, health, manpower, the economy, and social services, is too important to be left to the federal government alone.<sup>110</sup>

Increased provincial involvement should, however, not mean substitution of provincial for federal services by the former taking over all responsibility from the latter. Federal-provincial immigration agreements should not amount to blanket transfers of immigration power by the federal government to the provinces. This is one extreme that has occurred under the Accord.<sup>111</sup> In my view, it would be disastrous to offer the remaining nine provinces, the type of agreement that Quebec now has with the federal government.

On the issue of national objectives and standards, it would not be possible to pre-set national objectives and standards in all areas of immigration concern. Even if it were possible, there are no satisfactory means of monitoring compliance with these objectives and standards by the provinces.

I believe immigration agreements concluded under the framework of the *Immigration Act, 1976*, as opposed to constitutional immigration agreements, would be the best way of achieving the desired objective of, on the one hand, increasing provincial participation and, on the other,

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110. See Dalon, *supra*, note 77. See also, Lemieux, "Immigration: A Provincial Concern", (1983), 13 Mani. L.J. 111.

111. Under Clause 24 and Annex "B" to the Accord, the federal government has agreed to withdraw from the provision of linguistic, cultural and economic integration services which will be assumed by the provincial government in return for financial compensation to Quebec.

ensuring there is no compromise to national objectives and standards. To be more effective and secure they would have to be approved as suggested by the Beaudoin-Dobbie Committee with respect to approval of intergovernmental agreements in general. The approval process would give the agreements the stability and protection they require. If this were done, there would be no necessity to amend the immigration power under the Constitution as it presently stands.

The provinces may, but need not, supplement any agreements made under the *Immigration Act, 1976* and approved as an intergovernmental agreement with their own immigration statutes. A provincial immigration statute would be a good way of showing the interest, priority and policy of the province concerned. It is important to realise, however, that the absence of a statute ought not hold back those provinces that to date have only had peripheral interest in the matter. A provincial statute is not a prerequisite for provincial participation in immigration. While the fact is that under section 95 of the *Constitution Act, 1867* the provinces have power to legislate concurrently with the federal government in immigration, this alone is not a compelling reason for them to do so.