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Résumé de l'article

Le présent texte constitue une réplique à l'article de Walter Chi Yan Tom, « Equality Rights in the Federal Independent Immigrant Selection Criteria » ((1990) 31 C. de D. 477.)) et dans lequel l'auteur affirmait que les critères de sélection de l'immigrant indépendant sont discriminatoires au regard de l'article 15 de la Charte constitutionnelle et ne peuvent se justifier par l'article 1.

L'auteure affirme ici que la faculté d'apprécier et d'établir des distinctions dans le cours de la prise de décision administrative en la matière ne saurait équivaloir à la discrimination au sens de l'article 15. Elle examine le conflit entre la souveraineté de l'Etat et les principes généraux du droit, de même que l'utilisation par les tribunaux de la détermination de la qualité d'ester en justice pour éviter de se prononcer sur le fond constitutionnel. Enfin, elle critique l'absence de cohérence et de rationalité dans la reconnaissance de droits procéduraux à différentes catégories d'immigrants.

Independent Immigrant Selection Criteria and Equality Rights: Discretion, Discrimination and Due Process*

Anne DOBSON-MACK**

Le présent texte constitue une réplique à l'article de Walter Chi Yan Tom, « Equality Rights in the Federal Independent Immigrant Selection Criteria » ((1990) 31 C. de D. 477.)) et dans lequel l'auteur affirmait que les critères de sélection de l'immigrant indépendant sont discriminatoires au regard de l'article 15 de la Charte constitutionnelle et ne peuvent se justifier par l'article 1.

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This article is a response to Walter Chi Yan Tom's « Equality Rights in the Federal Independent Immigrant Selection Criteria », published in 1990 in this journal, in which it is asserted that the federal independent immigrant selection criteria are discriminatory within the meaning of s. 15 of the Charter and are not demonstrably justified according to s. 1.

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* I would like to thank Phil Bryden and Rob Grant for their insights and encouragement.

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The author argues that Tom badly distorts the section 15 meaning of discrimination when he equates the discretion and drawing of distinctions, which are part of the administrative decision-making process by which independent immigrants are selected, with section 15 discrimination. The article also addresses the conflict between State sovereignty and the sovereignty of universal legal principles, a conflict which is raised in Tom's article. Finally, the author examines the ways in which standing rights have been used by the courts in immigration decisions to avoid dealing with substantive Charter issues, and criticizes the lack of rationality and coherence in the assignment of due process rights to different classes of nonnationals under current immigration law.

In his article, « Equality Rights in the Federal Independent Immigrant Selection Criteria », Walter Chi Yan Tom assesses how well the federal independent immigrant selection criteria conforms to the standards of s. 15 of the *Canadian Charter of Rights and Freedoms*[1]. Both his analysis of the selection criteria's conformity with s. 15, and the assumptions upon which the analysis itself is based are flawed. Tom mistakenly concludes that several of the independent immigrant selection criteria are discriminatory

1. W.C.Y. TOM, « Equality Rights in the Federal Independent Immigrant Selection Criteria », (1990) 31 *C. de D.* 477. The selection criteria can be found in Schedule of the *Immigration Regulations, 1978*, SOR/91-497, which relates to ss. 3, 7, 8, and 11 of the *Immigration Act*, R.S.C. (1985), c. I-2. F.N. MARROCCO and H.M. GOSLETT, *1992 Immigration Act of Canada*, Toronto, Carswell, 1991, p. 535.

within the meaning of s. 15 of the Charter and are not demonstrably justified according to section 1. In addition, he fails to address some fundamental issues in his assessment of the current admissions policy. Tom's faulty anaylsis is illustrative of the confusion which surrounds the issue of equality rights in the context of the inherently discriminatory process of immigration. In my critique of some of the flaws in Tom's analysis of the selection process, I raise and explore some of the difficult questions which lie at the heart of this confusion. If Canadian immigration policy is to defend against accusations of discrimination, the basic questions raised in this paper must be clearly addressed, if not definitively answered, by Canadian immigration policy-makers.

In the introduction to « Equality Rights », the author states that immigration and admission to Canada, as noted by the courts, are seen as privileges to be determined by statute and regulation, rather than a matter of rights[2]. Making distinctions between people in terms of their rights and privileges is described as an exercise of State sovereignty which is « a basic premise of any immigration system[3] ». Tom points out that these distinctions, made as an exercise of State sovereignty are most often based on citizenship and nationality differences. Finally, he admits that immigration law is « inherently unequal in terms of its application to citizens and aliens » and as a result, the alien/citizen inequality is « difficultly challenged »[4].

2. W.C. TOM, *supra*, note 1 at 479. At footnote 5 the author cites ss. 5 and 8 of the *Immigration Act* and the cases of *Cronan* v. *M.M.I.* (1973) 3 I.A.C. 84, *Masella* v. *Langlais*, [1955] S.C.R. 263, 281, *Vaaro, Worozcyt and Others* v. *The King*, [1933] S.C.R. 36, 42 and *Prata* v. *Ministry of Manpower and Immigration*, [1976] 1 S.C.R. 376, 380 as examples of this understanding of immigration as a privilege rather than a right.
3. W.C.Y. TOM, *supra*, note 2. Edward Morgan analyses the problematic relationship which exists between the doctrine of State sovereignty (the sovereignty of the nation over the domestic legal order, in this case over immigration policy) and the doctrine of the transcendent sovereignty of law over State rights. This dilemma is all the more acute when the Constitution of a sovereign State, like our Charter, which incorporates the State's international human rights commitments, is applied to the State's domestic law concerning aliens. This dilemma will be dealt with in the final part of the paper. See E. MORGAN, « Aliens and Process Rights: The Open and Shut Case of Legal Sovereignty », (1988) 7 *Wis. Int'l L.J.* 107, and « International Law in a Post-Modern Hall of Mirrors », (1988) 26 *Osgoode Hall L.J.* 207. By contrast, see the following articles by Guy S. Goodwin-Gill and Christian Brunelle, which deal with the relationship between these doctrines, but do not regard it as problematic: G.S. GOODWIN-GILL, « The Status and Rights of Nonnationals », in HENKIN and ROSENTHAL, *Constitutionalism and Rights*, New York, Columbia University Press, 1990, p. 151 and C. BRUNELLE, « La primauté du droit: la situation des immigrants et des réfugiés en droit canadien au regard des Chartes et des textes internationaux », (1987) 28 *C. de D.* 585, 611-612.
4. W.C.Y. TOM, *supra*, note 3.

1. The Problem of Closed Borders and Human Equality

Having made the above admissions regarding the right of the sovereign State to make citizen/alien distinctions that are most often based on nationality differences, Tom next asserts that the « role of equality rights is still of primordial importance in distinctions based on the enumerated and analogous grounds of s. 15 of the Charter, such as race and religion, which are entirely inappropriate and of a discriminatory nature ». How does Tom marry his admissions concerning the right of the sovereign State to make nationality-based citizen/alien distinctions with his assertion regarding the primordial importance of s. 15 rights in distinctions based on enumerated and analogous grounds, in light of the fact that one of the enumerated grounds of s. 15 is « national or ethnic origin[5] » ? Is there not a contradiction between the assertion that the role of equality rights is of primordial importance in distinctions based on the enumerated and analogous grounds of s. 15 and the assertion that a basic premise of any immigration system is the right of a sovereign State to make distinctions between people based on nationality and citizenship ? Pondering these questions forces us to face the basic contradiction between the equality declared (regardless of citizenship) in s. 15 of the Charter, and the inequality inherent in any admissions system other than that of open borders[6].

In « Due Process and Membership in the National Community : Political Asylum and Beyond », David Martin acknowledges the apparent unfairness of the use of alienage (an accident of birth) as the only factor that

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5. Section 15(1) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.R.), 1982, c. 11, states : « Every individual is equal before and under the law and has the right to equal protection and benefit of the law without discrimination based on *race, national or ethnic origin*, colour, religion, sex, age or mental or physical disability [emphasis added]. »

6. One *popular* justification for closed borders in a world where our place of birth is purely accidental, can be summarised as follows. Opening our borders would likely result in an influx of those who could afford to emigrate from nations where the standard of living is significantly lower than that enjoyed in Canada (heavily weighted to third world immigrants). The result would be a brain drain on third world nations and a possible drop in the standard of living in Canada. The end result would be a net loss, since the Canadian government's ability to contribute to the transfer of technology, skilled labour and capital would decline drastically and the influx of immigrants could stretch the social safety net beyond its capacity. The general fear regarding an uncontrolled influx of immigrants is that industry would employ them at wages lower than those which obtained prior to the influx, and this would mean a drop in the general standard of living enjoyed in Canada. The counterargument to this is that many immigrants are employed in jobs that Canadians will not do, and their low wages in these areas of employment do not have a negative effect on the wages of Canadian workers in other employment areas. Indeed, by saving industry money in one employment sector, low immigrant wages likely help keep wages artificially high in sectors dominated by Canadian-born workers.

differentiates the procedural protection enjoyed by citizens from that applicable to first-time applicants for admission[7]. He states that:

> Placing so much weight on a characteristic wholly divorced from voluntary action and from any notion of individual merit may seem fundamentally unfair, whereas due process, we have been told, is about fairness. Birthplaces simply exist; they were not chosen. Giving them even the significance advocated here perhaps cannot be defended on purely moral grounds, on a rigorously policed process of reasoning only from neutral, rational, and a historical principle. But, as Anthony Kronman writes, « although morality requires us to look at human affairs from the timeless standpoint of reason itself, its prescriptions must somehow be accommodated to the contingent and irrational features of the human condition. » Those features include « the natural attributes that it its our accidental fate to possess »[8].

In a paper focussed on the application of equality rights in the context of immigration selection, the problem of justifications for any kind of discrimination in admissions (apart, perhaps, from restrictions on the admission of dangerous criminals) ought to be addressed. Rather than face this thorny question head on however, Tom avoids the issue and promotes a selection system which could, in the final analysis, result in the admission of all applicants who could describe their immigration as furthering one of the immigration policy objectives enumerated in s. 3 of the *Immigration Act*[9].

2. Selection Criteria[10]: The Problems of Discretion, Distinction, and Discrimination

Applying equality rights to a « selection » process is problematic: choosing one individual over another involves a process of discrimination,

7. D. MARTIN, « Due Process and Membership in the National Community: Political Asylum and Beyond », (1983) 44 *U. Pitt L. Rev.* 165, 217.
8. *Ibid.* In relation to this issue Martin notes the work of several authors. B. ACKERMAN, *Social Justice in the Liberal State*, New Haven, Yale University Press, 1980, pp. 89-95, critically examines the reasons generally given for closed borders and reveals their profound shortcomings. A. BICKEL, *The Morality of Consent*, New Haven, Yale University Press, 1975, is suggested as a counterpoint to Ackerman. Bickel (*supra*, p. 11) warns against « pretensions to universality [...] overconfident assaults on the variety and unruliness of the human condition [and] the intellectual and emotional imperialism of concepts like freedom, equality, even peace. » Finally the works of A. KRONMAN, « Talent Pooling », in XXII *Nomos: Human Rights*, vol. 58, no. 77, 1981, and M. SANDEL, *Liberalism and the Limits of Justice*, New York, Cambridge University, 1982, are recommended as thoughtful analyses of this problem.
9. Tom does not address the issue of what he would consider to be justifiable grounds for exclusion. Based on the kinds of distinctions which he finds discriminatory and not justified according to section 1 of the Charter, though, it is likely safe to say that he would not object to national health or national and community security based justifications for exclusion.
10. Schedule *Immigration Regulations, 1978*, SOR/91-497; F.N. MARROCCO and H.M. GOSLETT, *supra*, note 1.

in the broad sense of the word. Indeed, as Christopher Wydrzynski has noted, a key function of immigration law is to single out certain groups for differential treatment, in terms of their legal rights to enter and remain in Canada[11]. Wydrzynski explains :

> [P]rima facie, such treatment may be seen as a violation of guarantees of equal treatment. However, such an interpretation of this fundamental right is unlikely and unwarranted with regard to the immigration field. Not only would such an interpretation undermine immigration legislation completely, but it would contradict the historical rationale for immigration control[12].

In addition, it must be recognised that, given the kinds of restrictions we currently place on immigration, the kind of decision made by an immigration official necessarily involves subjective elements[13]. In addition, the restrictions we place on immigration generally involve some kind of subjective *national* judgment on why and in what situations we want to restrict access to membership in our community. While we want the officials who make the ultimate decisions as to who is admitted into membership in our community to be « discriminating », we want them to discriminate on the basis of an applicant's merits or capacities, and not on the basis of irrelevant considerations such as the grounds prohibited by section 15 of the Charter.

2.1 Discrimination

Any attempt to define the meaning of « discrimination » in section 15 must begin with Justice McIntyre's explanation of the concept in *Andrews* v. *Law Society of British Columbia*[14]. In his valuable study of section 15 of the Charter, Dale Gibson notes that McIntyre's concept of discrimination, which was approved by his colleagues on the Supreme Court of Canada, can only be understood through a careful analysis of several separate but connected passages in his reasons[15]. In one key passage, Justice McIntyre

11. C. WYDRZYNSKI, *Canadian Immigration Law and Procedure*, Aurora, Canada Law Book, 1983, p. 467.
12. *Ibid.*
13. And the restrictions we place on immigration generally involve some kind of subjective *national* judgment on why and in what situations we want to restrict access to membership in our community.
14. *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143, [1989] 2 W.W.R. 289 [hereinafter *Andrews*].
15. For an informative discussion of the meaning of discrimination in section 15 of the Charter, see : D. GIBSON, *The Law of the Charter : Equality Rights*, Toronto, Carswell, 1990, especially the discussion of the relation of « equality » to « discrimination » at p. 102 and Chapter IV, « Discrimination, General Considerations » at pp. 109-161. See also A.F. BAYEFSKY, « Defining Equality Rights », in M. EBERTS and A.F. BAYEFSKY (eds.), *Equality Rights and the Canadian Charter of Rights and Freedoms*, Toronto, Carswell, 1985, p. 1. D. GIBSON, *supra*, note 15 at 110.

explains that discrimination involves disadvantage to the victim, and that « personal characteristics » must be involved. He states :

> [D]iscrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed on others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed[16].

Later in his judgment, McIntyre J. notes that a further necessary ingredient to discrimination is that the distinction in question be « pejorative » or in other words, that it involve « prejudice ». He remarks :

> The words « without discrimination » [in s. 15(1)] require more than a mere finding of distinction between the treatment of groups or individuals. Those words are a form of qualifier built into section 15 itself and limit those distinctions which are forbidden by the section to those which involve *prejudice* or disadvantage[17].

Dale Gibson notes that « prejudice » has two meanings : 1) injury and 2) unreasonableness/lack of just grounds, both of which are involved in the s. 15 meaning of discrimination. There is a debate as to whether the « unreasonableness » aspect of prejudice should be considered in relation to s. 15(1) or only in relation to a s. 1 analysis, once a distinction has been found discriminatory. Regardless of the point at which it is considered, it is clear that an examination of the « reasonableness » of a distinction is a vital part of what is involved in dealing with laws, (in this case, regulations), that are alleged to be discriminatory within the meaning of s. 15(1) of the Charter[18].

In examining whether the independent immigrant selection criteria is discriminatory within the meaning of section 15, a portion of Justice La Forest's concurring judgment in *Andrews* is worthy of note. Describing his conception of s. 15 discrimination, (which was in substantial agreement with that of McIntyre J.), La Forest J. states :

> I am convinced that it was never intended in enacting s. 15 that it become a tool for the wholesale subjection to judicial scrutiny of variegated legislative choices in no way infringing on values fundamental to a free and democratic society. Like my colleague, [McIntyre J.], I am not prepared to accept that *all* legislative classifications must be rationally supportable before the courts. *Much economic and social policy-making is simply beyond the institutional competence of the courts : their*

16. *Andrews*, *supra*, note 14, [1989] 2 W.W.R. at 308.
17. *Id.* at 313.
18. D. GIBSON, *supra*, note 15 at 115.

role is to protect against incursions on fundamental values, not to second guess policy decisions[19].

Given the policy-oriented nature of immigration law in general and selection criteria in particular, this description of the purpose of section 15 of the Charter should be kept in mind in any analysis of the conformity of immigration admissions criteria to that section.

2.2 Discretion

Walter Chi Yan Tom is right when he characterizes the independent immigrant selection criteria format as very similar to the process involved in applying for employment. He finds this process unacceptable, describing it as « biased towards skilled workers and professionals of lower age » and hinting that the « Canadians first » premise of the policy represents a continuation of Canada's history of ethnic discrimination[20]. Furthermore, Tom judges those categories in the selection criteria that are dependent on a discretionary evaluation by a visa officer to be *prima facie* discriminatory in the sense of s. 15[21]. Although I take issue with most of Tom's conclusions regarding the non-conformity of the selection criteria with s. 15 of the Charter, I will limit my response and deal with only a few of the most serious problems in his analysis.

A significant flaw in Tom's analysis lies in his equation of discretion with discrimination. Tom argues that the attributes in category nine are « all subjective ones and thus depend on the discretion of the judging visa officer[22] ». He also complains that the standards upon which an officer bases her decision are the standards of a Canadian citizen. Because different people from different cultures may judge these attributes differently, Tom somehow reaches the conclusion that category nine is *prima facie* discriminatory. What he fails to establish is how and why Canadian immigration officials should distinguish between applicants from anything but a Canadian perspective[23]. I am not suggesting that the consideration of an applicant's « personal suitability », based on a personal interview, should

19. *Andrews*, *supra*, note 14, [1989] 2 W.W.R. at 297 (emphasis added).
20. W.C.Y. Tom, *supra*, note 1 at 495-496.
21. *Id.* at 496.
22. W.C.Y. Tom, *supra*, at 409.
23. It is likely fair to say that an alien who chooses to apply to immigrate accepts the fact that her application to become a part of our community will be considered according to Canadian standards. This is not to say that Canadian immigration officers are insensitive to the standards of other cultures, but rather that applications will be measured according to the standard of qualities valued in Canada, which will, after all, be the successful applicant's new home.

necessarily remain part of the decision-making process[24]. What I would suggest is that subjectivity and discretion in decision-making of this kind are not equivalent to the kind of discrimination prohibited by section 15 of the Charter. While subjective or discretionary decision-making *may sometimes* involve distinctions based on prejudice, and would therefore be discriminatory, such decisions are by no means *necessarily* prejudiced and discriminatory in nature. Using section 15 to label bad decision-making « discriminatory » is a misuse of the Charter.

While the determination of « personal suitability », (category nine) based on an interview with a visa officer is largely subjective and may involve the exercise of discretion, this does not mean that it is discriminatory within the meaning of section 15 (nor that it is not justifiable according to s. 1 of the Charter) as Tom argues[25]. Tom equates discretion and subjectivity with discrimination, and is completely blind to the positive elements of flexibility and humanity which are also aspects of the kind of discretionary decision-making at issue here. Tom claims :

> [c]ertain categories in the selection criteria are dependent on a discretionary evaluation by the visa officer and appear *prima facie*, discriminatory in the sense of s. 15 of the Charter. Even in the more objective categories, the visa officer has the discretion to refuse or approve an application notwithstanding the assessed unit total, if in his opinion, it does not reflect the chances of the applicant becoming successfully established in Canada[26].

The fact that a decision has strong subjective elements, does not mean that it creates a disadvantage based on a section 15 prohibited ground. When a visa officer decides that an applicant's points total does not truly reflect her ability to successfully establish herself in Canada, and the officer grants a visa based on her professional assessment of the applicant, she is not disadvantaging other applicants on a ground prohibited by s. 15.

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24. See P.L. BRYDEN, « Fundamental Justice and Family Class Immigration The example of *Pangli* v. *Minister of Employment and Immigration* », (1991) 41 *U. Toronto L.J.* 484, 523-524, regarding the use of trial-type procedures in a mass adjudication system, particularly his criticisms regarding efficiency and systemic bias. If it could be established that the immigration interview resulted in a systemic bias in the system, and this bias constituted discrimination within the meaning of s. 15 of the Charter, then I would agree that the personal suitability category is discriminatory. This is not the argument that Tom makes, however.

25. *Immigration Act*, *supra*, note 1, Category 9, Schedule 1:

> *PERSONAL SUITABILITY*
>
> Units of assessment shall be awarded on the basis of an interview with the person to reflect the personal suitability of the person and his dependants to become successfully established in Canada based on the person's adaptability, motivation, initiative, resourcefulness and other similar qualities. [10 units max.]

26. W.C.Y. TOM, *supra*, note 1 at 496.

By allowing an officer some discretion, an otherwise rigid system is injected with some flexibility. It is also important to note that the officer's discretion in this area is not untrammelled ; rather, it is exercised within the reasonably well-defined framework of the selection criteria, (and their objectives), as a whole[27].

It is likely true that most applicants for immigration have the ability to become successfully established in Canada. What this means is that the assessment of an applicant's ability to become established in Canada is not a very precise tool to employ in differentiating between applicants[28]. In making differentiations between equally qualified individuals, any tool is imprecise ; but this does not mean that its use results in discrimination.

It should be noted as well that many discretionary decisions under the *Immigration Act*, such as those involving sections 37, 70, 77 and 114(2), can only operate to *benefit* individual applicants. That is, those who do *not* qualify can be included but those who *do* qualify cannot be *excluded* using these provisions. The existence of such provisions may, however, mean that we develop rules for exclusion that are broader than are necessary to achieve our social objectives. This certainly seems to be the case with respect to inadmissibility and removability on medical and criminal grounds, for example. The point here is that at the margins, an entirely discretionary system, an entirely rule-oriented system, and a mixed system like ours will *all* produce benefits to at least some people and disadvantages to at least some others. To substantiate his claim that the Canadian system is discriminatory within the meaning of section 15 of the Charter, it is not enough for Tom to show that our system results in *some* disadvantage to *some* people, since any system will produce *some* disadvantages ; what he must show is that the *kinds* of disadvantages our system produces are stigmatized by section 15[29].

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27. E. KINGDOM, *What's Wrong With Rights ? : Problems for Feminist politics of Law*, Edinburgh, Edinburgh University Press, 1991, p. 113, contrasts policies that rely on defined rights and those that rely on judicial discretion. Her critique of discretion concludes : « It may be that discretion works better in areas of law which are reasonably well established but that in undeveloped areas of law [...] the use of discretion is particularly problematic. For if there are no reasonably clear principles and rules, there is no clearly defined framework within which discretion can be exercised. »
28. As stated above, however, it does allow an officer to use her discretion in extreme cases where her judgement tells her that an applicant very clearly would (or would not) settle successfully, regardless of their points total. Tom also ignores the fact that the personal interview gives the claimant an opportunity to participate in the decision-making process, to answer questions put to her and to know that her application has been considered.
29. I thank Phil Bryden for bringing this point to my attention.

In his discussion of the impact of Charter guarantees on immigration processes, Christopher Wydrzynski notes that « definitional approaches to particular rights may have to take into consideration the special administrative, discretionary and policy-oriented nature of immigration law[30] ». Unfortunately, Tom fails to take the special discretionary nature of immigration law into consideration in his definitional approach to section 15 equality rights. The kind of discretionary power involved in the immigration selection process can be strongly criticised on the grounds that it opens the door to inconsistent decision-making. But bad decision-making is not the same thing as discriminatory decision-making. Tom may have valid concerns about bad decision-making in Canada's immigrant selection process, but he fails to establish that the process is prejudiced/unreasonable, within Justice McIntyre's authoritative conception of s. 15 discrimination[31].

2.3 Distinction and Discrimination

Tom's most serious misuse of the equality provision of the Charter occurs in his section 15 analysis of the occupational demand category of the selection criteria in Schedule One[32]. Tom states:

> In Item 4 a distinction is made between independent immigrants based on the kind of occupation the applicant is qualified for, disadvantaging those whose occupations are less valued according to the occupational list [...] this loss of points may lead to the risk of inadmission for lack of a sufficient point total or even immediate disqualification[33].

According to Tom's reasoning above, a distinction between one applicant and another disadvantages some applicants, and the consequence of this disadvantage could be disqualification. Whether this constitutes discrimination in the sense of s. McIntyre's judgment in *Andrews* v. *Law Society of B.C.*[34] as authority for the proposition that « distinctions based on personal characteristics would almost certainly be discriminatory, while distinctions based on an individual's merits or capacities, almost always fell outside the concept of discrimination[35] », Tom goes on to assert

30. C. WYDRZYNSKI, *supra*, note 11 at 466.
31. See text at notes 14-18, *supra*.
32. *Immigration Act*, *supra*, note 1, Category 4, Schedule I:

> *OCCUPATIONAL DEMAND*
>
> Units of assessment shall be awarded on the basis of employment opportunities available in Canada in the occupation that the applicant is qualified for and is prepared to follow in Canada, such opportunities being determined by taking into account labour market demand on both an area and national basis. [10 units max.]

33. W.C.Y. TOM, *supra*, note 1 at 500.
34. *Andrews*, *supra*, note 14, [1989] 1 S.C.R. 143.
35. W.C.Y. TOM, *supra*, note 1 at 494.

that « [t]he occupation of an individual is a *personal aspect* that is for most cases « unalterable except on the basis of unacceptable costs and in some cases, unalterable by conscious actions »[36]. »

Two objections must be made to these assertions. Firstly, the fact that a distinction imposes disadvantages does not necessarily mean that it constitutes discrimination within the meaning of s. 15 of the Charter. Denying someone an *undeserved benefit*, like immigrant status, would be *disadvantageous*, but it would *not* be *discriminatory*[37]. Secondly, the assertion that an individual's occupation is an immutable personal characteristic[38], in the sense of being « typically not within the control of the individual » as defined by La Forest J. in *Andrews*, is simply ridiculous in an age when it is estimated that the average person will experience a number of occupational changes in their lifetime[39]. It is tantamount to saying that a government hiring decision which is based on occupational distinctions between applicants is discriminatory, because it takes the job applicant's immutable characteristics into account. While Tom may not believe that occupational factors *should be* relevant to admissions decisions, to assert that a claimant's occupation is an immutable personal characteristic is to distort the concept of « immutable » and « personal characteristic » which was intended by the Supreme Court justices who introduced the concept in the context of section 15 of the Charter[40]. It is one thing to argue, as Tom does[41], that immigration selection based on Canada's present labour needs is short-sighted, but to claim that it is discriminatory within the meaning of s. 15 of the Charter is something else altogether. In the same way that he

36. *Id.* at 501, quoting from the judgment of La Forest J. in *Andrews* (emphasis added).
37. D. GIBSON, *supra*, note 15 at 111.
38. In his study of equality rights in the Charter, D. GIBSON, *supra*, note 15 at 214, notes that « [i]n the context of the Charter and human rights legislation « immutability » appears to mean « alterable with great difficulty, if at all » ». For occupation to be an immutable characteristic in the context of immigration, would mean that distinctions between immigration applicants could not be based on occupational factors, without being discriminatory (and perhaps saved by s. 1). This flies in the face of the policy-oriented nature of immigration selection. Immigration is not a right of all who apply, and distinctions between applicants must be made. Given the social safety net in place in Canada, it is not surprising that the government is concerned that immigrants be employable in Canada. « Employable » does not necessarily mean highly skilled or professional. In the context of immigrant selection, Immigration Canada has the opportunity to choose new members of the community. It is submitted that in making this choice, the consideration of an applicant's occupational experience and skills is highly relevant.
39. D. Canon, Career Counsellor, Queen's University at Kingston, Ontario, 1989.
40. See D. GIBSON, *supra*, note 15 at 157-161, re : Immutability and Analagousness : Personal Characteristics.
41. *Id.* at 516-517.

failed to consider the special discretionary nature of immigration law in examining the discretionary nature of some admissions decisions, Tom also fails to take the special policy-oriented nature of immigration law into account in his analysis of occupation-related selection criteria[42]. Walter Chi Yan Tom may not agree with the labour market oriented, « Canada first » immigration policy currently in place, but he stretches section 15 of the Charter beyond its limits in his analysis of the independent immigrant selection criteria. It is submitted that it was precisely the kind of Charter review of immigration policy undertaken in « Equality Rights » that La Forest rejected when he said he was convinced :

> that it was never intended in enacting s. 15 that it become a tool for the wholesale subjection to judicial scrutiny of variegated legislative choices in no way infringing on values fundamental to a free and democratic society[43].

And that he was :

> not prepared to accept that *all* legislative classifications must be rationally supportable before the courts. *Much economic and social policy-making is simply beyond the institutional competence of the courts : their role is to protect against incursions on fundamental values, not to second guess policy decisions*[44].

In « Equality Rights », Tom uses s. 15 of the Charter to challenge criteria related to job experience and vocational training as well as occupational demand[45]. He submits that the occupational factor in category 4, (and consequently categories 2 and 3 as well), « is discriminatory in its indirect effects on immigrants from nations whose choice or access to those occupations « valued » by Canada's immigration criteria are limited, due to the social, economic, and political conditions in these nations. » Tom goes on to argue that if a broad and generous interpretation of analogous grounds of discrimination is used, his analysis does not « « overshoot the actual purpose of the right or freedom in question », nor is it stretching the imagination to characterize immigrants who are forcibly disadvantaged by their livelihood, as members of a discrete and insular minority[46] ».

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42. See text at note 21, *supra*.
43. *Andrews*, *supra*, note 14, [1989] 1 S.C.R. 143.
44. *Id.*, [1989] 2 W.W.R. at 297 (emphasis added).
45. W.C.Y. TOM, *supra*, note 1 at 502.
46. *Id.* at 502. Quoting from the judgment in *R.* v. *Turpin*, [1989] 1 S.C.R. 1296, re « overshooting » the actual purpose of the right in question. A major problem with Tom's analysis lies in his failure to address the issue of how Canada ought to determine who is granted immigrant status, if not through a process similar to that of applications for employment. Admittedly, such a process is not suited to applicants for refugee status, and family reunification considerations are key in the selection of family class applicants. But if considerations as to vocational skills, experience and occupational demand should not be taken into account in choosing independent immigrants, what criteria should govern the decision instead ?

Whether we understand the selection of immigrants whose vocational skills are valued in Canada to constitute a violation of s. 15 of the Charter, depends on our assumptions about the rationale for immigration policy. In his remarks to a panel on the *Philosophy and Mechanics of the Selection System*, at the 1990 Conference on Canadian Immigration Law and Policy, the Director General of Immigration Policy, (Andre Junau), proposed a framework of questions to think about. Junau emphasised the need to ask : What are the main assumptions about the rationale for immigration policy ? And since the selection of immigrants should follow from this rationale, what kind of constraints does this place on selection policy[47] ?

Our assumptions about the rationale for immigration policy, in turn, depend on how we understand the relationship between Canada's right, as a sovereign State, to define membership in the nation through immigration law on the one hand, and our Charter/international covenant commitment not to discriminate on national or ethnic grounds, on the other. Can s. 15 of the Charter be interpreted as broadly as Tom suggests ? What impact do our international commitments have on our domestic immigration policy[48] ? Is Canada violating its s. 15 commitment to transsovereign human rights law by differentiating between immigration applicants based on occupational factors ? Differentiating between overseas refugees based on vocational factors (which Canada has been accused of in the past), is thought by many to be reprehensible, but in the case of individuals who have chosen to apply to immigrate to Canada for reasons other than asylum-seeking, is it unfair to consider such factors ? The answers to these questions depend on how one views immigration. Is it akin to business recruiting, or is it more like an international equalization programme ? We

47. In his address, Junau remarked on the centrality of immigration to the way Canadians see themselves (noting that this varies across the country). He also noted that population movements, while not new, are nonetheless a new challenge to governments all over the world. Finally, he reminded his audience that in addition to policies and rules on selection, immigration is also about foreign policy and international trade. (« Outline of Remarks by Andre Junau, Director General, Immigration Policy, to a Panel on the Philosophy and Mechanics of the Selection System », in *Canadian Immigration Law and Policy*, Montreal, Canadian Bar Association, 1990.)

48. Irwin Cotler writes about the problem of States that sign international covenants, but make only a facial commitment to these agreements in their domestic law and legal system. Cotler criticises the Soviet Union for its purely facial commitment to mobility rights. He argues that to be meaningful, mobility rights must include accessory mobility rights (e.g. the State's granting necessary travel documents), and he urges Canada, a co-signatory to the covenant in question, to bring pressure to bear and remind the Soviets of their commitment. Cotler also points out that the right to emigrate is, in many ways, meaningless because no concomitant right to immigrate exists. (I. COTLER, « The Right to Leave and to Family Reunification », (1987) 28 *C. de D.* 625.)

are able to see immigration as both, but we must admit the contradiction between the two visions.

The contradiction between our two views of aliens is an illustration of the fundamental contradiction between universal and particularized legal norms[49]. In « Aliens and Process Rights : The Open and Shut Case of Legal Sovereignty », Edward Morgan attributes the fundamental contradiction that underlies our views of aliens to the fact that « [i]n domestic and international legal discourse, aliens are a reflection of ourselves. » He explains that since we as individuals have a « deeply split personality » — understanding ourselves as undifferentiated, universal beings one minute, and as differentiated, national beings the next — we tend to have a double vision of aliens as well[50]. In legal discourse, this split personality ultimately translates into two distinct and incompatible theories about how our legal order is constituted. These theories, in turn, are the bases for two distinct understandings of sovereignty. Conceptions of the sovereignty of the State over members of foreign nations, (e.g. domestic immigration law), clash with notions about the sovereignty of universal legal principles, (e.g. universal human rights principles), as over the assertions of the state. The dilemma caused by this clash of understandings of sovereignty is especially acute when universal legal principles are incorporated into a domestic law of constitutional stature, as in the case of the *Canadian Charter of Rights and Freedoms*. In examining the conformity of immigration selection criteria to the Charter, we are forced to recognize the fundamental contradiction that underlies immigration decisions. How we interpret the effect of the Charter on immigration selection criteria depends, to a great extent, on which conception of sovereignty we believe ought to govern in a given situation.

3. Standing and Due Process

3.1 The *Locus Standi* Problem

In an examination of the independent immigrant selection criteria's conformity with section 15, a consideration of independent immigration

49. P.L. BRYDEN, *supra*, note 24 at 517.

50. E. MORGAN, *supra*, note 3 at 147. A less poetic person might explain our « double vision » respecting aliens as resulting from our tendency to make rational decisions based on a desire to maximize the benefit to ourselves, rather than attributing it to « split personality ». We are nationals when it serves our best interests and internationalists if and when we believe that the benefits outweigh the costs. The problem with the rational decision-maker model is that it does not account for differences in the way that individuals derive benefits (i.e. *why* one person derives benefit from acting altruistically, and another derives benefit from completely self-centred behaviour).

applicants' standing rights (i.e. their right to bring actions complaining of the non-conformity of the selection criteria with s. 15 of the Charter) is of considerable importance[51]. When « Equality Rights » was written, there was a lacuna in the law regarding the applicability of the Charter to nonnationals not present in Canada. In the case of *Dolack* v. *M.M.I.* the Federal Court of Appeal held that the *Canadian Bill of Rights* applied only to people living in Canada[52]. In 1986, the Supreme Court of Canada decided the case of *Singh* v. *M.E.I.*[53]. In her judgment, Wilson J. defined the word « everyone » in section 7 of the Charter to include « every human being who is physically present in Canada and by virtue of such presence amenable to Canadian law[54] ».

Since the decision in *Singh*, Charter guarantees which are not expressly limited to citizens, have been interpreted to apply to citizens and aliens alike. When « Equality Rights » was written, there had not yet been a decision concerning the applicability of the Charter to aliens outside Canada : it remained an open question. As a result, Tom was free to carry out his s. 15 Charter assessment of the independent immigrant selection criteria, based on the assumption/prediction that the rights and guarantees of the Charter applied equally to everyone (or « every individual » in the case of s. 15 rights) regardless of location.

The state of the law in this area has changed since « Equality Rights » was written ; the legal lacuna has been filled by the decision of the Federal Court Trial Division in *Ruparel* v. *M.E.I.*[55]. At issue in that case was the question of whether s. 19(2) of the *Immigration Act* is inconsistent with

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51. While standing is important, the *ability* (in terms of financial, psychological, emotional, and legal resouces) of a person involved in the immigration process to bring a Charter action is also key. B. JACKMAN, « Advocacy, Immigration and the Charter », (1990) 9 Imm. L.R. (2d) 286, 293, notes that : « in realistic terms, ordinary people involved in the immigration process do not have the resources to litigate challenges raising Charter issues. Unless they have a lawyer assisting in the immigration process, most won't even recognise that there is an issue of fairness or discriminatory action involved. Those who are actually in Canada, such as illegals and refugee claimants, are not in a much better position to challenge a refusal of their application in a court. » Even if a nonnational has a lawyer, this does not mean that they will likely bring an action challenging the *Charter*. The reason for this, Jackman explains, is that many immigration practitioners are hesitant to take on Charter litigation. This is an understandable position, given that bringing a Charter challenge takes huge amounts of time, energy, and resources, none of which are plentiful for most people involved in the immigration process.
52. *Dolack* v. *M.M.I.*, [1983], 1 F.C. 194 [hereinafter *Dolack*].
53. *Singh et al.* v. *M.E.I.* [1985] 58 N.R. 1, 1 S.C.R. 177 [hereinafter *Singh*].
54. *Singh*, *supra*, note 53, [1985] 58 N.R. 1 at 49. See also C. WYDRZYNSKI, « Notes on *Singh* v. *M.E.I.* », (1986) 64 *Can. B. Rev.* 172, 176.
55. *Ruparel* v. *M.E.I.* (1990) 11 Imm. L.R. (2d) 190 (F.C.) [hereinafter *Ruparel*].

section 15 of the Charter. The applicant was in England when he applied as an independent with the assistance of his brother, who was a Canadian citizen. Although the Court believed Ruparel's s. 15 argument had merit, the application failed because it was made from outside of Canada. The Court ruled that « every individual » in s. 15 includes every human being who is physically present in Canada. The Court rejected the argument that the High Commission in London, where Ruparel made his application, was in fact Canada.

The decision in *Ruparel* has important implications for the standing rights of independent applicants in general. Due to the fact that application for immigrant visas must generally be made from outside Canada, (see sections 9(1) and 9(4) of the *Immigration Act*), most applicants for immigrant status lack standing to invoke the rights and guarantees of the Charter, including the s. 15 equality guarantees which are the focus of this study[56]. Although a Trial Division decision is by no means the last word on the issue, *Ruparel* does represent the state of the law today.

While standing is conceptually distinct from the existence of a legal right, it is only fair to recognise that courts sometimes use standing as a vehicle to avoid reaching a conclusion on the validity of a cause of action that they do not want to reach. The *Ruparel* decision is a good example of this. It is fairly clear that in that case the judge did not want Ruparel's claim to succeed, but he was not prepared to accept a section 1 justification, so he rejected Ruparel's application based on standing. By contrast, in section 7, *Bill of Rights* and fairness cases, the courts have been quite willing to entertain a claim of legal right, and standing has not appeared to be a barrier to the assertion of such a claim made by aliens who are outside Canada's borders. It must be recognised then, that standing can be used instrumentally by courts to avoid coming to grips with the kinds of problems in our current immigration system that Walter Chi Yan Tom would like to see addressed[57].

3.2 Due Process and Standing Confusion

In the section of his article entitled « *Locus Standi*: a Right or a Privilege », Walter Chi Yan Tom misinterprets the meaning and implications of Justice Wilson's decision in *Singh* v. *M.E.I.* in relation to aliens who are not claiming refugee status[58]. Tom points out that because im-

56. See sections 115(1)(ii) and 115(2) for exemptions to the requirements in ss. 9(1) and 9(4) of the *Act*; also, see the Appendix for further discussion of the standing problem.

57. I thank Phil Bryden for clarifying this issue.

58. *Singh* v. *M.E.I.*, *supra*, note 53, [1985] 1 S.C.R. 177. See W.C.Y. TOM, *supra*, note 1 at 487-489.

migration is seen as a privilege rather than a right, the due process rights of immigrants are less than those of residents. He describes some of the criticism which the distinction between rights and privileges has received, quoting from Wilson J.'s decision in *Singh* where she recognised that the appellant refugee claimants in that case were entitled to fundamental justice in the determination of whether they were convention refugees[59]. This entitlement was theirs due to the serious potential consequences for them of a denial of refugee status rather than as a result of the traditional, formalistically defined legal rights or privileges accorded to refugee claimants. In « Notes on *Singh* v. *M.E.I.* », Christopher Wydrzynski explains that Wilson's judgment means :

> In a sense, aliens had statutory « rights » under the *Immigration Act*, 1976 (for example, a « right » under section 55 not to be removed to a country of persecution). Despite the fact that in general alien status could be viewed as a privilege, refugee claimants have significant statutory rights which can be protected by the Charter[60].

Tom misunderstands Wilson's reasoning and misapplies it in his attempt to create a firm legal foundation for his assumption/prediction that the Charter applies to aliens not present in Canada. After admitting that in the case of *Dolack* v. *M.M.I.*, *supra*, the Federal Court of Appeal found that the *Canadian Bill of Rights* applied only to persons living in Canada, Tom states : « However, if the same reasoning of *Singh* may be applied to the differentiation on the basis of location as it was applied to that of status, then it would be possible for aliens to invoke the guarantees of the Charter regardless of location[61]. This proposition ignores the reason behind Wilson J.'s decision not to use the traditional right/privilege distinction in determining the kind of process rights to which the claimants were entitled. In her decision in *Singh*, Justice Wilson stated : « *Given the potential consequences* for the applicants of a denial of that status [...] it seems to me unthinkable that the Charter would not apply to entitle them to fundamental justice in the adjudication of their status[62]. » The reason she felt strongly that the claimants were entitled to fundamental justice in the determination of whether they were convention refugees is clear from the above quotation — the potential consequences for them, should they be denied status,

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59. In the passage referred to, Wilson J. states : « The creation of a dichotomy between privileges and rights played a significant role in narrowing the scope of the application of the Canadian Bill of Rights [...] I do not think this kind of analysis is acceptable in relation to the Charter [...] Given the potential consequences for the appellants of a denial of status [...] it seems to me unthinkable that the Charter would not apply to entitle them to fundamental justice in the adjudication of their status. *Singh*, *supra*, 1 note 53 at 209-210.
60. C. WYDRZYNSKI, *supra*, note 54 at 176.
61. W.C.Y. TOM, *supra*, note 1 at 489.
62. *Singh*, *supra*, note 53 at 209-210 (emphasis added).

were extremely serious. As refugee claimants, the appellants in *Singh* were in a position where denial of status could mean that they would be sent back to face persecution, torture, or even death in their home country[63].

This is simply not so in the case of a denial of independent immigrant status, which is the issue in Tom's analysis. For independent immigrant applicants, the consequence of differentiation based on location is the denial of Charter rights. While this may seem a serious consequence, to be true to the spirit of Wilson's reasoning in *Singh*, we must go one step further and determine the consequences, for an immigration applicant, of being denied Canadian Charter rights. The worst possible consequence of the denial of Charter rights would be a denial of immigrant status. I hardly need to note that the consequences of being denied immigrant status are not of the same magnitude as the consequences of a denial of refugee status. This means that there is no justification for the « same reasoning of *Singh* » to be « applied to differentiation on the basis of location as it was applied to that of status », (to quote Tom's proposition) at least in the case of independent immigrant applicants[64].

3.3 The Problem of Aliens and Due Process Rights

The different kinds of procedural protection granted to different categories of nonnationals in Canadian law appear to be more the product of accident than that of thoughtful jurisprudence. In light of the lack of rationality in this area of immigration law, it is little wonder that Tom got lost in the confusion. This confusion is illustrated in the lack of coherence in the due process rights that are currently granted to different classes of

63. C. WYDRZYNSKI, *supra*, note 54 at 176-177 citing Wilson in *Singh*, *supra*, note 53, [1985] 58 N.R. at 39, highlights the fact that the section 55 « right » of refugee claimants was particularly important because it was a right not to be removed to a country of persecution. Wilson J. even used international law to interpret the s. 55 right to benefit the claimants, stating that they were « entitled to rely on this country's willingness to live up to the obligations it has undertaken as a signatory to the *United Nations Convention on Refugees.* »

64. Though it could be argued that non-inland refugee claimants ought not to be differentiated from inland refugees based on location. Of course broadening the application of Charter guarantees to include those not physically present in Canada is not the only way to make those guarantees applicable to independent immigrant applicants. Allowing all visitors to Canada to apply for immigrant status from within this country would give them Charter protection. Needless to say, this broad policy will not be adopted. It would almost certainly result in the arrival of an influx of visitors, who would try to put down roots as quickly as possible, in order to fight removal orders (or who would simply count on Immigration Canada's inability to remove them). Unless the ministry were willing to increase target numbers significantly, this policy would result in either a large number of (costly) removals or severe restrictions in the granting of visitor's visas.

aliens. To summarize : the protections in the *Canadian Bill of Rights* and the Charter apply only to those physically present in Canada[65] ; the fairness doctrine, a principle of Canadian administrative law, applies to everyone, regardless of status or location[66] ; while the *Canadian Bill of Rights* applies to the sponsors of family class immigration applicants, but not the applicants themselves[67].

If we are to remedy the confusion which reigns in this area, we must return to first principles and address some fundamental questions. The first question which must be addressed in any consideration of the due process rights of aliens is : how should a court decide what process is due ? What is an acceptable framework for assessing the due process claims of different groups of nonnationals ? In « Due Process and Membership in the National Community : Political Asylum and Beyond », David Martin explores these questions in depth and constructs a framework for assessing the due process claims of different groups of nonnationals, based on a claimant's « level of membership in the community[68] ». Martin's thesis is based on « a basic intuition » that, « quite apart from any instrumental considerations looking toward administrative burdens, we, as a national community, somehow *owe less* in the coin of procedural assurances to the first-time applicant for admission than we do our fellow citizens or to permanent resident aliens, or even to nonimmigrants who have been among us for awhile[69]. »

The implications of Martin's system for the independent immigrant class are fairly clear. Because most applications for immigration must be

65. *Dolack*, *supra*, note 52, and *Ruparel*, *supra*, note 55.

66. The seminal case regarding the imposition of a general duty of procedural fairness is *Re Nicholson and Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311. The following are immigration cases involving the use of the fairness doctrine : *Muliadi* v. *M.E.I.*, [1986] 2 F.C. 205 (F.C.A.) ; *Hui* v. *M.E.I.*, (1986) 65 N.R. 69 (F.C.A.) and *Ho* v. *M.E.I.*, (1990) 11 Imm. L.R. (2d) 12 (F.C.A.). For a discussion of the use of the doctrine of fairness in an immigration context see : P.L. BRYDEN, *supra*, note 24 at 497-500.

67. *Pangli* v. *M.E.I.*, [1988] 4 Imm. L.R. (2d) 266 (F.C.A.).

68. D. MARTIN, *supra*, note 7 at 194-195. See also A. ALEINIKOFF's response to Martin : « Aliens, Due Process and « Community Ties » : A Response to Martin », (1983) 44 *U. Pitt L.R.* 237. Aleinikoff is justifiably critical of a serious flaw in Martin's work, namely, his approach to refugees. Humanitarian considerations inhabit a realm which is distinct from (and indeed above) that of community considerations. The considerations which go to a decision to grant asylum to a refugee are altogether different from those that go to a decision to grant a person immigrant status. Considerations of the process due to immigrant applicants and refugee claimants, likewise, should be distinct, even if it means that Martin must abandon his goal of developing *one* framework for assessing *all* due process claims.

69. D. MARTIN, *supra*, note 7 at 192.

made from outside the country, many members of the independent class have no ties to the Canadian community (beyond their desire to join it) when they make their application[70]. It may be that following Martin's assessment framework would result in little actual change in the process rights of applicants for Canadian immigration. It could be argued that family class members, having important family ties with members of the Canadian community, generally have greater ties to Canada than do independents. As a result, they would generally deserve greater procedural protection. As explained above, this is in fact the case in Canada today : family class immigrants, through the *Bill of Rights* claims of their sponsors, have greater procedural protection than do independent class applicants. But we must look at more than the practical results of our system and any system to which we compare it. The attractiveness of developing a carefully considered assessment framework lies in the fairness, situation-sensitiveness, and clarity of the process through which decisions are derived as well as in the fairness of the results. I am not suggesting that we adopt Martin's assessment system[71]. I am however, suggesting that we replace the illogical current system, with a carefully considered assessment framework. To do this, we must return to first principles and ask the same fundamental questions that David Martin did.

Wilson J's decision in *Singh* represents a revolution in the Canadian approach to due process. In her judgment, the traditional right/privilege distinction was flatly rejected in favour of a more pragmatic, situation-sensitive approach which requires that the court consider the interests at stake when it decides the level of procedural protection due a given claimant. In « Fundamental Justice and Family Class Immigration », *supra*, Philip Bryden applauds this revolution in Canadian due process law. He recognises that judicial definition of classes of people able to assert due process claims based on either the magnitude of harm associated with the denial of their claim, or some philosophical or social consensus that what is at stake is worthy of special protection, presents some problems. « [B]ut at least it gets us thinking about what ought to be the central problem, which is how we ought to conceive of the areas of human relations with government that deserve special constitutional safeguards[72]. » Bryden urges Canadian judges, legislators and immigration policy makers to think about what it is

70. As illustrated in the case of *Ruparel*, *supra*, note 55, however, independent class applicants may have family ties with members of the Canadian community which fall outside of the ties that are necessary for them to qualify for family class immigration.

71. As I indicated above, when applied to refugees, the community ties approach is wrong-headed. An approach which considers the interests at stake, like that of Justice Wilson in *Singh*, is preferable.

72. *Singh*, *supra*, note 53 at 516.

they are trying to achieve in mandating constitutional review, and emphasizes the need to ask whether a value is sufficiently transcendent before allowing it to be «judicially defined and frozen into our structure for making immigration decisions[73]». He also warns that the traditional view of trial-type procedures as «the paradigm of fair and just procedures» is unjustified and extremely problematic in a mass adjudication context like that of immigrant selection[74]. In the development of a new, carefully considered assessment framework, Bryden's conclusions, and the warnings they contain should be kept in mind.

Conclusion

Although Walter Chi Yan Tom failed to establish that the independent immigrant selection criteria in the *Immigration Act* constitute a violation of the equality section of the Charter, his article is nonetheless valuable for the important issues it raises. Are aliens protected by the Charter, and if so what implications does this have for Canada's admissions policy ? What is the present framework for assessing the procedural protection that aliens are due, and how might it be improved ? « Equality Rights in the Federal Independent Immigrant Selection Criteria » also raises the issue of what constitutes good administrative decision-making. The article points us to areas where improvements may need to be made in Immigration Canada's decision-making processes. And perhaps most importantly, Walter Chi Yan Tom's arguments regarding equality in admissions criteria, force us to confront the fundamental contradiction that underlies immigration decisions.

Appendix

If *Ruparel* v. *M.E.I.* is followed, the legal situation today is such that the only feasible way to challenge the independent immigrant selection criteria as violating s.15 of the Charter would be by way of an action brought by an individual who had applied for immigration from within Canada. A public interest action would not be possible. According to the Federal Court of Appeal decision in *Canadian Council of Churches* v. *Regina*, public interest standing will only be granted when : a) there is a serious issue to be tried ; b) the plaintiff has a genuine interest as a citizen in the validity of the impugned legislation (i.e. she/he is not a «mere busybody») and c) there is no other reasonable and effective manner in which the issue may be brought before the court (e.g. where the parties who are directly affected by the impugned legislation are not able to bring the action themselves)[75].

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73. *Id.* at 531.
74. *Id.* at 485 and 518-532, while Bryden finds the trial type process problematic in immigration situations, he does not find it so in refugee situations.
75. *Canadian Council of Churches* v. *Regina*, (1990) 10 Imm. L.R. (2d) 81 (F.C.A.).

In light of the *Ruparel* decision, applicants for independent immigration who are not present in Canada (the parties directly affected by the provisions of the *Immigration Act*), are not able to bring an action protesting the unconstitutionality of certain provisions of the Act. Whether a party seeking public interest standing to challenge the constitutionality of the independent immigrant selection criteria will meet the genuine interest requirement described in b) above, will depend on the Court's assessment of the nature of their interest[76]. But, while there is no question that an allegation that the selection criteria for independent immigrants, as set out in the *Immigration Act*, is discriminatory within the meaning of section 15 of the Charter constitutes a serious issue to be tried, MacGuigan J.A. in *Canadian Council of Churches* stated that a public interest action like the one under discussion here, « could found a right of standing, but *cannot constitute a reasonable cause of action* since the claimants affected would all be non-citizens outside Canada with no claim to admission, and therefore beyond the scope of the Charter[77]. » When *Ruparel* is read in conjunction with *Canadian Council of Churches*, it is clear that it would not be possible to bring a public interest action challenging the selection criteria's Charter conformity.

Section 3(f) of the *Immigration Act*

Section 3(f) of the *Immigration Act* provides some support for the argument that there is a serious public interest at stake when an allegation of discrimination in the immigrant selection process is made, despite the fact that the claimants affected would be non-citizens outside of Canada, as stated by MacGuigan J. in *Canadian Council of Churches*[78]. According to that section, the standards of admission are subject to the scrutiny of the Charter and particularly the test of discrimination in section 15. This means that Parliament has recognized that the Act should conform to the Charter. If our government is committed to bringing the *Immigration Act* into conformity with the Charter, there is no logical reason why a public interest action could not be brought by concerned Canadians. While they might not be directly affected by the Charter violation in question, it could be argued that they are affected by their government's failure to live up to the standards it has set for itself in section 3(f) of the *Immigration Act*. With respect, I disagree with MacGuigan J.A.'s finding that this does not constitute a « reasonable cause of action ».

When dealing with the objectives section of the Act, however, it must be kept in mind that s. 3 includes a long list of competing and often contrary objectives. In addition, the objectives

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76. The fact that public interest standing was granted to Joseph Borowski in *Minister of Justice of Canada* v. *Borowski (No. 1)*, [1981] (S.C.C.) 2 S.C.R. 575, indicates that the test to meet requirement (b) is a low one.
77. *Canadian Council of Churches* v. *Regina*, (1990) 106 N.R. 61 at 77 (F.C.A.). This passage is cited in Muldoon J.'s decision in *Ruparel*, *supra*, note 55 at 26 (QuickLaw transcript).
78. *Immigration Act*, R.S.C. (1985), c. I-2:

> Section 3 Immigration Objectives
>
> It is hereby declared that Canadian immigration policy and the rules and regulations made under this Act shall be designed and administered in such a manner as to promote the domestic and international interests of Canada recognizing the need:
>
> [...]
>
> (f) 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.

section of the *Immigration Act* is very rarely cited in immigration decisions, and when it is referred to, it is only used in a conclusionary way[79].

In « Equality Rights » Walter Chi Yan Tom concedes that the objectives section of the Act has traditionally been viewed as « at best, vague rules of statutory construction » which are not referred to in most immigration decisions[80]. He argues, however, that « they form an underlying rationale of Canadian immigration policy, which requires a balance to be maintained between competing principles[81] ». Furthermore, Tom claims that « with the advent of the Charter, the nature and role of these objectives have taken on a greater significance as they now serve as the basis upon which the guarantee of Charter rights are judged[82]. » Due to the fact that considerations concerning the objectives of impugned legislation are involved in a section 1 Charter test, section 3 of the Act may become more significant in *Immigration Act*-related Charter litigation[83].

79. J.H. GREY, *Immigration Law in Canada*, Scarborough, Buttersworth, 1984, p. 15; C.J. WYDRZYNSKI, *supra*, note 11 at 72-73.
80. W.C.Y. TOM, *supra*, note 1 at 512.
81. *Ibid.*
82. *Ibid.*
83. It should be noted that section 3(f) of the Act has been cited in only one of the reported Federal Court decisions regarding the Charter to date, and in none of the recently reported cases (see *Armadale Communications Ltd.* v. *M.E.I.* (F.C.A.) (1991) (QuickLaw transcript at 5)). Although the objectives section of the Act may not loom large in immigration decisions, it is viewed as significant by the immigration policy makers. In a paper on discrimination, equality and immigration policy (presented at the CBA immigration law and policy seminar in 1990), Mildred Morton of the immigration and policy branch of Employment and Immigration Canada describes the success that Canadian immigration policy has had in meeting the s. 3(f) objective that admissions policies should not discriminate in a manner inconsistent with the Charter. Morton cites the following 1988 data on landing by way of illustration : « In 1988 25 % of all persons landed in Canada as immigrants came from Europe and 4 % from the U.S. By contrast, 43 % came from Asia and the Pacific, 14 % from Africa and the Middle East and 14 % from Central and South America. » (M. MORTON, « Discrimination, Equality, and Immigration Policy », in *Canadian Immigration Law and Policy*, Montreal, Canadian Bar Association, 1990, p. 4. More recent data on landing shows that this pattern of high immigration from Asia and the Pacific, and low immigration from Europe and the U.S. has continued to date (IMMIGRATION CANADA, *Immigration Statistics*, Ottawa, Immigration and Demographic Policy Group, Employment and Immigration Canada (annual) 1989, 1990).