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Equality Rights in the Federal Independant Immigrant Selection Criteria

Walter Chi Yan Tom

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Article abstract

The potential impact of fundamental guarantees in favour of equality on the Canadian immigration system is significant. Although immigration law is inherently unequal, the role of equality rights is still of primary importance in distinctions based on the enumerated and analogous grounds of s. 15 of the *Canadian Charter of Rights and Freedoms*.

The objective of this paper is to examine the federal independent immigrant selection criteria and to assess its conformity to the standards of s. 15 of the Charter, according to recent judicial interpretation by the Supreme Court of Canada.

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Equality Rights in the Federal Independent Immigrant Selection Criteria

Walter CHI YAN TOM *

L'impact potentiel du droit à l'égalité de la Charte canadienne sur le système d'immigration canadienne est important. Bien que le droit de l'immigration soit intrinsèquement discriminatoire, le rôle du droit à l'égalité demeure d'une importance primordiale par rapport aux distinctions fondées sur les motifs énumérés à l'article 15 de la Charte ainsi que sur les motifs qui leur sont analogues.

L'objectif de cet article est d'examiner les critères fédéraux de sélection des immigrants indépendants, et d'évaluer leur conformité aux exigences de l'article 15 de la Charte selon l'interprétation jurisprudentielle de la Cour suprême du Canada.

The potential impact of fundamental guarantees in favour of equality on the Canadian immigration system is significant. Although immigration law is inherently unequal, the role of equality rights is still of primary importance in distinctions based on the enumerated and analogous grounds of s. 15 of the Canadian Charter of Rights and Freedoms.

The objective of this paper is to examine the federal independent immigrant selection criteria and to assess its conformity to the standards of s. 15 of the Charter, according to recent judicial interpretation by the Supreme Court of Canada.

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* Étudiant, Faculté de droit, Université Laval. Il remercie les professeurs Alain Prujiner et Henri Brun pour leurs conseils et leur patience.

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> The admission of aliens into Canada is, as stated above, by law a privilege extended to persons seeking admission and is not a right that is exercised quasi-unilaterally by them.
>
> *Cronan v. M.M.I.* [1]

> L'idée de démocratie n'a aucun sens si elle ne repose par sur l'égalité des membres de la communauté : la souveraineté du Parlement ne peut en effet se justifier que si elle repose sur le peuple dans sa totalité.
>
> C.J. FRIEDRICH,
> "La crise de l'égalitarisme" [2]

1. (1973) 3 *I.A.C.* 84, p. 126.
2. *L'égalité*, vol. 1, Bruxelle, Bruylant, 1971, p. 307.

The potential impact of fundamental guarantees in favour of equality before and under the law, as well as protection of the law, on the Canadian immigration system is significant. The primary function of immigration law in singling out specific groups for differential treatment, regarding their legal rights of admission into Canada, may be seen, *prima facie*, as a violation of guarantees of equal treatment [3]. Also, the fact that immigration is internally selective and provides different statutory rights and privileges to aliens within the same class of persons to whom immigration legislation is applicable, should suggest similar forms of analyses. At the very least, the government will have realized that unequal treatment in law and administrative practice may have to be justified as reasonable, given a free and democratic society [4].

Immigration and admission to Canada, as has been noted by the courts, are seen as privileges to be determined by statute and regulation, rather than a matter of rights [5]. A basic premise of any immigration system is that it must be able to make these distinctions regarding to classes of people in terms of their rights and privileges, as an exercice of the State sovereignty [6]. International law and State practice demonstrate that such distinctions are most often drawn of the basis of citizenship and nationality [7]. Immigration law itself is inherently unequal in terms of its application to citizens and aliens, thus the alien/citizen inequality, for the most part, is difficulty challenged [8].

The role of equality rights is still of a 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 [9]. The objective of this paper is to examine the independent immigrant

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3. S. 15 of *Canadian Charter of Rights and Freedoms*, which is Part I of the *Constitution Act of 1982*; hereinafter referred to as the Charter, as exposed in C.J. WYDRZYNSKI, *Canadian Immigration Law and Procedure*, Aurora, Canada Law Book, 1983, p. 460.
4. *Id.* and s. 1 of the Charter.
5. S. 5 ans s. 8 of *Immigrations Act, 1976*, S.C. 1976-77, c. 52, concerning admission to Canada; *Cronan, supra*, note 1; *Masella v. Langlais*, [1976] 1 S.C.R. 263, p. 281, *Vaaro v. The King*, [1933] S.C.R. 36, p. 42; *Prata v. Ministery of Manpower & Immigration*, [1976] 1 S.C.R. 376, p. 380; among others.
6. C.J. WYDRZYNSKI, *supra*, note 3, p. 468; J.H. GREY, *Immigration Law in Canada*, Toronto, Buttersworth, 1984, p. 7; H. BRUN and G. TREMBLAY, *Droit constitutionnel*, Cowansville, Éditions Yvon Blais, 1982, p. 144.
7. C.J. WYDRZYNSKI, *supra*, note 3, p. 14-16; I. BROWNLIE, *Principles of Public International Law*, 2nd ed., Oxford, Clarendon Press, 1973, p. 505.
8. J.H. GREY, *supra*, note 6, p. 152; H. BRUN and C. BRUNELLE, "Les statuts respectifs de citoyen, résident et étranger à la lumière des chartes des droits", (1988) 29 *C. de D.* 689.
9. C.J. WYDRZYNSKI, *supra*, note 3, p. 469; H. BRUN and C. BRUNELLE, *supra*, note 8, p. 711-713; R. ANAND, "Ethnic Equality", in A.F. Bayefsky and M. Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms*, Toronto, Carswell, 1985, p. 121-122.

selection criteria [10] and to assess its conformity to the standards of s. 15 of the Charter, according to the recent jurisprudential interpretation by the Supreme Court of Canada of equality rights [11]. The first part of the study deals with the points system and the scope of discrimination in s. 15 the Charter, in particular, the range of application of equality rights, and the definition of discrimination and its application to the points system. The second part examines the reasonable limits of equality rights by discussing the role of multicultural rights [12] in the immigration law and applying the test of justification [13] to the selection criteria, given that discrimination is present according to s. 15. The study will conclude with a related discussion of the present problem of abuse in the refugee system, a critique on the business immigration program, and problems of discrimination in the immigration system as a whole.

Before continuing with the study, it is important to examine the historical development of Canadian immigration policy, and especially the evolutionary process of legislative change, to fully appreciate current Canadian immigration law. Our present laws are an outgrowth of former policies and legislative history, and this history has established the pattern for the immigration law which comprises our present regime [14].

Pre-Confederation immigration policy was characterized by few controls and little planning as the British government searched for methods to gain numerical superiority of the anglophone population over the dominant francophone population in Quebec [15].

The period from Confederation to the Second World War saw the development of a philosophy of immigration, which for the most part, is still present in modern administration. The exclusionary nature of the *Immigration Acts of 1869 and 1872* [16], their discretionary procedures, and their short term policies based on domestic economic stability have served as models for the present-day legislation [17]. The negative selection process excluded immigrants

10. Schedule I s. 8-11 of *Immigration Regulations, 1978*, S.O.R./78-172 and amended up to 26/01/90; hereinafter referred to as the selection criteria or points system; also s. 6 of *Immigration Act, 1976* concerning immigrant selection.
11. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *R. v. Turpin*, [1989] 1 S.C.R. 1296.
12. S. 27 of the Charter.
13. S. 1 of the Charter.
14. C.J. WYDRZYNSKI, *supra*, note 3, p. 39; J.H. GREY, *supra*, note 6, p. 15.
15. C.J. WYDRZYNSKI, *supra*, note 3, p. 40-42; G. HERSAK and D. THOMAS, *Recent Canadian Developments Arising from International Migration — Research Abstract*, Ottawa, Employment and Immigration Canada, 1988, p. 5.
16. S.C. 1869, c. 10, as amended by S.C. 1872, c. 28.
17. J.H. GREY, *supra*, note 6, p. 11-12; C.J. WYDRZYNSKI, *supra*, note 3, p. 42-43.

who were not of the Anglo Saxon Protestant mould, and discriminated particularly against the Orientals ans Asiatics [18]. By the end of the great migration of the early 20th century, Canadian immigration law and policy had undergone a major revision, from a basically unrestricted immigration to a highly selective and controlled system. While the main purpose behind earlier immigration philosophy was aimed at filling the vast agricultural land with farmers and their families, after World War I immigrants were solicited for their labour skills and training. [19]

The *Immigration Act of 1952* [20] was an attempt to clarify and simplify immigration policy, while retaining its highly selective nature. Discrimination remained an outward feature of immigration policy through the use of national origin preferences made possible by the wide regulatory powers of the Minister [21]. However, by the early 1960's the vast majority of legal restrictions on immigrant admission based on national origins were eliminated, with a shift in emphasis to a more labour oriented criteria [22].

The publication of the *White Paper on Immigration* of 1966 [23] brought on major revisions in immigration policy concerning economic prosperity, population increase and administrative fairness. In order to relate selection to labour needs, an improved and novel selection process was instituted by the enactment of the *Norms for Assessment* or points system [24]. Prospective immigrants could apply for admission within Canada, instead from only their country of origin, and be evaluated in the same manner as those who followed normal procedure [25]. Finally, the establishment of a permanent Immigration Appeal Board would ensure that the administration of new policy would be

18. *Chinese Immigration Act*, S.C. 1885, c. 71 and *Chinese Immigration Act*, S.C. 1923, c. 38. An outstanding feature of this legislation was its "head tax", or entry fee, charged against all Chinese who wished to immigrate to Canada ; R. ANAND, *supra*, note 9, p. 86–88 ; G. HERSAK and D. THOMAS, *supra*, note 15, p. 6 ; J.S. WOODSWORTH, *Stranger within our Gates*, Toronto, University of Toronto Press, 1972, p. 232. The book was first published in 1909 and served as a pioneer sociological study of Canadian immigrant life-styles.
19. C.J. WYDRZYNSKI, *supra*, note 3, p. 49–55 ; J.H. GREY, *supra*, note 6, p. 12.
20. R.S.C. 1952, c. 325.
21. See also CORBETT, *Canada's Immigration Policy : A Critique*, Toronto, University of Toronto Press, 1957, p. 66–74.
22. See also HAWKINS, *Canada and Immigration Public Policy and Public Concern*, Montreal, McGill — Queen's University Press, 1972, p. 119–138 ; G. HERSAK and D. THOMAS, *supra*, note 15, p. 6.
23. DEPARTMENT OF MANPOWER AND IMMIGRATION, *White Paper on Immigration*, Ottawa, Queen's Printer, 1966 ; see also G. HERSAK and D. THOMAS, *supra*, note 15, p. 6.
24. *Supra*, note 10.
25. S. 34 of *Immigration Regulations*, P.C. 1967-1616, S.O.R./67-434 ; revoked by P.C. 1972-2502, S.O.R./72-443.

carried out in an effective and equitable fashion [26]. The changes in policy were unique and progressive reforms in immigration administration.

As the Canadian economy began to decline, immigration regulation reflected this trend. Canada's "liberal" immigration policy had apparently become a source of potential immigrants not envisaged by the regulation makers, as official indicated large-scale abuse by persons who would enter Canada as visitors, when their true intention was to apply for landed immigrant status as soon as practicable. Government response in 1973 was geared toward limiting the abuse of the regulatory system, but was characterized by a piecemeal approach to the overall problem of developing an equitable framework of selection and deportation. The most important development of all the changes was the realization that the system then in use was inadequate and outmoded [27].

The *Green Paper on Immigration Policy*, released in 1974 [28], was the result of plans for a massive overhaul and review of immigration policy and procedures. Rationality of the future policy would be demonstrated by linking immigration flow to the economic recession. The *Green Paper* was carefully worded and lacked in-depth analysis of immigration and population in Canada's future. The future policy would include stricter admission requirements, a reduction in annual immigration population and increased contact between immigration flow and the Canadian labour market. The focus had shifted once again to a self-serving concentration of Canada's domestic needs [29].

The *Immigration Act, 1976* [30], based on the recommendations of the *Green Paper*, was increasingly restrictive and labour-oriented. Future policy "appeared" to be less haphazard and more inclined to examine the overall effects of immigration on the Canadian population in a planned demographic manner. The new legislation did make some changes indicating a humanitarian concern, but for the most part it was reflective of a policy which placed Canada's interest in primacy [31]. The recent legislation of *Bill C-55* and *Bill*

26. *Immigration Appeal Board Act*, R.S.C. 1970, C. I-3.
27. C.J. WYDRZYNSKI, *supra*, note 3, p. 61-63.
28. DEPARTMENT OF MANPOWER AND IMMIGRATION, *Green Paper on Immigration Policy*, Ottawa, Queen's Printer, 1974.
29. *Supra*, note 28; see also H.G. HOWITH, *Immigration Levels Planning: The First Decade*, Ottawa, Employment and Immigration Canada, 1988, p. 3.
30. *Supra*, note 10.
31. EMPLOYMENT AND IMMIGRATION CANADA, *Canada's Immigration Law*, Ottawa, Minister of Supply and Services Canada, 1989, p. 1; see also C.J. WYDRZYNSKI, *supra*, note 3, p. 65.

C-84 [32], concerning refugee law reform through the steadfast commitment of the government to the interposition of political and administrative discretion in what should be a human rights-based protection system, simply reaffirms the selectivity of Canada's concern for refugees [33].

In summation, the present legislation is a product of immigration policies developed since the beginning of British control. A philosophy of exclusion has been attenuated by some forms of positive selection, but the policy of restraint is still dominant. Planned demographic growth is a prime feature of the modern policy but as a result, immigration law remains complex and subject to both frequent change and potential abuse of discretionary power. The dominant values are economic and controlled flow of labour and it is unlikely that any major shift in emphasis will occur in the near future [34].

As immigration is essentially a statutory subject, most common law relating to immigration matters is of little modern relevance. In this sense, the *Immigration Act of 1976* is the most important single source of immigration law and procedure, wherein all legal rules relating to immigration in Canada must find their status of legitimacy [35]. The present legislation confers wide powers to enact regulations on a supplementary source of legal rules. While these regulations may not be enacted in a form contrary to the explicit requirements of the statute, extensive scope is provided to allow for major changes of policy and administration of immigration matters. The major source of subsidiary rules enacted the form of delegated legislation, and of which is the subject of this study in the *Immigration Regulations, 1978* [36].

The judicial interpretations of the various provisions of the *Act* and regulations by the Immigration Appeal Board, the Trial Division and Appellate Division of the Federal Court, the Supreme Court of Canada, and occasionally, the provincial superior courts are also essential to an understanding of

32. *Bill C-55*: An Act to amend the *Immigration Act, 1976*, and to amend other Acts in consequence thereof, 2d Sess., 33rd Parl., 1986-87; *Bill C-84*: An Act to amend the *Immigration Act, 1976* and the Criminal Code in consequence thereof, 2d Sess., 33rd Parl., 1986-87; these bills have since been integrated into their respective laws.
33. J.C. HATHAWAY, "Postscript-Selective Concern: An Overview of Refugee Law in Canada", (1984) 34 *McGill L.J.* 354, 357; see also B. SEGAL, "Restructuring Canada's Refugee Determination Process: A Look at Bills C-55 and C-84", (1988) 29 *C. de D.* 733, p. 735; P. DUQUETTE, J. YEDID and M. WEIGEL, "Le projet de loi C-55: le gouvernement fait semblant de protéger les refugiés", 31/03/88, *Le Devoir*.
34. J.H. GREY, *supra*, note 6, p. 15; C.J. WYDRZYNSKI, *supra*, note 3, p. 66; see also G. HERSAK and D. THOMAS, *supra*, note 15, p. 5-6.
35. C.J. WYDRZYNSKI, *supra*, note 3, p. 87-90.
36. *Id.*; J.H. GREY, *supra*, note 6, p. 103-106; see also F.N. MARROCO and H.M. GOSSETT, eds., *The Annotated Immigration Act of Canada*, Toronto, Carswell, 1988, p. 293.

immigration law. Finally of importance to an appreciation of legal principles and especially, current immigration policies, are the various administrative policy manuals issued to guide immigration officials in the administration of the *Act*. These Immigration Manuals are a valuable source of information concerning contemporary immigration policy and practice [37].

1. The Selection Criteria and the Scope of Discrimination in s. 15

> 15. (1) [Equality before and under law and equal protection and benefit of law] Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) [Affirmative action programs] Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. [38]

1.1. The Range of Application of Equality Rights

Before applying the test of discrimination of s. 15, the preliminary question of what categories of persons may invoke their equality rights, and against which parties and what material these rights are opposable, must be examined to discover the range of application of s. 15. Only then can the *locus standi* of the immigrant be discussed, in view of the troublesome distinction in immigration law over rights and privileges.

1.1.1. Who's Protected?

The first constitutional objective of s. 15 (1) is that it is intended to protect essentially the individual, all individuals, no matter who they are, by stating that they are all judicially at the same level of equality [39]. The French version speaks of "tous" and "personne", while the English version indicates that equality rights are for the benefit of "every individual." The main concern of equality rights therefore is centered on the human being as the individual beneficiary of equality [40].

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37. C.J. WYDRZYNSKI, *supra*, note 3, p. 70; see also J.H. GREY, *supra*, note 6, p. 4-5.
38. *Supra*, note 3.
39. W. BLACK and L. SMITH, "Les droits à l'égalité", in G.A. Beaudoin and E. Ratushny, eds., *La Charte canadienne des droits et libertés*, Montreal, Wilson et Lafleur Ltée, 1989, p. 678; D. PROULX, "L'objet des droits constitutionnels à l'égalité", (1988) 29 *C. de D.* 567, p. 581; see also P. HOGG, *Constitutional Law of Canada*, 2 ed., Toronto, Carswell, 1985, p. 798.
40. *Id.*

Although the Supreme Court of Canada has yet to rule expressly on this question, the principal and seemingly the only restriction of the *locus standi* to invoke equality rights, applies to corporations and other artificial entities [41]. The doctrine observes that corporations are judicial creations and not living humans. The idea of equality has always been associated with the dignity and value of a human being, and by principle, it would be illogical that artificial entities become part of a category of beings that are equal by nature. Also, in consideration of the objectives of s. 15 concerning the improvement of the situation of disadvantaged groups and individuals, the inequitable or arbitrary treatment of a human being is of a much greater importance than of a judicial being [42].

The recent interpretation of the Supreme Court in *Irwin Toy* [43] of the term "everyone" in s. 7 of the Charter [44] may be applied analogously to the term "every individual" in s. 15 (1). According to the Supreme Court, the word "everyone" in s. 7 read in the light of the rest of the section, excludes corporations and other artificial entities incapable of enjoying life, liberty or security of the person, and includes only human beings. This transposable reasoning along with the Supreme Court's definition of discrimination in *Andrews* [45] may have effectively decided the question one and for all [46].

1.1.2. What's Protected?

Who are the persons and what are the domains which have to conform to the equality guarantees of s. 15? In *Dolphin Delivery* [47], the Supreme Court

41. *Id.*; see also *Smith Kline v. A.G. Canada*, [1987] 2 F.C. 359. It was judged that a corporation could not invoke s. 15 (1) of the Charter. However, its individual inventors and employees had *locus standi*, despite the cession of their copyrights to the corporation.
42. D. PROULX, *supra*, note 39; W. BLACK and L. SMITH, *supra*, note 39; see also P. BLACHE, "Affirmative Action: To Equality Through Inequalities?" in J.M. Weiller and R.M. Elliot, eds., *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms*, Toronto, Carswell, 1986, p. 180.
43. *Irwin Toy Ltd. v. Quebec Attorney General*, [1989] 1 S.C.R. 927.
44. S. 7 of the Charter concerns the legal rights of life, liberty, and security of person.
45. *Supra*, note 11.
46. *Milk Board v. Clearview Dairy Farms, Inc.*, (1987) 12 B.C.L.R. (2d) 125. It was judged that corporations were excluded from s. 15 (1) protection because artificial beings had none of the personal qualities, inherent in human beings.
47. *S.D.G.M.R. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; W. BLACK and L. SMITH, *supra*, note 39, p. 674-677; R. JURIANSG, "Section 15 and the Human Rights Codes" in G.A. Beaudoin, ed., *Your Clients and the Charter — Liberté and Equality*, Cowansville, Yvon Blais, 1988, p. 324-332; see also J. WHYTE, "Is the Private Sector Affected by the Charter?" in L. Smith and others, eds., *Righting the Balance: Canada's New Equality Rights*, Saskatoon, Canadian Human Rights Reporter, 1983, p. 145 s.

declared that on the basis of s. 32, the Charter[48] applied only to the legislatures, the governments and all their legislative, executive, and administrative activities. Therefore, the Charter does not apply to persons outside of the government unless they are in a domain authorized by the legislature. Equality is essential in the administration of justice, the application and even the content of the law. This interpretation is clear in the French version of s. 15. "La loi ne fait acception de personne et s'applique également à tous." So both the administrator as well as the legislator are submitted to s. 15, thus avoiding the problems faced by the Supreme Court in its application of the *Canadian Bill of Rights*[49].

In its examination of equality rights in *Dolphin Delivery*, the Supreme Court approved of the reasoning in *Blainey*[50] by the Ontario Court of Appeal and declared that this decision illustrated the sort of rapport that must exist with the government in order to apply the Charter. However, the Supreme Court announced that s. 15 applied because the discrimination in question was authorized by law and not because of the lien existing between the government and the regulated activity[51].

The following principle can be extrapolated from *Dolpin Delivery* and *Blainey* in the context of s. 15[52]. First it seems that the Charter only applies when the government has chosen a legislative style of writing that states a general prohibition of all discrimination, accompanied with special exclusions, and not a style of writing that numbers specific prohibitions, while remaining silent on other unmentioned domains, leaving the common law a possibility to effect a discrimination *de facto*. Secondly, when the style used permits, it seems the effect of the Charter on laws concerning human rights has been more important than foreseen. Governments risk violating equality rights even if in authorizing a discrimination, they are simply maintaining a principle of common law.

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48. S. 32 of the Charter as concerns its application ; see also Y. DE MONTIGNY, "Section 32 and Equality Rights", in A.F. Bayefsky and M. Eberts, eds., *supra*, note 9, p. 565 s.
49. *Q. v. Drybones*, [1972] S.C.R 282 and *A.G. Canada v. Lavell*, [1974] S.C.R. 1349. In the first case para. 1 (B) of the *Canadian Bill of Rights*, R.S.C. 1970, was judged to have guaranteed equality "before the law" and "under the law," affecting its content, while the second case restricted the guarantee to only equality "before the law," not including the substance of the law ; D. PROULX, *supra*, note 39, p. 583.
50. *RE Blainey and Ontario Hockey Association*, (1986), 26 D.L.R. (4th) 728 (Ont. C.A.). A section of the *Ontario Human Rights Code*, R.S.O. 1980, c. 340, was judged unconstitutional because it excluded the prohibition of sexual discrimination in amateur sports.
51. W. BLACK and L. SMITH, *supra*, note 39, p. 675-676 ; K.H. FOGARTY, *Equality Rights and Their Limitations in the Charter*, Toronto, Carswell, 1987, p. 354.
52. *Id.* ; R. JURIANSG, *supra*, note 47, p. 342.

The definition of the word "law" in s. 52 of the Charter[53] may also be used in interpreting the meaning of "law" in s. 15. Provided that the word "law" has the same meaning in both sections, then s. 15 will have the same limitations as that of s. 52 in its range of application[54].

The recent decision of *Andrews* has perhaps enlarged the definition of "law" and consequently the protection from discrimination through the application of the "law". Although no problem regarding the scope of the word "law" arose in this case because legislation was under attack, La Forest J. stated in an *obiter*:

> I am not prepared to accept at this point that the only significance to be attached to the opening words that refer more generally to equality is that protection afforded by the section is restricted to discrimination through the application of law... It may also be thought to be out of keeping with the broad and generous approach given to other Charter rights, not the least of which is s. 7, which is like s. 15 is of a generalized character.[55]

Therefore, as reasoned by the Supreme Court in *Singh*[56] for s. 7 of the Charter, perhaps s. 15 applies not only to decisions of a judicial nature but to all decisions susceptible of a discriminatory effect.

1.1.3. *Locus Standi*: A Right or a Privilege?

Traditionally permission to enter Canada has not been viewed as a right, but a privilege to be granted on whatever conditions are deemed appropriate by the State. While courts do speak of immigrants having statutory rights or those rights which are extended by the State in relation to the administration of immigration, the underlying presumption seems to be that immigrants have no cause for complaint if legislative rights do not measure up to an objective standard offered by concept of overriding fundamental rights. Consequently, the view of the elements of immigrant status as privileges merely serves government expediency, causes injustice, is detrimental towards improvement of the safeguards of fundamental rights, and makes the immigrants subservient to political discretion[57].

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53. S. 52 of the Charter as concerns the primacy of the *1982 Constitution Act*.
54. *Douglas Kwantlen Faculty Assn. v. Douglas College*, [1988] W.W.R. 718. A collective agreement clause, approved by the government, stipulating mandatory retirement at age 65, was judged discriminatory by s. 15 and s. 52 (1); W. BLACK and L. SMITH, *supra*, note 39, p. 676.
55. *Supra*, note 11, p. 193; see also *Drybones* and *Lavell*, *supra*, note 49.
56. *Singh v. M.E.I.*, [1985] 1 S.C.R. 177; Y. DE MONTIGNY, *supra*, note 48, p. 567; H. BRUN and C. BRUNELLE , *supra*, note 8, p. 710.
57. *Supra*, note 5; H. BRUN and C. BRUNELLE, *supra*, note 8, p. 709; J.H. GREY, *supra*, note 6, p. 7; C.J. WYDRZYNSKI, *supra*, note 3, p. 459.

The troublesome distinction between rights and privileges was discussed in *Singh* by Wilson J. who recognized that while the appellants in the case were not yet entitled to *assert* rights of convention refugees, they were still entitled to fundamental justice in the *determination* of whether they were convention refugees or not.

> 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 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. [58]

This same reasoning has already been shown by the Supreme Court, regarding administrative law, in *Martineau*:

> There has been an unfortunate tendency to treat "rights" in the narrow sense of rights to which correlative legal duties attach. In this sense, "rights" are frequently contracted with "privileges" in the mistaken belief that only the former can ground judicial review of the decision-maker's actions. One should, I suggest, begin with the premise that any public body exercising power over subjects may be amenable to judicial supervision. [59]

As put astutely by Professor Grey, because no untrammelled discretion is ever found, then every "privilege" necessarily implies a right to be considered and thus decisions about reviewability cannot depend on a distinction between rights and privileges but rather on the importance of the rights involved. In the case of basic rights guaranteed by the Charter, old distinctions and procedural refinements will give way to considering the merits and the consequences [60].

There is no longer any doubt today that the Charter can be invoked by not only Canadian citizens or permanent residents, but also by any person in Canada such as immigrants and refugees. Unless there is a clear intention by a constitutional section limiting the application of the Charter to Canadian citizens or permanent residents, all sections of the Charter can be invoked by aliens [61].

In the context of this study, paragraph 3(f) of the *Immigration Act, 1976*, as amended by *Bill C-55* s. 2 [62] expressly subjects the standards of admission

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58. *Supra*, note 56, p. 209-210; J.H. GREY, "Comment on Singh v. M.E.I.", (1986) 31 *McGill L.J.* 496; C.J. WYDRZYNSKI, "Notes on Singh v. M.E.I.", (1986) 64 *R. du B. Can.* 172.
59. *Martineau v. Matsqui Institution Disciplinary Bd.*, [1980] 1 S.C.R. 602, p. 618-619.
60. J.H. GREY, *supra*, note 57, p. 504-506.
61. *Id.*; see also C.J. WYDRZYNSKI, *supra*, note 58, p. 177; H. BRUN and C. BRUNELLE, *supra*, note 8, p. 709.
62. *Supra*, note 32.

to the scrutiny of the Charter and particularly s. 15 and its test of discrimination. The range of application concerning "the law" poses no problem here, in as it is the legislation which is being contested, in particular, s. 8 and Schedule I of *Immigration Regulations, 1978*. However, administrative policy manuals will also be considered in the application of s. 15 because of their importance in guiding the administration of the immigration policy and practice[63].

Although it is established that all aliens in Canada have the right to invoke the guarantees of the Charter, it is not yet clear that the terms "every individual" also includes aliens outside of Canada. It may be suggested that the application of the Charter to aliens involved with immigration processes may vary with the physical location of the alien. Aliens who are physically present within Canada either legally or illegally, might be justifiably entitled to greater protection than those seeking admission to Canada at a port of entry or from outside of Canada. In other words, the alien may have to establish a close contact with the jurisdiction in order to rely on rights which are provided by the Charter[64].

The courts have already drawn such distinctions, as in the case of *Dolack v. M.M.I.*[65] where the plaintiff, who was in an inadmissible class, sought a Minister's permit to facilitate his admission to Canada to participate in judicial proceedings. In dismissing the plaintiff's complaint of denial of process, equality before the law and a fair hearing, Justice Nitikman judged that the *Canadian Bill of Rights* applied only to persons living in Canada and not to a person living out of Canada[66]. 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[67].

1.2. The Notion of Discrimination : Defining the Undefinable

This part of the study will examine the notion of discrimination and equality rights as defined by the traditional "similarly situated test" and as recently redefined in *Andrews* by the appropriate test of discrimination "on the enumerated or analogous grounds" of s. 15. Following the clarification of

63. EMPLOYMENT AND IMMIGRATION CANADA, *Immigration Manual*, updated to 26/01/90, available for public viewing at local Canadian Immigration Centres.
64. C.J. WYDRZYNSKI, *supra*, note 3, p. 464-465.
65. [1983], 1 F.C. 194, 140 D.L.R. (3d) 767 (Fed. Court of appeal), 45 N.R. 146.
66. F.N. MARROCO and H.M. GOSSETT, *supra*, note 36, p. 125; C.J. WYDRZYNSKI, *supra*, note 3, p. 465; see also J.H. GREY, *supra*, note 6, p. 154.
67. *Supra*, note 56.

the test of s. 15, these non-discriminatory standards will then be applied to the selection criteria for independant immigrants to assess its conformity to equality rights.

1.2.1. Equality Rights and the Similarly Situated Test

The formal notion of equality, in which "things that are alike should be treated alike, while things that are unalike should be treated unalike in proportion to their unlikeness"[68], has often been criticized as a tautology that is of no use in judging discrimination[69]. Professor Weston suggests this principle could only be of use if rules were established that would determine if two people were equal and if the treatment accorded to them was equal, because no two people are ever identical and the treatment accorded could be qualified indentical or different depending on the criteria chosen to make the comparison. The notion of equality is really a masquerade of the true nature of the analysis made, because it is really the rules dictating what constitutes a difference that permits the determination of the real meaning of the given rights[70].

The concept of equality is an elusive one and, as shown above, the formal notion of equality is insufficient by itself. Equality is, according to McIntyre J. in *Andrews*, "a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises"[71]. Therefore the real meaning of the notion of equality is not a question of logic but one of values and political choices.

The traditional test based on the formal notion of equality "that similarly situated be similarly treated and conversely that persons who are differently situated be differently treated," has been widely accepted with some modifications in Canadian courts[72]. The test is, however, seriously deficient in that it

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68. Originally observed by ARISTOTLE, *Politics*, trans. John Warrington, London, Dent Everyman's Library, 1961, p. 134-135; see also K.H. FOGARTY, *supra*, note 51, p. 2-3; A.F. BAYEFSKY, "The Orientation of Section 15 of the Charter of Rights and Freedoms", in J.M. Weiller and R.M. Elliot, eds., *supra*, note 42, p. 105.
69. *Id.*; W. BLACK and L. SMITH, *supra*, note 59, p. 628; D. PROULX, *supra*, note 39, p. 573-580; see also W.S. TARNOPOLSKY, "The Equality Rights (s. 15, 27, and 28)" in W.S. Tarnopolsky and G.A. Beaudoin, eds., *The Canadian Charter of Rights and Freedoms: Commentary*, Toronto, Carswell, 1982, p. 398.
70. P. WESTON, "The Empty Idea of Equality", (1982) 95 *Harv. L. Rev.* 537, p. 544-548.
71. *Supra*, note 11, p. 164; see also M. GOLD, "Moral and Political Theories in Equality Rights Adjudications", in J.M. Weiller and R.M. Elliot, eds., *supra*, note 42, p. 85 s.
72. *R. v. Ertel*, (1987), 35 C.C.C. (3d) 398, p. 419 (Ont. C.A.); *Q. v. Century 21 Ramos Realty*, (1987), 190 A.C. 25; *Zutphen Brothers Construction Ltd. v. Dywidag Systems Interntl*,

excludes any consideration of the nature of the law and so the mere equality of application to similarly situated groups or individuals does not offer a realistic test for a violation of equality rights [73].

S. 15 (1) of the Charter provides a much broader protection thant the *Canadian Bill of Rights*, in posing four basic rights of (1) equality before the law, (2) equality under the law, (3) equal protection of the law, and (4) equal benefit of the law. The inclusion of the last three additional rights was a clear attempt to remedy some of the shortcomings of the rights to equality under the *Bill of Rights* [74]. For this reason the equality guarantees in s. 15 (1) must be interpreted in their own context, which may involve entirely different considerations from comparable provisions in the *Canadian Bill of Rights* [75]. However, the definitions given for the *Bill of Rights* may be considered as the minimal content of the right to equality before the law found in s. 15 of the Charter [76].

In defining the scope of the four basic equality rights it is important to ensure that each right be given its full independent content divorced from any justificatory factors applicable under s. 1 of the Charter [77]. The existence of s. 1 and the demands it places on the State to justify limitations on rights is a distinctive feature of the Charter not found in the *Canadian Bill of Rights* [78].

Every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may

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Can. Ltd., (1987), 35 D.L.R. (4th) 433 (Nova Scotia S.C., Appeal Division). *Reference Use of French in Criminal Proceeding in Saskatchewan*, (1987), 44 D.L.R. (4th) 46 (C.A. Sask.); *R. v. Bailey*, (1986), 17 C.R.R. 1 (Sup. Court of Yukon terr.); *Reference re Family Benefits Act*, (1986), 75 N.S.R. (2d), 338/351 (Nova Scotia S.C., Appeal Division); see also C.F. BECKTON, "Section 15 and Section 1 of the Charter — The Courts Struggle", in G.A. Beaudoin, ed., *supra*, note 47, p. 282–286.

73. As stated by McIntyre J. in *Andrews*, *supra*, note 11, p. 166, "If it were to be applied literally, it could be used to justify the Nuremburg laws of Adolf Hitler. Similar treatment was contemplated for all Jews."
74. For example: *Bliss v. A.G. Canada*, [1979] 1 S.C.R. 188. It was judged under the *Canadian Bill of Rights* that no sexual discrimination existed against a woman denied unemployment benefits because of her pregnancy, for the reason that all people within the same category of pregnant persons were treated equally; C.F. BECKTON, *supra*, note 72, p. 277-278.
75. *Turpin*, *supra*, note 11, p. 1326; see also W. BLACK and L. SMITH, *supra*, note 39, p. 626; K.H. FOGARTY, *supra*, note 51, p. 89–134; A.F. BAYEFSKY, "Defining Equality Rights", in A.F. Bayefsky and M. Eberts, eds., *supra*, note 9, p. 5–25.
76. *Turpin*, *supra*, note 11, p. 1329.
77. *Id.*, p. 1326; see also A.F. BAYEFSKY, *supra*, note 75, p. 69–78; K.H. FOGARTY, *supra*, note 51, p. 89–99.
78. McIntyre J., *Andrews*, supra, note 11, p. 177; *Turpin*, *supra*, note 11, p. 1326; see also *MacKay v. the Queen*, [1980] 2 S.C.R. 370, p. 407.

frequently produce serious inequality. This same reasoning was expressed in *Big M Drug Mart* by the Supreme Court in the context of s. 2 (B) of the Charter.

> The equality necessary to support religious freedom does not require identical treatment of religions. In fact, the interests of true equality may well require differentiation in treatment. [79]

The fact that identical treatment may frequently produce serious inequality is recognized in s. 15 (2) which states that affirmative action programs are exempt from the effect of s. 15 (1) [80].

To approach the ideal of full equality before and under the law, the main consideration must be the impact of the law on the individual or group concerned. As stated in *Andrews* by McIntyre J.,

> The ideal should be that a law expressed to bind all, should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another. [81]

In considering the similar judicial reasoning of the Supreme Court on the *Ontario Human Rights Code* [82] and in *Big M Drug Mart* [83], s. 15 should be applicable in discrimination that is either intentional or non-intentional.

The purpose of s. 15 is to ensure equality in the formulation and application of the law. However the promotion of equality has a much more specific goal than the mere elimination of distinctions. Once it has been determined that a distinction created by the impugned legislation results in a violation of one of the equality rights, it must be judged whether the distinction is discriminatory in its purpose or effect [84].

1.2.2. Based on the Enumerated or Analogous Grounds of s. 15

In *Andrews* and *Turpin* the Supreme Court of Canada anchored the s. 15 analysis in the concept of "discrimination." The internal qualification in s. 15 that the differential treatment be "without discrimination" is determinative of whether or not there has been a violation of this section. It is only when one

79. *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, p. 347.
80. W. BLACK and L. SMITH, *supra*, note 39, p. 666-668.
81. *Andrews*, *supra*, note 11, p. 165.
82. *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536; see also *Re Blainey*, *supra*, note 50.
83. *Supra*, note 79.
84. McIntyre J., *Andrews*, *supra*, note 11, p. 182; *Turpin*, *supra*, note 11, p. 1334.

of the four equality rights has been denied with discrimination that a complaint under s. 15 could be sustained[85].

After examining the jurisprudence on discrimination developed under the *Human Rights Codes*[86], McIntyre J. in *Andrews* offered the following definition of discrimination:

> I would say then that discrimination 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 upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society.[87]

In determining whether there is discrimination on grounds relating to personal characteristics of the individual or group, Wilson J. states in *Turpin* that

> it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context... A finding that there is discrimination will in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged.[88]

In short, the immediate or related, as well as intentional or non-intentional consequences of the law will be submitted to the test of discrimination in s. 15.

In recognizing that the enumerated and analogous grounds approach most closely accords with the purposes of s. 15 and the definition of discrimination given by McIntyre J., the criteria of a discrete and insular minority was also considered[89]. The determination of whether a group falls into an analogous category to those enumerated in s. 15 should not be made only in the context of the impugned law but rather in the context of the place of the group in the entire social, political and legal fabric of Canadian society[90]. These analogous grounds should be interpreted in a broad and generous

85. McIntyre J., *Andrews*, *supra*, note 11, p. 182; *Turpin*, *supra*, note 11, p. 1331; see also A.F. BAYEFSKY, *supra*, note 75, p. 3-32; C.F. BECKTON, *supra*, note 72, p. 278.
86. *Simpson Sears Ltd.*, *supra*, note 82; *C.N. Railway Co. v. Canada* (Canadian Human Rights Commission), [1987] 1 S.C.R. 1114; *Bhinder v. C.N. Railway Co.*, [1985] 2 S.C.R. 561.
87. *Supra*, note 11, p. 174; reaffirmed in *Turpin*, *supra*, note 11, p. 1331.
88. *Supra*, note 11, p. 1331-1332; see also A.F. BAYEFSKY, *supra*, note 75, p. 32-38; W. BLACK and L. SMITH, *supra*, note 39, p. 641.
89. *Andrews*, *supra*, note 11, p. 183; *Turpin*, *supra*, note 11, p. 1332; see also C.F. BECKTON, *supra*, note 72, p. 279-280.
90. Wilson J., *Andrews*, *supra*, note 11, p. 152.

manner, reflecting the fact that they are constitutional provisions not easily appealed or amended[91].

The limits if any on the grounds of discrimination await definition in future cases. However, the search for stereotyping, historical disadvantage, or vulnerability to political and social prejudice would serve as an indicator of discrimination[92]. McIntyre J. was of the view 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[93]. La Forest J. refined this viewpoint by classifying as analogous distinctions based on personal aspects not within the control of the individual, and in this sense, immutable, or not alterable by conscious action and in some cases not alterable except on the basis of unacceptable costs[94].

In the Charter, while s. 15 (1), subject always to subs. (2), expresses its prohibition of discrimination in absolute terms, s. 1 makes allowance for a reasonable limit upon the operation of s. 15 (1). This is a distinct step called for under the Charter which is not found in most *Human Rights Acts*, because in these *Acts* justification for or defence to discrimination is generally found in specific exceptions to the substantive rights, nor in the *Canadian Bill of Rights* as mentioned before[95]. In describing the analytical approach to the Charter in *Oakes*[96] and *Edwards Books and Arts Ltd.*[97], the essential feature was that the right guaranteeing sections be kept analytically separate from s. 1. Thus once discrimination is found under s. 15 it must be justified under the broad provisions of s. 1 of the Charter.

1.2.3. Selection Criteria : Discretionary or Discriminatory ?

The independent immigrant is the third class of immigrants, the other two being the family class and Convention refugees, and it includes all immigrants who apply on their own initiative for admission into Canada, such as assisted relatives, retirees, entrepreneurs, investors, self-employed

91. McIntyre J., *Andrews*, *supra*, note 11, p. 175; *Turpin*, *supra*, note 11, p. 1332; see also *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, p. 155; *Big M Drug Mart*, *supra*, note 9.
92. *Turpin*, *supra*, note 11, p. 1333.
93. *Andrews*, *supra*, note 11, p. 174-175.
94. *Id.*, p. 195.
95. McIntyre J., *Andrews*, *supra*, note 11, p. 177; see also C.F. BECKTON, *supra*, note 72, p. 288-290.
96. *R. v. Oakes*, [1986] 1 S.C.R. 103.
97. *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713.

persons, etc.[98]. Except for retirees, all immigrants in this class are assessed against the factors in the selection criteria. However, not every independent applicant is assessed against all the selection criteria. Applicants are rated only according to those factors which actually affect their ability to become successfully established in Canada[99]. In the case of Quebec, there is an agreement which provides for Canada and Quebec to participate jointly and equally in the selection according to criteria established by each party. The landing of an independent immigrant in Quebec requires Quebec's prior agreement[100].

In general, the selection criteria established in Schedule I of the *Immigration Regulations, 1978*, provide the visa officer with an independent assessment structure for appraisal of the qualities and skills of prospective immigrants in order to determine their acceptability for permanent residence. The format is arranged into 100 available assessment points and is reflective of the qualities which are supposed to exemplify a qualified and capable immigrant. The criteria's composition and weighing are designed to meet Canada's demographic and labour market needs and thus emphasis is placed on the practical training, experience, education, and capability of the applicant[101].

The selection criteria evaluation format is very similar to the process an individual must undertake when applying for employment. It represents an outwardly non-discriminatory and practical approach to determining a person's suitability as a prospective immigrant. Biased towards skilled workers and professionals of lower age, it forms the centre of an aggressive immigration policy to meet some of Canada's skilled worker needs for the future, and specific criteria are adjusted as conditions warrant[102]. However, a key feature of the policy is that it is clearly based on the premise of "Canadians first"[103].

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98. S. 6 of *Immigration Act, 1976* concerning selection of immigrants; *Canada's Immigration Law, supra*, note 31, p. 6-11; *Immigration Manual*, I.S. 4 independent immigrants, *supra*, note 63; see also F.N. MARROCO and H.M. GOSSETT, eds., *supra*, note 36, p. 320-326; C.J. WYDRZYNSKI, *supra*, note 3, p. 110-112.
99. *Id.*
100. *Canada-Quebec Agreement on Immigration*, 20/02/78, by virtue of s. 108, *Immigration Act, 1976* concerning consultation and agreements with provinces; see also J.H. GREY, *supra*, note 6, p. 9-10.
101. S. 114 (1) of *Immigration Act, 1976*, concerning regulatory powers of the Governor in Council; *supra*, note 98.
102. *Immigration Manual*, I.S. 4.01-4.03, *supra*, note 63; C.J. WYDRZYNSKI, *supra*, note 3, p. 111; see also J. JEAN, *Statut judirique de l'immigrant au Canada*, Mémoire de maîtrise, Université Laval, 1984, p. 28.
103. Item 5, the factor of arranged or designated employment, of Schedule I, *supra*, note 10, assures minimal impact on employment opportunities for Canadians; see also C.J. WYDRZYNSKI, *supra*, note 3, p. 113.

Canada's history of ethnic discrimination, inflicted in part through immigration laws, has its remnants in the present regime [104]. Although the *Immigration Act of 1976* is "colour blind" in appearance, a variety of regulations remain overtly discriminatory and leaked documents indicate that policies are often applied in a discriminatory manner against specified ethnic and national groups [105]. Certain categories in the selection criteria are dependent on a discretionay 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 [106].

This study will now examine several of the factors considered by the selection criteria and assess their conformity to equality rights in s. 15.

1.2.3.1. How Old is "Old Enough"?

Item 7 of the selection criteria evaluates the applicants according to their age, awarding the maximum of 10 points if they are at least 21 and not more than 44 years old, and subtracting two points for each full year that they exceed or fall short of the set age limits. However, in order to discover if s. 15 of the Charter may be invoked, it must be determined, (1) whether the distinction of age created by s. 8 and Schedule I results in a violation of one of the equality rights and, if so, (2) whether that distinction is discriminatory in its purpose or effect.

As stated before, to approach the idea of full equality before and under the law, the main consideration must be the impact of the law on the individual or group concerned. In applying the "similarly situated" test [107], it is found that there are distinctions made between the same class of independent immigrants solely on the basis of their age. The effect of this distinction is such that those who are within the set age limits receive preferential treatment while those who are outside of the limits are penalized and risk falling short of the required point total for admission.

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104. R. ANAND, *supra*, note 9, p. 121; see the introduction of this study.
105. *Lodge v. M.E.I.*, [1979] 1 F.C. 775, 25 N.R. 437, 94 D.L.R. (3d) 326 (Fed. C.A.); A.F. BAYEFSKY, "The Jamaican Women Case and the Canadian Human Rights Act: Is Government Subject to the Principle of Equal Opportunity?" (1980), 18 *U.W.O.L. Rev.*, 46.
106. S. 11 (3) of *Immigration Regulations, 1978*; see also J.H. GREY, *supra*, note 6, p. 30.
107. See part 1.2.1. of this study.

The guarantee of equality before the law, as stated by Wilson J. in *Turpin*,

> is designed to advance the value that all persons be subject to the equal demands and burdens of the law and not suffer any greater disability in the substance and application of the law than others. This value has historically been associated with the requirements of the rule of law that all persons be subject to the law impartially applied and administered. [108]

Therefore, the differentiation in ages between the independent immigrants is held to have violated the principle of equality before that law.

The second part of the test of discrimination is easily accomplished as the distinction of age is an enumerated category of s. 15 [109]. Age is clearly a personal characteristic of an individual and not a merit or capacity. In the unamended version of s. 3(f) of the *Immigration Act of 1976*, the guarantee of non-discrimination on the grounds of age was omitted. Perhaps this is an implicit admission that age discrimination was considered a legitimate practice in immigration policy. Thus, Item 7 of s. 8 of the *Regulations, 1978* is judged to be discriminatory in its intent and effect, violating s. 15 of the Charter and paragraph 3(f) of the *Immigration Act, 1976* as amended by *Bill C-55*, s. 2 subjecting itself to the equality guarantees of the Charter [110].

The recent jurisprudence of discrimination based on age has reaffirmed this principle of a discrimination *prima facie* for the enumerated grounds of s. 15 (1) [111]. As stated by McIntyre J. in *Andrews*,

> The enumerated grounds do, however, reflect the most common and probably the most usually destructive and historically practiced bases of discrimination and must, in the words of s. 15 (1), receive particular attention. [112]

1.2.3.2. Personal Suitability from a Personal Viewpoint?

In Item 9 determination of the number of points to be awarded to an applicant, to a maximum of 10, depends on the interviewing officer's judgement of the applicant's personal suitability. The qualities of adaptability,

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108. *Supra*, note 11, p. 1329.
109. See part 1.2.2. of this study; see also M.E. ATCHESON and L. SULLIVAN, "Passage to Retirement: Age Discrimination and the Charter", in A.F. Bayefsky and M. Eberts, eds., *supra*, note 9, p. 272–277.
110. *Supra*, note 32.
111. *Harrison v. University of B.C.*, [1988], 2 W.W.R. 688 (B.C. C. of A.); *McKinney v. University of Guelph*, (1988), 63 O.R. (2d) 1; *Stoffman v. Vancouver General Hospital*, [1988], 2 W.W.R. 708 (B.C. C. of A.), All three judgements ruled that a stipulation of obligatory retirement at age 65 years old was discriminatory according to s. 15 of the Charter.
112. *Supra*, note 11, p. 175.

motivation, initiative, resourcefulness and other similar attributes, admirable or otherwise, are characteristics on which the officer may base his judgement. In addition, such characteristics on the part of the applicant's dependents may also influence the assessment [113].

In applying the test of discrimination in s. 15 to the personal suitability factor, the assessment made on the basis of this criterion must first have an effect which differentiates the treatment accorded to an individual or group from the treatment accorded to a similarly situated individual or group. The subjects of comparison, as in all of the cases dealing with the selection criteria, are the independant immigrant class with the distinctions being based on the qualities afore-mentioned. The disadvantages imposed by the law on those immigrants judged lacking in the valued qualities, are the loss of assessment points and risk of refused admission because of an insufficient point total. Given that the principle of equality before the law has been violated, the discriminatory nature of the distinction must now be proven. The key to this determination is the qualification of the desired attributes in Item 9. In applying the test posed in *Andrews*, on distinctions based on personal characteristics and merits, each attribute must be examined to see if it is of a discriminatory nature [114]. The words "motivation, initiative, and resourcefulness" may be classified arguably as merits in the sense that they are alterable by conscious action and can be controlled by the individual. However, the term "adaptability" presents certain difficulties as to its meaning.

The word "adaptability" is defined in common terms as the ability to adjust or fit oneself to new surroundings [115]. In referring to the Immigration Manual I.S. 4.08 concerning factors of selection and its appendix A, the meaning of this term is unexplained. Therefore, it must be presumed that the meaning given to adaptability is that of its everyday use. However, in order to judge one's adaptability, it seems essential that certain immutable personal characteristics such as ethnic origin, religion, or age have to be considered in this evaluation. The essence of the ability to adapt itself implies a certain intimate aspect of a person. This interpretation is supported by s. 3 (b) of *Immigration Act of 1976* which links Item 9 to the objective to enrich and strengthen the cultural and social fabric of Canada [116].

It may be argued that the term "adaptability", read in conjunction with the other attributes mentioned in Item 9, should thus be interpreted in a more neutral, non-discriminatory sense and considered moreover as a merit. By

113. Supra, note 10; *Immigration Manual*, I.S. 4.08, *supra*, note 63.
114. See part 1.2.2. of this study.
115. J.B. Sykes, ed., *The Concise Oxford Dictionary*, Oxford, Clarendon Press, 1982.
116. *Canada's Immigration Law*, *supra*, note 31, p. 46-47.

recalling the reasoning of the Supreme Court in the determination of discrimination, it is important to also examine Item 9 in the larger social, political and legal context [117]. The attributes enumerated in Item 9 are all subjective ones and thus depend entirely on the discretion of the judging visa officer. The standards upon which this officer must judge the attributes by are presumably those of a Canadian citizen. However, different individuals from different ethnic or religious groups may judge these same qualities by different standards inherent to their particular culture or religion [118]. Therefore, by considering the larger social context of Item 9, the discriminatory nature of the evaluation itself and its unintentional effects becomes evident [119].

This wide interpretation of the personal suitability factor conforms with the spirit of s. 15 and its objectives to prevent cultural or religious discrimination. Thus the attributes enumerated in Item 9 may be declared *prima facie* discriminatory, as related to grounds enumerated in s. 15 of the Charter or even as an analogous category [120].

1.2.3.3. Discrimination and the Colour of Money

The aim of this part of the study will be to test Item 4 as well as Items 2 and 3, as they are interrelated to the occupational factor, for a differentiation in treatment accorded to independent immigrants and if this differentiation is discriminatory in the sense of s. 15.

The occupation factor of Item 4 is evaluated according to the employment opportunities available in Canada in the occupation that the applicant is qualified for and is prepared to follow in Canada. An occupation list, in Appendix B, specifies a variety of occupations with a point value of between 0 and 10 assigned to each occupation. Points will be awarded to a maximum of 10 and 0 points will be a bar to further processing unless the applicant has a validated offer of employment. Finally, the list is reviewed on an ongoing basis by the Commission to determine if any changes should be made in consideration of the current labour market or for immigration management reasons [121].

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117. See part 1.2.2. of this study.
118. For example, the terme "initiative" for an Oriental immigrant may not have the same socio-cultural connotation as for a Canadian visa officer, because of how "initiative" is defined and viewed according to Oriental customs and values.
119. R. ANAND, *supra*, note 9, p. 110-116; see also part 1.2.2. of this study; W. BLACK, "Religion and the Right of Equality", in A.F. Bayefsky and M. Eberts, eds., *supra*, note 9, p. 140-151.
120. *Id.*
121. *Immigration Manual*, I.S. 4.08, *supra*, note 63; see also EMPLOYMENT AND IMMIGRATION CANADA, *Future Immigration Levels — 1988 Consultation Issues*, Ottawa, Minister of Supply and Services Canada, 1988, p. 18-19; C.J. WYDRZYNSKI, *supra*, note 3, p. 113.

The specific vocational preparation (S.V.P.) factor of Item 2 is used to assign a point equivalent to the formal training required for average performance in the occupation in which an applicant is assessed in Item 4. The S.V.P. value of the occupation is found in the *Canadian Classification and Dictionary of Occupations* [122] and converted to the appropriate amount of points, to a maximum of 15, by using the conversion table in Item 2 [123].

For the experience factor in Item 3, points are awarded for experience in the occupation in which the applicant is assessed under Item 4. A maximum of 8 points is available with 0 points being a bar to further processing unless, the applicant has arranged employment in Canada, a written statement from the proposed employer certifying his hiring of the unexperienced applicant, and the consent of the visa officer as detailed in s. 11 (1) of *Immigration Regulations, 1978*. There is also a direct correlation between the points awarded and the S.V.P. time required for the occupation as shown in the table of Item 3 [124].

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 [125]. As has been noted with the factors of age and personal suitability, this loss of points may lead to the risk of inadmission for lack of a sufficient point total or even immediate disqualification if the applicant cannot meet the conditions of s. 11 (2) of *Immigration Regulations, 1978* [126]. The same analysis may be made resulting in this violation of the principle of equality before the law, for Items 2 and 3 with experience or S.V.P. time being used as the basis of differential treatment.

As was with the factor of personal suitability, the determination of whether these differential treatments are discriminatory or not, in the sense of s. 15 of the Charter, will depend on the qualification of the nature of these distinctions. The analysis of the occupational factor in Item 4 will be equally valid for the experience and S.V.P. factors in Items 3 and 2, because of their intrinsic dependency on the former [127]. Once again, the case of *Andrews*

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122. Available from Chief Occupational and Career Information Operations, Employment Operational Services, Employment and Immigration Canada, Ottawa.
123. *Supra*, note 121.
124. *Id.*
125. The special admission procedures applicable to certain professions in *Immigration Manual*, I.S. 4.32, *supra*, note 63, do not affect the validity of these limitations and thus, will not be considered in this analysis.
126. *Supra*, note 121.
127. *Immigration Manual*, I.S. 4.08, *supra*, note 63 ; Items 2 and 3 depend on the consideration of the occupational factor as the basis for their own individual assessments.

asserted invaluable guidelines by its qualification of personal characteristics as discriminatory and personel merits as non-discriminatory, with the rare possibility of exceptions to these classifications [128].

The 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" [129]. Among those occupations which are excluded from the list, are physicians, surgeons, lawyers, or supervisors. These occupations require a great deal of sacrifice on the part of the individuals to have attained their present employment status. In being forced to abandon their chosen occupations to avoid possible exclusion and to have to relearn a new career, the first criterion of unacceptable costs is clearly satisfied.

It may even be argued that for some, if not most individuals, their choice of occupation is unalterable by conscious action because of the great importance of the role it plays in their lives. Changing occupations is often not only an economic choice but also a psychological one involving the consideration of many social factors that are themselves immutable. Although not applicable to aliens, s. 6 (2b) of the Charter indicates the importance of the right to a livelihood, and its consideration as a constitutional guarantee [130]. The recent ruling in *Irwin Toy* by the Supreme Court on economic rights does not detract from this analysis because only the economic rights encompassed by the term "property" are not protected by s. 7 of the Charter while those economic rights fundamental to human life or survival were distinguished from the former and left unpronounced on by the Court [131]. In any case, the analyses made in s. 7 are not binding here, because the guarantees of equality rights are the exclusive domain of s. 15 [132].

In pursuing this analysis, the search for stereotyping, historical disadvantages or vulnerability to political or social prejudices could serve as a useful indicator of discrimination [133]. The *Green Paper* [134], upon which the

128. See part 1.2.2. of this study.
129. La Forest J., *Andrews, supra*, note 11, p. 195.
130. The objective of s. 6 (2b) of the Charter, as affirmed in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, and *Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591, is the elimination of provincial barriers to the right of a livelihood. In this sense, the freedom to work where one pleases is protected; see also P. BLACHE, "Liberté de circulation et d'établissements de résidence", in G.A. Beaudoin and E. Ratushny, eds., *supra*, note 39, p. 362-363.
131. *Supra*, note 43, p. 1003.
132. *R. v. Cornell*, [1988] 1 S.C.R. 461.
133. See part 1.2.2. of this study.
134. *Supra*, note 28.

present *Immigration Act* is based upon, was characterized by many groups as a thinly-veiled racist document. Rather than examining the real root causes of Canada's social and economic difficulties in the 1970's, it was charged that the *Green Paper* used immigrant groups, being one of the least politically powerful groups in society, as convenient scapegoats. Continued restrictions in the immigration field were alleged to be economically based, simply to conceal the true social and domestic considerations [135]. Whatever the true implications of the analysis in the *Green Paper*, the new legislation, in line with its format, was increasingly restricted and labour-oriented [136].

Considering this context, this study submits that the occupational factor of Item 4, and consequently Items 2 and 3, is discriminatory in its indirect effects on immigrants from nations whose choice or access to these occupations "valued" by Canada's immigration criteria are limited, due to the social economic and political conditions in these nations. It matters not that these discriminatory effects are intentional or not, the fact remains that the distinctions made in Item 4 are personal aspects not within the control of the individual and thus violate the equality rights of s. 15 [137].

The broad and generous interpretation of analogous grounds of discrimination in s. 15, encouraged by the Supreme Court in *Andrews*, helps in justifying this analysis. Unlike the case of *Turpin*, this 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" [138]. The purposes of s. 15 in remedying or preventing discrimination against groups suffering social, political and legal disadvantage in Canadian society are advanced here, as immigrants' equality rights are shielded from the omnipresence of administrative discretion in immigration law and policy.

2. The Selection Criteria and Reasonable Limits of Equality Rights

2.1. Multiculturalism and Equality Rights

> 27. [Multiculturalism heritage] This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

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135. C.J. WYDRZYNSKI, *supra*, note 3, p. 64-65 ; see also LONEY and MOSCOVITCH, "The Immigration Green Paper in Black and White", (1975), 10 *Can. Dimensions*, p. 4.
136. *Id.* ; H.G. HOWITH, *supra*, note 29.
137. See part 1.2.2. of this study.
138. *Turpin*, *supra*, note 11, p. 1333 ; *Big M Drug Mart*, *supra*, note 79, p. 344.

S. 27 of the Charter which states that the interpretation of the Charter must conform with the preservation and enhancement of the multicultural heritage of Canadians, may also be of use in the interpretation of equality rights. The following analysis will focus on the concept of multiculturalism in s. 27, its correlation with equality rights in s. 15, and its influence on immigration law.

2.1.1. The Scope of Multiculturalism

Constitutional interpretation of s. 27 by the courts as well as attempts by Canadian courts to interpret the Charter in a manner to preserve and enhance multiculturalism have yet to result in the formulation of a coherent theory for s. 27 [139]. The wording itself of s. 27 does not recognize an apparent significance of the multiculturalism principle nor does an examination of its constitutional sources provide a uniform manner of its application by the courts [140]. The difficulties of interpreting s. 27 arise from the very fact that the section itself is a principle of interpretation [141].

In order to remedy its doctrinal and legislative ambiguity, the coherent application of s. 27 will necessitate the elaboration of intermediate principles that will help to clarify the usefulness and sense of the section. There are, however, three minimal conditions that each principle must satisfy in order is be considered an applicable judicial principle for s. 27. First, a coherent intermediate principle must be able to reconcile or balance the interests of the majority and those of the minority groups. Second, any principle of multiculturalism implies that a great importance is attached to the autonomy and diversity of minorities, within reasonable limits. Finally, the principle of multiculturalism must be useful in analysis or understanding as a tool for jurists and other practitioners [142].

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139. J.E. MAGNET, "Multiculturalisme et droits collectifs vers une interprétation de l'article 27", in G.A. Beaudoin and E. Ratushny, *supra*, note 39, p. 832.
140. *Big M Drug Mart*, *supra*, note 79; *Edwards Books*, *supra*, note 97; in these two cases the reasoning in the application of s. 27 of the Charter, differed greatly from a judgement based on religious grounds in the former and one based on secular grounds in the latter; see also *Q. v. Videoflicks*, (1984) 5 O.A.C. 1, for an analysis of the link between s. 27 and the *International Convenant on Civil and Political Rights*, G.A. Res. 2200 (XXI), 21 U.N. G.A.O.R., supp. (No. 16), 52 U.N. Doc. A/6316 (1966).
141. M. LEBEL, "Quelques réflexion autour de l'article 27 de la Charte canadienne des droits", in Canadian Human Rights Foundation, *Multiculturalism and the Charter : A Legal Perspective*, Toronto, Carswell, 1987, p. 139; see also D. GIBSON, *The Law of the Charter — General Principles*, Toronto, Carswell, 1986, p. 67-69; W.S. TARNOPOLSKY, *supra*, note 69, p. 441.
142. J.E. MAGNET, *supra*, note 139, p. 836-838.

The following three intermediate principles are all pertinent and should be considered when interpreting the Charter : the ethnic symbolism, structural ethnicity and non-discrimination [143].

Ethnic symbolism is a psychological concept in which the cultural heritage is defined as a voluntary identification of the individual to the traditions and history of a given ethnic group. Therefore, an attack on the cultural heritage of an individual will also constitute an attack affecting all members of the group. As an intermediate principle, ethnic symbolism will guide the courts in their understanding of this personal aspect each time they interpret the Charter. At the very least the courts will have to recognize the particular importance of the needs of a group to develop the essential traits of their personality and to express them in forms that may be internalized in individuals [144].

Structural ethnicity is defined as the capacity of a collectivity to perpetuate, to compensate for its losses, to resist assimilation and to propagate its beliefs and practices. This form of ethnic membership is not an individual choice but rather the creation of an institutional infrastructure by a group or the government, to promote the welfare and justify the continuation of its existence. This principle implies that the courts must recognize the certain autonomy of the cultural communities in their management of this infrastructure. In short, this principle allows for the further legitimization of collective rights in Canada for cultural minorities [145].

The intermediate principle of non-discrimination is essentially based on equality rights and as such shall be discussed in the following part of the study.

2.1.2. Non-discrimination as an Intermediate Principle

The guarantee of equality in s. 15 of the Charter underlies the existence of a principle of non-discrimination that is very efficient but if too strictly interpreted, applies only to individuals. Application of s. 27 to the principle of non-discrimination in s. 15 helps to enlarge the interpretation of equality rights so that groups may also be protected by the Charter. As for the interpretation of other Charter guarantees, s. 27 contains its own intermediate principle of non-discrimination that applies to groups when they invoke the protection of their Charter rights [146].

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143. *Id.*
144. *Id.*, p. 840-841.
145. *Id.*, p. 842-865.
146. C.F. BECKTON, "Section 27 and Section 15 of the *Charter*", in Canadian Human Rights Foundation, *supra*, note 141, p. 1-3 ; see also W.S. TARNOPOLSKY, *supra*, note 69, p. 442 ; R. ANAND, *supra*, note 9, p. 112.

Every judicial system that intends to preserve and promote the characteristics of a group of persons must recognize the importance of the principle of non-discrimination. Indeed, discrimination is the most serious problem facing the preservation of a distinct cultural identity, because if the sacrifices to maintain this cultural distinctiveness are too great, then assimilation will become more desired by the individuals of the ethnic minorities into the predominant cultural majority. It is for this reason that the concept of non-discrimination is so essential to the understanding and the application of s. 27 [147].

Ethnic cultural minorities have much in common with the order groups that compose the Canadian political system, but in the preservation and development of their ethnic cultures, they have their own political objectives. If discrimination hinders the access of these minorities to the political system, or prevents their essential interaction with the dominant groups, the ethnic minority will lose its capacity for self-development. It is for this second reason that the principle of non-discrimination must be maintained to preserve and enhance the particular traits that are characteristic of cultural groups in Canada [148].

The principle of non-discrimination is based not on the idea of multiculturalism but on equality and it is in this perspective that its limits become apparent. From a formal viewpoint of equality, where those similarly situated should be similarly treated, the argument is that advantages should not be accorded to one group without according them, and to the detriment of other groups [149]. However, as discussed before, the inadequacies of the "similarly situated" test are evident and in order to appreciate the full meaning of the equality guarantee in s. 15, the larger political, social and legal context must also be considered. The key in the "similarly situated" test is to see which two categories of groups are to be chosen for comparison, and to do so, the rules for choosing these categories may be found in the generous and conscientious interpretation of s. 15 [150].

Thus the objectives of s. 27 necessitate the adoption of special measures in order to protect our multicultural heritage from the forces of assimilation, and thus, lead to the notion of equality that authorizes differences in treatment, to arrive at an equality by indirect results [151].

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147. *Id.*
148. M. LEBEL, *supra*, note 141, p. 143; R. ANAND, *supra*, note 9, p. 124; J.E. MAGNET, *supra*, note 1399, p. 839.
149. C.F. BECKTON, *supra*, note 146, p. 12-13; J.E. MAGNET, *supra*, note 139, p. 839.
150. *Id.*; M. LEBEL, *supra*, note 141, p. 144.
151. *Id.*; for example, in *Bhinder*, *supra*, note 86, the Supreme Court made it clear that the *Canadian Human Rights Act*, 25-26 Elizabeth II, Ch. 33, 1977, extends to both intentional

2.1.3. Multiculturalism and Immigration Law

The importance of the principle of multiculturalism to immigration law is evidenced by the presence of s. 3 (b) of the *Immigration Act, 1976*, emphasizing the cultural and social objectives of present immigration policy [152]. Thus, s. 27 of the Charter should be considered when applying other Charter rights to Canadian immigration law. The equality rights in s. 15 of the Charter and reaffirmed in s. 3 (f) of the *Immigration Act of 1976* as recently amended, guarantee the principle of non-discrimination that is so essential in the preservation and enhancement of Canada's multicultural heritage.

The early legislative history of Canada's immigration law was characterized by overt and blatant ethnic discrimination, as discussed earlier in this study. Later on with the reforms brought on by an increasing emphasis on economic objectives and the institution of the points system, Canadian immigration law became in its appearance non-discriminatory [153]. However, as discussed at length in this study, the present immigration law is still deficient in its conformity to equality rights in s. 15. Not only is the principle of non-discrimination prominent in the application of immigrant law, but those of ethnic symbolism and structural ethnicity should also be considered in the interpretation of equality rights in the multicultural context, and, as well their reasonable limits [154].

With Canada's declining birthrate, there will be a greater need for immigrants in order to compensate for the resulting decline in the Canadian work force and to support the country's social programs. Canadians with European roots have little option but to adapt to a society increasingly fed by newcomers from other continents. The reality confronting Canada is clear, for the ethnic mosaic will increasingly be set in colours other than white [155].

The role of the legislator will be to contain any backlash against visible minorities by promoting the value of multiculturalism and the need for new immigrants from these minorities [156]. In 1988, Parliament passed the new

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and non-intentional, or adverse impact discrimination, in deciding a claim involving religious discrimination.

152. *Canada's Immigration Law*, *supra*, note 31, p 46-47; C.J. WYDRZYNSKI, *supra*, note 3, p. 72; see also G. HERSAK and D. THOMAS, *supra*, note 15, p. 12-13.

153. See introduction of this study.

154. S. 27 and s. 1 of the Charter respectively.

155. P. KOPVILLEN and others, "An Angry racial Backlash", 10/07/89, *Maclean's*, p. 14, 16; G. HERSAK and D. THOMAS, *supra*, note 15, p. 6-7; V. MALAREK, "Canada to remain favored target for immigrants, study predicts", 4/01/90, *The Globe and Mail*.

156. *Id.*, D. STOFFMAN, "Asia comes to Lotusland", 11/89, *The Globe and Mail — Report on Business Magazine*, p. 124, 124.

Canadian Multiculturalism Act, 35-36-37, c. 31, 1988, that enshrined in law, "the freedom of all members of Canadian society to preserve and share their cultural heritages." Legislation now before Parliament would create a separate and more powerful department of multiculturalism and citizenship. However, with the disturbingly discriminatory philosophy in current immigration policy, these measures will be ineffectual and simply superficial unless the necessary changes are instituted in the immigrant selection criteria and system as a whole. S. 27 should be considered as an active agent in the promotion of multicultural rights and has, at the very least, an interpretative value in the implementation of equality rights in immigration law.

2.2. Discrimination and the Test of Justification

> 1. [Rights and freedoms in Canada] The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The test of justification is to be applied only when there has been found a violation of a fundamental right or freedom guaranteed by the Charter. In keeping the analysis of reasonable limits separate from the test of discrimination in s. 15, the impugned immigration legislation must now be justified according to the following criteria in s. 1 of the Charter, and as interpreted in the recent jurisprudence of the Supreme Court of Canada. Keeping in mind the limits of this study, an indepth analysis of these questions will not be possible at this stage. However, this study will provide an overview of the problems at hand.

2.2.1. Pressing and Substantial Objectives

In order to apply the test of justification in s. 1, a limitation on a Charter right must be "prescribed by law"[157]. In the recent case of *Thomsen*, the Supreme Court concluded that a limit is

> ... prescribed by law within the meaning of s. 1 if it is expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or regulation or from its operating requirement. Therefore, a reasonable limit need not be spelled out in legislation but is sufficient if its regulators set out the limitations.[158]

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157. *Irwin Toy*, *supra*, note 43, p. 980-981; see also *Q. v. Therens*, [1985] 1 S.C.R. 613; A.F. BAYEFSKY, *supra*, note 75, p. 73; D. GIBSON, *supra*, note 141, p. 152–155; ONTARIO ATTORNEY GENERAL, *Sources for the Interpretation of Equality Rights Under the Charter — A Background Paper*, Toronto, 1985, p. 182–184.

158. *R. v. Thomsen*, [1988] 1 S.C.R. 640, p. 650-651; reaffirmed in *Irwin Toy*, *supra*, note 43, p. 981 and Wilson J., *Andrews*, *supra*, note 11, p. 153-154.

Limits within s. 1 must also be sufficiently precise to be reasonable [159]. In *Irwin Toy*, the Court held that

> Absolute precision in the law exists rarely if at all. The question is whether the legislature has provided an intelligible standard according to which the judiciary must do its work. The task of interpreting how that standard applies in particular instances might always be characterized as having a discretionary element, because the standard can never specify all the instances in which it applies. On the other hand, where there is no intelligible standard and where the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances, there is no "limit prescribed by law." [160]

It is now well established that the onus of justifying the limitation of a right or freedom rests with the party seeking to uphold the limitation, and the analysis to be conducted is that set forth by Dickson C.J. in *Oakes* [161]. The first part of the test is that the objective sought to be achieved by the impugned law must relate to concerns which are "pressing and substantial" in a free and democratic society.

> First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. The standard must be high in order to ensure that objective which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important. [162]

In regard to the equality rights of s. 15, Wilson J. in *Andrews*, judged that such a test is an appropriate standard when it is recognized that not every distinction between individuals and group will violate s. 15. If every distinction did result in a violation of s. 15, then "this standard might well be too stringent for application in all cases and might deny the community at large the benefits associated with sound and desirable social and economic legislation" [163]. However, the Court in *Andrews* did not give s. 15 such broad application and because the equality provision was designed to protect those groups who suffer social, political and legal disadvantage in society, the

159. D. GIBSON, *supra*, note 141, p. 151 ; see also ONTARIO ATTORNEY GENERAL, *supra*, note 157, p. 179-182.
160. *Supra*, note 43, p. 983.
161. *Supra*, note 96, p. 136-137 ; see also D. GIBSON, *supra*, note 141, p. 157 ; W.R. LEDERMAN, "Droits et libertés constitutionnels et conflit de valeurs : l'interprétation de la Charte et article 1", in G.A. Beaudoin and E. Ratushny, eds., *supra*, note 39, p. 176.
162. *Oakes*, *supra*, note 96, p. 138 ; reaffirmed in *Irwin Toy*, *supra*, note 43, p. 986 ; see also D. GIBSON, *supra*, note 141, p. 143-146.
163. *Supra*, note 11, p. 154.

burden resting on the government to justify discrimination against such groups is appropriately an onerous one [164].

The Supreme Court reaffirmed this reasoning in an analogous case involving the protection of children as a group that is most vulnerable to commercial manipulation. In *Irwin Toy* the criterion of a "pressing and substantial" objective was further refined by judging that it was not open to the government to assert *post facto* a purpose which did not animate the legislation in the first place [165]. However, in proving that the original objective remains pressing and substantial, the government can and should draw upon the best evidence currently available. The same is true as regards proof that the measure is proportional to its objective [166].

2.2.2. Proportionality of Means and Objectives

The second part of s. 1 involves the balancing of a number of factors to determine whether the means chosen by the government are proportional to its objective [167]. The Court must consider the nature of the right, the extent of its infringement and the degree to which the limitation furthers the attainment of the legitimate goal of the legislation. As Dickson C.J. stated in *Edwards Books*:

> Second, the means chosen to attain those objectives must be proportional or appropriate to the ends. The proportionality requirement, in turn, normally has three aspects: the limiting measures must be carefully designed, or rationally connected, to the objective; they must impair the right as little as possible; and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgement of rights. [168]

The legislature must be given sufficient scope to achieve its objective [169]. As noted in the *Edwards Books* case, when struggling with questions of social policy and attempting to deal with conflicting pressures, a legislature must be given reasonable room to manoeuvre.

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164. *Id.*
165. *Supra*, note 43, p 984; *Big M Drug Mart*, *supra*, note 79, p. 335.
166. *Irwin Toy*, *supra*, note 43, p. 984; *Edwards Books*, *supra*, note 97, p. 769; *contra*, *Ford v. A.G. Quebec*, [1988] 2 S.C.R. 712, p. 779-780 where it was judged that the evidence or rather lack of it, was insufficient.
167. *Oakes*, *supra*, note 96, p. 139; reaffirmed in *Irwin Toy*, *supra*, note 43, p. 991, and by Wilson J., *Andrews*, *supra*, note 11, p. 154-155; see also W.R. LEDERMAN, *supra*, note 161, p. 175; K.H. FOGARTY, *supra*, note 51, p. 332-333.
168. *Supra*, note 97, p. 768; see also *Q. v. Hufsky*, [1988] 1 S.C.R. 621.
169. *Black*, *supra*, note 130, p. 627-628; *Irwin Toy*, *supra*, note 43, p. 990; W.R. LEDERMAN, *supra*, note 161, p. 177-178.

> Both in articulating the standard of proof and in describing the criteria comprising the proportionality requirement the Court has been careful to avoid rigid and inflexible standards. [170]

S. 1 of the Charter does not advocate perfection and the notion of flexibility is inherent in the term "reasonable limit."

In *Andrews*, the reasoning advanced in support of the citizenship requirement for membership into a Bar of Law was judged not to have been rationally connected to its objectives, much less to have been carefully designed to achieve them with minimum impairment of individual rights. Therefore, the legislation was in violation of equality rights in s. 15 [171].

In the second aspect of the proportionality test, the party seeking to uphold the limit must demonstrate on a balance of probabilities that the means chosen impair the freedom or right in question as little as possible. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups [172].

As a result, a legislature mediating between the claims of competing groups will be forced to strike a balance without the benefit of absolute certainty concerning how the balance is best struck [173]. Democratic institutions are meant to allow its citizens to share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function [174]. In *Irwin Toy*, the Court did not take a restrictive approach to social science evidence, nor require legislatures to choose the least ambitious means to protect vulnerable groups. However, there had to be a sound evidentiary basis for the government's conclusions [175].

In other cases, however, rather than mediating between different groups, the government is best characterized as the single antagonist of the individual whose right has been infringed. In such circumstances, and indeed whenever the government's purpose relates as an example to maintaining the authority and impartiality of the judicial system, the courts can access with some certainty whether the "least drastic means" for achieving the purpose has been chosen. The same degree of certainty may not be achievable in cases involving

170. *Supra*, note 97, p. 768-764; *Black*, *supra*, note 130, p. 628.
171. Stated by Wilson J., *supra*, note 11, p. 157.
172. Oakes, *supra*, note 96, p. 139; *Irwin Toy*, *supra*, note 43, p. 992-993.
173. *Irwin Toy*, *supra*, note 43, p. 993.
174. *Edwards Books*, *supra*, note 97, p. 779.
175. *Irwin Toy*, *supra*, note 43, p. 999-1000; *contra*, *Ford*, *supra*, note 166.

the reconciliation of claims of competing individuals or groups or the distribution of scarce government resources [176].

The third and last aspect of the proportionality test may best be summed up by Dickson C.J. in *Oakes*.

> Even if an objective is of sufficient importance and the first two elements of the proportionality test are satisfied, it is still possible that because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society. [177]

2.2.3. Selection Criteria : Reasonable Limits of Discrimination ?

When first introduced, the Canadian immigration points system was hailed as a unique and unbiased selection process by which all independent applicants would be eveluated on the basis of their usefulness to the Canadian economy. However, as this study has shown, the selection criteria's highly-touted appearance of impartiality seems somewhat tainted upon a closer examination of its legislative dispositions, meaning and consequences. In interpreting s. 15 of the Charter in a large and generous manner, consistent with Canadian jurisprudence, it would seem that the guarantee of equality rights in the independent immigrant selection criteria have been revealed to be more *transparent* than *apparent*.

This part of the study will now examine the Items of the selection criteria found discriminatory earlier on for any reasonable limits that may be justified under s. 1 of the Charter.

2.2.3.1. What's Age Have to Do with It ?

Having proven that the age factor of Item 7 is discriminatory according to s. 15, the test of justification must now be applied to determine if the discriminatory limit is reasonable in a free and democratic society. The legislation in question is a regulation and therefore the limit is "prescribed by law." Also, the limits on age are sufficiently precise and clear in their wording. The discrimination based on age is direct in its intention and effect in that those immigrants who are too young or too old will be disadvantaged by the criteria [178].

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176. *Irwin Toy*, *supra*, note 43, p. 994. This reasoning was stated as an *obiter*, because the government acted as a mediator in the case, and not as an antogonist.
177. *Supra*, note 96, p. 140.
178. See part 2.2.1. of this study; M.E. ATCHESON and L. SULLIVAN, *supra*, note 109, p. 275; K.H. FOGARTY, *supra*, note 51, p. 367.

The onus of justification is on the part of the government and s. 8 (1) of *Immigration Act, 1976* stating that the burden of proof of admission rights is on the immigrant, is not contrary to this principle because the former is dealing with the respect of constitutional guarantees involving immigration admissions and, the latter with immigration admissions itself[179].

The appropriate test here is that the objectives of the age limitation legislation must be "pressing and substantial" in order to be sufficiently important to override the guarantee of equality in s. 15. The objective related to this particular factor is paragraph 3(a) of the *Immigration Act, 1976*, which states:

> to support the attainment of such demographic goals as may be established by the Government of Canada from time to time in respect of the size, rate of growth, structure and geographic distribution of the Canadian population[180].

Keeping in mind the vulnerability of disadvantaged groups in Canadian society and that the proof of the objectives' importance can be made by the best evidence currently available, the pressing and substantial nature of the concerns cannot be disputed. As shown by the legislative history of the *Immigration Act*, planned demographic growth is a prime feature of the modern policy and is inherent in the nature of immigration policy itself[181].

The high level principles and objectives of the immigration policy has traditionally been viewed as, at best, vague rules of statutory construction, rather than as a form of enumerated rights. These statements of principle do not override the explicit statutory provisions, and by their breath and extensive nature would tend to come into conflict in even the most ordinary set of individual circumstances. On the whole, most decisions are made without reference to these principles, although they form an underlying rational of Canadian immigration policy, which requires a balance to be maintained between competing principles[182]. However, with the advent of the *Canadian Charter of Rights and Freedoms*, 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.

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179. *Jolly v. M.M.I.*, [1975], F.C. 216, 54 D.L.R. (3d), 277, 7 N.R. 271; *Germain v. Malouin*, [1979], 2 F.C. 784, 101 D.L.R. (3d), 384; *supra*, note 5; see also J.H. GREY, *supra*, note 6, p. 40; C.J. WYDRZYNSKI, *supra*, note 3, p. 96.
180. *Canada's Immigration Law*, *supra*, note 31, p. 46; see also M.E. ATCHESON and L. SULLIVAN, *supra*, note 109, p. 276; *supra*, part 2.2.1.
181. As shown by s. 7 of *Immigration Act, 1976*, concerning the planning of immigration levels; see also H.G. HOWITH, *supra*, note 29, p. 1-3; C.J. WYDRZYNSKI, *supra*, note 3, p. 44, J. JEAN, *supra*, note 102, p. 12.
182. J.H. GREY, *supra*, note 6, p. 15; C.J. WYDRZYNSKI, *supra*, note 3, p. 72-73.

Next the proportionality test must be applied to the age limit legislation, to determine if means chosen by the government are proportional to its objective [183]. The first aspect of this test involving the careful design and rationality of the objective is difficult to contest because of the very wording of the objective. The terms "to support the attainment of such demographic goals as may be established by the government..." seems to indicate that paragraph 3(a) is an objective based on other objectives that are subservient to the government's discretion. The only other clue of what these other objectives may be is s. 7 of the *Immigration Act, 1976*, which sets the levels of immigration after consultation with the provinces. Therefore, it seems that the onus of justification by the government for this aspect of the proportionality test will be based on its own discretionary powers concerning immigration levels [184].

In examining the minimal impairment aspect of the proportionality test, once again the vague nature of the limits' objective presents a problem. However, in considering the *obiter* by the Supreme Court in *Irwin Toy*, in cases where the government is the single antagonist of the individual and does not act as a mediator between competing groups, the criteria of the "least drastic means" should, perhaps, be applied by the courts in their assessment of the age discrimination. The same degree of certainty may prove a problem in the assessment of immigration law as compared to that concerning the maintenance of authority and impartiality of the judicial system. Nevertheless, the burden of proof for the government is still quite onerous, especially because of the requirement of a sound evidentiary basis for the government's conclusions that age discrimination is essential for achievement of its demographic goals [185].

Finally, the deleterious aspect of the proportionality test may prove for the government the most difficult to justify because of the nature of the age discrimination. The equality rights in s. 15 of the *Charter* are applicable to everyone, including immigrants or other aliens. The justification of age discrimination by demographic goals that are themselves unsubstantiated and discretionary, opposes the very nature of equality rights by subjecting constitutional guarantees to administrative discretion.

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183. M.E. ATCHESON and L. SULLIVAN, *supra*, note 109, p. 277.
184. J.H. GREY, *supra*, note 6, p. 28; C.J. WYDRZYNSKI, *supra*, note 3, p. 73.
185. See part 2.2.2. of this study; recent studies have indicated the advantages of admitting younger immigrants to resolve in part the problem of an aging population that pays less taxes but requires more services, see Presse Canadienne, "Les immigrants versent plus d'argent dans le trésor fédéral qu'ils n'en retirent", 4/01/90, *Le Soleil*; A.H. AKBARI, *Net Impact of different immigrant groups on Canadians — Research Abstract*, Ottawa, Employment and Immigration Canada, 1989, p. 3; G. HERSAK and D. THOMAS, *supra*, note 15, p. 5.

For these reasons and as already supported by recent jurisprudential developments on this subject, it is submitted that the discriminatory age limits in Item 7 of the s. 8 of the *Immigration Regulations, 1978* are unreasonable and unjustifiable according to the test of s. 1 of the Charter [186].

2.2.3.2. Justifying Personal Subjectivity

Given that the factor of personal suitability is discriminatory, according to s. 15 of the Charter, the government now has the onus of justifying this subjective limit based on administrative discretion. The impugned legislation is "prescribed by law" but the criterion of an "intelligible standard" defining the personal suitability factor or its exact assessment and allotment of points is, at best, questionable. Neitheir the legislation nor its accompanying directives provide a concise method for evaluating personal suitability in its content or its point distribution. In the present analysis, it is submitted that the visa officer is given "a plenary discretion to do whatever seems best in a wide set of circumstances;" thus, there is no "limit" prescribed by law [187].

Provided that Item 9 satisfies the preliminary requirements of s. 1, the government then has to justify that the following objectives in s. 3 of *Immigration Act, 1976* linked to the personal suitability factor are sufficiently "pressing and substantial" [188].

> 3(b) to enrich and strengthen the cultural and social fabric of Canada taking into account the federal and biligual character of Canada.
>
> 3(i) to maintain and protect health, safety and good order of Canadian society.

Once again, as in the case of the age factor, the importance of these objectives is shown by the role they have played in the legislative history of immigration law in Canada and its application in current immigration policy. Also, s. 27 of the Charter involving the guarantee of multiculturalism reaffirms the substantial nature of the first objective of cultural and social concerns [189].

The application of the triple-tiered proportionality test, comparing the means applied to the objectives desired, will demonstrate the critical problems resulting from the personal suitability factor [190]. In applying the test of

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186. *Harrison* and *Stoffman*, *supra*, note 111; *Kwantlen Faculty Assn.*, *supra*, note 54; *contra*, *McKinney*, *supra*, note 111; where the age distinction was judged discriminatory by s. 15 of the Charter, but conforming to the s. 1 justification test.
187. *Irwin Toy*, *supra*, note 43, p. 983; see part 2.2.1. of this study; *Immigration Manual*, I.S. 4.08, *supra*, note 63.
188. See part 2.2.1. of this study; *Canada's Immigration Law*, *supra*, note 31, p. 46-47.
189. See part 2.1.3. of this study; J. JEAN, *supra*, note 102, p. 6-7.
190. See part 2.2.2. of this study; R. ANAND, *supra*, note 9, p. 110.

rationality or careful design to the means applied in Item 9, it is difficult to see how the subjective qualities enumerated within can reasonably or even rationally "enrich and strengthen the cultural and social fabric," or "maintain and protect the health, safety and good order of Canadian society." In reconsidering the earlier discussion of these terms concerning discrimination, even by interpreting these qualities in their most objective sense, the rational lien between objectives and means is not evident [191]. Item 9's lack of "careful design" in its wording has already been discussed in examining the vagueness of its limits.

The application of the test of "minimal impairment" to Item 9 demonstrates once more the omnipotence of administrative discretion in immigration law. In reviewing the reasoning exposed in the testing of the age factor, it is submitted that the personal suitability factor fails miserably in its balancing of the interests of society with those of the applicants who are disadvantaged. Not only is the evaluation of the factor completely at the discretion of the visa officer in charge, but the subjective guidelines in Item 9 provide no discernable limits whatsoever in the scoring of this personal evaluation. It should be quite interesting to see what evidentiary proof the government has to offer in order to justify this discrimination by "personal subjectivity" [192].

The aspect of the deleterious effects of the preceding two tests. As discussed earlier in the section dealing with *locus standi*, all aliens have the right to the protection of Canadian constitutional guarantees. In allowing the power of administrative discretion to prevail over equality rights in s. 15, and multicultural rights in s. 27, it will not only be the discriminated immigrant who risks exclusion that will suffer, but also Canadian society as a whole, by this debasement of its fundamental rights and freedoms [193].

2.2.3.3. A Factor of Economics or Politics?

As was the case with the preceding factors, the prerequisite of the impugned limit being "prescribed by law" posed no problems as to the scope of the "law" because of the legislation concerned. The vagueness doctrine is neither applicable here, as all the factors in Items 2, 3 and 4 are clearly and painstakingly explained as well as their evaluation and distribution of points. The next step is the government's proof of a "pressing and substantial"

191. It seems difficult to reconcile the "objective and universal" standards of the terms in Item 9 with the cultural and social goals of s. 3 (b) which are subjective by nature.

192. See part 2.2.3.1. of this study.

193. See part 2.2.2. of this study; R. ANAND, *supra*, note 9, p. 113; an analogous analysis may be made with *Bhinder*, *supra*, notes 151 and 86.

objective which shall be attempted by examining the following objectives of the occupational, experience and S.V.P. factors [194].

3(b) (as outlined earlier in justifying the age factor and pertaining only to the S.V.P. and experience factors in this analysis.)

3(h) to foster the development of a strong and viable economy and the prosperity of all regions in Canada. (This objective concerns all three Items 2, 3 and 4.)

The pressing and substantial nature of these objectives is unconstested as the reasons for the very existence of immigration law and policy depend on these objectives [195]. The problem, as usual, lies more in the application of the means chosen to achieve these objectives.

In applying the proportionality test, the first hurdle faced will be the government's justification of the rationality or careful design of the impugned limits [196]. Once again, by examining only the occupational factor in light of s. 3(h), this analysis will be equally valid for Items 2 and 3 because of their interdependence. The relationship between s. 3(b) and the S.V.P. and experience factors shall not be examined in the framework of this study. However, it has been noted that this link applies more specifically to the self-employed class of business immigration who are required to establish a business in Canada that will contribute to the economy or the cultural or artistic life of Canada [197].

To examine the rationality in the link between Item 4 and s. 3(h), if in fact it exists, one must delve once more into the legislative history of the present *Immigration Act*. The elimination of the Department of Citizenship and Immigration in favour of a new Department of Manpower and Immigration in 1966 made clear the philosophy that immigration would be viewed as an element of domestic labour and economic policy. This reorganization was not accepted without reservations, as it appeared that effective long-range immigration planning would become secondary to short-range, stop-gap measures, designed to fill immediate shortages of the labour force. As the Canadian economy began its decline in later years, immigration regulation reflected this trend and opponents of the government reorganization of manpower and immigration would see their predictions reflect reality. Identification of immigration considerations apart from short-term economic concerns would become difficult to discern [198].

194. See part 2.2.1. of this study; *Canadian Immigration Law*, *supra*, note 31, p. 45-46.

195. See introduction of this study; *supra*, note 37.

196. See part 2.2.2. of this study.

197. S. 2 (1) and s. 8 (1B) of *Immigration Regulations, 1978*, concerning respectively, the definition of a self-employed immigrant and his selection assessment; *Immigration Manual*, I.S. 5.01 and 5.07; see also F.N. MARROCO, and H.M. GOSSETT, *supra*, note 36, p. 296.

198. C.J. WYDRZYNSKI, *supra*, note 3, p 58-61; see also R. ANAND, *supra*, note 9, p. 88.

This prediction turned-fact was realized once more in the early 1980's, when in response to rising unemployment, a restriction of selected workers was imposed, admitting only those with arranged employment [199]. The restriction ended only in 1985 with an expansion in economic immigration, as a response to economic recovery. However, the damage was already done, as the recession and its aftereffects resulted in the unfulfillment of the announced immigration planning ranges from 1982–1986 [200]. Although as rationalized by the government, the immigration levels set by the Special Joint Committee of Parliament on Immigration Planning did not represent a quota or a target, they did indicate, as submitted by this study, to what point the present legislation was ineffective in providing long-range economic planning [201].

Recent demographic reports show that with Canada's falling birthrate, 1.7 children/woman in 1988, the Canadian population will begin to decline by 2026 even if immigration continues at present 1989 levels [202]. This prospect will have troubling implications for Canada's economy, as noted earlier in the discussion of multiculturalism, because a declining workforce could be too small to support the country's social programs by the early years of the next century. This view was supported by a 1987 discussion paper by the Institute for Research on Public Policy, stating that population growth has a positive effect on economic growth [203]. The demographic factor in Item 7 was increased from 5 points to a maximum of 10 in 1986 in an effort, as claimed by the government, to permit a higher number of eligible applicants to be accepted [204].

In light of the analysis presented above, this study proposes that the occupational factor in Item 4 is not rationally connected to the objective of developing a strong and viable economy, as well as prosperity in all regions of Canada. The occupational factor is, at best, a short-range, stop-gap measure to fill immediate shortages of the labour force. This observation is supported by the use and purpose of the occupational list for point assessment, as well as by historical evidence. The pressing and substantial demographic concerns which invariably affect the economy demonstrate to what point the present

199. H.G. HOWITH, *supra*, note 29, p. 16–27; G. HERSAK and D. THOMAS, *supra*, note 15, p. 2.
200. *Id.*, p. 37.
201. *Id.*, 38; see also *Canada's Immigration Law*, *supra*, note 31, p. 5; the reasoning of the government's claim that the announced immigration levels are "only" global planning levels is questionable, for one may inquire of what possible use are predictions without a purpose or a goal.
202. P. KOPVILLEN and others, *supra*, note 155, p. 16; G. HERSAK and D. THOMAS, *supra*, note 15, p. 5; *Future Immigration Levels*, *supra*, note 121, p. 24.
203. *Id.*; H.G. HOWITH, *supra*, note 29, p. 38-39.
204. H.G. HOWITH, *supra*, note 29, p. 31.

legislation is deficient in achieving its economic objectives, both long and arguably, short term [205].

In considering the test of minimal impairment, the "least drastic means" criterion should be the appropriate one in the balancing of society's interest with those of the individual or group [206]. With the government as arguably the sole antagonist, the disadvantaged immigrant is not only subjected to the whims of administrative discretion but also to the influence of powerful lobby groups on decisions of public policy regarding the point distribution in the occupational list. Economic policies may easily become political policies based on government reaction to public opinion, as demonstrated by the continued use of immigration restrictions during the recession [207].

By eliminating the occupational factor altogether, along with the S.V.P. and experience factors, there would still be an effective limit assuring the economic viability and employment of immigrants by Item 5, the assessment of Arranged Employment or Designated Occupation [208]. At the very least, the occupational factor should be restructured so that the distribution of points is less sensitive to fluctuations in the Canadian economy, and less subjective in its discretionary evaluation of occupations. Through these or other similar means, the indirect discriminatory effects on immigrants will be minimized and perhaps eliminated in whole. The government finding that "immigrants do not take jobs away from Canadians but rather contribute to economic growth and job creation," along with the official immigration job policy of "Canadians first," seems to contradict the underlying reason for occupational factor's restrictive selectivity [209].

The final aspect of deleterious effects can be easily demonstrated by the evident risks the disadvantaged immigrant faces by exclusion for inadequate point total, or even immediate disqualification. As stated in *Oakes*, this test need only be examined if the first two criteria have already been satisfied.

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205. P. KOPVILLEN and others, *supra*, note 155, p. 14–16; see also G. HERSAK and D. THOMAS, *supra*, note 15, p. 5; R. CLEROUX, "Immigration revises list of desirable jobs", 18/11/89, *The Globe and Mail* in which the reliability and validity of the occupational list is questioned.
206. See part 2.2.2. of the study.
207. *Immigration Manual*, I.S. 4.08 and Appendix B; R. CLEROUX, *supra*, note 205; H.G. HOWITH, *supra*, note 29, p. 19–26; R. ANAND, *supra*, note 9, p. 88; see also J. JEAN, *supra*, note 102, p. 8.
208. H.G. HOWITH, *supra*, note 29, p. 16; G. HERSAK and D. THOMAS, *supra*, note 15, p. 2; C.J. WYDRZYNSKI, *supra*, note 3, p. 113; the reliance of the government on this factor to restrict immigration levels during the recession in the 1980's, is indicative of its effectiveness in implementing the "Canadians first" employment policy.
209. C.J. WYDRZYNSKI, *supra*, note 3, p. 112-113; see also H.G. HOWITH, *supra*, note 29, p. 28; G. HERSAK and D. THOMAS, *supra*, note 15, p. 8-9; V. MALAREK, *supra*, note 155.

Therefore, because the occupational factor failed primarily in its test of rationality, and secondly the test of minimal infringement, further analysis is unnecessary.[210].

Conclusion

In the conflict between administrative discretion and equality rights, the rule of constitutional guarantees is supreme. The immigration system and in particular the selection criteria are reflections of the omnipresence of administrative powers as shown throughout its legislative history. The distinction between rights and privileges in immigration law is no longer valid in regards to the protection of constitutional rights and all individuals or groups now have the *locus standi* to invoke the equality rights guaranteed in s. 15. The appropriate test for discrimination in s. 15 as elaborated in *Andrews* by the finding of a differential treatment and whether this differentiation was discriminatory, was applied to the selection criteria for independant immigrants. In determining discrimination for grounds analogous to those enumerated in s. 15, the key was the distinction between merits and personal characteristics. In this context, the factors of age, personal suitability, occupation, experience and specific vocational preparation were found to have disadvantaged certain independent immigrants in a discriminatory manner. Multiculturalism guarantees were discussed as it was concluded that s. 27 should play an active role in promoting higher immigration levels as well as protecting multicultural rights in immigration law and policy. A more passive role was also assigned, as s. 27 would aid in the interpretation of other constitutional guarantees and especially the principle of non-discrimination in s. 15. Finally, once a legislative provision was judged discriminatory, the test of justification had to be applied to determine the reasonableness of these limits. The appropriate test, as stated in *Oakes* and refined later by jurisprudence, in particular *Irwin Toy*, was first, providing that the "limits were prescribed by law," to see if the concerns overriding the Charter guarantees were "pressing and subtantial" and if so, to apply the multi-tiered proportionality test. In considering the criteria of rationality or careful design of means to objectives, minimal impairment of constitutional rights, and the proportionality of the deleterious effects as to the objectives concerned, the Items 2, 3, 4, 7 and 9 of the selection criteria that were judged discriminatory were found to be equally unreasonable for various reasons and in varying degrees. However, one aspect in which all three analyses were in consensus was the need for reform in immigration law and policy and, in particular, a tighter control of administrative discretion.

210. See part 2.2.2. of the study.

A brief examination of the Canadian refugee system and its present urgent and critical situation will provide an excellent example of the true malaise of the Canadian immigration system. As discussed in the introduction, refugee law in Canada should be, according to its nature, a human-rights based protection system[211]. However, in every facet of its overseas refugee resettlement programs, Canada has institutionalized screening processes that effectively ensure the acceptability and productivity of the refugees it receives[212]. Refugees must either be privately sponsored or they must show that they possess an adequate mix of skills, formal preparation and aptitudes to permit them to become self-sufficient and contributing members of society. Notwithstanding Canada's commitments to the advancement of international human rights law[213], the government has constructed a refugee law that is fundamentally premised to safeguard and advance its own domestic well-being. Thus humanitarian concerns are sacrificed for economic concerns.[214].

The recent abuse of the refugee process, before implementation of *Bills C-55 and C-84*, was caused as much by the undue harshness and discriminatory nature of Canadian immigration law, as by improper exploitation of the system by applicants[215]. Apart from the discriminatory nature of the selection criteria as discussed in this study, a variety of other regulations remain overtly discriminatory. The differential treatment of prospective visitors from different countries under Schedule II of *Immigration Regulations, 1978* which lists those nations from which visas are not required in advance of arrival in Canada is questionable[216], as well as the three designated refugee classes (from Indochinese, Latin American, and Communist countries) with varying requirements of proof in spite of Canada's international commitments in refugee law[217]. On the administrative level, the uneven distribution of Canadian immigration offices throughout the world have resulted in *de facto* discrimination on the basis of national origin, because of the visa distribution

211. J.C. HATHAWAY, *supra*, note 33, p 357; B. SEGAL, *supra*, note 33, p. 735; G. HERSAK and D. THOMAS, *supra*, note 15, p. 3.
212. J.C. HATHAWAY, "A Selected Concern: An Overview of Refugee Law in Canada", (1988) 33 *McGill L.J.* 676, p. 714; G. HERSAK, and D. THOMAS, *supra*, note 15, p. 3.
213. *U.N. Convention Relating to the Status of Refugees*, 28/07/51, 189 U.N.T.S., p. 150; *Protocol Relating to the Status of Refugees*, 31/01/67, 606 U.N.T.S. 267.
214. J.C. HATHAWAY, *supra*, note 212, p. 714-715.
215. J.H. GREY, *supra*, note 58, p. 597; P. DUQUETTE, J. YEDID and M. WEIGEL, *supra*, note 33; J.C. HATHAWAY, *supra*, note 212, p. 676 s.
216. S. 9 of *Immigration Act, 1976*, and s. 13 of *Immigration Regulations, 1978*, concerning visitor visa; P. DUQUETTE, J. YEDID and M. WEIGEL, *supra*, note 33.
217. Respectively, *Indochinese Designated Class Regulations*, S.O.R./78-931; *Political Prisoners and Oppressed Persons Designated Class Regulations*, S.O.R./82-977; and *Self-Exiled Persons Class Regulations*, S.O.R./78-933; R. ANAND, *supra*, note 9, p. 122.

principle of "first-come, first served." Although recent legislative and administrative measures have been taken to alleviate this problem, the fact remains that the Canadian government's failure to provide the necessary resources is a denial of equality rights[218]. In light of these formidable obstacles, and as always the pervasiveness of administrative discretion in immigration law and policy, it is not suprising that many desperate immigrants have tried to gain admission into Canada in the guise of "economic refugees"[219].

In concluding this study, a closing remark must be made concerning the present immigration administration's obsession with short-term "get-rich-quick" policies and its special business immigration program. Immigration requirements for business immigrants such as self-employed applicants, entrepreneurs, or investors are assessed under a relaxed set of criteria to encourage the admission of wealthy foreigners[220]. Critics have claimed that the policy has failed to deliver clear economic benefits, while discriminating against many potential immigrants who are not wealthy[221]. The indirect effects of this discrimination as assessed by s. 15 were discussed earlier in this study. Visas are given on the intent of applicants' promises, but the monitoring system is inadequate and many federal officials suspect the unfulfillment of these promises[222].

In the end, this policy, atypical of the recent evolution of immigration law, may be undermining other types of immigration. With the heavy criticism Canada received in its encouragement of the immigration of professionals from underdeveloped nations through the point system the government soon after took special legislative and administrative measures to "discriminate" against these occupations[223]. However, the "brain drain" of the 1970's has now been transformed into a " money drain" of the 1980's, depriving underdeveloped nations of valuable sources of capital and investment. Finally, as shown by recent demographic and economic studies, the present immigration policy's economic benefits are still uncertain and may be even

218. H.G. HOWITH, *supra*, note 29, p. 6; R. ANAND, *supra*, note 9, p. 122; J.H. CUFF, "Film raises tough questions about immigration policy", 21/11/89, *The Globe and Mail.*
219. *Supra*, note 215.
220. In particular Schedule I s. 3, 8, 9 and 11 of *Immigration Regulations, 1978*; see also *Immigration Manual*, I.S. 5, *supra*, note 63, concerning business immigration.
221. D. BURKE, S. SHARIFF, and T. TEDESCO, "The Moneyed Class", 10/07/89, *Maclean's*, p. 19; D. STOFFMAN, *supra*, note 156, p. 129; J.H. CUFF, *supra*, note 218.
222. *Id.*
223. For example, the special procedures for certain professional occupations, *supra*, note 125.

counterproductive in the long term. As succinctly and appropriately put by Dan Heap, N.D.P. Immigration Critic, "We don't need to sell visas. What builds the country is work, not money"[224].

224. D. BURKE, S. SHARIFF, and T. TEDESCO, *supra*, note 221, p. 19; see also J.H. CUFF, *supra*, note 218, in which the unsettling knowledge is revealed that neither our ancestors, nor most of us, would qualify to emigrate to Canada under the present immigration law.