IS THE DIRECTION OF CANADIAN IMMIGRATION POLICY IN KEEPING WITH OUR COMMITMENT TO MULTICULTURALISM?

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Canada’s national character is shaped by the government’s approach to immigration. Since Clifford Sifton’s monumental effort to settle the west, Canada has taken on an identity much greater than the sum of its founding English, French, and Aboriginal roots. This is reflected in the contemporary Canadian attitude towards national citizenship—Canada is the only Western nation where the strength of national identification is positively correlated with support for immigration.\(^1\) In a 2009 study exploring the correlation between ethnic diversity and social capital, Canada ranked so highly among other Western democracies that the authors proclaimed it a kind of “Canadian Exceptionalism.”\(^2\)

Such findings are significant today. Many nations, concerned by increasing migration, are rethinking their approach to citizenship.\(^3\) Will Kymlicka, a Canadian immigration and multiculturalism expert, notes “[t]here are growing numbers of migrants in most Western countries, and these migrants often retain close ties with their country of origin [that has led] some commentators [to] argue that the whole idea of ‘national citizenship’ is increasingly obsolete.”\(^4\) Others argue that increasing ethnic and religious diversity requires a more active effort by governments to sustain a sense of common national citizenship.\(^5\) “Feelings of solidarity and common values...must now be actively promoted by the state, in part by emphasizing the centrality of common citizenship.”\(^6\) This position, known as the “reevaluation of citizenship” model, is more in line with contemporary Canadian immigration policies.\(^7\) Grounded in this broader philosophical position, current Canadian immigration, citizenship, and multiculturalism policy can be viewed as highly pragmatic. However, recent changes within Canada’s immigration policy have made the system more restrictive toward newcomers.

This paper surveys recent changes in Canada’s immigration policy: the expansion of the Temporary Foreign Workers Program, the introduction of more rigid language requirements in the economic immigration stream, and changes made to our asylum system by Bill C-31, Protecting Canada’s Immigration System Act. The effect of these changes on the rights and benefits of newcomers is evaluated, considering Canada’s long term interests, commitment to...

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\(^4\) Ibid.

\(^5\) Ibid.

\(^6\) Ibid.

\(^7\) Ibid.
multiculturalism, and human rights. In light of recent restrictions, I argue human rights considerations should figure more prominently into immigration, citizenship, and multiculturalism policy.

HISTORICAL CONTEXT

Although multiculturalism has long been a reality in Canada, it is a relatively recent development in the country’s legal and political history. The origins of multiculturalism in legal and political discourse can be traced back to the late 1960s and the Royal Commission on Bilingualism and Biculturalism. The Commission’s recommendations influenced two important developments, which gave legal definition to Canadian national identity. First, the creation of the Official Languages Act in 1969 recognized French and English as our official languages. Second, the 1971 policy statement on multiculturalism adopted multiculturalism as an alternative to biculturalism. The 1971 policy statement was largely a means of diffusing the Anglophone and Francophone tensions preoccupying Canada at the time. Thus, from the outset, official Canadian multiculturalism policies have existed within the confines of a bilingual legal framework.

Despite originating as a political compromise, there are many reasons to be proud of Canada’s early commitments to multiculturalism. Canada was the first Western nation to officially adopt a multiculturalism policy, and remains the only Western nation with multiculturalism enshrined in its constitution. Section 27 of the Canadian Charter of Rights and Freedoms provides: “[t]his Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians”.

While the Constitution provided a commitment to multiculturalism in 1982, it was not until the passage of the Canadian Multiculturalism Act in 1988 that the legal and political scope of Canadian multiculturalism policy was defined. The preamble in the Multiculturalism Act acknowledges Canada’s constitutional commitment to multiculturalism and strong legislative framework for human rights, citizenship, and discrimination prevention. The preamble outlines the obligations of federal institutions. The mandate of the Minister responsible for multiculturalism is also set out in the Multiculturalism Act; the Minister is responsible for overseeing the implementation of the multiculturalism policy. The preamble also authorizes all Ministers to implement the policy within their respective mandates.

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10 House of Commons, Standing Committee on Multiculturalism, Multiculturalism: Building the Canadian Mosaic: Report of the Standing Committee on Multiculturalism (June 1987) at 17 (Chair: Gus Mitges).
11 Ibid.
12 Kymlicka, Success, Failure and the Future, supra note 1 at 10.
13 Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 27 [Charter].
14 RSC 1985, c 24 (4th Supp) [Multiculturalism Act].
15 Ibid., ss 4-7.
Canada’s multiculturalism policy has typically been implemented with an internal focus, addressing the relationship between its majority and minority populations. While the Multiculturalism Act has been invoked in a limited number of cases to litigate issues of discrimination, it has mostly been the impetus for federal government agencies to enact cultural diversity policies, and to promote political and social inclusion.

When violations of Canada’s multiculturalism policy occur, they are generally litigated through the Charter in view of the section 27 interpretive power. Section 27 has implications for sections 2(a) and 15, in particular. It typically appears in the context of cases dealing with hate speech, language rights, judicial impartiality, and freedom of religion. It has also been used to interpret the meaning of “free and democratic society”, and to define “public interest” in the Criminal Code hate speech provision, section 181.

The Three-Legged Stool

Canada’s multiculturalism does not exist in a vacuum. Multiculturalism is but one component of a broader system, which includes Canada’s immigration and citizenship policies. Will Kymlicka argues that immigration, citizenship, and multiculturalism can be thought of as a “three-legged stool”, with each leg supporting or weakening the other two. He writes, “[w]here one leg is weak, people begin to worry about the motives and consequences of the other two legs as well. Conversely, confidence in one leg can help generate optimism and trust in the other two.” For example, potential citizenship policy concerns can be defused or pre-empted by strong state policies on immigration and multiculturalism.

In addition to the three-legged stool, public confidence in the proper functioning of the state is an important consideration in immigration policy. In 1997, a study of nine industrialized countries concluded that in countries where citizens had more faith in their governments, society

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18 Canadian Human Rights Foundation, Multiculturalism and the Charter: A Legal Perspective (Toronto: Carswell, 1987) at 54.
19 Ibid at 50.
21 RSC 1985, c C-46, s 181.
22 Kymlicka, “Exploring the Links”, supra note 3 at 195.
23 Ibid at 202.
24 Ibid.
was better able to handle issues arising from the admission and integration of immigrants. These countries also experienced fewer problems with ill-conceived restrictive legislation. In 2008, Canada demonstrated commitment to these areas when the Honourable Jason Kenney was appointed Canada’s first Minister of Citizenship, Immigration and Multiculturalism, vesting responsibility for the implementation of all three policies in a single office. Simultaneously, the administration of Canada’s multiculturalism policy was transferred from the Department of Canadian Heritage to the Department of Citizenship and Immigration Canada (“CIC”). This shift in administration recognizes that multiculturalism is more than a historical phenomenon in Canada. Multiculturalism is a contemporary policy concern, which continues to shape and redefine the character of our nation.

In the 2010-2011 Report on the Multiculturalism Act (the “Report”), Minister Kenney described Canadian multiculturalism as, [E]mbedded in law in the form of the Canadian Multiculturalism Act. It is part of a larger legislative framework that includes the Canadian Charter of Rights and Freedoms, the Canadian Human Rights Act, the Citizenship Act, the Employment Equity Act, the Official Languages Act and the Immigration and Refugee Protection Act.

The Report’s reference to the Immigration and Refugee Protection Act is significant. By explicitly including the IRPA within the framework of multiculturalism, the Report acknowledges that Canadian multiculturalism is defined internally, and extends to immigration policy. In light of this broad conception of multiculturalism, recent changes to our immigration and citizenship legislation warrant scrutiny.

EXPANSION OF THE TEMPORARY FOREIGN WORKERS PROGRAM

One controversial change to Canadian immigration policy is the expansion and administration of the Temporary Foreign Worker Program (“TFWP”). Currently under the IRPA, foreign nationals can apply for permanent residence status through three broad streams: economic immigration, family reunification, and claims by Convention refugees and persons in need of protection. Parallel to the economic immigration stream, a number of temporary residency programs allow migrants to enter Canada for temporary work. Almost two-thirds of foreign nationals applying for permanent residence arrive under the economic class.

A worker’s skill level determines if they can apply for permanent residence status or if their status is temporary. Skill level is determined under the National Occupational Classification

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26 CIC Multiculturalism Report, supra note 17 at iii.
27 Ibid at 9.
28 Ibid at 9.
30 SC 2001, c 27 [IRPA].
31 Ibid, s 12.
32 Alberta Civil Liberties Research Centre, Temporary Foreign Workers in Alberta: Human Rights Issues (Calgary: University of Calgary, Faculty of Law, 2010) at 17 [ACLRC Report].
33 Faraday, supra note 8 at 9.
34 Ibid.
(“NOC”) system, which classifies occupations on a matrix based on skill type and level. Skill type is ranked from zero to nine, skill level is ranked from A to D. Workers are considered skilled if they possess a skill type of zero, or a skill level of A or B. This includes managerial occupations and occupations requiring a university degree, or two or more years of technical, postsecondary training. By contrast, foreign nationals with occupations in the NOC categories of C and D are considered lower-skilled and, with limited exception, are barred from applying for permanent resident status. While there are numerous ways for those designated as skilled workers to obtain permanent residence status, low wage migrant workers are excluded from the economic immigration class and left in a situation of insecurity.

Temporary migration in Canada is not new: the first general temporary foreign worker program, the Non-Immigrant Employment Authorization Program (“NIEAP”), was introduced in 1973. What has changed is the number of temporary foreign workers in Canada. Since 2000, the number of migrant workers has more than tripled. Further, the administration of temporary workers has undergone an intense shift.

In 2006, temporary foreign workers began to outnumber permanent residents. By 2012, the number of temporary foreign workers surpassed permanent residents by a ratio of 1.3 to 1. This trend can be attributed to the federal government’s decision to use foreign workers as a source of inexpensive and flexible labour. The government has characterized the TFWP as its “principal tool to help employers meet immediate skill requirements when qualified Canadian workers cannot be found.”

Canada currently operates four programs to bring temporary workers into the country, based on provisions contained in the IRPA and its regulations, and in the Citizenship Act. These programs are the Seasonal Agricultural Worker Program, the Live-in Caregiver Program, the NOC C and D Pilot Project, and the Agricultural Stream of the NOC C and D Pilot Project. Under all of these programs, workers are issued work permits for a single employer. The employer must request permission to hire foreign labour, through a process known as the Labour Market Opinion (“LMO”) process. Though the government imposes employee-protective requirements on employers through the LMO, a “significant and systemic gap between their rights on paper and their treatment in reality” is widely noted.

A few high profile examples are useful to illustrate the differential treatment suffered by these workers. In preparation for the 2010 Vancouver Olympics, thirty-six Latin American construction workers—mainly from Costa Rica—were brought to Canada by SELI Canada and SNC Lavalin to work on the Vancouver SkyTrain. These workers were paid an average hourly

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35 Faraday, supra note 8 at 9.
36 Ibid.
37 ACLRC Report, supra note 31 at 7.
38 Supra note 8 at 5.
41 Supra note 31 at 17.
42 Supra note 8 at 11, 13.
43 Ibid at 27.
rate of three dollars and fifty-seven cents.\textsuperscript{44} LMO procedure requires that employers sign an agreement to pay workers at the prevailing Canadian wage.\textsuperscript{45} By issuing work permits under a free trade agreement between Canada and Costa Rica—using “intercompany transfers”—SELI Canada and SNC Lavalin were able to circumvent this standard LMO procedure.\textsuperscript{46}

Fortunately for these thirty-six construction workers, when their story became public, many were persuaded to join the Construction and Specialized Workers Union (“CSWU”). On the workers’ behalf, the CSWU initiated an action against SELI Canada and SNC Lavalin in the British Columbia Human Rights Tribunal.\textsuperscript{47} The tribunal ordered the employers pay compensation to the workers, totalling more than $2.4 million.\textsuperscript{48}

Other examples of documented abuse of migrant workers exist. For example, a group of workers sued the Denny’s Restaurant chain for failing to adhere to LMO conditions for overtime wages and travel compensation. A Ugandan nanny employed through the Live-in Caregiver Program alleged she was denied over $162,250 in wages and other entitlements over a two year period.\textsuperscript{49} Despite these documented cases, temporary workers remain in a “legally, economically and socially marginalized position”.\textsuperscript{50}

One of the major issues in protecting the rights of temporary foreign workers is the lack of enforcement mechanism for the protective measures in place.\textsuperscript{51} Since migrant workers are employed on tied permits, they are highly dependent on the employer to maintain their status. This undermines workers’ capacity to resist unfair treatment.\textsuperscript{52} Temporary workers could leave their jobs and seek new employment, while accessing the justice system; however, workers often do not know their rights. Even when workers exercise their rights, court procedures can take so long that a worker’s visa or work permit may expire long before the matter is resolved.\textsuperscript{53}

In addition to the abuse suffered by temporary foreign workers, a further concern is the trend toward temporariness within the Canadian economy. Many of the jobs these workers fill cannot truly be characterized as temporary.\textsuperscript{54} Migrant workers are often hired for positions in the accommodation, food service, and manufacturing industries, where real growth and an accompanying labour shortage have been projected over the long-term.\textsuperscript{55} Minister Kenney has recognized the need to re-evaluate the medium and long-term labour market demands for certain NOC C and D occupations. However, there is no evidence that such an evaluation has been conducted.\textsuperscript{56} As the use and promotion of temporary labour continues to expand, it seems the

\textsuperscript{45} Ibid.
\textsuperscript{46} Ibid.
\textsuperscript{47} Construction and Specialized Workers’ Union Local 1611 v SELI Canada Inc, 2008 BCHRT 436, 65 CHRR D/277.
\textsuperscript{48} Ibid at paras 531-560.
\textsuperscript{50} Faraday, supra note 8 at 5.
\textsuperscript{52} Faraday, supra note 8 at 25.
\textsuperscript{53} Ibid at 29.
\textsuperscript{54} ACLRC Report, supra note 31 at 11.
\textsuperscript{55} Ibid at 11-12.
\textsuperscript{56} Ibid at 12.
only temporary aspect of many jobs staffed through the programs will be the foreign workers who fill them.\textsuperscript{57}

Although the government places caps on all permanent immigration streams, no such mechanism exists to regulate the TFWP.\textsuperscript{58} The Metcalf Foundation released a report in 2012 outlining “a deepening concern that Canada’s temporary labour migration programs are entrenching and normalizing a low wage, low rights ‘guest’ workforce on terms that are incompatible with Canada’s fundamental Charter rights and freedoms, human rights, and labour rights.”\textsuperscript{59} Indeed, many commentators see the expansion of the program as an invitation for exploitation. Alberta Federation of Labour president, Gil McGowan, has stated that Canada is becoming “the Dubai of the North using an exploitative guest worker program to fill our most menial and undesirable jobs.”\textsuperscript{60}

Canada’s TFWP has been unfavourably compared to the \textit{Gastarbeiter}, or Guest Worker, program in Germany. The German program was driven by labour market demand and, as the name implies, intended workers migrating under the program to stay for a short time. Yet, as the labour demand persisted, many workers remained in the country far longer than intended without access to citizenship or the rights of permanent residents.\textsuperscript{61} Since the vision for the program was temporary, no attempt was made to integrate the workers into German society.\textsuperscript{62}

Reforms in January of 2001 allowed the longstanding guest workers in Germany to naturalize, but the German experience should be a cautionary tale for Canadians. Alberta’s Former Employment and Immigration Minister, Thomas Lukaszuk, has recognized that the TFWP is acting as a “temporary solution to a permanent problem.”\textsuperscript{63} Not taking measures to improve the condition of foreign workers could lead to a large, disenfranchised, and unintegrated migrant community, antithetical to Canada’s model of multicultural inclusion.

\textbf{LANGUAGE REQUIREMENTS}

A second controversial change to Canadian immigration policy relates to tougher minimum language competency requirements, imposed on applicants prior to entry. In the past, Canada’s immigration and citizenship policies were lauded as favourable to immigrants whose first language was not an official language. Provided applicants made a “modest good faith effort” on the citizenship test, they were likely to pass.\textsuperscript{64} The new language requirements were created by amending the \textit{Citizenship Regulations} and the \textit{IRPA Regulations}. These changes affect candidates in the Canadian Experience Class (“CEC”), the newly created Federal Skilled Trades Class (“FSTC”) and the re-launched Federal Skilled Workers Class (“FSWC”).\textsuperscript{65}

\begin{itemize}
\item \textsuperscript{57} Ibid at 9.
\item \textsuperscript{58} Alarcon, “Imported Workers Fight Back”, \textit{supra} note 44.
\item \textsuperscript{59} Faraday, \textit{supra} note 8 at 5.
\item \textsuperscript{60} Krystle Alarcon, “Will Tories Fix Temp Foreign Worker Program?”, \textit{The Tyee} (10 January 2013) online: The Tyee <http://www.thetyee.ca/News/2013/01/10/Fix-Temp-Foreign-Worker-Program>.
\item \textsuperscript{61} ACLRC Report, \textit{supra} note 31 at 36.
\item \textsuperscript{62} Ibid.
\item \textsuperscript{64} Kymlicka, “Exploring the Links”, \textit{supra} note 3 at 197.
\item \textsuperscript{65} Citizenship Regulation Amendments, \textit{supra} note 8; Removal of Claimants Amendment, \textit{supra} note 8; IRPA Regulation Amendments, \textit{supra} note 8.
\end{itemize}
Changes to the *Citizenship Regulations* require applicants provide “objective evidence” that they have “an adequate knowledge of one of the official languages of Canada”\(^{66}\). Applicants must show their level of speaking and listening in one of the official languages is at or above the “Canadian Language Benchmark (CLB) 4…when they file their application.”\(^{67}\) Evidence may be submitted in the form of CIC approved third party test results, the completion of secondary or postsecondary education in English or French, or through achieving the appropriate language level in certain government funded language training programs.\(^{68}\) Prior to the amendment, language ability was assessed through interactions with CIC staff and through a multiple-choice citizenship exam. The citizenship exam also tested the applicant’s knowledge of Canadian history, as well as the rights and responsibilities of citizenship.\(^{69}\)

In the new FSWC point system, the threshold level of language proficiency is fixed at CLB 7 or an “adequate intermediate proficiency”.\(^{70}\) In the CEC and the FSTC, the language competency level is determined by the Minister on a discretionary basis. Though new limits may be specified in the regulations, it is believed that the initial level for the CEC will also be fixed at CLB 7.\(^{71}\)

The government’s stated rationale behind the changes to the *IRPA Regulations* is to “recognize the importance of language to socioeconomic integration”.\(^{72}\) Proponents of the stringent language requirements point to research that has consistently shown language proficiency to be a key factor in securing better employment and a higher salary.\(^{73}\)

While the rationale may be sincere, the changes are not without controversy. Opponents fear the language requirements could lead to a dramatic shift in source countries, potentially excluding an entire class of people who could otherwise contribute significantly to Canada.\(^{74}\) From a multiculturalism perspective, this argument is troubling. Openness has characterized Canada’s immigration system since the 1960s. Since that time, Canada has rejected racially biased policies that made it difficult for non-Europeans to gain admission or to become citizens of Canada. This trend has been supported by immigrant groups.\(^{75}\) If stringent language requirements shift source countries to the point of exclusion, Canadian immigration policy will have seriously deviated away from openness.

In addition to marking a shift in Canadian immigration policy, new language policies may have a discriminatory impact on immigration. Today’s racial discrimination often manifests in practices, policies, and laws that appear neutral on their face, but detrimentally affect visible

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\(^{66}\) Citizenship Regulation Amendments, *supra* note 8 at 2148.


\(^{68}\) *Ibid*.

\(^{69}\) *Ibid*.

\(^{70}\) IRPA Regulation Amendments, *supra* note 8 at 2449-50.

\(^{71}\) *Ibid* at 2458.

\(^{72}\) *Ibid* at 2449.


\(^{75}\) Kymlicka, “Exploring the Links”, *supra* note 3 at 198.
minorities.\textsuperscript{76} “In an era when both international law and the \textit{Canadian Charter of Rights and Freedoms} prohibit discrimination based on race, it is unlikely that one will find evidence of overtly racist law and policies.”\textsuperscript{77}

From the very beginning, Canada’s commitment to multiculturalism, tolerance, and promotion of linguistic diversity was tempered by the commitment to bilingualism, enshrined in the \textit{Official Languages Act}, the \textit{Charter} and the \textit{Multiculturalism Act}.\textsuperscript{78} Given the basic principle that Canadian multiculturalism exists within a bilingual framework, it is difficult to imagine a successful claim for discrimination on the basis of language proficiency requirements in an official language. This is especially true in light of the Supreme Court of Canada’s holding in \textit{Chiarelli v Canada} that “[t]he most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in [Canada].”\textsuperscript{79}

Minister Kenney has dismissed allegations that new language requirements will have a negative impact on multiculturalism in Canada.\textsuperscript{80} He points to statistics showing that for over a decade, Canada’s top immigrant source countries have been China, India, and the Philippines.\textsuperscript{81} However, it should be noted that English has official language status in the Philippines.\textsuperscript{82}

While the new emphasis on language may be a good faith attempt to promote economic success and integration of newcomers, it will be important to monitor the effects of this policy. Evaluation is required to determine if there is a notable shift in source countries, and if such a shift can be attributed to new language requirements.\textsuperscript{83} If the policy has a detrimental effect on non-European immigration, its validity could be challenged as a violation of section 3(2) of the \textit{Multiculturalism Act}. This section states, “all federal institutions shall...promote policies, programs and practices that enhance the ability of individuals and communities of all origins to contribute to the continuing evolution of Canada”.\textsuperscript{84} At a minimum, the government should consider potential negative consequences of new language requirements and heed calls for study.\textsuperscript{85} After all, section 5(1)(b) of the \textit{Multiculturalism Act} requires the Minister “undertake and assist research relating to Canadian multiculturalism, and to foster scholarship in the field.”\textsuperscript{86}

\textbf{BILL C-31 AND THE REFUGEE DETERMINATION SYSTEM}

A third and controversial change to Canadian immigration policy relates to how certain refugee claims are handled. Bill C-31 was introduced as a means to reduce the influx of false or irregular asylum claims, provide faster protection to genuine refugees, and liberalize visa

\begin{footnotes}
77 \textit{Ibid} at 2-3.
80 \textit{Fabregas, supra note 74.}
81 \textit{Ibid.}
82 \textit{Constitution of the Republic of the Philippines 1987, Art XIV, s 7.}
84 \textit{Supra} note 14, s 3(2)(b).
85 \textit{Fabregas, supra note 74.}
86 \textit{Supra} note 14, s 5(1)(b).
\end{footnotes}
requirements for certain countries. However, critics argue many of the changes contained in Bill C-31 undermine the system’s integrity by denying basic rights to many, and by placing too much discretionary authority in the hands of a few.  

The two most notable changes are: the creation of a safe country list, and the introduction of new powers over asylum seekers whose arrival is deemed irregular.

### A. Designated Countries of Origin

Bill C-31 amended section 109.1 of the Balanced Refugee Reform Act, thus amending the IRPA. These amendments give the Minister broad powers to list certain Designated Countries of Origin (“DCO”) as safe for the purpose of refugee determination. A country is designated as safe where the number of claims rejected by the Refugee Protection Division from that country surpasses a threshold designated by the Minister. Of concern, paragraph 109.1(2)(b) enables the Minister to deem a country safe without passing the rejected claims threshold, if he is of the opinion that in the country:

(i) there is an independent judicial system,
(ii) basic democratic rights and freedoms are recognized and mechanisms for redress are available if those rights or freedoms are infringed, and
(iii) civil society organizations exist.  

The DCO provision creates safe country lists in two separate schedules. Although the rationale for designations made under Schedule 1 seems clear, it is not uncontested. Listed in Schedule 1, alongside countries like France and the United States, are Hungary and the Czech Republic. Hungary and the Czech Republic are known as significant sources of ethnic Roma refugee claimants. The high rate of Roma claims from these countries—and correspondingly high rate of rejection or abandonment—explains their presence on the Schedule, and is also cited as a major factor behind the creation of the Schedules in the first place.

In 2011, claims made by Roma people in Canada doubled from approximately 2,500 to nearly 5,000. Over that same period no analogous spike in Roma claims occurred in other countries of asylum, such as the United States. This led many to conclude that claims were falsely made, in order to take advantage of Canada’s generous asylum system. In support of

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88 Ibid.
89 See Bill C-31, supra note 8, cls 58, 10.
90 Ibid, cl 58.
91 IRPA, supra note 29, s 109.1(2)(a).
95 Order Designating Countries of Origin, supra note 93.
96 Elliott & Payton, supra note 94; Cohen, supra note 87.
97 Elliott & Payton, supra note 94.
98 Ibid.
99 Ibid.
this, Minister Kenney’s office notes that in 2011, virtually all of the asylum applications from the European Union were abandoned, withdrawn, or rejected.\textsuperscript{100} Canadian taxpayers were left to foot the bill for the healthcare and welfare benefits these claimants received while in the country.\textsuperscript{101} To contrast, representatives of the Roma community in Canada claim that they are being racially discriminated against and are persecuted ethnic minorities from otherwise safe countries.\textsuperscript{102}

Countries listed in Schedule 2 are also problematic. Conspicuously placed in the midst of stable democracies like Denmark, Sweden, and Belgium, sits Mexico.\textsuperscript{103} Mexico is not typically regarded as an exemplar of human rights protection or the rule of law, and the country is currently in the midst of an ongoing drug war.\textsuperscript{104} As former Immigration and Refugee Board chair Peter Showler notes, despite the political pressure placed on the Immigration and Refugee Board to refuse Mexican claims, nearly ten percent of all claimants from Mexico are still approved.\textsuperscript{105}

While the DCO process may expedite individuals who qualify for regular visas, ineligible individuals—whose lives are genuinely at risk—face additional barriers to making successful claims under the DCO regime. The implications of a country being designated as a DCO are significant. Claimants from these countries are subject to an expedited claim process. A hearing will occur after forty-five days for claims made at a port of entry, or thirty days for inland claims. This leaves the applicant, or counsel, little time to prepare.\textsuperscript{106} In addition, individuals from DCOs, along with all new claimants for refugee status, are denied the basic and emergency health care benefits previously available under the system. If unsuccessful, claimants from DCOs will be denied the right to appeal to the Refugee Appeal Division and face immediate deportation, even pending judicial review of the decision.\textsuperscript{107}

The discretionary nature of DCO designation is concerning. Mexico’s inclusion in Schedule 2 demonstrates the Minister may use the discretionary power to designate a country as safe in borderline cases. Such designation may be made more as a matter of political expediency to achieve other policy goals, rather than based on a factual amelioration of a country’s conditions.\textsuperscript{108}

\section*{B. Designation of Irregular Arrivals}

Another significant change brought by Bill C-31 is designed to combat human smuggling and “queue jumping” by refugee claimants who arrive in the country irregularly—usually by boat and in large groups.\textsuperscript{109} The introduction of this measure can be linked to two separate incidents in 2009 and 2010 involving large influxes of Tamil Sri Lankans.\textsuperscript{110} These highly
publicized mass arrivals aboard the smuggling ships MV Ocean Lady and the MV Sun Sea, linked a number of the potential claimants to Tamil Tiger rebels, and led to the groups being treated as a security threat.\textsuperscript{111}

In response to the two incidents, the government imposed strict measures to send a strong message to those attempting to enter the country illegally or engage in human smuggling.\textsuperscript{112} The measures, introduced to the \textit{IRPA} as section 20.1, give the Minister of Public Safety broad discretion. The Minister of Public Safety may designate two or more foreign nationals as a group of irregular arrivals if he is of the opinion that it is in the public interest, or has reasonable grounds to suspect smuggling has occurred.\textsuperscript{113} The threshold to establish such cause is low, especially in the context of mass, unannounced arrivals by boat.

Once an asylum claimant is designated as an irregular arrival, regardless of whether the claim is \textit{bona fide}, the consequences include: mandatory detention for all persons aged sixteen or older, limited right of review and no right of appeal to the Refugee Appeal Division, and a prohibition on claiming permanent resident status for a minimum of five years.\textsuperscript{114} This means that even if such claimant is admitted, there no possibility for them to sponsor their spouse and children in Canada until the five year period is over.\textsuperscript{115}

As we examine Canadian immigration policy, it is worth bearing in mind that many refugee claimants today are desperate economic migrants. Their origin in troubled parts of the world is merely coincidental. Our low tolerance for this truth drives many to bend their stories in an effort to gain admittance.\textsuperscript{116} As far back as 1989, Armand Petronio noted that “[b]efore [the 1980s] such economic migrants came predominantly from Europe and were welcome to Canada. Now that such migrants come from the so-called third world we insist that they meet the strict legal definition of refugee.”\textsuperscript{117} While our system must properly regulate refugee claims, many claimants are often underprivileged and exploited individuals, hoping to start new lives in Canada. For these individuals, the only means of entry available are as temporary workers, “bogus refugees”,\textsuperscript{118} or to remain undocumented. Additionally, many claimants may not meet the strict definition for a Convention refugee, but still have a genuine fear of persecution in another country.\textsuperscript{119} On the basis of public confidence in Canada’s immigration system and basic human dignity, the Canadian government should exercise compassion, instead of treating refugee claimants as criminals.\textsuperscript{120}

The changes brought by Bill C-31 that restrict freedom of movement and limit access to basic services, such as health care, could be subject to a \textit{Charter} challenge. These measures allow for differential treatment by the state based explicitly on one’s country of origin or

\textsuperscript{111} Ib\textit{id}.
\textsuperscript{113} See Bill C-31, \textit{supra} note 8, cl 10.
\textsuperscript{114} \textit{Ibid}, els 10, 23.
\textsuperscript{115} \textit{CCR}, \textit{supra} note 106.
\textsuperscript{116} Armand A Petronio, “Immigration and Multiculturalism” (materials prepared for a Continuing Legal Education seminar held in Vancouver, British Columbia, 23 February 1989), (Vancouver: Continuing Legal Education Society of British Columbia, 1989) at 4.1.01.
\textsuperscript{117} \textit{Ibid}.
\textsuperscript{118} Elliot & Payton, \textit{supra} note 94 (In Minister Kenney’s introduction of Bill C-31 he stated that Canadians have no tolerance for “bogus refugees”, referring to the growing number of claims by Roma people origination from European Union democracies).
\textsuperscript{119} \textit{CCR}, \textit{supra} note 106.
\textsuperscript{120} \textit{Ibid}.  

citizenship status. The Supreme Court of Canada recognized these factors as an analogous ground under section 15 of the *Charter* in *Andrews v Law Society.* Justice La Forest in *Andrews* stated, “[d]iscrimination on the basis of nationality has from early times been an inseparable companion of discrimination based on racial, national or ethnic origin.”

Further, the *IRPA* seeks “to fulfill Canada’s international legal obligations with respect to refugees and affirm Canada’s commitment to international efforts to provide assistance to those in need of resettlement.” Provisions that expedite the adjudication of claims and deny appeals may violate Canada’s international obligations under the *UN Convention Relating to the Status of Refugees,* as they increase the risk refugees may be deported into situations of persecution without opportunity for appeal. As Canada has ratified the *Refugee Convention,* our immigration policy must be evaluated with that obligation in mind.

*Singh v Minister of Employment and Immigration* is an example of the *Refugee Convention* shaping the scope of Canada’s obligations vis-à-vis Convention refugees and refugee claimants. The Supreme Court of Canada took note of the *Refugee Convention*’s preamble that states:

> Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on December 10 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination...[and] has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms

The Supreme Court of Canada interpreted fundamental rights generously, and afforded Convention refugees legal protection under section 7 of the *Charter.* This court held the right to “security of the person” encompasses the right to be free from the threat of physical punishment or suffering. The removal from Canada to a country where one’s life or freedom is threatened is a breach of that right. Although the appellants were refugee claimants, not Convention refugees, the court determined the claimants were entitled to fundamental justice in the adjudication of their claims because the potential consequences of a denial of status were so grave.

**CONCLUSION**

In an era of changing notions of citizenship and increasingly fluid migration, it is important to be mindful of how Canada’s citizenship, immigration, and multiculturalism policies interact to define our nation’s character. Canada’s identity is shaped by its commitment to multiculturalism. We rely on immigrants for continued economic growth. When making changes to any of these three policies, we should start by reflecting on what kind of country we aspire to be. Our legislative enactments make it clear that Canada aspires to be a tolerant, welcoming, and diverse

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121 *Supra* note 20.
122 *Ibid* at 196.
123 *IRPA, supra* note 29, s 3(2)(b).
124 28 July 1951, 189 UNTS 137, Can TS 1969/6 [*Refugee Convention*].
125 [1985] 1 SCR 177, 17 DLR (4th) 422 [*Singh*, cited to SCR].
126 *Refugee Convention, supra* note 124, Preamble
127 *Singh, supra* note 125 at 179.
society, where human rights are respected—regardless of citizenship status. This is how we want to present ourselves to the world.

While the Canadian approach was previously exceptional, recent shifts in our policy raise doubts about our future path. The government’s approach is based on pragmatism, with an emphasis on short-term interests. The lacking emphasis on human rights is troubling. This approach could undermine Canada’s commitment to multiculturalism and human rights. The exploitation faced by guest workers, increased language requirements for newcomers, and the characterization of certain asylum seekers as criminals could decrease public support for immigration. In turn, this could change Canada’s welcoming image, making it a less popular choice for the immigrants we hope to attract. In any case, as stresses between traditional views of state sovereignty and globalization are increasingly expressed in the immigration context, Canada, like other countries, will be required to continually reassess the social and economic impact of its policies, within and outside its borders.129

129 See Carasco, supra note 76 at 1.