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Immigration Law and Issues

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The starting point for the study of any subject of law is the common law. The common law originally meant that part of the law of England formulated, developed and administered by the old common law courts. This law was based originally on the common customs of the country and was unwritten. It stands in opposition to statute law, which is the law laid down in acts of Parliament.

The common law of England was imported into Canada and became the common law of Canada. At common law, no alien had any right to enter the country, except by leave of the Crown, and the Crown could refuse leave without giving any reason. The Crown could impose such conditions as thought fit as to the alien's length of stay or otherwise. The alien had no right whatever to remain. He or she was liable to be sent home to his or her own country at any time, if, in the opinion of the Crown, his or her presence here was not conducive to the public good and for this purpose the executive could arrest him or her and put him or her on board a ship or aircraft bound for his own country[1].

So you can see from this statement of the common law by Lord Denning that the non-citizen is referred to as an alien. That was the common-law term. An alien, at common law, referred to the subject of a foreign state who was not born within the

[1] *R.vs. Brixton Prison (Governor), ex parte Soblen* [1963] 2 Q.B. 243 at 300, 301

allegiance of the Crown. This person was not a British subject and not a British-protected person.

These aliens then had, as you can appreciate from the remarks of Lord Denning that I read to you a few moments ago, virtually no right to remain permanently in the United Kingdom and, by extension, the colonies of the United Kingdom.

In 1867, as you are aware, the provinces of Canada, Nova Scotia and New Brunswick, were federally united into one dominion under the Crown of the United Kingdom, with a constitution similar in principle to that of the United Kingdom. Canada, at that point, formally constituted the Provinces of Upper and Lower Canada and so it was severed. Upper Canada became Ontario. Lower Canada became Quebec. They were joined to Nova Scotia and New Brunswick and the entire combination was then referred to as the Dominion of Canada.

Dominions were autonomous communities within the British Empire, equal in status, in no way subordinate one to another. In any aspect of their domestic or internal affairs, they were united by a common allegiance to the Crown and freely associated as members of the British Commonwealth.

The *British North America Act* declared that there shall be one Parliament for Canada, consisting of the Queen, an upper house called the Senate and the House of Commons. It also stipulated that for each province there shall be an officer, styled the Lieutenant Governor, appointed by the Governor General in Council, and that there shall be a legislature.

With respect to the matters that we are talking about today, the *British North America Act* in section 91 stipulated that Parliament had control over naturalization and

aliens. Naturalization is the term that describes the change in status of a person from an alien to a subject of the state, which is naturalizing him or her. Typically, the qualifications for naturalization at common law were residence in the British territories, coupled with an intention to reside there; service with the British Crown, coupled with an intention to be in Crown service; good character and a knowledge of English. So naturalization, in 1867, referred to the concept whereby a person who was not a British subject became one.

The *British North America Act* also provided, in section 95, that the Legislature in each province might make laws in relation to "immigration into the province". Section 95 also declared that the Parliament of Canada may from time to time make laws in relation to "immigration into all or any of the provinces". Finally, section 95 declared that the law of a province in relation to immigration shall have effect only so long as it was not repugnant to a law passed by the Parliament of Canada.

Thus under the *British North America* Act of 1867, the Parliament of Canada had jurisdiction over aliens, naturalization. Both Parliament and the Legislature in a province had jurisdiction over immigration into the province with the provision that if there was a conflict between the laws of the Legislature or Parliament, the laws of Parliament prevailed.

The next major constitutional change in Canada occurred in 1982 with the passing of the *Constitution Act*. The *Constitution Act* contained a guarantee of rights and freedoms, most often referred to as the *Charter of Rights*, and section 6 of the *Charter of Rights* provides as follows:

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right:

a) to move to and take up residence in any province; and

b) to pursue the gaining of a livelihood in any province.

Thus, the most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country. The common law recognized no such right and the constitutional documents that informed the common law recognized a distinction between citizens and non-citizens. Only citizens are accorded the right to "enter, remain in and leave Canada".

Parliament, therefore, has the right to adopt an immigration policy and to enact legislation prescribing the conditions under which aliens will be permitted to enter and remain in Canada (i.e. naturalized). It has done so in what is now called the *Immigration and Refugee Protection Act*.

At common law, there was no recognition of a non-citizen who was outside his or her country of nationality and was afraid to return there for fear of persecution for reasons of race, religion, nationality, or membership in a particular social group or political opinion. Such a person was an alien like anyone else who was not a citizen and his or her entitlement to reside in Canada was entirely at the discretion of the Crown.

Canada's obligations in the area of refugees stem from the *Fourth Geneva Convention*, signed by Canada July 28, 1951, and the Protocol to the *Geneva* Convention, signed January 31, 1967.

You will recall that the *British North America Act* of 1867 gave to Parliament jurisdiction over aliens. Due to the fact that persons who meet the definition of Convention refugee are aliens in Canada when they are claiming refugee status, jurisdiction over these people in respect of their status as refugees clearly falls to Parliament.

A Convention refugee is defined in the United Nations Convention (and also in the current section 96 of the *Immigration and Refugee Protection Act)* as follows:

> *A Convention refugee is a person who by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group, or political opinion,*
>
> *(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries or,*
>
> *(b) not having a country of nationality, is outside the country of their habitual residence and is unable, or by reason of that fear, unwilling to return to that country.*

There is no reason why a person found to be a Convention refugee should become a permanent resident of Canada or ultimately a citizen of Canada. Canada's international obligations require that Canada provide a refuge for this person until it is safe for them to return to their home country. There is only one exception to this rule and that is when the persecution that the person has suffered is so horrific that they should not be returned to their home country despite the fact that persecution is no longer likely. The international community was meant to be a forum of second resort for the persecuted, a surrogate

approachable on the failure of local protection (*Canada (Attorney General) vs. Ward* [1993] 2 S.C.R. 689). The rationale upon which international refugee law rests is that it is there to provide refuge to those whose home state cannot or does not afford them protection from persecution.

International refugee law was formulated to serve as a back-up to the protection one expects from the state of which an individual is a national. It was intended to come into play only in situations when that protection is unavailable and then only in certain situations. The international community intended that persecuted individuals be required to approach their home state for protection before the responsibility of other states became engaged.

So Canada assumed a responsibility for Convention refugees internationally and in the *Immigration and Refugee Protection Act* has enacted domestic laws so that it can fulfill those international obligations.

It is important to remember, therefore, that both with respect to immigrants and refugees, the *Immigration and Refugee Protection Act* affords protections that the common law does not provide.

The *Charter of Rights and Freedoms*, which became part of the law of Canada in 1982, also provides protections to persons claiming refugee status by reason of section 7 of the *Charter of Right*, which provides as follows:

> *Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.*

Given that a refugee claimant is by definition a person who claims to fear persecution and that the return of genuine claimants will, therefore, affect their life, liberty or the security of their person, then it is clear that all refugee claimants have, at the very least, a claim to the protection of section 7, therefore, in addition to the rights conferred on Convention refugees by the *Immigration and Refugee Protection Act*, there is the requirement that the provisions of the *Immigration and Refugee Protection Act*, in so far as they relate to refugees, conform with section 7 of the *Charter of Rights*.

Let us now review what changes the *Immigration and Refugee Protection Act* has made to the common law.

The *Immigration and Refugee Protection Act* (IRPA) creates essentially three kinds of aliens, although it should be noted that the term "alien" is not used anymore. These three types are: permanent residents, temporary residents and Convention refugees.

A permanent resident of Canada has the right to enter and remain in Canada, subject to the provisions of the IRPA. A permanent resident must comply with the residency obligation with respect to every five-year period. The details of this residency obligation are set out in section 28 of the Act and, subject to certain exceptions, the obligation is physical presence in Canada for 730 days (i.e. two years out of the five).

A permanent resident visa can be granted if you are a member of the immediate family of someone getting a permanent visa (e.g. spouse, common-law partner, conjugal partner, dependent child, grandchild, parent, grandparent) or you are a member of an economic class of immigrants (e.g. skilled worker, entrepreneur, investor). For economic class immigrants there are selection criteria - education, proficiency in English or French,

business experience, age, arranged employment and adaptability. You also get points for your spouse's education, family relationships in Canada and previous employment in Canada or some variation of those criteria.

A temporary resident is authorized, subject to the other provisions of the IRPA, to enter and remain in Canada on a temporary basis as a visitor. A temporary resident must comply with any condition imposed under the Regulations and with any requirements under the Act and must leave Canada by the end of the period authorized for their stay and may re-enter Canada only if their authorization provides for re-entry.

Within the group of persons known as temporary residents, are students. The general rule is that a foreign national may not study in Canada unless authorized to do so under the IRPA. A foreign national may study in Canada without a study permit, if the duration of their course or program of studies is six months or less and will be completed within the period of their authorized stay in Canada. Typically this covers foreign nationals studying English or French as a second language. Every minor child in Canada can go to school without a study permit, unless the minor child is the child of a foreign national who is not authorized to work or study in Canada.

The term "minor" is not defined. Provincially, a minor would be someone under the age of eighteen. The age of majority, however, can vary from province to province and so the provincial standard of the age of majority is not uniform and, therefore, not likely to be applied. At common law a minor was someone under the age of twenty-one. Every child of a foreign national who is not a minor, who wishes to study in Canada, must obtain a study permit even if the foreign national is authorized to study or work in

Canada, unless the course they are taking is less than six months long (see section 30 of the IRPA).

Normally a foreign national must apply for a student permit before entering Canada. If the foreign national is a citizen or permanent resident of the United States, they may apply for the study permit when they are entering Canada. A foreign national already in Canada may apply for a study permit if he or she already holds a study permit, he or she holds a work permit, if a family member holds a study permit or a work permit and in certain other more obscure situations.

The IRPA permits persons to claim refugee protection whether inside or outside of Canada. A Convention refugee is defined in section 96 of IRPA and has the same definition that I referred to earlier in these remarks. That definition, and the one in section 96, is the same as the definition that appears in the United Nations Convention Relating to the Status of Refugees. Some claims are ineligible; for example, a claim made by a person who was recognized as a Convention refugee by another country where the claimant can be returned to that country (see section 101 of the IRPA). The IRPA creates two types of protection. You can be found to be a Convention refugee or a person in need of protection. Convention refugee is defined in section 96 and that definition has been referred to earlier.

A person in need of protection is defined in section 97. This person has to be in Canada and must demonstrate that his or her removal to his or her home country would likely subject him or her to torture or cruel and unusual treatment. Such a person need not be subject to this treatment because he or she was being persecuted due to his or her

race, nationality, religious, political opinion or membership in a social group and therefore need not be a refugee.

If the person is in Canada, the Canada Immigration Commission decides if a person is eligible to make a claim for refugee protection. The Refugee Protection Division (RPD) of the IRB (Immigration and Refugee Board) determines whether a person is a Convention refugee or a person in need of protection. If the person is accepted as a Convention refugee or a person in need of protection, that person may apply for permanent residence without leaving Canada. Such persons are subject to security, criminal and health clearances (sections 21(2), 34, 35, 36(1), 37, 38 IRPA).

A person outside of Canada can approach a Canadian embassy and claim refugee protection and ask for a visa to Canada. If the claim is successful, the visa officer at the embassy will give a permanent visa to the person.

War criminals, terrorists or serious criminals are not entitled to refugee protection, although, as you can appreciate, it is necessary to establish that the persons claiming protection are such persons before protection will be denied.

Judicial Review of Decisions Affecting Foreign Nationals

I propose to examine now how the courts oversee the administration of the IRPA and Regulations. At common law there was no right of appeal in any matters. Decisions, when given by administrative bodies or courts, were final in the truest sense of the word. Therefore, the authority for any appeal or review must be found in the statute law.

IRPA provides for judicial review of any decision in an immigration matter. The Minister can apply for permission to review and the person concerned or affected can also apply for permission. If permission to review a decision is refused, the decision in

question is final and unalterable. If permission to review is granted, a judicial review proceeding takes place in the Federal Court Trial Division.

In such a proceeding, the Trial Division judge reviews the decision to see if, among other things, an error of law occurred or there was an unfairness in the way the matter was handled. If there was, the court can order the matter to be re-determined. The court does not decide the matter it is reviewing and it does not substitute its judgment of the matter for the decision maker's. An application for judicial review cannot be made until all administrative appeals under IRPA have been exhausted.

An appeal from the Trial Division to the Federal Court of Appeal is only possible with the permission of the Trial Division judge who heard the matter.

Policy Considerations

From time to time Immigration Policy is affected by external factors such as war and the state of the economy. For example, in March 1931, to counter unemployment, the landing of all immigrants was prohibited, subject to four exceptions:

1. British subjects,
2. Citizens of the U.S,
3. The wife or unmarried child of a legal resident,
4. Agriculturalists having sufficient means to farm in Canada.

In November 1947, additional classes of workers were added, along with persons entering to marry, to the categories of those permitted to immigrate. Also included were persons honourably discharged from the Canadian Armed Forces.

In June 1950, in response to a need for workers in an expanding post World War II Canadian economy, by an Order-in-Council, the class of immigrants was further

expanded to anyone who satisfied the Minister that he was a suitable immigrant. Suitable meant:

1. *Suitable having regard to climatic, social, educational or other conditions of Canada, and*
2. *Interestingly, not undesirable "owing to his peculiar customs, habits, modes of life, methods of holding property or because of his inability to become readily adapted and integrated into the life of a Canadian community and to assume the duties of Canadian citizenship within a reasonable time".*

Thus, external factors such as war and the economy can affect the migration of people to Canada in a positive or negative way.

Conclusion

Immigration laws have expanded the rights of "aliens" to live and work in Canada. There is great discretion in the law, allowing officers to assess suitability to enter and remain in Canada. This discretion is overseen by the Trial Division of the Federal Court, which seeks to ensure fairness in the decision-making process, without taking over that decision-making.

The immigration law recognizes and protects persons fleeing persecution on account of their race, religion, nationality, membership in a particular social group or political opinion.

Our immigration laws, as they have in the past, will continue to be affected by and evolve to meet the ever-changing realities of the world we live in.