Return of the Chancellor's Foot?: Discretion in Permanent Resident Deportation Appeals under the Immigration Act

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Abstract
This article examines recent changes to section 70 of the Immigration Act that allow the minister of immigration to deport Canadian permanent residents who are determined to be a danger to the public without proper procedural safeguards. The authors argue that much of both current theoretical literature on discretion and the history of the development of discretion within the immigration scheme are against these changes. By analyzing how discretion is employed in other, similar, public safety regimes, the authors show that the recent changes violate individual rights and will very likely create more intractable problems than those they set out to solve.

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RETURN OF THE CHANCELLOR’S FOOT? DISCRETION IN PERMANENT RESIDENT DEPORTATION APPEALS UNDER THE IMMIGRATION ACT®

By Richard Haigh* and Jim Smith**

This article examines recent changes to section 70 of the Immigration Act that allow the minister of immigration to deport Canadian permanent residents who are determined to be a danger to the public without proper procedural safeguards. The authors argue that much of both current theoretical literature on discretion and the history of the development of discretion within the immigration scheme are against these changes. By analyzing how discretion is employed in other, similar, public safety regimes, the authors show that the recent changes violate individual rights and will very likely create more intractable problems than those they set out to solve.

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I. INTRODUCTION

Within the last thirty years, two different approaches to the exercise of discretion in deportation appeals by permanent residents have been utilized. Prior to 1967, the exercise of discretion was the sole province of the minister of immigration, who could confirm, quash, or substitute his or her own judgment for any decision by the Immigration Appeal Board. After 1967, with the transformation of that Board into a "court of record" with regard to sponsorship and removal appeals, jurisdiction over appeals was stripped from the minister and endowed solely in the Board itself. Despite numerous changes made since then, the Immigration Appeal Board (now the Immigration and Refugee Board—Appeal Division) has continued to exercise this discretionary power. This approach has now ended. Recent changes to the Immigration Act introduced by Bill C-44 strip the Appeal Division of its jurisdiction in the case of criminal deportation appeals under s. 70, should the minister issue an "opinion" that the appellant is "a danger to the public in Canada." This pre-emption represents a partial return to the pre-1967 state, giving the minister control over the removal arm of the Appeal Division's jurisdiction, while preserving inviolate the Board's exercise of discretion in sponsorship appeals.

Two questions arise from this situation. The first concerns the preferable location and type of discretion best suited to temper the rule-

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1 The changes to the Immigration Act, R.S.C. 1985, c. I-2, detailed in this article affect other persons, but the negative implications of these changes for permanent residents will perhaps be the most acute. Similar arguments can probably also be made for Convention refugees, sponsored relatives, and returning residents.

2 See Immigration Act, R.S.C. 1952, c. 325, s. 31(4):
   The Minister may in any case review the decision of an Immigration Appeal Board and confirm or quash such decision or substitute his decision therefor as he deems just and proper and may, for these purposes, direct that the execution of the deportation order be stayed pending his review and decision, and the decision of the Minister on appeals dealt with or reviewed by him or the decision of the majority of an Immigration Appeal Board on appeals, other than those reviewed by the Minister, is final.

3 Immigration Appeal Board Act, S.C. 1966-67, c. 90, ss. 7, 11, 12. The minister retained the residual discretionary power not to remove a person (or to arrange for their admission).

4 Unless the context requires otherwise, for simplicity both forms of this appeal tribunal will be referred to as the Appeal Division or the IAD.

5 An Act to Amend the Immigration Act and the Citizenship Act and to make a consequential amendment to the Customs Act, S.C. 1995, c. 15 [hereinafter Bill C-44]. The bill received royal assent on 15 June 1995, and came into force on 10 July 1995.

6 Immigration Act, supra note 1, s. 70(5).
driven nature of immigration law. Preliminary to this is the question of what standards shall determine such a preference. Unless the minister plans to issue an "opinion" in all criminal removal appeals, the effect of Bill C-44 is to create two distinct classes of permanent resident under deportation order: those about whom the minister does not exercise the newly-regained oversight to issue an opinion (and who therefore retain a right of appeal), and those about whom the minister does issue an opinion (who have no right of appeal). On the face of it, the Appeal Division appears to retain its jurisdiction in criminal removal appeals in which the minister does not issue an opinion. However, the amendment also allows the minister to decide that a successful appellant has later on breached any terms and conditions of a stay and is a danger to the public, thereby nullifying the Appeal Division's decision and again making the person deportable. In a nutshell, the problem is that the minister is endowed with a discretion to determine when the Appeal Division may exercise its discretion in section 70 appeals. The ambit of this discretion extends for the duration of any stay granted by the Appeal Division; any subsequent positive discretionary decision by the Board may be impeached, should the minister so decide.

The second question involves the additional requirements brought about by the Canadian Charter of Rights and Freedoms. In 1967, one of the key factors that resulted in discretionary power over removal appeals being placed within the Board was a perception that there was a potential for arbitrariness on the part of the minister. Since that time, the Charter has come into force, imposing a whole new standard by which to measure government action; and the law regarding judicial review, similarly, has grown more attentive to issues of procedural fairness and misuse of discretion. Immigration tribunals, via the Appeal Division and its predecessor, have spent nearly three decades developing structures to help guide the exercise of discretion in removal appeals, which included determining the "safety and good order of Canadian society." These have been set down in a well-developed set of cases. The fate of this body of jurisprudence—much anticipated by

7 Ibid. s. 70(6). See discussion in Part VII(F), below.
10 This express acknowledgement of objective 3(i) of the Immigration Act was confirmed by the Federal Court of Appeal in Canepa v. Canada (Minister of Employment and Immigration), [1992] 3 F.C. 270 (C.A.) [hereinafter Canepa], leave to appeal refused, [1993] 1 S.C.R. v (note).
Joseph Sedgwick in his 1965 report— is cast in doubt by the recent legislative changes.

This article has two underlying goals: to provide a reasoned critique of the latest legislative instalment placing discretion back with the minister; and to defend the Appeal Division’s prior control over this same discretion as better placed to identify threats to the public. It will be argued that, if discretion is to be exercised in deporting permanent residents, it should be carried out within the jurisdiction of the quasi-judicial Appeal Division, whose exercise of it is more justiciable. Further, we argue that the current encroachment by the minister on the Division’s section 70 jurisdiction is contrary to the tenets of a developing body of thought about discretion, and to the example set by two other attempts to protect public safety: the national security certificate regime under the Immigration Act, and the dangerous offender regime under the Criminal Code. The article is not, however, a call to arms against discretion in favour of rules. Underlying all of it is a belief that the proper exercise of discretion can deliver a rational, purposive, and just result while achieving statutory goals.

After setting out the law both prior to and after the amendments, the article will turn to theoretical aspects of discretion, and will propose a normative framework—owing much to the works of Kenneth Culp Davis and Denis Galligan—which will operate in the background as an informal guide to where one might best locate a discretionary power. The proposed normative criteria fall under the broad areas of rationality, purposiveness, and justice (fairness). The article will then raise three arguments against placing supervisory discretion in the minister, using each of the normative criteria. The first such argument outlines criticisms made towards a similar ministerial discretion prior to 1967, and a renewed plea for their continued relevance today. Second, the article questions the efficiency of endowing an additional executive scrutineer with a discretionary jurisdictional veto over a factor already taken fully into account by the existing quasi-judicial body. Third, by

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11 See Sedgwick, supra note 9, Part II at 9 (recommendation 4).
12 R.S.C. 1985, c. C-46, Part XXIV.
14 The minister seems to have chosen to re-endow himself with only the negative version of the pre-1967 discretionary power, saying in effect that those who are not vetoed are left to their own devices at the Appeal Division, but that there are some permanent residents whose appeal right should be vetoed.
way of a detailed examination of two other regimes, it will be demonstrated that the nature of the discretion exercisable by the minister is entirely out of keeping with similar "public safety" discretion given to the executive in other situations. The conclusion makes several observations and recommendations concerning the possible provenance of such a flawed scheme, and what, pragmatically, might be done to help it conform more to the norms set out. In this way, it is hoped that exercise of discretion in these cases will be more palatable, that it will not vary according to arbitrary criteria like the length of the proverbial "Chancellor's foot."15

A final cautionary note should be made. In January 1998, the Immigration Legislative Review issued its wide-ranging report on future immigration policy and regulatory framework in Canada.16 The report recommended substantial changes to virtually the entire immigration system, including structural changes to the immigration and citizenship branches, changes to immigrant selection criteria, and a new Protection Act reflecting radical changes to the refugee determination system. One of the major concerns expressed in the report was the need to alter the exercise of discretion, by minimizing it wherever possible, and structuring it by codifying its use in those other cases.17 If the report is adopted, it may dramatically affect the use of ministerial discretion, and some of the remarks made in this article may become superfluous. However, despite the general tenor of the report affirming natural justice rights, including favouring the right of review in most cases, this does not seem to be indicated in matters involving national security or dangers to the public. Chapter 9 of the report states that landed immigrants should be entitled to a review of deportation in every case, unless a security certificate is issued or in the minister's opinion, they represent a danger to the public.18 The report is silent on the actual framework surrounding the issuance of this opinion—whether this will

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15 The aphorism from which the title of this article draws its inspiration originated with John Selden who, in the seventeenth century, described equity as "a rogish thing" measured by the length of "the Chancellor's foot": J. Selden, The Table Talk of John Selden by S.W. Singer, 3d ed. (London: J.R. Smith, 1860) at 148-49. Years later, Lord Eldon L.C. expressed the hope that he had done nothing "to justify the reproach that the equity of this Court varies like the Chancellor's foot": Gee v. Pritchard (1818), 2 Swans. 402 at 414, 36 E.R. 670 at 674 (Ch.). Since then, the phrase has become a familiar way of describing arbitrary and unstructured decisionmaking processes.


17 Ibid. c. 10.

18 Ibid. at 129 and accompanying text (Recommendation 163).
be similar to the current procedure discussed in this article is unknown. However, until such time as a new, and different, legislative scheme is adopted, our concerns with the present system, and that proposed in the report, remain undiminished.

II. THE LEGISLATIVE FRAMEWORK

A. The Law Before Bill C-44 Came into Force (10 July 1995)

Part IV of the Immigration Act sets out the statutory basis for claims and appeals. A tripartite Immigration and Refugee Board (IRB) is established by section 57(1), which consists of the Chairperson of the IRB and the members of the three divisions, one of which is the Appeal Division. The IAD is a “court of record" with sole and exclusive jurisdiction to hear appeals made under sections 70 (removal orders), 71 (minister’s appeals of an adjudicator’s decision) and 77 (refusals to approve an application for landing made by a member of the family class). The jurisdiction of the IAD includes the power to hear and determine all questions of law and fact, including questions of jurisdiction. Within its jurisdiction, the IAD has all the powers, rights and privileges of a superior court of record, including a widened evidentiary power to consider evidence it finds credible or trustworthy and necessary for dealing with the subject-matter before it. Rules of practice and procedure may be set by the chairperson of the IRB subject to the approval of the Governor in Council. The IAD must provide written reasons for its decision on request.


20 Immigration Act, supra note 1, s. 57(2).

21 Ibid. s. 69.4(1).

22 Ibid. s. 69.4(2).

23 Ibid. s. 69.4(3).

24 Ibid. s. 69.4(3)(c).

25 Ibid. ss. 65, 79, 80.

26 Ibid. s. 69.4(5).
Permanent residents who are subject to a removal order or conditional removal order are granted rights of appeal under section 70 of the Act. Those whose removal has already taken place may appeal, and be allowed under terms and conditions to return to appear in person at their appeal. The person may, subject to certain exceptions set out in section 70(4), appeal on either or both of the grounds of (i) questions of law or fact, or mixed law and fact; or (ii) that having regard to all the circumstances of the case the person should not be removed from Canada. The exceptions in section 70(4) limit the grounds of appeal to questions of law, fact, or mixed law and fact for specified persons: subjects of a national security certificate issued under section 40(1), or those whom an adjudicator has determined to be members of an inadmissible class described in section 19(1), which includes organized crime, criminal conspiracy, terrorism, danger to the security of Canada, war criminal or perpetrators of crimes against humanity, or senior member of a government involved in terrorism. Where a permanent resident appeals a removal order, the IAD may order the inquiry to be reopened in order for the adjudicator to receive additional evidence or testimony; in such a case, a transcript and assessment must be supplied by the adjudicator to the IAD for its consideration.

The IAD may dispose of an appeal by allowing it, dismissing it or, if it is made pursuant to section 70(1)(b), by directing a stay of execution of the order under such terms and conditions as the IAD may determine. The case may be reviewed from time to time if the IAD considers it necessary or advisable and the terms and conditions may

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27 The specific focus of this article is permanent residents; others who may appeal are Convention refugees, sponsors and those in possession of a valid returning resident permit.

28 Immigration Act, supra note 1, s. 75.

29 This is what has been described as the "equitable" jurisdiction of the IAD. If a removal order is validly issued to the person whose identity has been established, all that remains is this discretionary ground. Almost all appeals are concentrated on this ground. See also R.P. Cohen, "Fundamental (In)justice: The Deportation of Long-term Residents From Canada" (1994) 32 Osgoode Hall L.J. 457.

30 Immigration Act, supra note 1, s. 70(1)(a), (b).

31 Ibid. s. 72(1).

32 Ibid. s. 72(2).

33 Ibid. s. 73(1)(c).

34 Ibid. s. 74(2).

35 Ibid. s. 74(2).
be amended at any time.36 The iAD may cancel the stay at any time and dismiss the appeal, directing that the removal order be executed.37 Any decision by the iAD is subject to an application for judicial review, with leave, to the Federal Court (Trial Division),38 which must be filed within fifteen days.39 If leave is granted, the judgment is subject to appeal only if the court has certified and stated a serious question of general importance arising from the case.40

B. The Law After Bill C-44

The Bill C-44 amendments, which came into force on 10 July 1995,41 radically limit who may avail themselves of the process described above. A limited right of appeal (on fact, law, or mixed fact and law only) is preserved for permanent residents with respect to whom a national security certificate has been issued but who are not described by the new section 70(5).42 Similarly, certain of the adjudicator-determined inadmissible classes retain the same limited right of appeal—terrorists, war criminals, perpetrators of crimes against humanity, and members of terrorist governments.43 Three classes from the formerly inadmissible list—organized crime, criminal conspiracy, and threats to the security of Canada—have had their limited appeal rights removed.44 Organized crime and criminal conspiracy now appear in the proscribed list of the new section 70(5); in contrast, those who pose threats to the security of

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36 Ibid. s. 74(3)(a).
37 Ibid. s. 74(3)(b).
38 Ibid. s. 82.1(1).
39 Ibid. s. 82.1(3).
40 Ibid. s. 83(1).
41 Bill C-44 contained a contentious "retroactivity" provision that is at the time of this writing being fought out in a number of iAD cases. The minister is contending that for any appeal which has not been decided on the coming into force of the amendments, an opinion may be issued and the jurisdiction of the iAD to hear the appeal may be removed. It seems that this argument is winning: in Tsang v. Canada (Minister of Citizenship and Immigration) (1997), 211 N.R. 131 (F.C.A.), aff'g (1996), F.T.R. 214 (F.C.T.D.), the court held that the retrospective provisions of the new Immigration Act do apply, and, once an opinion is issued, terminate the jurisdiction of the iAD. Fascinating and disturbing as this issue is, it is beyond the ambit of this article to comment upon it in detail.
42 Immigration Act, supra note 1, s. 70(4)(a).
43 Ibid. s. 70(4)(b).
44 Ibid. s. 70(4)(b).
Canada have simply dropped from sight in the new section 70(4) and thus have presumably lost their right to appeal their removal (although it was never clear how someone could fall exclusively within this category, so the practical effect is probably non-existent).

The major change introduced by Bill C-44 is the loss of the right of appeal to the IAD for a number of classes of person against whom a deportation order or conditional deportation order has been made. The right of appeal is removed by the issuance of an opinion by the minister that the person constitutes a danger to the public in Canada. The only condition precedent beyond the existence of a deportation order for this opinion is that the person must have been determined by an adjudicator to be a member of one of the following classes:

- persons convicted in Canada of an offence that may be punishable by a maximum term of ten years or more;
- persons who there are reasonable grounds to believe have been convicted of a similar offence outside Canada;
- persons who have committed an act or omission outside Canada that would attract a similar maximum term;
- persons who there are reasonable grounds to believe are or were members of organized crime outside Canada;
- persons who there are reasonable grounds to believe will commit one or more indictable offences;
- persons who there are reasonable grounds to believe will commit acts of indictable criminal conspiracy;
- permanent residents who in the opinion of an immigration officer or peace officer, based on a balance of probabilities, have committed an act or omission elsewhere which would attract a maximum sentence of ten years or more if committed in Canada.

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45 Ibid. s. 19(1)(k).
46 Ibid. s. 70(5).
47 Ibid.
48 Ibid. s. 19(1)(c).
49 Ibid. ss. 19(1)(e.1)(i) or 27(1)(a.1)(i).
50 Ibid. s. 19(1)(c.1)(ii).
51 Ibid. s. 19(1)(c.2).
52 Ibid. s. 19(1)(d)(i).
53 Ibid. s. 19(1)(d)(ii).
54 Ibid. s. 27(1)(a.1)(ii).
persons convicted under any Act of Parliament for an offence for which a term of ten years or more may be imposed.\textsuperscript{55}

Whereas section 70(5) operates to remove a right of appeal from the specified classes, either pre-emptively or on an attempt to file an appeal,\textsuperscript{56} section 70(6) deals with appeals that have already been decided by the IAD and a stay imposed on terms and conditions. Affecting the same classes of persons, the section declares that a stay against the execution of a deportation order will be of no force and effect if the minister issues an opinion that the person has breached the terms and conditions of the stay and that the person is a danger to the public in Canada. The section also specifies that when the stay becomes of no force and effect due to the minister's opinion, the IAD may not review the case notwithstanding the provision to do so in section 74(2).

The general provision for judicial review in section 82.1(1) is applicable to the new procedure. Leave is required,\textsuperscript{57} application must be made within fifteen days after the person has been notified of the decision,\textsuperscript{58} and there is no appeal of a denial of leave.\textsuperscript{59}

Perhaps most telling about the amendments is the clear demarcation between what may be called political crimes and what are true crimes. The amendments preserve all existing appeal rights for those under order of removal for alleged political crime, while stripping away all such rights from those involved in true crimes. The difference in procedures for those reported as "politically" removable, and those criminal classes which are the subject of Bill C-44, is dealt with at length in Part VI, below. This distinction is largely specious, given the nature of the presumed component acts.

\textsuperscript{55} Ibid. s. 27(1)(d), as modified by s. 70(5)(c).

\textsuperscript{56} The triggering event for issuing an opinion is not specified in the amended legislation. One theory is that on filing an appeal with an immigration officer, a decision is taken as to whether an opinion should be issued. The matter is still obscure. In a private conversation with an IAD member, hope was expressed that an opinion would issue in such a fashion, but ultimately there is no way of knowing until the Appeals Officer tendered it: interview with an IRB-AD member, (Toronto, 21 March 1996). The person asked that his or her name not be used.

\textsuperscript{57} Immigration Act, supra note 1, s. 82.1(1).

\textsuperscript{58} Ibid. s. 82.1(3).

\textsuperscript{59} Ibid. s. 82.2.
III. POSITING AN EVALUATIVE FRAMEWORK

A. Preliminary Matters: Discretion Under the Immigration Act

The Immigration Act is, essentially, a great cobbled-together mass of rules and prohibitions on who may come to Canada and, once here, who may remain, and under what terms. However, particularly since the seminal work of Kenneth Culp Davis,\(^6\) it is equally possible to see the Act as a compendium of discretionary powers distributed among various governmental actors. For the present purposes, it is sufficient to identify the two locations of positive discretion which can be exercised when a permanent resident is in contravention of the statute and subject to a removal order. The first site is at the LAD, which may grant an appeal of a deportation order "on the ground that, having regard to all the circumstances of the case, the person should not be removed from Canada."\(^6\)\(^1\) The second, which operates throughout the Act as a "manumission," is through direct application to the minister on compassionate or humanitarian grounds.\(^6\)\(^2\) More will be said below about the effect of the change in location of one discretion on the availability of the other.

In effect, what has been created is a new, negative discretion on the part of the minister to remove a positive discretion from an independent quasi-judicial body. This negative discretion is exercisable against permanent residents, ironically the only class other than Canadian citizens to be accorded a right, albeit qualified, to come into and remain in the country.\(^6\)\(^3\)

Prior to analyzing the details of the amendments, it is first necessary to gain an understanding of how discretion works, how it should work, and whether and in what form it does (or does not) work.\(^6\)\(^4\)

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\(^6\)\(^0\) Supra note 13. The pioneering work of Davis underlies much of this analysis. Although subsequent theorists have found much to argue with in terms of how to go about it, his premise—that structuring discretion is preferable to raw, untreated, discretion—is compelling.

\(^6\)\(^1\) Immigration Act, supra note 1, s. 70(1)(b). Although a statutorily created discretion, "equitable jurisdiction" has come to be a synonym for this discretion. The two terms will be used interchangeably in this article.

\(^6\)\(^2\) Ibid. s. 114(2).

\(^6\)\(^3\) Ibid. ss. 4(1), (2).

The “flow downwards” from the executive—with a few notable exceptions—has been taken as the natural course of events. This is understandable in that we live in a world of ever-increasing delegated discretionary power; as such there has been little concern with analyzing discretionary power seized back by the delegator. Denis Galligan has described the most typical structural separation:

Typically, the legislature sets the objectives ... and then leaves implementation to administrative bodies. The latter settle the more specific policies and strategies within the defined area, and work out their application in actual cases. The lines of accountability for each are different. The legislature is the creature of the electoral process, and accountable to it; the administration is the creature of the legislature, and while the former is accountable in various ways to the latter, the administration acquires a certain independence and autonomy from the legislature.

Definitions of discretion are various, but usually centre around two essentials: choice between allowable alternatives and the relative autonomy of the decisionmaker.

B. Constructing an Evaluative Framework

The easiest way to evaluate a revised discretionary apportionment might be to investigate what could be termed its “negative capability.” Is the procedure no less fair than its predecessor? No less efficient? No less in conformity with the Charter? No less in conformity with policy goals? If the revisions are equal or better than the former regime, there should be little to complain about.

While such questions do underlie much of what follows, existing theories about the manner of exercising discretion can also be used to assess the ideal place for its exercise. The decision about where to locate discretion—in the minister or in the IAD—is in itself an archetypal discretionary decision. As such, criteria used to evaluate how discretion is best exercised can be used to structure (in the classic Davis sense) an

65 John Evans, in one of the few works that attempts to examine factors which might impede the devolution of discretionary power from the executive to an appellate structure, identifies several procedural fairness problems to be encountered in administering substantively unjust rules, as well as “cost” factors that are impediments to a smooth downward flow. See J. M. Evans, Immigration Law (London: Sweet & Maxwell, 1983) c. 7 at 354ff.

66 Supra note 13 at 232-33.

67 Such definitions include “an express grant of power conferred on officials where determination of the standards according to which power is to be exercised is left largely to them”: ibid. at 1; or, “A positive way of conferring powers where it is important that officials have more freedom as to the way they are to be exercised than a detailed set of rules might allow”: ibid. at 2.
assessment of the wisdom of placing the discretionary power at a particular site. Galligan’s evaluative framework of rationality, purposiveness and morality is in many ways the most useful in the instant case, given the resonance between the standards he sets and the principles underlying the Supreme Court of Canada’s test for justifying Charter infringements.

1. Rationality

In its simplest sense, rationality concerns the explicability and openness of an action or decision. A process that is not open and explicable to some degree may well satisfy the decisionmaker, but is unlikely to satisfy an unsuccessful interested party. Openness is important in order to legitimate decisionmaking, to ensure that each person’s, group’s, and community’s stake in a particular outcome is clear. Given a high individual interest in the outcome of a discretionary decision, an inexplicable exercise of discretionary power may well attract accusations of bias, arbitrariness, discrimination, irrationality, fettering or unreasonableness. As Keith Hawkins has pointed out, a lack of openness also does a potential disservice to the decisionmaker:

68 Ibid. at 4-5:
The most rudimentary requirements of political morality are that in exercising discretionary powers, officials should comply with standards of rationality, purposiveness and morality; from these, more specific legal principles of accountability can be developed. They are not, however, very precise concepts, nor are they very easily separated from each other.

69 There is, of course, no direct correspondence between the standards developed by the British academic Denis Galligan in his 1986 work and the continuously evolving s. 1 Charter jurisprudence first developed in R. v. Oakes, [1986] 1 S.C.R. 103. However, resonance between Galligan’s criteria—rationality, purposiveness, morality—and the second, proportionality, stage of the Oakes test—rational connection, minimal impairment, deleterious effect weighed against importance of objective—are both aspects of shared societal values that necessarily come into play when individual interests conflict with government policy goals. See also, A. Lamer, “The Rule of Law and Judicial Independence: Protecting Core Values in Times of Change” (1996) 45 U.N.B.L.J. 3; and P. McCormick, “The Supreme Court Cites the Supreme Court: Follow-up Citation on the Supreme Court of Canada, 1989-93” (1995) 33 Osgoode Hall L.J. 453.

[The procedures by which discretion is exercised prompt concern. Decision-makers are free to take into account a wide array of information, which may be of questionable accuracy, reliability or relevance. This concern becomes the greater when discretion is exercised in private. Privacy not only obstructs the possibility of review and the general accountability of decision-makers; it also leads to a lack of understanding about how decisions are made, not only by those who are the subject of discretion, but also by those who decide.]

Openness is manifested through, among others, prior notice, the chance to lead and/or test evidence or some form of participation rights, and the rendering of reasons for a decision. It is not simple coincidence that explicability, as well, underlies the first stage of the proportionality test for justification of Charter violations—"rational connection." A measure adopted must be carefully designed to achieve the objective, not based on arbitrary, unfair, or irrational considerations.

Careful design, in terms of an appropriate relocation of discretion in the immigration appellate context, was the subject of much of the deliberations of Parliament in 1967. In order to avoid the possibility of arbitrary, unfair, or capricious exercises of discretion, it was decided to remove all discretion from the minister's control. The absence of a clear, rational connection between the perceived threat and the resulting reinstatement of ministerial control in the Immigration Act's current guise, undercuts what might be legitimate policy concerns.

2. Purposiveness

There should be a valid purpose for relocating discretion. This helps to situate the decision in a rational context, and also insulates it from claims of arbitrariness. Galligan observes that "[a]ny exercise of official power should be capable of being explained in terms of its purposes and within a framework of constraining principles." Some of the more likely reasons for altering the locus of discretion in an

71 K. Hawkins, "The Use of Legal Discretion: Perspectives from Law and Social Science" in Hawkins, ed., supra note 64, 11 at 16.

72 While there is no general common law duty to give reasons, a number of compelling arguments can be made for their articulation: see J. M. Evans et al., Administrative Law: Cases, Text, and Materials, 4th ed. (Toronto: Emond Montgomery, 1995) at 479-80 and, generally c. 6; see also, generally, R. Dussault & L. Borgeat, Administrative Law: A Treatise, 2d ed., vol. 4, trans. D. Breen (Toronto: Carswell, 1990); and D.J. Mullan, Administrative Law, 3d ed. (Toronto: Carswell, 1996).


74 See Part IV, below.

75 Supra note 13 at 20.
administrative context include: efficiency and effectiveness, the ability to take into account all relevant interests and avoid irrelevant factors, and the ability to predict future outcomes from past decisions. In sum, a common objective is to attain a high degree of continuity and consistency. Central to the concept of purposiveness is the notion of justiciability: does the exercise of discretion raise issues suited to an adversarial, evidence-testing process, or does the discretion turn on issues more broadly based and political in nature, affecting numbers of people equally? If it is the latter, the discretion more clearly lies in the realm of the executive. Discretion capable of being structured, in which evidence might be led and assessed in order to satisfy ascertainable criteria, where findings of fact are produced which pertain to the exercise of the discretion, is more suited to a judicial (or quasi-judicial) arena.

The likelihood of structuring a discretionary power should also be a determining factor in considering the best location for that discretion. It is much more likely that an independent, quasi-judicial administrative agency—relying on evidence from individual parties in conflict, and rendering a decision between those conflicting interests—will be structured in a manner that also enables it to make decisions on how to effectively exercise discretion. In contrast, a minister—whose political and policy decisions are probably incapable of testing or proof—would generally have less need for a comparably detailed structure.76

The second stage of the Oakes proportionality test considers whether an action impairs as little as possible the right or freedom involved.77 It is unlikely that a provision formed on the basis of a single purpose, such as efficiency, will minimally impair a competing interest. The better solution is to advert to the complexity of decisionmaking and formulate policy in a rational way with this in mind. In the case of discretion, the existence of structural guidelines might provide at least a prima facie argument that thought has been given to various competing interests.

In the last thirty years, in exercising their discretion, the IAD has developed guidelines that consider the public safety goal that is now central to the minister's new powers. Replacing guidelines that assist


with measuring competing interests, with a single, unassessable standard would seem to ignore, let alone minimally impair, the interests of an individual facing deportation.

3. Morality

The third Galligan criterion is in many ways the hardest both to assess and fulfil. Under the general rubric of “morality,” Galligan includes notions of procedural and substantive fairness, and balancing individual interests with official ones: “Perhaps the most basic moral principle ... is that the rights and interests of individuals be treated with understanding and respect; from this more specific principles, including ideas of fairness, both in substance and procedure, and non-discrimination, may be generated.”

This final method of quality control over discretion is the arena in which the battle for individuated justice is fought. The previous two criteria are value neutral—a discretionary power could be openly exercised, notice served, evidence led, reasons given, and purpose fully linked and effectively and efficiently exercised—with no guarantee that an individually just result will occur. The morality criterion exists to ensure a proper outcome is reached. It is the reason that the equitable powers were placed and made immune from ministerial interference in the Appeal Board in 1967. It is also under this head that the potential for review of the decision and Charter scrutiny arises.

The final section of the Oakes proportionality test weighs the ascertained deleterious effect on an identified individual interest against the importance of the government objective. To satisfy this portion of the test, the government needs to show that the measures infringing on an interest allow for due consideration of that interest and its violation, and that the measures taken satisfy, in some nominal way at least, the basic principles of natural justice. In theory, this establishes a court of morality that reviews whether a government goal was followed blindly, oblivious to the interest being infringed.

Were it still the era of the Singh Supreme Court, it might be worthwhile to remount arguments for section-7-Charter scrutiny of the

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78 Supra note 13 at 5.

79 See Singh v. Canada (Minister of Employment and Immigration), [1985] 1 S.C.R. 177, which expanded dramatically the requirements of procedural fairness imposed on the refugee determination process under s. 7 of the Charter.
alterations to the deportation scheme. A plausible case could be made that the automatic (in some cases only) issuance of a minister’s opinion superadded upon a previously completed (or in process) criminal conviction, resulting in a penalty (withdrawal of appeal rights) is a violation not just of section 7 but also sections 11(d) and (h), section 12 and, arguably, section 15 of the Charter. However, Chiarelli v. Canada (Minister of Employment and Immigration) signified an era of diminished expectations in the field of immigration, removals, and the rights and interests of non-citizens.

A permanent resident facing deportation has a legitimate claim to certain rights and interests. These include: qualified statutory right to remain in the country; possible property interests; livelihood or employment in the country; the impact upon character and reputation (particularly if deportation is considered a stand-alone stigma, outside of the criminal conviction which might or might not be a factor giving rise to it); and other justifiable expectations developed by simply spending time in a country. Many or most of these call for equitable consideration, and should at least necessitate a regime that allows them to be weighed against the legitimate interests of the state. These concerns would seem to be borne out by the placement, confinement and structuring of ministerial discretion in related public safety regimes, which will be addressed in Part VI, below. The next part examines the thirty year history leading up to Bill C-44.

IV. A HISTORICAL CRITIQUE OF MINISTERIAL DISCRETION

What the minister has reacquired in the newly-amended Immigration Act is basically a revised version of a power held prior to 1967. It is the timing of the exercise of discretion that has changed. Rather than awkwardly overruling certain decisions already made by the appellate body, the minister is now able to preemptively prevent that body from possibly making a “wrong” decision. By issuing an opinion, the minister effectively removes the appellate body’s jurisdiction. It is safe to presume that the minister will not always be of the opinion that potential section 70 appellants will be a danger to the public; if that were

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so, the amendments could have just as easily removed section 70 jurisdiction from the Appeal Division altogether.

What is left then, is essentially the situation that existed prior to 1967 with respect to certain classes of individual. Our analysis is made easier by the existence of previous criticisms of this form of arrangement. Four sources are pertinent: the two Sedgwick reports (1965), the minister of immigration’s *White Paper on Immigration*, and the House of Commons debates in February-March 1967 surrounding the reconstitution of the Immigration Appeal Board. Each of these is discussed. Underpinning the discussion is the central question: if it was the correct decision to surrender discretion to an independent body in 1967, what convincing reasons can be mustered for taking it back in the late 1990s?

A. *The Sedgwick Reports (1965)*

The grant to the minister of absolute discretion regarding deportation appeals in the earlier *Immigration Acts* was definitive. He or she could review the Immigration Appeal Board’s decisions and confirm, quash or substitute it with his or her own decision, directing a stay of execution of the deportation order if necessary. There was no indication of what circumstances could prompt a review, nor of what considerations might be taken into account in assessing the Board’s decision and coming to a decision. By leaving both these questions open, the process was compromised, as Sedgwick made plain:

1. To make appeals to the Board subject to review and final determination by the Minister is to render the Board essentially sterile. If the Board’s decision is unfavourable, recourse to the Minister is almost automatic in a great proportion of cases and the Board is reduced to a mere stepping stone between the Special Inquiry Officer and the Minister.

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84 Canada, House of Commons, *Debates and Proceedings*, 1st Sess., 27th Parl. [hereinafter *H.C. Debates*]. The debates occurred over a number of days and can be found as follows: vol. XII (20 February 1967) at 13267-70; (21 February 1967) at 13280-328; vol. XIII (22 February 1967) at 13375-90; (27 February 1967) at 13502-10; and (1 March 1967) at 13626-41.

85 The first use of this absolute discretion was contemplated in the *Immigration Act, S.C. 1906*, c. 93, s. 33; it remained thus until 1967: see, for example, *supra* note 2, for text of the relevant provision of the 1952 *Immigration Act*.

86 *Supra* note 2.
2. [Granting finality to Board decisions] would relieve the Minister of a great deal of pressure of an undesirable nature. My inquiry satisfies me that the pressures brought to bear have often dictated the disposition of cases.\(^8\)

Sedgwick also recommended, not unrelatedly, that the Appeal Board be made truly independent.\(^8\)

Apparent even from Sedgwick's understated prose is a picture of how appellate matters were carried out from 1952 until 1967. Those with the resources and connections would, unless they received a favourable decision at the Appeal Board, bring as much pressure as possible to bear on the minister. Those who managed to bully, bribe or entice the minister sufficiently would see the denial of their appeal struck down. The Commons debates record that some lawyers had taken to refusing to make submissions at the Appeal Board at all, instead merely declaring that they would wait and take the matter up with the minister.\(^8\) All of this was conducted in secrecy, except when the media decided to take up the cause of potential deportees, as they did with a number of Greek ship deserters in the mid-1960s.\(^9\)


The massive task of expanding and updating the 1952 Immigration Act had been under way for some time by the publication of the Sedgwick reports. In 1966, the minister of immigration, Jean Marchand, released his White Paper to outline the status of the project. Particularly relevant, seen from today, are the minister's comments on the nature of deportation:

84. The procedures leading to an order of deportation, involving arrest, detention and inquiry, are inseparable from any law enforcement activity. For justice to be done, however, it must be seen to be done. For this reason some procedural improvements seem desirable, apart altogether from the creation of a new appeals system on which legislation already has been introduced in Parliament.\(^9\)

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\(^8\) Sedgwick, supra note 9, Part II at 8.

\(^8\) Ibid. at 9.

\(^9\) H. C. Debates, supra note 84.

\(^9\) This particular outcry resulted finally in the appointment of Mr. Sedgwick in 1964 to study first the particular cases, then the relation of the minister to the Appeal Board. See Sedgwick, supra note 9, Part I at 1.

\(^9\) White Paper, supra note 83 at 33-34 [emphasis added].
The value placed on justice being seen to be done is evident in the fulsome adversarial processes available under a revamping of appeal rights. The minister discussed alternatives to deportation but concluded that none of them was applicable, as long as the deportation itself consists of a fair hearing and a right of appeal. This places deportation within an administrative framework requiring at least some level of procedural fairness—a "fair hearing" and "justice seen to be done"—which, by predating the notion of procedural fairness in most other administrative matters, is a sure sign of the gravity with which forcible banishment from Canada was viewed at that time. This spirit was borne out in the attempt to provide an appeal process guaranteeing individual protection by allowing for an independent court of record to arbitrate.

After outlining the limitations of the old Immigration Appeal Board, the minister then deplored the lack of independence produced by ministerial oversight, pointing out the general unhappiness with the situation:

> The public has become aware of this [lack of independence of decisionmaking] and of the fact that the Board's view may be reversed by the Minister. ... The Department in effect decides the outcome of appeals against the actions of its own officers. This is the unavoidable fact under the present Act; those charged with enforcing the Act have been no happier with the appeals system than the public.

Key factors to note here are the stark conclusion regarding lack of independence, and the nemo judex implication arising when the minister may personally reconfirm, by denying an appeal, that a deportation order in his or her name was justified and would be carried out.

The White Paper went on to provide assurance that the problems regarding deportation appeals will be solved by the proposed new agency. That new Board, it urged will have authority to deal conclusively in all respects with an appeal against any Order of Deportation. ... The Board's jurisdiction will otherwise be limited only by the right to appeal its decisions on questions of law to the Supreme Court of Canada with leave of that

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92 Ibid. at 35. Among the options under consideration were fines or jail sentences.
93 Ibid.
94 Ibid. (para. 91).
95 It should be noted that the concern at the time, regarding the Greek ship-jumper cases, was the failure of the minister to exercise a positive discretion in favour of the appellants. The concern expressed in some quarters, which gave rise to the current situation, is, of course, exactly the opposite—that the Appeal Division has allowed too many potential deportees to stay in Canada.
This becomes particularly relevant in discussing the contention that the Appeal Division has, since 1967, expended a great deal of time and judicial consideration in these matters and become adept at doing so. If it is now crucial for the minister to have exclusive jurisdiction over determining potential dangers to the public, by having the power to circumvent stays against a deportation order, convincing arguments are needed to show the flaws in the old process.

C. Commons Debates: Immigration Appeal Board Act (1967)

Almost all of Sedgwick's 1965 recommendations, and the content of Minister Marchand's 1966 report, were implemented in the Immigration Appeal Board Act in 1967. The minister was stripped of discretionary oversight of appeals. The Board itself was immunized from interference by making it a court of record operating under seal, and when faced with a legal deportation order, able to exercise its discretion after considering all the circumstances of the case.

John Munro, parliamentary secretary to Minister Marchand, introduced second reading of the Bill with an explanation that although a non-citizen's presence in Canada is a privilege and not a right, once in Canada, that person "should not be deported without a right of appeal." He then repeated the Minister's earlier observation on the Board's lack of independence and the department's appearing to be the judge in its own case:

In these circumstances, the effectiveness of the existing board is extremely limited. The public is aware of the board's limitations. Everyone knows that its decisions may be reversed by the minister .... Thus the board has no independent status. It is regarded as merely an arm of the immigration division which appears, in effect, to decide the outcome of appeals against the actions of its own officers. This casts doubt on the application of other aspects of immigration law, policy, and procedure.

96 White Paper, supra note 83 at 35, para. 92 [emphasis added].

97 Supra note 3. Interestingly, in 1967 the Wilson Committee Report in England led to the creation in 1969 of an independent, quasi-judicial appeal tribunal of similar purpose—for the first time in the United Kingdom since the First World War.

98 H.C. Debates, supra note 84 (20 February 1967) at 13268.

99 Ibid. [emphasis added].
In the ensuing debate, it was widely perceived that the former Appeal Board had its problems. Former Immigration Minister Tremblay stated that “it is not enough for the minister to make a fair decision, his decision must also seem fair,” echoing the need for procedural protections and true independence from the department. There was exceptionally wide consensus within and beyond the Liberal government members on the inappropriateness of ministerial interference in “what always should have been an area of either judicial or quasi-judicial decision.”

Interestingly enough, there was strong resistance to giving up all ministerial discretion (as had also been expressed earlier in the *White Paper*). There was thus little objection to the minister retaining a residual positive discretion to allow people into Canada who were in contravention of the statute, at any point in the process. This residual positive discretion still survives, but operates independently of the appeal process. As an exercise of executive discretion resembling the royal prerogative of mercy, even in the unlikely event that it would be employed for an unsuccessful section 70 appellant at the Appeal Division, it would presumably not constitute a challenge to the Division’s jurisdiction.

**D. Summary Observations**

Among the most attractive aspects of the reasoning that took place in the lead up to the 1967 legislative changes are (i) a prescient understanding of the need to accord heightened procedural fairness requirements to an administrative process; and (ii) the recognition

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101 *Ibid.* at 13293. Unhappily, his further comment, at 13395, that the new bill “meets a need ... felt by all ministers of immigration ... to unload themselves as much as possible of their discretion on an organization of officials or commissioners where no criticism could be made” indicates that the values of independence and fairness were grounded as well in political pragmatism.

102 *Ibid.* at 13297 (G. W. Baldwin (Peace River)).


104 See *Immigration Act*, supra note 1, s. 114(2). See also s. 37 (provisions for minister’s permits).

105 This clear legislative call for procedural “fairness” in 1967 predated by over a decade the first of the “trilogy” of Supreme Court decisions which marked what one commentator has termed the “advent of fairness” in Canadian administrative doctrine: M. Eberts, “Section 7 of the Charter Plus Natural Justice: An Administrative Justice Section 11?” in N.R. Finkelstein & B.M. Rogers, eds., *Administrative Tribunals and the Charter* (Toronto: Carswell, 1990) 101 at 102. The cases were:
that some procedural rights are required even for non-citizens in Canada. This vision was motivated by a clear sense of the tension between individual interests and government policy.

Despite a measure of political pragmatism in any major legislative change, it is quite clear that the legislative intent in removing discretion from the executive level and placing it in a statutorily independent quasi-judicial body was to achieve a process that was procedurally fair to the appellant. The form envisioned for this procedure was a judicial-type hearing, in which a person under a valid deportation order could raise any circumstances—which previously would have been raised with the minister—to try to obtain a favourable discretionary decision. Procedural fairness was important in this instance, as, although not a citizen, anyone residing in Canada merited a certain level of appeal before being stripped of this privilege. An overriding concern, expressed in both the White Paper and in Commons debates, was that justice and fairness being done was not enough, but that they had to be seen by the public to be done. Ministerial interference in appeals was arbitrary, and allowing a minister to sit in judgement over decisions made by his or her own department, could bring the rest of the immigration system into disrepute. The best solution was to prescribe open decisionmaking based on an independent quasi-judicial body, hearing all the circumstances of an appellant's case, immunized from interference by the executive but subject to appeal if necessary.

The concerns expressed in the 1960s mirror almost exactly the current concerns about the vesting of discretion in the minister. The new amendments allow the minister to produce an opinion which prevents the Appeal Division from hearing an appeal of a decision to deport taken in the name of that same minister. Ministerial oversight was considered an intrusion on, and compromise of, the Appeal Division's independence in the past, and should be construed as no less so now.106

This particular issue is currently the subject of contention in a series of cases generated by the transitional provisions of Bill C-44,107

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106 The Law Reform Commission of Canada, writing a decade after the White Paper, felt safe enough to declare that it was “obvious” that “any tribunal exercising adjudicative powers in cases where the Department is a party must be seen to be dealing with the Department at ‘arms-length’”: Law Reform Commission of Canada, The Immigration Appeal Board: A Study Prepared for the Law Reform Commission of Canada by I.A. Hunter (Ottawa: Minister of Supply and Services Canada, 1976) at 65 [hereinafter Immigration Appeal Board].

107 Supra note 5, ss. 26-27.
which allow for a certain amount of retroactivity of the opinion where an appeal had been filed or heard but not decided at the date the amendments came into force. The Appeal Division contends that in such a process, the minister "is acting both as a party to a cause and the judge of that cause."\textsuperscript{108} It can hardly be argued that the grant of jurisdiction to the Appeal Division over section 70 appeals, which would now be entering its fourth decade, was a mistake, since the new ministerial oversight is only exercised at the discretion of the minister, not universally. As will be shown below, no cogent argument can be made that the Appeal Division has continually failed to ask itself the relevant questions about danger to the public in Canada, necessitating the minister to step in and ask it of himself or herself.

Although much has changed in the intervening thirty years, "hands-on" ministerial oversight on a case by case basis to prevent appeals by those considered "dangers to the public" still denies a review by an independent agency on the merits. If ministerial interference in a deportation order smacked of \textit{nemo judex} to then-Minister Jean Marchand, then the current minister rendering an opinion in order to ensure the Appeal Division does not stay a deportation order should be equally suspect.

V. IMMIGRATION TRIBUNALS AND PUBLIC SAFETY

A. \textit{A History of Attention to Public Safety}

Removing a discretionary jurisdictional veto might be supportable if it could be shown either that the independent appellate body had consistently failed to turn its mind to the question of danger to the public in Canada, or that the question was dealt with in such a quixotic way that a firm ministerial hand was needed to ensure conformity with the goal. Neither position is supportable based on the history of immigration appellate tribunals. From the start the Appeal Board took seriously its role as judicial guardian of both individual and state interests, evidenced by Board Chair Janet Scott's clear statement: "[that any exercise of its equitable jurisdiction] cannot be used irresponsibly to

\textsuperscript{108} \textit{Barnes v. Canada (Minister of Citizenship & Immigration)}, [1995] I.A.D.D. No. 1251 (QL), Doc. No. T95-02198 (3 November 1995) at 34 [unreported] (I.R.B.-A.D.). A search of recent cases revealed more than a dozen such situations, in some of which the sitting member insists that the Appeal Division retains jurisdiction.
Scott was meticulous in differentiating the Board's discretion from that which had been exercised previously by the minister, by virtue of the need to confine and structure it. The Board was aware of the balancing requirement: "the evidence against the granting of special relief is weighed on one side, the evidence for on the other." In Chirwa v. Minister of Manpower and Immigration, decided within the first eighteen months of its mandate, it was held that discretion "was not intended [by Parliament] to be applied so widely as to destroy the essentially exclusionary nature of the Immigration Act and Regulations." The Board demanded proof of reasonable grounds to justify special relief against valid deportation orders. It developed guidelines to ensure that all aspects of a case were considered; statutorily imposed and internally developed steps for making decisions showed a serious commitment to its new position. These institutional changes can be classified into structured approaches and structured processes.

B. A Structured Approach

Constantly aware of the tension between the statutory goal of ensuring public safety and the necessity of individually contextualized justice, the Board developed an increasingly sophisticated system of analysis by which to structure and guide their exercise of discretionary power. Early cases counterposed the express public safety goal with such factors as family considerations and the related question of "rootedness." These included indicia such as the citizenship and

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109 J.V. Scott, "Speech on the Immigration Appeal Board Delivered at the Midwinter 1970 Meeting of the Canadian Bar Association" (Address to the Canadian Bar Association, Ottawa, 1970) at 17 [unpublished] [hereinafter "Speech"].

110 Ibid. at 19: "it is nothing of the kind—judicial discretion bears no relationship to ministerial, or executive, clemency."

111 Ibid. at 23.

112 (29 May 1969) [unreported] (I.A.B.) [hereinafter Chirwa], referred to ibid. at 20.

113 "Speech," supra note 109 at 20, citing Chirwa, supra note 112.

114 The gravity with which the Board viewed its role as a deliberative, adversarial court earned it criticism from some quarters, including the Law Reform Commission of Canada. See W. Janzen & I. Hunter, "The Interpretation of Section 15 of the Immigration Appeal Board Act" (1973), 11 Alta. L. Rev. 260 at 277; and Immigration Appeal Board, supra note 106 at 61.

115 Immigration Act, supra note 1, s. 3(i).

116 Janzen & Hunter, supra note 114 at 272.
family ties of the appellant’s immediate family,\textsuperscript{117} the length of time in Canada,\textsuperscript{118} present or future occupational prospects,\textsuperscript{119} and presence of relatives in Canada.\textsuperscript{120} Many of these criteria were developed in cases of non-permanent residents facing deportation, given the early paucity of permanent resident deportation appeals.\textsuperscript{121}

These considerations had, by the 1985 case of Ribic v. Canada (\textit{Minister of Employment and Immigration}),\textsuperscript{122} matured into an enumerated set of criteria under which every case was examined and weighed against the domestic interests of Canada, including safety and public order. The criteria were: 1) the seriousness of the offence leading to the deportation order; 2) the possibility of rehabilitation; 3) the length of time spent in Canada and the degree to which the appellant is established here; 4) the family in Canada and the dislocation to the family that deportation would cause; 5) the support available to the appellant, not only within the family but also within the community; and 6) the degree of hardship that would be caused to the appellant by the return to his or her country of nationality.\textsuperscript{123} The factors were not considered to be exhaustive, and the weight attached to each would vary according to all the circumstances of the case.\textsuperscript{124}

The practice of weighing these factors against each other and against the public safety objective was reaffirmed in 1992 by the Federal Court of Appeal in Canepa.\textsuperscript{125} It was alleged on appeal that the Appeal Division had incorrectly asked whether it should, in these cases, “carefully weigh the interests of Canadian society against the interests of the individual,”\textsuperscript{126} and thereby was distracting itself in Canepa’s favour.

\textsuperscript{117} See Progakis v. Minister of Manpower and Immigration (10 December 1970) [unreported] (I.A.B.); and Agouros v. Minister of Manpower and Immigration (1970), 3 I.A.C. 40.

\textsuperscript{118} See Aina v. Minister of Manpower and Immigration (1969), I.A.C. 52.

\textsuperscript{119} See Ming Lu v. Minister of Manpower and Immigration (1970), 2 I.A.C. 46.

\textsuperscript{120} In a number of early cases cited in Janzen & Hunter, supra note 114 at 273, this factor “is especially evident in the appeals that the Board has dismissed.” It seemed that the absence of family was more of a negative factor than presence was a plus.

\textsuperscript{121} \textit{Ibid.} at 263-64. The authors complain about this lack of decisions.

\textsuperscript{122} (20 August 1985), Doc. No. V-9623, [unreported] (I.A.B.) [hereinafter Ribic].

\textsuperscript{123} O’Connor v. Canada (Minister of Employment and Immigration) (1994), 21 Imm. L.R. (2d) 64 at 68 (I.R.D.-A.D.).

\textsuperscript{124} Ribic, supra note 122.

\textsuperscript{125} \textit{Supra} note 10.

\textsuperscript{126} \textit{Ibid.} at 285.
regarding “all the circumstances of the case.” MacGuigan J.A., speaking on behalf of the court, disagreed with the allegation:

I cannot accept that the phrase “having regard to all the circumstances of the case” means that a tribunal should, to make such a judgment, abstract the appellant from the society in which he lives. The statutory language does not refer only to the circumstances of the person, but rather to the circumstances of the case. That must surely be taken to include the person in his total context, and to bring into play the good of society as well as that of the individual person.127

Leave to appeal to the Supreme Court was later denied, which may be taken as at least a passive vote of confidence in this approach.

It is apparent, particularly in the Canepa holding, that the immigration appellate tribunals have a history of explicitly addressing concerns about the safety of the public in Canada. The Ribic guidelines and the Canepa balancing have continued to be carried out in much the same form to the present in board hearings. This is also made plain in that the principles are reproduced in the current public promotional materials circulated by the Immigration and Refugee Board.128

Further proof of the Appeal Division’s specific focus on the social impact of the appellant’s criminal behaviour, and of its implications for the Canadian public, is its willingness to allow victim evidence where appropriate. As was stated in Muehlfellner v. Canada (Minister of Employment and Immigration):

[V]ictim evidence as to the repercussions of an appellant’s criminal act on affected victims, including the victim’s family members [may be received]. The evidence may be received in furtherance of the objective in section 3(i) of the Immigration Act, to maintain and protect the health, safety and good order of Canadian society. Such evidence is found in pre-sentence reports or in the Court’s sentencing remarks, but the Minister’s representative may also seek to call a victim to testify.129

There is, in fact, no evidence of which the minister could be privy which cannot also be presented to the Appeal Division. Given the tribunal’s careful, clear and longstanding consideration of the potential impact on society of allowing an appellant to stay in Canada, there is little doubt such evidence would be taken into account. Thus, there is

127 Ibid. at 286 [emphasis in original.]

128 This development of providing some information to the public about how the Appeal Division structured its discretion was posited as desirable as far back as 1976: Immigration Appeal Board, supra note 106 at 65.

little, if any, rationale for adding a ministerial veto to a jurisdiction in which the minister may fully and amply present a case against a perceived danger to the public.

C. A Structured Process

Once an appellant appears before the Division, and once the Ribic and Canepa factors have been addressed by the appellant and the minister, a series of threshold decisions must be made. Based on the evidence supplied by both parties, the following questions are raised by the Board: a) whether to grant the appeal without terms or conditions; b) whether to grant a stay on terms and conditions; c) the length of stay; d) what terms and conditions of stay; e) an informal issue discussion with colleagues; f) a review by the legal department of the IRB; and g) a general review of reasons by the Assistant Deputy Chair.

At each of these stages, any evidence led regarding an appellant’s perceived danger to the public will be considered. The first four steps balance this evidence against the personal circumstances of the appellant. The last three steps (which take place against the background constraints on consultation provided by IWA v. Consolidated-Bathurst Packaging Ltd.,130 and conform to Davis’s concept of “checking”131) ensure that in the course of making a decision, the member has had the widest possible opportunity to turn his or her mind to all relevant questions.

Compare this process with the minister’s new opinion process. In rendering an opinion there is no structuring. Further, it is not possible to check the decisionmaking process, and there are no apparent threshold decisions culminating in the final decision to veto. As far as can be discerned, information which would have historically formed the substance of the minister’s case at the Appeal Division, is gathered in order for a decision to be made either to negate or acknowledge the jurisdiction of the appellate body.

D. Adjudicative Tribunal or the Minister’s New Foot?

The exercise of discretion by the Appeal Division is a graduated process in which evidence from both the appellant and the minister must

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131 See Davis, supra note 13, c. 1,2.
be assessed under a number of heads, with the resultant adjudicative facts then used in a step-by-step process to reach a decision.\(^{132}\) If certain adjudicative facts are found, an appellant may be determined to be a danger to the public in Canada, and the appeal will fail. In contrast, the exercise of discretion by the minister under the new statutory regime is a binary process in which the evidence in possession of the minister either does or does not result in a finding of legislative fact which in turn either does or does not veto the jurisdiction of the Appeal Division.\(^{133}\) When the discretion is exercised and the jurisdiction expunged, the minister's view always prevails—by default.

If the purpose of \textit{Bill C-44} is to validate and carry out a deportation order in the least number of steps, with the least expenditure of effort and resources, then the amendments should be adjudged a success. This seems to be the government's goal. Unfortunately, when individual interests must also be in the foreground, as required by \textit{Singh}, the \textit{Charter}, and the \textit{Canadian Bill of Rights}\(^{134}\) and by the consideration of the matrix of social and individual interests affirmed in \textit{Canepa}, different measurements apply. The yardstick for efficiency cannot be how quickly and cheaply a policy goal can be achieved, but must instead be how balanced and considered is a decision that is inherently an adjudicative one.

To argue that all along the process has been ill-suited to the adjudicative end of the spectrum, and more suited to the political end, belies history. The fulsome participation of the minister in adducing evidence and testing the appellant's evidence under the listed heads of analysis is, throughout the last thirty years, incontrovertible. In that time the minister never refused to contest an appeal, nor argued that such a determination was not suited to the adjudicative process as structured. Rather, the minister consistently tested evidence relating to the individual, presented evidence relating to the individual, and argued for facts to be found regarding the individual, each time based on evidence "in all the circumstances of the case" supporting a decision in favour of upholding a deportation order. There is no evidence that the minister ever addressed, in thousands of appeals, the issue of the suitability of the appellate, adjudicative nature of the process, which might show a need


\(^{133}\) \textit{Ibid.}: "The practical difference between [adjudicative and legislative] categories of fact is that ... adjudicative facts must be supported by substantial evidence whereas findings of legislative fact frequently are not (and sometimes cannot be) supported by evidence."

for a more political form of discretion over such cases. Similarly, there has never been a complaint about the unsuitability of addressing individual issues according to the Ribic and Canepa criteria. It all leads to the much more likely conclusion that changing the locus of the discretionary power is both a political and economic decision, brought about partly by a sensationalist media. That this is true can be seen by the different approaches to other public safety regimes, the focus of the next part of this article.

VI. COMPARING OTHER DISCRETIONARY PUBLIC SAFETY REGIMES

Whether public safety is under greater threat from permanent resident criminals, potential terrorists, or dangerous offenders is a question beyond the scope of this article. However, with the coming into force of Bill C-44, it is timely to compare how government has dealt with the issue of public safety in each of the above three areas. Each regime treats the matter differently, although arguably the individual threat is similar. In the first three sections of this part, a brief overview of the three regimes is given. The final section compares the three, and shows how, in two of the three regimes, the government has “hedged its bets” in a number of ways, which is a more acceptable way to structure the discretion than the apparently unfettered discretion conferred on the minister by section 70 of the Immigration Act.

A. Permanent Residents Who Might “Endanger the Lives or Safety of Persons in Canada” in a National Security Context

Sections 38.1 to 40.2 of the Immigration Act provide the basis on which permanent residents are subject to deportation on national security grounds. In this case, a report issued under section 27 should include reference to a member’s inadmissibility under any of paragraphs 19(1)(e)-(g) and (k) of the Act. The four provisions cover a potential eight variations in status, including persons who:

a) have committed past acts or will commit future acts of espionage, subversion or terrorism;  

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135 See text accompanying notes 122-128, supra.

136 Immigration Act, supra note 1, s. 19(e), (f).
b) will commit acts of violence in future that would or might endanger the lives or safety of persons in Canada;\textsuperscript{137} or 

c) are a "danger to the security of Canada" but cannot be characterized as members of any of the classes described in subsections a) to g).\textsuperscript{138}

Although permanent residents have only a qualified right to enter or remain in Canada,\textsuperscript{139} the possession of this right merits, at least in the national security context, a delay in deportation (referred to as a "certificate" in the Act) until after a form of hearing. More procedural safeguards exist for permanent residents than for non-permanent residents. In order to commence the process, two Ministers—the immigration and the solicitor general—must agree and report their joint opinion to the Security Intelligence Review Committee (SIRC),\textsuperscript{140} which holds an investigation. SIRC is a "specialist tribunal" to whom is owed "considerable deference ... in regard to matters of concern in relation to security."\textsuperscript{141}

SIRC's investigation process is not set out in the Immigration Act, but is incorporated by reference to SIRC's enabling legislation, the Canadian Security Intelligence Service Act.\textsuperscript{142} It is, in fact, the same as SIRC's procedure for dealing with a complaint regarding a denial of a security clearance. The hearing provisions include the necessity of advance notice to the person,\textsuperscript{143} provision of at least a summary of the information giving rise to the investigation,\textsuperscript{144} and the opportunity to make representations, present evidence and appear personally or by counsel before the committee.\textsuperscript{145} In conducting the hearing, SIRC's powers are virtually identical to those of the Appeal Division in terms of
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compulsion of witnesses and widened evidentiary scope,\textsuperscript{146} but the process differs significantly in that it is not adversarial and there is no right to be present, have access to, or comment on ministerial representations to the committee.\textsuperscript{147}

On completion of its investigation, \textsc{sirc} in turn reports its conclusion and reasons to the Governor in Council\textsuperscript{148} and its conclusion, without reasons, to the person involved.\textsuperscript{149} The Governor in Council will, if satisfied, direct the minister to issue a certificate,\textsuperscript{150} which then becomes conclusive proof of the subject's status, resulting in a deportation order against that person.\textsuperscript{151}

A limited right of appeal exists to the Appeal Division,\textsuperscript{152} solely on a question of law or fact, or mixed law and fact. However, as the certificate is "conclusive proof" of any allegations regarding the permanent resident\textsuperscript{153} it is unclear what point of law could make an appeal useful.\textsuperscript{154} Should an appeal to the Appeal Division already be under way on compassionate or humanitarian grounds under section 70(3)(b), the existence of a certificate will cause it to be dismissed.\textsuperscript{155} Although the \textit{Immigration Act} is silent on the issue, subsequent recourse to section 70(3)(b) is arguably moot as well.

B. Dangerous Offender Declarations Under the Criminal Code

Persons in Canada who have been convicted but not yet sentenced for a "serious personal injury offence"\textsuperscript{156} may be subject to an application by the Crown to have them declared a "dangerous offender."

\textsuperscript{146} \textit{csis Act, supra} note 142, s. 50.

\textsuperscript{147} \textit{Ibid.} s. 48(2). For a more thorough description of the \textsc{sirc} investigation and hearing process see I. Leigh, "Secret Proceedings in Canada" (1996) 34 Osgoode Hall L.J. 113, especially at 159ff.

\textsuperscript{148} \textit{Immigration Act, supra} note 1, s. 39(9).

\textsuperscript{149} \textit{Ibid.}, s. 39(10).

\textsuperscript{150} \textit{Ibid.} s. 40(1).

\textsuperscript{151} \textit{Ibid.} s. 32(2).

\textsuperscript{152} \textit{Ibid.} s. 70(4)(a).

\textsuperscript{153} \textit{Ibid.} s. 40(2).


\textsuperscript{155} \textit{Immigration Act, supra} note 1, s. 82(2).

\textsuperscript{156} \textit{Criminal Code, supra} note 12, s. 752.
A successful application will result in imposition of a sentence for an indefinite period, rather than the sentence which otherwise might have been imposed for the offence.\textsuperscript{157} The crime must be of a certain type, including: a) indictable offences of violence, endangerment to life or safety, or infliction of severe psychological damage for which a sentence of ten years may be imposed;\textsuperscript{158} and b) a sexual offence or attempted sexual offence mentioned in section 271 of the \textit{Criminal Code}. Should the Crown exercise its discretion and attempt to have someone who has been convicted but not yet sentenced declared a dangerous offender, application must be made to the convicting court or a superior court judge.\textsuperscript{159} The attorney general of the province in which the conviction took place must consent to the application before it can be heard.\textsuperscript{160} Once consent has been obtained, a hearing of the application \textit{must} take place.\textsuperscript{161}

Although the hearing takes place without a jury,\textsuperscript{162} there are a number of procedural protections in place, including the provision of prior notice to the offender, outlining the basis for the application;\textsuperscript{163} the requirement of expert testimony of two psychiatrists, one nominated by each party;\textsuperscript{164} and the ability of the offender to call other relevant evidence,\textsuperscript{165} including evidence of character and repute.\textsuperscript{166} The offender must be present at the hearing.\textsuperscript{167} It must be established to the satisfaction of the court that (i) the conviction is for a crime that fits the definition of a "serious personal injury offence;"\textsuperscript{168} and (ii) that the offender has shown repetitive, persistent, or sufficiently brutal behaviour connected to or associated with the offence for which he or she has been convicted.\textsuperscript{169} Once the statutory criteria have been met, a judge cannot

\textsuperscript{157} Ibid. s. 753.
\textsuperscript{158} Ibid. s. 752(a), (b).
\textsuperscript{159} Ibid. s. 753.
\textsuperscript{160} Ibid. s. 754(1)(a).
\textsuperscript{161} Ibid. s. 754.
\textsuperscript{162} Ibid. s. 754(2).
\textsuperscript{163} Ibid. s. 754(1)(b).
\textsuperscript{164} Ibid. s. 755(1).
\textsuperscript{165} Ibid.
\textsuperscript{166} Ibid. s. 757.
\textsuperscript{167} Ibid. s. 758.
\textsuperscript{168} Ibid. s. 752.
\textsuperscript{169} Ibid. s. 753.
refuse to make a finding that the defendant is a dangerous offender.\textsuperscript{170} The only discretion is deciding whether to impose a sentence of indeterminate detention.\textsuperscript{171}

An offender does have a right of appeal, but this is limited to an appeal of the indeterminate sentence, on any ground of law or fact, or mixed law and fact.\textsuperscript{172} If the appeal succeeds, the court of appeal may order a new hearing or quash the indeterminate sentence and impose a determinate sentence suitable to the conviction.\textsuperscript{173} If the original hearing failed, the Crown may also appeal, on any ground of law, and if successful, gain another hearing.\textsuperscript{174}

C. Permanent Residents Who “Constitute a Danger to the Public in Canada” Under Bill C-44

A full outline of the law has previously been set out in Part II, above; added here are a few relevant observations. As already noted, section 70(5) of the Immigration Act implies that the minister’s opinion may be issued any time the two conditions specified are fulfilled (deportation order and within specified criminal class). However, by appearing in the appeal section of the Act, with a specific reference under section 70(2), it is likely that an opinion will only be issued once an appeal has been filed under section 70, amounting to a third condition precedent.

There also exists, in section 70(6), an alternate third condition precedent. Where an appellant concerning whom no opinion was issued has been successful at the Appeal Division, and the Division has directed a stay of the deportation order on terms and conditions, the minister may—at any subsequent time—issue an opinion that the appellant has breached the terms and conditions and is a danger to the public in

\textsuperscript{170} Ibid. And see R. v. Moore (1985), 49 O.R. (2d) 1 (C.A.).

\textsuperscript{171} See, for example, J.D. Watt & M. Fuerst, The Annotated 1995 Tremain’s Criminal Code (Toronto: Carswell, 1995) at 1222. However, a recent amendment to the Criminal Code removed even this discretion by dictating that a judge “shall impose” an indefinite sentence on an offender who meets the statutory requirements of dangerous offender status: S.C. 1997, c. 17, s. 4 (creating s. 753(4)). This change in the law was enacted after this article was written, thus changing the context in which the authors’ comparisons in Part VI(D), below, can be made. However, this change does not appear to be significant enough to vary the conclusions.

\textsuperscript{172} Criminal Code, supra note 12, s. 759(1).

\textsuperscript{173} Ibid. s. 759(3).

\textsuperscript{174} Ibid. s. 759(4).
In such an instance, section 70(6) prohibits the Appeal Division from reviewing the case as otherwise provided for in section 74(2). There is no indication whether the minister must in these cases arrive at two simultaneous opinions—that the conditions have been breached and that the person is a danger. Another possible reading is that one triggers or is linked inevitably linked to the other, that is, by breaching a condition, a person is by definition a danger.

There are no procedural provisions or routes of appeal laid out in subsections 70(5) and (6). They simply provide exceptions to the appeal rights otherwise provided for in section 70 of the Immigration Act. The only possible avenue for someone about whom an opinion has been issued would appear to be the compassionate or humanitarian application rights under section 114(2). Such an attempt is likely futile, in that application is being made to the same minister responsible for issuing the opinion under subsection 70(5) or (6).\textsuperscript{176}

D. Comparing the Three Schemes

There are five bases for arguing that the three schemes are sufficiently alike to merit comparison. First, all have the express purpose of protecting “persons” or the “public in Canada” from danger. In other words, they are public safety provisions. Second, each provision deals with individuals who are found to pose in some manner or other a danger to “persons” or the “public in Canada.” Third, the criteria used to identify the potential danger posed by an individual are past or predicted actions or omissions of individuals that have either resulted in, or could result in, criminal convictions expected to attract sentences over a certain threshold. Fourth, each of the three schemes must be set in motion by an exercise of ministerial discretion. None operates automatically by operation of law. Finally, the end result of exercising this discretion is a separation of that danger from the public in Canada—two through deportation, one through indefinite incarceration.

\textsuperscript{175} Immigration Act, supra note 1, s. 70(6).

\textsuperscript{176} See the arguments raised in Sedgwick, supra note 9; and the White Paper, supra note 83. But see Williams v. Canada (Minister of Citizenship & Immigration), [1997] 2 F.C. 646 (C.A.) [hereinafter Williams], for an alternate view (Courts are to assume that decision-makers act in good faith—the Court implies that the minister could make a different determination upon humanitarian and compassionate grounds): see Part VII(E), below.
1. Procedural similarities between the national security and dangerous offender regimes\textsuperscript{177}

In both the national security certificate and the dangerous offender regimes, exercising ministerial discretion initiates a defined judicial or quasi-judicial process arising from, but independent of, that exercise of discretion. In the national security regime, two ministers decide whether to issue a joint opinion about someone to SIRC. That independent process requires SIRC to conduct an "investigation" with some resemblance to a hearing. In the dangerous offender regime, the attorney general may apply to the convicting court or a judge of a superior court prior to an offender being sentenced. This requires a judge (without jury) to conduct an application hearing.

Procedural features common to both regimes include: prior notice of the hearing\textsuperscript{178} with some indication of the basis for it; the opportunity to appear and participate in person or by counsel at the hearing; the opportunity to lead evidence; a wider, loosened evidentiary standard guided by the principle of adjudged relevance; and the power of the decisionmaker to compel and swear witnesses. Both decisionmakers have some level of expertise within the field—SIRC in security affairs, the convicting judge in criminal matters.

Beyond these features, there are other similarities of a structural nature. In both regimes, a check against possible arbitrary decisionmaking is provided by requiring double agreement for the implementation of the discretionary decision. In the national security instance, the minister of immigration and the solicitor general must both agree to issue an opinion. In the case of dangerous offender applications, the application may not proceed without the agreement of the Crown and the relevant provincial attorney general. Although the close working relationships of the respective ministries may lessen its impact, there is still some check against excess available through such a process.

In addition, if the original act of discretion succeeds at the hearing stage, the next Davis-like check on it is that the result is subject to a second, differently-located discretion (albeit of an arguably more pro forma nature). In the national security case, the SIRC conclusion and

\textsuperscript{177} For the sake of argument here, we are ignoring the glaring differences which exist as well, not least among them the immediacy of Charter concerns in the criminal context in contrast with the seeming immunity from Charter scrutiny of the national security scheme.

\textsuperscript{178} For the sake of economy, both are referred to as a hearing, despite the differences manifest in the SIRC "investigation."
reasons are submitted to the Governor in Council before directing the minister to issue a certificate. Similarly, a presiding judge in a dangerous offender application—if required to declare someone a dangerous offender—may still decide whether or not to sentence the offender to an indefinite term.

Both schemes evidence at least a nominal nod in the direction of some presumptive rights on behalf of the individual. In dangerous offender applications, the Crown must satisfy the evidentiary burden; while at SIRC, evidence might result in a negative finding on the ministers’ initial report.

Once a decision has been taken, appeal rights do exist, although limited in scope. Once a national security certificate has been issued concerning a permanent resident, questions of law, fact, or mixed law and fact may be appealed to the Appeal Division. A dangerous offender may appeal the order of an indeterminate sentence, although not the designation giving rise to it. The likelihood of success in either case may be minimal. However, an essential point is that the mere existence of these rights places events initiated by acts of ministerial discretion back into the adjudicative mainstream.

2. *Bill C-44* amendments and the other two regimes

The recent amendments to the *Immigration Act* evidence significant differences when compared with the two other discretion-initiated regimes. The *Bill C-44* regime is at least similar to the national security arrangement in that in both it is unclear precisely what motivates the initial exercise of ministerial discretion. All three, it is suspected, are largely products of media attention to particular cases. However, beyond this passing similarity, any resemblance to the other two regimes breaks down. By beginning and ending in the exercise of the minister’s discretion, the *Bill C-44* regime is unique.

Procedurally, the *Bill C-44* regime provides neither coherent discretionary structure nor adequate checking. There is no notice. There is no hearing of any kind (in fact, the point of the exercise is exactly the opposite—to remove the chance of a hearing). Thus, there is no opportunity to lead evidence or hear or respond to any part of the adversary’s case. At no stage is there a requirement to consult with another executive member. Moreover, there is no breathing space created by being subjected, however perfunctorily, to a second discretion, and there is no way to step back from the process once the exercise of discretion has started it rolling.
What is most remarkable about these differences is that there is such a paucity of detail concerning how the minister's discretion operates, and no provision for anything deriving from the discretion once it has been exercised. In this, the Bill C-44 regime seems to be of a very different type from the other two regimes. It is, in its lack of explicative detail and absence of any kind of external involvement in making the decision, much more an exercise in absolute discretion. This is made even more apparent in its curious inclusion of two other variants of absolute discretion—one of which simply strips away appeal rights, the other which nullifies them by intruding after existing appeal rights have been successfully exercised. Ultimately, the process is pure discretion with no objectifying factors.

In terms of the normative criteria set out in Part III, above, the national security and dangerous offender regimes both exhibit some rationality. Both are exercises of discretion that are later grounded in separate adjudicative processes. Both have contextualizing machinery that help to both structure and check the initial exercise of discretion.

It is, of course, impossible to disentangle the exercise of discretion in any of these regimes from the dictates of policy. In all three, individual interests conflict with government policy. What is clear, though, is that in comparing these three attempts to achieve a similar policy goal, the Bill C-44 regime is alone in failing to even appear to protect individual rights. The result is a move toward direct political control of individual justice. Resembling both the national security and the dangerous offender regimes in the location of discretion, the "opinion" regime lacks even their nominal protection of the interests of the individual. Further, the role of the Federal Court (Trial Division), by way of review, is rendered toothless, as the unstructured nature of the discretion gives little for it to grip. Why then do we have the appearance of such legislation now, in the face of historical antipathy, and other schemes that deal more responsibly with a similar problem? What will this mean for permanent resident status? These are the concerns of the next part.

\[179\] See Part VII(C), below.
VII. BILL C-44: WHITHER RATIONALITY, PURPOSIVENESS, AND MORALITY?

A. Role of Public Outcry in Forming Legislation

In the year preceding the introduction of Bill C-44 several crimes were committed by persons who had been successful in obtaining stays of their deportation orders from the IAD appeal process. Subsequent media coverage made much of the fact that the perpetrators of these crimes had been ordered deported but were still in Canada by virtue of stays granted by the Appeal Division. In response to one of the crimes, then-Immigration Minister Sergio Marchi stated that in the cases of those perpetrators, the immigration process had failed and let down the Canadian people. He promised quick remedial action, which was delivered in the form of Bill C-44. In his statement to the House of Commons on 1 November 1994, he opined that the Bill “provides fair access and ensures the rule of law,” and was the result of a “loss of confidence in the immigration program’s ability ... to enforce the Immigration Act against those who have been ordered removed.” The avowed goal of the measures was to seek “to restore Canadians’ confidence and thus contribute to this Government’s broader goal of creating safe streets and safe homes.”

While this and similar pronouncements may be considered, charitably, populist restatements of one of the objectives of the Immigration Act, they fail to indicate that the Immigration Appeal Division had, in reviewing these same

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180 These included the 1994 shotgun slaying of a young woman customer, Vivi Leimonis, during a robbery in the “Just Desserts” café in Toronto, and the murder of a police officer, Todd Bayliss, during an attempted drug arrest in June 1994. Each received extensive media coverage across Canada.


183 See Immigration Act, supra note 1, s. 3(i): “to maintain and protect the health, safety and good order of Canadian society.”
cases, also been guided by that objective—as was required under the *Canepa* judgment.\textsuperscript{184}

It is another irony, among many, that neither a balancing of interests under the *Canepa* criteria, nor an exercise of the minister's new negative discretion, will prevent the possibility that some permanent resident in Canada under a stayed deportation order will commit a further crime. Unless an opinion is issued, ending a huge majority of deportation appeals, can the minister achieve anything more via the new shotgun approach, than the IAD does by taking the same evidence and factors into consideration? Further, unless the minister intends to render an opinion for every section 70 appeal (or catch them later under a breach of condition), then some section 70 appeals will go forward and may succeed at the IAD on "equitable" grounds. There can never be certainty that the non-offence rate will be 100 per cent. The only rational way to achieve the stated goal would be to have ousted the jurisdiction of the Appeal Division entirely. This would, however, have obliterated a procedural acknowledgment recognizing a permanent resident's qualified right to remain in the country.\textsuperscript{185}

Attention to public opinion, even if fuelled by capricious media coverage, can hardly be considered an irrational consideration for a politician. It is irrational, however, if it is used as the primary consideration for making specific alterations to a statutory framework, without due regard to the framework as a whole and the larger legal framework within which the statute operates. In this case, the *Immigration Act*, the *Charter*, and the common law all have parts to play.

**B. Is Political Accountability a Sufficient Safeguard?**

One argument that is made is that ministers are politically accountable, and that accountability will operate sufficiently as a safeguard against arbitrary exercise of a discretion. In fact, the amendments themselves, enacted duly as a response to a perceived problem, can be seen as an exercise of political accountability. This argument is fallacious. Although the public did indeed express unhappiness with a system that allowed criminals under deportation orders to remain in the country, nothing in that public response dictated that the minister needed to reclaim a jurisdiction from the IAD; the public outcry could just as well have been interpreted as a call to revamp

\textsuperscript{184} See text accompanying notes 123-128, *supra.*

\textsuperscript{185} *Ibid.* s. 4(2).
the IAD. It could have been interpreted as a call to institute procedures along the lines of the national security or dangerous offender regimes, or some entirely new solution. In any event, it is always advisable to diagnose a problem before attempting a solution.

Moreover, as Davis and Galligan have observed, too much is made of political accountability, in that it is not as fine a tool as credited. \(^{186}\) Barring truly egregious actions that might cause a particular minister's removal (but still leaving the statutory regime intact), such accountability is too infrequent. An arbitrary exercise of discretion against an individual three or four years in the past might or might not be remembered at election time and would be jumbled together with all the other election considerations anyway. In the case of this particular discretion, its arbitrary exercise against a permanent resident places the subject outside the country, an oubliette from which it would generally be difficult to drag up a cause célèbre. The failure of the minister to exercise the discretion merely gives the appellant permanent resident an opportunity to be heard by the IAD, but no guarantee of remaining in the country. Should, however, a notorious crime be committed subsequently by a successful appellant, the minister is partially insulated from direct accountability by pointing to the IAD's positive decision in any event. It is thus difficult to see how political accountability justifies a change as fundamental as this.

There is a final argument against the efficacy of political accountability. If a political decision is unpopular, notions of accountability may come into play, subject to the doubts expressed above. However, when a political decision is made that panders to public opinion—however much it might violate or discount the importance of individual interests—then the safeguard of political accountability breaks down. This can be seen in the example of the use of executive action to "roll back" many of the tenets of procedural fairness which occurred in the prison cases.\(^{187}\) The idea that political accountability acts as a brake in these situations is not believable.

C. Justiciability

A judgment rendered by the IAD on an appeal, as it may be subject to judicial review under section 82.1(1)(1), is clearly more justiciable than a minister issuing an opinion. There is no requirement

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\(^{186}\) See generally supra note 13.

\(^{187}\) See Martineau, supra note 105; and Cardinal, supra note 105.
that the minister give reasons for section 70(5) opinions, and the record consists of only the adjudicator’s findings giving rise to the deportation order.\textsuperscript{188} Opinions delivered under section 70(6) will be even more problematic on review. In such a case, the reviewing court will be in the unenviable position of assessing two separate and conflicting exercises of discretion—by the IAD, for the appellant, and by the minister, against.

Of concern is also the question of expertise in the standard of review. Although the IAD is not overtly a tribunal of specialists, in accumulating thirty years of collective experience, the IAD can claim to be a “specialist” panel of a sort. Contrast this with the fact that the minister of immigration is not a specialist—unlike the solicitor general or attorney general of a province\textsuperscript{189}—on dangers to the public. Further, as there is no back-up or confirmation, as in the national security or dangerous offender regimes,\textsuperscript{190} there is no recourse to any specialist expertise. Finally, if attempts are made to avoid this issue by characterizing the minister’s opinion as a policy decision, the wide deference that is given to these forms of decisionmaking will give rise to legitimate concerns over individual rights.\textsuperscript{191}

D. Comparing Terrorists and Criminals

The amended \textit{Immigration Act} now provides greater procedural protections for permanent residents who are allegedly terrorists, war criminals, or who have committed crimes against humanity than it does for those whom the minister considers dangerous to public safety on the basis of certain criminal criteria. Those greater procedural protections represent a minimum dictated by the requirements of the statute (permanent resident’s qualified right to remain), the common law (requirement of a certain level of natural, if not fundamental, justice when rights or interests of an individual are at stake), and the unresolved

\textsuperscript{188} This procedure was confirmed as valid in Williams, supra note 176.

\textsuperscript{189} These ministers are regarded as such because they exercise discretion under the national security provisions or the dangerous offender provisions of the Criminal Code. See Part VI, above.

\textsuperscript{190} This was discussed in Part VI, above.

\textsuperscript{191} See Canada (A.G.) v. Inuit Tapirisat of Canada, [1980] 2 S.C.R. 735 [hereinafter Inuit Tapirisat]. Arguably, the kind of decision at issue in Inuit Tapirisat is very different from a ministerial decision relating to an individual pursuant to section 70 of the \textit{Immigration Act}. In any case, even if the “policy” label is invoked, one might query whether or to what extent deference is due when Charter rights are at stake. See, for example, Operation Dismantle Inc. v. R., [1985] 1 S.C.R. 441.
boundary of Charter application.\textsuperscript{192} In forming a rational, purposive and moral legislative response to public concern over certain criminal incidents, the minister would have been well advised to take into account such considerations. This is especially true given that, in the past, equal public concern and media attention have been focused on the other public safety classes of terrorists and dangerous offenders. While the amendments ostensibly reflect a strong response to a serious public concern, they ignore the implications inherent in a permanent resident's qualified right to remain, or the procedures established in the other regimes for ousting such a right.

E. Purely Administrative Deportation?

The waters are also muddied by delineating a set of criminal criteria and linking deportation to criminality, within a statutory context which maintains that deportation is not a criminal sanction. Under the amended procedure, a minister's opinion leads inexorably to deportation. Despite the Federal Court of Appeal's statement in \textit{Williams}\textsuperscript{193} that a person has recourse to compassionate and humanitarian grounds under section 114(2), an opinion strips not just the jurisdiction of the Appeal Division, but as we argued in Part V(B), above, also effectively forecloses the underlying informal route of section 114(2) because it becomes an application to the same opinion-issuing minister. Moreover, an opinion issued against someone who has violated terms and conditions and is a danger\textsuperscript{194} means that a previously successful appellant can subsequently be removed without recourse. That is, the IAD may find sufficient equitable reasons for an appellant not to be removed, even considering public safety, but the minister may unilaterally declare that appellant to have violated a condition and be a danger. In either case, deportation is linked to the characteristic of criminality, identified by an adjudicator at first instance. It is difficult to see how removal of a permanent resident, resulting from either criminal conviction or potential conviction, falls so clearly outside the boundaries of criminal sanction as to remain insulated from the heightened procedural and Charter protections it would otherwise invoke. Only a

\begin{itemize}
\item \textsuperscript{192} Sopinka J. left this as an open question in \textit{Chiarelli}, supra note 81.
\item \textsuperscript{193} Supra note 176.
\item \textsuperscript{194} \textit{Immigration Act}, supra note 1, s. 70(6).
\end{itemize}
very narrow reading of fundamental justice rulings such as Singh\textsuperscript{195} can maintain such an artifice.

F. Specific Section 70(6) Problems

Several particularly problematic situations arise under the specific provision allowing a minister to issue an opinion against an appellant who has been successful at the IAD where the appellant has broken terms or conditions of the stay. First, if, as typically occurs, a condition of “no criminal fraternization” has been imposed, and if the permanent resident then attends self-help meetings with such groups as Alcoholics Anonymous or Narcotics Anonymous (or even adult education classes) at which another person convicted of a crime is present, that person becomes vulnerable to the minister’s new discretion. Similarly, those who inadvertently fail to notify the ministry that their address has changed (a common reporting condition), or, even less glaring, have such notice go astray or be delayed through no fault of their own, are at risk. Transforming such events into the equivalent of a strict liability offence, subject to the possible and final sanction of an opinion, speaks particularly against this branch of the minister’s new discretion.

Second, the nature of the finding is substantively different in the case of a section 70(6) opinion. A ministerial opinion that a person has broken a term or condition of his or her stay is a question of fact which is capable of specific determination. As a finding of fact, that species of minister’s opinion should be reviewable, as specified in Singh, on a different standard. In these cases, the standard can only be met through an oral hearing.

G. Potential Fettering of the IAD’s Operation

For those appeals in which the IAD is allowed to exercise its jurisdiction, the new amendments cannot help but operate as a constraint on its ability and/or willingness to allow an appeal with a stay. The subsequent vulnerability to ministerial discretion and the potential

\textsuperscript{195} Supra note 79.
for embarrassment are simply too great.\footnote{The Law Reform Commission of Canada has described this desire for "political approval":
This can result in confusion as to the criteria to be followed by the agency. For example, the agency, in reaching its decision, is likely to be influenced by its perception of what will meet with approval. ... [T]he agency may be forced to draw inferences about government policy from insufficiently explained reactions to its prior decisions.

Law Reform Commission of Canada, Report on Independent Administrative Agencies: A Framework for Decision Making (Report No. 26) (Ottawa: The Commission, 1985) at 39 [hereinafter LRCC Report No. 26]. See also Law Reform Commission of Canada, Independent Administrative Agencies (Working Paper No. 25), (Ottawa: The Commission, 1985). In our view, this is a form of what could be termed "internal regulatory capture"—worth researching further, but outside the scope of this article. For an explanation of regulatory or agency capture see P.J. Quirk, Industry Influences in Federal Regulatory Agencies (Princeton, N.J., Princeton University Press, 1981).} Independent agencies are not immune from political or public pressure. For one thing, no one wants to be pilloried in the press or by neighbours for one's actions; for another, terms of appointment expire all too quickly. Such factors may push the IAD towards reaching more negative decisions on appeal. Richard Lempert has described this fettering process as an agency "systematically constrain[ing] its so-called discretionary decisions in a particular direction."\footnote{R. Lempert, "Discretion in a Behavioral Perspective: the Case of a Public Housing Eviction Board" in Hawkins, ed., supra note 64, 185 at 226.} If the IAD does allow itself to be fettered by the fear of subsequent ministerial "correction," the net result is a further erosion, or even extinguishing, of the IAD's equitable discretion.

H. Possible Increase in Evasion

Another potential impact of the amendments will be to force persons considered dangerous (but not in custody) to avoid the appeal system entirely. The only lawful way to remain in Canada can be foreclosed if a person files an appeal and in doing so stimulates a minister's opinion. There appears to be little reason for any non-detained section 70 potential appellant to take that chance, since even having done so and succeeded, they are still subject to a ministerial opinion under section 70(6). A certain number may opt to go underground instead. This could then shrink the number of appeals, which could affect the nature and capability of the Appeal Division. In any case, the likely rise in tension between the minister and the IAD can only serve to create further uncertainties and inefficiencies in a system
the minister has acknowledged has a tenuous hold on public confidence.\textsuperscript{198}

VIII. CONCLUSION

\textit{We must not make a scarecrow of the law,}
\textit{Setting it up to fear the birds of prey,}
\textit{And let it keep one shape, till custom make it}
\textit{Their perch and not their terror.}

\textit{My business in this state}
\textit{Made me a looker-on here in Vienna,}
\textit{Where I have seen corruption boil and bubble}
\textit{Till it \textquoteright{}errun the stew; laws for all faults,}
\textit{But faults so countenanced that the strong statutes}
\textit{Stand like the forfeits in a barber\textquoteright{}s shop,}
\textit{As much in mock as mark.}

\textit{---Shakespeare, Measure for Measure, Act II.i \& Act V.i}

In its most abstract form, the question comes down to whether a politically accountable body exercising discretion in an opaque way or a quasi-judicial body exercising discretion in an open and transparent manner, is better suited to protecting the interests of individuals within the policy goals of the immigration regime. This article has argued that open and structured discretion is preferable. Returning discretionary power to the minister, which has previously been condemned as having no rational basis, is a throwback to a less enlightened era. Political accountability alone cannot seem to bear the weight of a decision to relocate discretion in the minister, since a four or five year review is far too blunt and unbalanced an instrument to carve out individual justice in individual cases.

The Law Reform Commission of Canada, in its 1985 study of independent administrative agencies, observed that "[p]oliticians appear to be torn between two poles, insisting on the benefits of independent extra-departmental decisionmaking, while looking for ways to influence it."\textsuperscript{199} The imposition of the amendments introduced by \textit{Bill C-44} and the consequent discretionary jurisdictional veto granted to the minister

\textsuperscript{198} See citations to pronouncements from Hon. S. Marchi, \textit{supra} notes 181-182.

\textsuperscript{199} See LRCC Report No. 26, \textit{supra} note 196 at 7.
would seem to be a classic example of this. One of the reasons identified by the Law Reform Commission for establishing independent agencies was the "desire to divert the responsibility for the resolution of politically sensitive issues," which was evident in the 1967 maturation of the Immigration Appeal Board. Curiously, it seems that the immigration minister has now gone against this trend. By re-seizing discretion to prevent some permanent residents from being heard or considered on appeal, the minister is virtually dictating an outcome without establishing any new problems to resolve. This disproportionate executive response is out of keeping with the need to attend, in some manner, to an individual's legitimate interest. It ignores other regimes where the executive has constructed a response which better addresses those individual rights. The result is a system that is as fundamentally wrong as it was in its first incarnation prior to 1967. It is to be hoped that its flaws will be its downfall—either through further amendment, or through a court willing to address the difficult constitutional, as well as social and political, issues.

200 Ibid. at 5.