The Immigrant Investor Program: Cleaning up Canada's Act

James D. DeRosa
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I. INTRODUCTION

Canada’s Business Immigration Program was enacted as part of the Immigration Act as a way to promote, encourage, and facilitate the immigration of experienced business persons who can contribute to Canada’s economic growth by applying risk capital and business acumen to Canadian business ventures that create jobs for Canadians. There are three categories of immigrants in the Business Immigration Program: entrepreneurs, the self-employed, and investors. This Note will analyze the Immigrant Investor Program (Program) established for international investors, being the most recent addition to Canada’s complex Business Immigration Program.

Through the Program, permanent residency can be gained if a perspective immigrant has obtained a net worth of at least $500,000 through his own endeavors and has successfully passed the medical and security tests applicable to all immigrants entering Canada. Additionally, the foreigner agrees to transfer a minimum of $250,000 to a govern-

* J.D. Candidate, Case Western Reserve University School of Law (1995). The author especially thanks Professor Henry T. King, Jr. and Christian M. Williams for their advice and guidance, and gratefully acknowledges the assistance of the Canadian, Hong Kong, and Taiwanese practitioners and governmental officials who responded to inquiries and provided comments by letter or telephone.


2 EMPLOYMENT AND IMMIGRATION CANADA, IMMIGRATION MANUAL, reprinted in PAC. RIM INVESTMENT & BUS. IMMGR. 1.1.01 (Continuing Legal Education Society of British Columbia, 1989).

3 Permanent residents (also called landed immigrants) have the right to come into Canada and remain in Canada unless the immigrant remains outside Canada for more than six months in any twelve-month period or performs certain criminal acts. If an immigrant has been in Canada for three years as a permanent resident, that person may apply to become a Canadian citizen. Only Canadian citizenship affords the highest order of rights to a person. Permanent residents, for example, cannot fully participate in the political process, cannot hold some forms of property, and cannot occupy certain professions. THE ANNOTATED 1994 IMMIGRATION ACT OF CANADA 107-135 (Frank N. Marrocco & Henry M. Goslett eds., 1993).

4 All figures are in Canadian dollars unless otherwise noted.


6 Originally, an investment of $150,000 for a period of three years was possible.
ment-accepted business investment fund or syndicate fund, which pools money from numerous investors and invests in two or more businesses that are of substantial economic benefit to Canada.\textsuperscript{7}

Ridden with controversy since its inception in 1986, all new investments into the Program were halted on November 1, 1994, while new and more comprehensive regulations are developed to prevent further Program abuse. As part of a comprehensive review of Canada's general immigration policy, Citizenship and Immigration Canada intends to replace the current Program in 1996 with a revised investor program, pending extensive consultation with a special advisory panel which is studying ways to enhance economic benefits and reduce program abuse.\textsuperscript{8}

To help understand why this moratorium was issued, this Note will first provide a brief historical sketch of the immigration policies upon which the Program was founded and outline the Program's design and its practical application to potential immigrant investors. Second, this Note will focus on past monitoring and enforcement problems found in the Program's framework. Special emphasis will be given to recent improprieties in Manitoba as representative of occurrences across Canada. This Note will then analyze the 1993 regulatory changes which provide the Program with statutory underpinnings that give Ottawa more control over monitoring and enforcing the patchwork of provincial immigration policies. Moreover, this Note will show how the government could place greater emphasis on creating economic development in rural provincial areas and developing better techniques for keeping investment opportunities in the province for which they were intended. Finally, while numerous improvements to the Program could be explored,\textsuperscript{9} this Note will


\textsuperscript{9} Major considerations include the combination of the Investor and Entrepreneur categories, changing the tier differential, and increasing organizational efficiency. These topics will only be discussed tangentially in this Note. Two comprehensive studies conducted by the Canadian government came to such conclusions. See generally THE MINISTERIAL TASK FORCE ON THE IMMIGRANT INVESTOR PROGRAM - A DISCUSSION DOCUMENT (1992) [hereinafter TASK FORCE]; Canada, House of Commons, Standing Committee on Labour, Employment and Immigration, Interim Report on the Immigrant Investor Program, Issue No. 21 (1992) [hereinafter Interim Report] (conducting,
argue that in order for the Program to be a viable option for potential immigrants in years to come, the illusion of a seal of governmental guarantee must be dispelled and more efficient regulations must be enacted. If these and other potential concerns are incorporated into the new investor program to be introduced in 1996, the Immigrant Investor Program's tarnished image abroad may be restored and its potential economic benefits could be shared more equally by Canadians in all provinces.

II. A PRELIMINARY ILLUSTRATION

The following example illustrates the type of problems that have become commonplace with the Program. Controversy arose in Alberta concerning an investment fund named Western Canadian Shopping Centres (Western Canadian) which was started by the Alberta government's former head of business immigration in Hong Kong. After being approved by federal and provincial authorities in 1988, Western Canadian was marketed in Asia as an investment fund which would jointly invest money from numerous immigrant investors in shopping mall construction projects. The fund manager collected a total of $34 million from over two hundred Asian investors. Instead of building malls, the money was invested in a gold mine in northern Saskatchewan - without investors' approval and in clear disregard of the investors' reasonable expectations. From the beginning, cost over-runs, production

pursuant to Standing Order 108(2), an informative and comprehensive review of the Investor category of the Business Immigration Program, in particular a study of the recommendations of the Ministerial Task Force).

Before founding Western Canadian, Joe Dutton served as executive secretary to former Alberta premier Peter Lougheed and served as the Alberta government's former head of business immigration for Asia. Timeline of Events: The Money Trail: From Asia to Saskatchewan, CALGARY HERALD, Mar. 29, 1992, at A2.

Western Canadian's initial offering memorandum stated that the fund's objective was investment in commercial, non-residential, income-producing property on a turn key basis. Though not a true investment syndicate or "blind pool," the fund managers had discretion as to where to invest, within several possible options. After investors had subscribed to the fund, Western Canadian amended its offering memorandum to include the possibility of investment in industrial operations. Telephone interview with Geoffrey L.K. Yeung, immigration lawyer with Chen & Leung, Vancouver (Jan. 22, 1995) [hereinafter Yeung Interview]. (Mr. Yeung is the lawyer representing the immigrant investors in the Western Canadian law suit.)

A problem, however, was that this change was not clearly stated in Western Canadian's promotional materials and its name allowed investors to infer that funds would be invested in shopping centers. Canada, House of Commons, Standing Committee on Labour, Employment and Immigration, Minutes of Proceedings and Evidence,
delays, and insufficient gold reserves made it certain that investors would be unable to recoup their investment. In December 1991, the fund ceased to pay investors their semi-annual ten percent interest payments. Meanwhile, the fund manager made a three million dollar profit by selling the investment fund to the owner of the gold mine, Claude Resources Inc. The fund went bankrupt and a law suit was brought by the immigrant investors against the fund manager and eleven other parties.

The activities of Western Canadian displayed the following: non-disclosure of material information and misrepresentation in both marketing information and the offering memorandum’s investment objectives; failure of the fund to meet cash-back obligations to the investors; failure of the provincial and federal government to monitor project development; failure of the government to ensure that investments would create economic development in the expected province; failure of the government to prevent excessive monetary gains by fund managers; and lack of governmental responsibility after an apparent “seal of approval” was given by the government in initially approving the fund. Western Canadian’s much-publicized course of events is not an isolated incident in Canada.

It will be shown that most immigrants are attracted to the Program

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13 Alan Boras, Immigrant Investors Sue Dutton, 11 Others, CALGARY HERALD, May 27, 1992, at A1. Defendants included Bennett Jones Verchere (Dutton’s lawyers), Ernst & Young (his accountants), The Royal Trust Company, Cominco Engineering Services Ltd. (a mining engineering company) and Claude Resources Inc. Id. After a five-month investigation, the Alberta Securities Commission decided it would not prosecute on its own behalf. ASC Declines to Prosecute, PREDICASTS, Aug. 31, 1992, available in LEXIS, World Library, PWORLD File.

14 While the precise facts of each impropriety may differ, Western Canadian is representative of many similar events and illustrative of many problems with Canada’s Immigrant Investor Program. As Robert Wenman, chairperson of the Standing Committee on Labour, Employment and Immigration said “. . . [w]e can also learn from negative examples. Can you think of a more classic one than Western Canadian if we were to really call for the government to look into something and ask what went wrong here?” House of Commons, Issue No. 17, supra note 11, at 17:90. See generally David Baines, Investor — Immigrant Fraud, 12 EQUITY Oct. 9, 1994, at 32; Peter D. Fairey, Immigrant Investor Program - Where It’s At, Where It’s Going, in INBOUND INVESTMENT INTO CANADA: PEOPLE AND MONEY 1.3, 1.3.17-19 (Continuing Legal Education Society of British Columbia, ed. 1992).
because of a number of illusions that are propagated by the spell of the agent who sells the investment fund and by bureaucratic confusion between federal and provincial governments. These illusions include perceptions of ease; lack of time commitment to the business before and after investing; the ability to "buy one's way into Canada"; the ability to reside outside Canada for extended periods of time without losing one's permanent residency status or the ability to obtain citizenship; and the belief that projects are very "safe" because they are government-approved, or worse still, a belief that they are "guaranteed" by the government. These are the myths that must be dispelled for the Program to work effectively and efficiently, meeting both the expectations of the Canadian government and the foreign investors.

Various government study groups and parliamentary committees have been set up since 1992 to study the Program's design and identify its shortcomings. Bill C-86 was introduced in 1993 in light of these study groups as a way to correct past Program abuses. The 1993 regulatory changes mainly codified the already existing Program guidelines into enforceable regulations and enacted new provisions restricting passive investments in real estate. The amendments also addressed in a limited fashion the ineffectiveness of both federal and provincial governmental monitoring of privately administered investment funds and business ventures.

These changes, however, appear to be only token efforts to correct the sort of problems that transpired at Western Canadian. Nothing was done to dispel the illusion of governmental approval and little was done to ensure greater regional economic development. At a time when the Program has become Canada's primary source of venture capital, these regulations were too little, too late.

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15 Questionnaire completed by Norris Yang, partner with Yang & Company, Hong Kong in Association with the Vancouver-based Canadian barristers and solicitors of Boughton Peterson Yang Anderson (Feb. 16, 1993) (on file with author) [hereinafter Yang Questionnaire]. See infra Section IX.
16 In 1992, upon being appointed the Minister of Employment & Immigration, the Honorable Bernard Valcourt appointed a Task Force to examine all aspects of the Program and recommend new approaches to ensure that the Program reached its full potential. TASK FORCE, supra note 9, at 9. The House of Commons then reviewed the findings of the Task Force and released its own report on the Program. Interim Report, supra note 9. More recently, a special advisory panel was established in 1994 to study the Program. See supra note 8 and accompanying text.
19 Id. at 3443-44.
III. CANADA’S IMMIGRATION HISTORY

The purpose of giving this brief historical background is to show the historical basis for Canada’s current Business Immigration Program and to highlight Canada’s continued doctrinal emphasis on immigrant selectivity and economic benefit.

Canadian officials have never minced words over their right to limit and regulate the flow of immigrants into the country. Prime Minister Mackenzie King said in 1921, “I wish to make it quite clear that Canada is perfectly within her rights in selecting the persons whom we regard as desirable future citizens. It is not a ‘fundamental human right’ of an alien to enter Canada. It is a privilege.” This sentiment was echoed again in 1955 by Citizenship and Immigration Minister J. W. Pickersgill when he said,

Immigration isn’t a matter of right at all . . . Only a Canadian has a right to enter Canada. For everyone else it is a privilege which we have a perfect right to grant or deny as we see fit. When an alien applies for permission to come to Canada, he isn’t on trial in a court, he is like someone applying for membership into a club.

More recently, court decisions and official statements concerning refugee policy choices reinforce the government’s continued position that immigration into Canada is a privilege and not a right. While such a stance is embraced by many countries around the world, this continued emphasis on immigrant control developed notwithstanding the fact that since its founding, Canada has required a large number of immigrants to populate its sizable land mass.

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20 Jean Bruce, After the War 18 (1982).
22 Bhadauria v. M.M.I., 1 F.C. 229 (1978); R. v. Governor of Pentonville Prison, ex parte Azam, 2 All E.R. 741 (1973); Koula Gana v. M.M.I., S.C.R. 699 (1970); Masella v. Langlais, S.C.R. 263, 281 (1955) (emphasizing “Immigration to Canada by persons other than Canadian citizens or those having a Canadian domicile is a privilege determined by statute, regulation or otherwise, and is not a matter of right.”).
23 As Bernard Valcourt, then Immigration Minister, commented on a proposed joint immigration policy among Canada, the United States, and Mexico: “Why should I, in Canada, be caught up with this whole thing [refugee determination] when I could simply direct [refugees] back where they belong or where they come through, the United States.” Estanislao Oziewicz, Canada Seeking to Stem Flow of Refugee Claimants, Globe and Mail, Oct. 17, 1991, at A1.
As a dominion of the United Kingdom and the northern neighbor of the United States, getting immigrants was not a problem. The difficulty experienced in the early years of Canadian immigration policy was how to attract enough settlers to fill its vast western expanse (so as not to lose land to the United States), while being able to be selective enough to prevent the degeneration of Canadian society or the "pollution of the country's racial stock." Traditional concerns related to immigrants include: taking jobs from Canadians and causing unemployment; crowding in the cities and creation of city slums; straining social services; and contributing to a rising crime rate. This discriminatory bias in Canada's immigration policy was sustained by a widespread ignorance of and prejudice towards visible minorities.

The Empire Settlement Act of 1922 enabled other dominions of the United Kingdom to be a substantial source of immigrants for Canada. The common perception of this Act, however, was that although it would be likely to ensure the stability and growth of British values in Canada, it would attract a great number of paupers. It was generally believed that the Act "would produce a great many settlers who are not likely to make a success on the land and who would give [the] country a black eye." Canadians have perhaps been most xenophobic about Asians. This prejudice culminated in The Chinese Immigration Act of 1923, S.C., ch. 38 (1923) (Can.), which instituted a ban on Chinese immigrants. It was not until 1947 that this Act was repealed. In the 1940s and especially the 1950s many discriminatory laws were repealed, but it was not until the 1970s that all racist laws and regulations were stricken from Canada's law books. This is not to say that discriminatory practices have completely ceased, but certainly such activities are frowned upon and are not part of the everyday experience in Canadian immigration practices. See JULIUS H. GREY, IMMIGRATION LAW IN CANADA 14 (1984). See generally ASHKAN HASHEMI, CONTROL AND INADMISSIBILITY IN CANADIAN IMMIGRATION POLICY (1993); RUTH CAMERON, THE WHEAT FROM THE CHAFF: CANADIAN RESTRICTIVE IMMIGRATION POLICY 1905-1911 (1978); JOHN A. MUNRO, BRITISH COLUMBIA AND THE "CHINESE EVIL": CANADA'S FIRST ANTI-ASIATIC IMMIGRATION LAW (1971).

See THE LAW UNION OF ONTARIO, CANADA'S NEW IMMIGRATION ACT: A GUIDE AND CRITICAL COMMENTARY 10-13 (1978) (emphasizing that immigrants became easy scapegoats for problems caused by troubles in Canada's economy).


26 Id. at 150-51. Canadians have perhaps been most xenophobic about Asians. This prejudice culminated in The Chinese Immigration Act of 1923, S.C., ch. 38 (1923) (Can.), which instituted a ban on Chinese immigrants. It was not until 1947 that this Act was repealed. In the 1940s and especially the 1950s many discriminatory laws were repealed, but it was not until the 1970s that all racist laws and regulations were stricken from Canada's law books. This is not to say that discriminatory practices have completely ceased, but certainly such activities are frowned upon and are not part of the everyday experience in Canadian immigration practices. See JULIUS H. GREY, IMMIGRATION LAW IN CANADA 14 (1984). See generally ASHKAN HASHEMI, CONTROL AND INADMISSIBILITY IN CANADIAN IMMIGRATION POLICY (1993); RUTH CAMERON, THE WHEAT FROM THE CHAFF: CANADIAN RESTRICTIVE IMMIGRATION POLICY 1905-1911 (1978); JOHN A. MUNRO, BRITISH COLUMBIA AND THE "CHINESE EVIL": CANADA'S FIRST ANTI-ASIATIC IMMIGRATION LAW (1971).

27 See THE LAW UNION OF ONTARIO, CANADA'S NEW IMMIGRATION ACT: A GUIDE AND CRITICAL COMMENTARY 10-13 (1978) (emphasizing that immigrants became easy scapegoats for problems caused by troubles in Canada's economy).

28 HASHEMI, supra note 26, at 3-8.

29 12 & 13 Geo. 5, ch. 13 (1922).

30 Schultz, Leaven for the Lump, supra note 25, at 150.

31 Immigration Branch, C.O. Cory to R. Greenway, June 1, 1921,
Canada's solution to this perceived problem, even at that early time, was to envision ways to encourage well-off British people to settle in the dominion to encourage provincial economic development. It was suggested, for example, by the Ontario Association of Boards of Trade in 1921, that an adjustment of the *Income Tax Act* would encourage wealthy Englishmen to migrate and invest in the development of Canada. For the same purpose, the Western Canada Colonization Association (WCCA) was organized by wealthy land speculators and railroad companies. This acted as an early type of investment fund to facilitate immigrant investment in Canada.

Prime Minister Mackenzie King recognized that such “proposals all stood for ‘the kind of patriotism which means profits to private citizens’ which in turn meant a potential for scandal.” In the end, Prime Minister King acknowledged the desire for Canada to attract immigrants who had the potential to better contribute to the Canadian economy and endorsed the WCCA’s proposal. In a manner that is reflective of the Canadian government's treatment of the Program today, this endorsement was conditioned by Prime Minister King with the statement that “the government of Canada accepted no responsibility for [WCCA’s] undertakings.”

In 1966, over forty years later, a federal White Paper was introduced which stressed that the privilege of immigration should be bestowed upon those immigrants who could compete in the economic marketplace. This document essentially became the blueprint for the Business Immigration Program which was introduced as part of the *Immigration Act* of 1976.

The *Immigration Act* was the culmination of a full-scale review of Canada’s immigration policy at a time when Canadians were focused on traditional concerns of their own needs as a vast country with a shortage of manpower and a low birth rate, as well as international issues concerning world political problems. As the basis of Canada’s current immi-
immigration policy, the Immigration Act today is a testament to Canada's commitment to ending discrimination among immigrants on the basis of race, national or ethnic origin, and religion through the codification of a non-discriminatory point system core. The changes in legislation and the point system also show Canada's commitment to attracting the "right kind of people for a developing economy next door to the USA." For example, under the Business Immigration Program, entrepreneurs were given fourth priority among immigrant categories (after relatives, refugees, and selected workers). Entrepreneurs still had to qualify under the point system, but they were assessed mainly on their business skills.

Many changes have been made to the Immigration Act throughout the 1980s. Canada's immigration policy was revised in 1984 because of the economic recession of the early 1980s. These amendments gave entrepreneurs third priority (behind the family and refugee classes); provided the entrepreneur with two years to produce a business proposal; and required that the business need create only one new job, instead of the previously required five new jobs. In 1985, it became the stated government policy to increase immigration levels in a moderate and controlled manner in order to reverse a record low of people immigrating to Canada.

After heavy lobbying by banks and other financial institutions,
the investor category was introduced to the Business Immigration Program in 1986. Thus, since 1986, business immigrants are allowed to apply for entry under either the immigrant entrepreneur, the self-employed immigrant, or the immigrant investor categories. The Immigration Act was again amended in 1993 by Bill C-86 in order to streamline the refugee determination system, put in place better management tools for processing immigrants abroad, and provide for better enforcement and control of the Business Immigration Program.

This brief history of Canada’s immigration policy should make it understood how the Program is a logical extension of Canada’s continued immigration policy preference of selective admissibility based upon economic criteria.

IV. PROGRAM DESIGN

Employment and Immigration Canada enacted the Immigrant Investor Program in January 1986 as “a means of admitting qualified business persons to Canada who will invest their capital in Canadian business ventures which will contribute to business expansion.” In particular, the program was designed to create jobs and encourage investment in smaller businesses which ordinarily have more trouble raising funds. Practitioners are guided by the federal Guidelines for the Immigrant Investor Program and must abide by the requirements set out in the Immigration

BACKGROUND PAPER NO. BP-190E, CANADA'S IMMIGRATION PROGRAM 1 (Jan. 1989, rev. Sept. 1991) [hereinafter YOUNG, CANADA'S IMMIGRATION PROGRAM]. This downward trend is shown in immigration levels ranging from a record high of 222,876 in 1967 to a low of 84,302 in 1985. Id. at app. 1.


Id.


IMMIGRATION CANADA, IM-103-03-93, GUIDELINES FOR THE IMMIGRANT INVESTOR PROGRAM 1 (1993) [hereinafter PROGRAM GUIDELINES 1993]. Employment and Immigration Canada has since been restructured and renamed Citizenship and Immigration Canada.

Id. For a small business, banks are unable to spend the money necessary to perform due diligence. This makes an investment in a small business much more of a risk than a multi-million dollar loan, making banks less likely to loan money. Questionnaire completed by Cecil L. Rotenberg, barrister & solicitor certified by Law Society of Upper Canada as a “Specialist” in Immigration Law, Toronto (Mar. 24, 1994) (on file with author) [hereinafter Rotenberg Questionnaire].
Act, the Regulations to the Immigration Act, provincial securities legislation, as well as all regulations and financial and securities legislation in any jurisdiction in which marketing efforts take place.  

Qualification as an "investor" requires meeting a number of specific parameters. In particular, the immigrant must have successfully operated, controlled, or directed a business or commercial venture and the immigrant must have a minimum net worth of $500,000 which has been accumulated through the immigrant's own endeavor. Given the importance placed on the investor category in the Business Immigration Program, visa officers are expected to exercise a great amount of latitude in their admission of investors. In evaluating an immigrant's application, visa officers consider the individual's background and experience and decide whether this is the type of person envisaged under the Program: "a person who has, through his previous or current activities, gained significant business experience and who, given an opportunity, would be likely to make a positive contribution to Canada on the basis of the applicant's knowledge and skills." This category is not limited to owners, presidents, and vice presidents, but is extended to persons who have held other positions of significant responsibility. An immigrant visa will be issued to a qualified investor only after verification that the full amount of the minimum investment has been invested into an accepted business.

The amount of money that the approved immigrant must invest in

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48 PROGRAM GUIDELINES 1993, supra note 46.
49 A minimum of $700,000 is required if subject to a guarantee as a Tier III investment. Id. at 14. Net worth equals the immigrant's total assets less total liabilities.
EMPLOYMENT AND IMMIGRATION CANADA, IMMIGRATION MANUAL, in PAC. RIM INVESTMENT & BUS. IMMIGR., supra note 2, at 1.1.03.
50 An "investor" means an immigrant who: (a) has successfully operated, controlled or directed a business or commercial undertaking, (b) has made a minimum investment, since applying for an immigrant visa, that will contribute to the creation or continuation of employment opportunities for Canadian citizens or permanent residents, other than the immigrant and the immigrant's dependents, and (c) has a net worth, accumulated by the immigrant's own endeavors of at least $500,000 for a Tier I or Tier II investment or $700,000 for a Tier III investment.
PROGRAM GUIDELINES 1993, supra note 46, at 14.
51 EMPLOYMENT AND IMMIGRATION CANADA, IMMIGRATION MANUAL, in PAC. RIM INVESTMENT & BUS. IMMIGR., supra note 2, at 1.1.13.
52 Id. at 1.1.12. See also Canada, House of Commons, Standing Committee on Labour, Employment and Immigration, Minutes of Proceedings and Evidence, Issue No. 19 (16 June 1992) at 19:6-8.
53 Cheng v. Canada (Secretary of State) 50 A.C.W.S. 3d 120 (1994).
54 PROGRAM GUIDELINES 1993, supra note 46, at 3.
Canada depends upon the province into which the money will be invested. A three-tiered investment structure has been in effect since 1988, which in theory ensures that economic benefits flow to all provinces. A province will be placed in Tier I if that province is the destination of less than ten percent of business immigrants. Tier II provinces are those that receive more than ten percent annually of those immigrants entering through the Business Immigration Program, and is generally comprised only of the provinces of British Columbia, Ontario, and Quebec. No federal, provincial, or municipal investment incentives may be utilized to change the minimum investment amount required in a particular Tier. Tier III investments can be obtained in any province and was created for investments of $500,000 for which the immigrant receives a guarantee.

In order to ensure that there is an element of risk involved, no guarantees, whether of interest payments or principal payment, are permitted in Tier I or Tier II investments, with the limited exception being investments in Quebec.

57 Specifically, a province will be considered part of Tier I if it was: the destination indicated on the immigrant visas of less than 10 percent of the aggregate of those persons who were granted landing as entrepreneurs, investors and self-employed persons in the calendar year prior to April 1 preceding the day on which the Minister approved the eligible business or fund.
58 Fairey, supra note 14, at 1.3.21-22.
60 Tier III investments are typically implemented as follows:
A business with an existing operating line or loan of $500,000 or more from a Canadian chartered bank, trust company or caisse is located; the “bank” funds are replaced by the $500,000 Investor funds; the “bank,” already satisfied with the creditworthiness of the borrower, is therefore prepared to guarantee the Investor’s funds absolutely and maintain the same security from the borrower which it had originally.

Peter D. Fairey, Some Realities of the Investor Programme, in PAC. RIM INVESTMENT & BUS. IMMIGR. 3.2.01 (Continuing Legal Education Society of British Columbia, 1989).

61 PROGRAM GUIDELINES 1993, supra note 46, at 7. Soon after the Program began, controversy arose over the practice in some provinces of guaranteeing investments. The federal government took the position that guarantees in either Tier I or Tier II categories would undermine the entrepreneur program and would make it even more difficult for the government to refute that Canadian visas were for sale. YOUNG, CANADA’S IMMIGRATION PROGRAM, supra note 41, at 16.
62 See generally Pearl Eliadis, Quebec’s Investor Program: A Distinct Scheme, 9
There are two vehicles available in all tiers of the Program through which an immigrant may invest in Canada: an approved business venture or either a privately or government-administered venture capital fund. If the investor chooses to invest in a specific business venture, simply purchasing an approved business is not acceptable. The investment must be in an active business operation, as defined by the Guidelines.\(^6^4\)

The immigrant may also invest in a federally approved investment fund, which pools a number of immigrants' money and invests jointly in federally approved projects.\(^6^5\) An investment fund may take one of two forms in order to be approved by the government. It may be a privately

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63 Imm. L.R.(2d) 197, Case No. 93b (1990). See infra Section VII.

64 Program Guidelines 1993, supra note 46, at 6.

administered venture capital fund or a government-administered venture capital fund.\textsuperscript{66} The only difference between the two is that one is operated by the private sector whereas the other is operated directly by the provincial government.\textsuperscript{67} Both types of funds must then use the pooled money to invest in the active business operations of two or more eligible businesses.

One of the benefits of investing in an approved business is that: (1) the investor knows specifically where the money is being invested; and (2) what type of industry is involved. For the alternative, fund managers advocate that the benefits of investing in a fund, as opposed to a business, are that it provides: (1) the opportunity to participate in a diversified portfolio of investments in small and medium-sized businesses; (2) a reduced amount of risk than if the entire investment amount was placed in one business; (3) returns that are competitive with those of other investment options; and (4) a portfolio that is managed by a group of investment managers.\textsuperscript{68}

While several provincial governments have placed restrictions on investments into certain industries,\textsuperscript{69} the federal government has also enacted nationwide investment restrictions.\textsuperscript{70} Before an eligible fund or business will be approved, the fund or business manager must submit an offering memorandum and an escrow agreement to the Minister of Citizenship and Immigration (Minister). An offering memorandum is a disclosure document that describes the approved business and how the managers will use the investment money. The offering memorandum must use statements that contain "full, true and plain disclosure of all material

\textsuperscript{66} Id. at 3410.

\textsuperscript{67} Id. at 3444. From the Program's start through 1993, only two provinces (Saskatchewan and Prince Edward Island) have chosen to operate a government-administered venture capital fund, which shows that the vast majority of funds are privately operated. \textit{CITIZENSHIP AND IMMIGRATION, BUSINESS IMMIGRATION BRANCH, PROGRAM STATISTICS 1993}, at schedule V (Apr. 1, 1994) [hereinafter PROGRAM STATISTICS 1993].

\textsuperscript{68} Deloitte & Touche, \textit{Report on the Canadian Maple Leaf Fund (Manitoba) Ltd., IMMIGRANT INVESTOR PROGRAM REVIEW, Apr. 14, 1993}, at 6-7 (hereinafter Deloitte & Touche, \textit{CMLF}).

\textsuperscript{69} Manitoba, for example, does not permit immigrant investments in natural resource exploration operations. \textit{MANITOBA INVESTMENT PROMOTION BRANCH, IMMIGRANT INVESTOR PROGRAM, MANITOBA PROGRAM GUIDELINES, in PAC. RIM INVESTMENT & BUS. IMMIGR. 3.2.70} (Continuing Legal Education Society of British Columbia, 1989). See also House of Commons, Issue No. 17, \textit{supra} note 11 at 17:70 (listing criteria for investment in Ontario).

\textsuperscript{70} Most notably, the 1993 amendments include rules to limit real estate-based investments. SOR/93-412, 1993, C. Gaz. Part II, 3410, 3449. Further explanation and analysis of real estate restrictions are discussed \textit{infra} Section VI.
facts” relating to the eligible business or fund. This uniform disclosure is required to ensure that sufficient information is provided about the investments.

Immigrants have full discretion in choosing which means best suit their investment needs. Although investors can make investigatory visits to Canada, most rely on information that is made available in their native country. The federal government issues an official list of investment operations participating in the Program, but the government adheres to a disclaimer that “acceptance under the Program does not mean that any government or securities commission in Canada has assessed or passed on the merits, feasibility, financing, investment potential, commercial viability, or risks associated with the offering.”

The federal government only requires that the eligible business or fund be managed or controlled by Canadian residents, and that certain minimum and maximum offering levels are met. Each approved business or fund has a limited amount of time in which to sell securities to investors and meet its offering levels. This offering period is a maximum of eighteen months, with the possibility of two six-month extensions. During this time, the immigrant will choose an approved business or fund by initially looking at the list distributed by the federal government. After an eligible business or fund is contacted, the prospective investor must receive a copy of the offering memorandum before the investor agrees to make the minimum investment. This allows the investor to have access to the same data that was available to the government and make an informed decision about the investment proposal. It also allows the immigrant to be fully aware of his legal rights, since each offering memorandum must contain a statement of the investors’ contractual and statutory rights of the province in question. In addition to reviewing the offering memorandum, the immigrant would review the approved business or fund’s promotional material and would take into account the province where the investment is located, the reputation of the business or fund, the advice of independent financial and legal consultants, and the business or fund’s sales and marketing agents who promote the opportunities abroad.

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71 Program Guidelines 1993, supra note 46, at 8.
72 Id. at 11.
75 Program Guidelines 1993, supra note 46, at 9.
After an investor chooses the approved business or fund the immigrant must invest the minimum investment for a five-year minimum holding period. This minimum holding period begins on the date that one hundred percent of the immigrant’s investment is invested in the active business operations of an eligible business.\(^7\) This time requirement was implemented to ensure that the investor’s money is truly invested, that is, irrevocably committed to the project, not just being held by the fund while other immigrants are being solicited.\(^8\) To this end, all minimum investments must be held by an escrow agent until the minimum offering is met and the investment is ready to be made into a business operation.\(^9\) This procedure creates an audit trail which is useful in the monitoring of approved businesses and funds.

If the investor’s application for business immigration is rejected (for medical or security reasons, for example), the approved business or fund must return the investor’s money within ninety days of notice of such rejection.\(^10\) Also, if the approved business or fund’s minimum offering is not met by the end of the offering period, all investors’ money must be returned or transferred to another approved business or fund (at the investor’s discretion) within thirty days.\(^11\)

Prior to the 1993 regulatory changes, only limited provisions were outlined in the federal Guidelines that would take effect when the investor Guidelines were breached or knowingly contravened. Primarily, the only action available was the business or fund’s suspension from the Program. Under the pre-1993 Program Guidelines, the federal government would reconsider its approval given to the suspect investment proposal and to any other projects which the original business or fund’s owners, promoters, or associates were involved.\(^12\) During this investigative period, the government’s approval of the business or fund in question could have been suspended.\(^13\) If suspension occurred during the time when the fund

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\(^7\) PROGRAM GUIDELINES 1993, supra note 46, at 7.

\(^8\) Regulation 9(3) states that any investment may have a condition that it be refunded if the immigrant is not granted an immigrant visa. This is the only condition that does not negate the irrevocable aspect of the investment commitment. Any other provision for a refund would render the investment commitment revocable [and the investment would be in violation of the Program requirements].

EMPLOYMENT AND IMMIGRATION CANADA, IMMIGRATION MANUAL, in PAC. RIM INVESTMENT & BUS. IMMIGR., supra note 2, at 1.1.14.

\(^9\) PROGRAM GUIDELINES 1993, supra note 46, at 7-8.


\(^11\) PROGRAM GUIDELINES 1993, supra note 46, at 10.

\(^12\) IMMIGRATION CANADA, GUIDELINES FOR THE IMMIGRANT INVESTOR PROGRAM 9 (1991).

\(^13\) The Minister could have suspended approval, for example, if the approved
or business was still soliciting investors, no further marketing activity or subscription could have been undertaken until the breach was resolved.\textsuperscript{84}

If the government rescinded its acceptance of the investment proposal, all investment funds were to be returned to the investors who could invest in another business or fund of their choice. Suspension could have been lifted at the Minister's discretion if certain terms and conditions were met by the suspended fund or business. Independent of the government's decision regarding withdrawal of project acceptance, investors had rights of rescission pertaining to "material misrepresentation or non-disclosure of a material fact."\textsuperscript{85} Investors who wished to exercise this right of withdrawal or rescission needed to notify the government in writing to arrange for a transfer of their investment money to another approved business or fund.

Recent improprieties, particularly in Manitoba, have lead to much needed governmental attention being focused on these inadequate enforcement and monitoring provisions.

V. MISMANAGEMENT OF INVESTMENT PROJECTS IN MANITOBA

On August 18, 1992, the province of Manitoba hired the accounting firm of Deloitte & Touche to perform an audit review of the Program as it was operating in Manitoba.\textsuperscript{86} This full program audit's objective was conducting a comprehensive review of investment offerings to determine the level of compliance and the amount of economic benefit accruing in the province.\textsuperscript{87} After an initial report issued on December 30, 1992,\textsuperscript{88} Manitoba's Department of Industry, Trade and Tourism requested additional in-depth reviews of five syndicated funds and business venture projects\textsuperscript{89} and on January 4, 1993, placed a moratorium on provincial

\textsuperscript{84} \textit{Immigration Canada}, supra note 82 at 9.

\textsuperscript{85} \textit{Id.} at 8.


\textsuperscript{88} \textit{Id.}

\textsuperscript{89} The audit was performed by Deloitte & Touche regarding: (1) The Winnipeg Ramada Renaissance Hotel Limited Partnership; (2) The Bison Fund of Manitoba, Ltd.; (3) The Canadian Maple Leaf Fund (Manitoba) Ltd.; (4) WinnInvest Capital Corporation, WinnPacific Capital Corporation, & WinnFuture Capital Corporation; and (5) Hotel
acceptance and processing of any offerings under the Program.

Manitoba's Department of Industry, Trade and Tourism Minister Eric Stefanson announced that this action was in response to the auditor's report which called for "clearer definition of the roles and responsibilities of the federal and provincial governments with respect to the review, compliance, and monitoring of the program." The problems identified in these projects include: related party transactions, embezzlement, misrepresentation of material information, and non-compliance with foreign securities laws. These problems are worth studying as they are representative of the types of situations which occur across Canada and which new immigration regulations aim at correcting. Improprieties in Manitoba are emphasized because more empirical data is available on projects in that province, due to the Deloitte & Touche Program audit, than on similar cases of mismanagement in other locations.

A. Related Party Transactions

The audit uncovered a significant number of problems concerning related party transactions. In particular, the auditors found that a signif-

Executive Centre (International I) Limited Partnership, Hotel Executive Centre (International II) Limited Partnership, & Lakeview Airport Executive Centre Phase II. Deloitte & Touche, Summary Report, supra note 86, at index.


See generally Deloitte & Touche, Summary Report, supra note 86.

One federal audit of the Program's operation during 1986-1989 found that nearly one-third of the investors had personal knowledge of abuse associated with their funds; more than two-thirds had heard of such problems; and less than half were pleased with how their money was managed. Audit by Ernst & Young (Nov. 1992) cited in Kirk LaPointe, Federal Auditor Finds Start-up Flaws in Immigrant Investor Program, GAZETTE (Montreal), Dec. 20, 1993, at A9.

Deloitte & Touche, Final Summary Report, supra note 86, at 8-10, 15. Such accusations were made against Canadian Maple Leaf Financial Corporation of Vancouver (CMLF), a specialist corporate finance company and the largest of Canada's immigrant investor fund managers. Listed on the Toronto Stock Exchange, there are currently divisions of CMLF in several provinces, including Canadian Maple Leaf Fund (Manitoba) Ltd. which was the focus of this audit's investigation. CMLF received provincial approval on August 30, 1988, and attained federal acceptance on November 18, 1988. It subsequently received subscriptions from a total of 232 investors each contributing $150,000 each, totaling $34,800,000. Because twenty-one immigrants failed the visa application, the total amount of investment money available for investment was $31,650,000. Provisions were made for the issuance of retractable preferred shares, common shares, or junior preferred shares of CMLF stock to investors. Deloitte & Touche, CMLF, supra note 68, at 2-6.
icant number of investments were made in companies in which fund directors had a personal interest. As the report stated, "[r]elated party transactions put a great degree of responsibility on the board of directors to ensure that they conduct proper due diligence and evaluation to adequately discharge their fiduciary responsibility as to the appropriateness of the transaction." Fund managers did not meet this level of scrutiny. The auditors also discovered that short-term investment funds were not invested in Canadian chartered banks as is required. Rather, the money was placed in private investment companies whose shareholders included the fund managers.

B. Embezzlement

It was found that interest income earned on short-term deposits was not regularly credited to the fund. On numerous other occasions, auditors discovered that fund managers were diverting money from proper investment avenues. Some fund managers were also found to be receiving excessive management fees. In one case, the offering memorandum provided for a management fee of two and one-half percent of the fund's "net asset value," which is the fund's assets less its liabilities. Auditors found that management fees were actually paid based upon gross subscriptions received, as opposed to net asset value. For one fund manager, this resulted in an overpayment of $9,534 in just the first six months of 1992.

94 Deloitte & Touche, CMLF, supra note 68, at 25-29.
95 Id. at 31. In the case of CMLF, because three of the five directors are appointed by the fund manager, there is a great potential for conflict of interest or perceived conflict of interest. Id. It was recommended that multi-million dollar funds that offer shares to investors should be held to the same standard as widely held public corporations: shareholders should elect board members without restrictions by the management and the number of independent directors should be adequate in number to ensure the interests of the shareholders are protected. Id. at 31-32.
96 While 70% of investment funds must be invested in active business within nine months of the investment being made (this is the so-called 70% Rule), 30% of the Fund's residual investments may be maintained, instead, as short-term instruments issued by Canadian chartered banks as liquid investments. PROGRAM GUIDELINES 1993, supra note 46, at 6.
98 Id. at 19.
99 Id.
100 Id. at 20.
101 See id. at 20-21. One fund in Saskatchewan refurbished a landmark hotel with
Auditors also uncovered discrepancies as to the cost of certain projects. Most notably, such problems were linked to the Winnipeg Ramada Renaissance Hotel Limited Partnership, which was marketed as a specific business venture for a proposed hotel development. Although the offering memorandum listed the cost of hotel completion as $21,930,000, the official architect indicated the budget to be only $13,142,000. The business managers explained that the difference of $8,788,000 was for “overhead costs” that would be incurred during the three-year period it would take to complete the project. No definition of “overhead costs” was ever provided per the auditors’ request, which led them to conclude that the business did not comply with the terms of its offering memorandum. In addition to these violations, the auditors also uncovered cash deficiencies, non-compliance with material contracts, and the co-mingling of funds from the limited partnership with those from the investors’ escrow account.

C. Misrepresentation of Material Information

Auditors found that a number of Manitoba’s funds were under the undisclosed control of one entity, Lakeview Group of Companies (Lakeview), which created concern regarding possible breach of fiduciary duty towards investors. Fund managers explained that Lakeview and
its marketing organization helped enable other funds to obtain the number of subscribers needed to meet the minimum offering level. The problem with this, however, was that an agreement was made without the knowledge of the investors which enabled Lakeview projects to have the first option to use investment funds raised. This caused investment projects to fraudulently differ from the stated objectives in the offering memorandum and marketing information.

In one case, the offering memorandum clearly stated that the focus of investments would be on manufacturing or processing and technical research and development. But, in reality, eleven percent consisted of investments in new company financing, while eighty-nine percent of investments were placed in real estate projects. Additionally, marketing information indicated that the proposed portfolio makeup would consist of “73% of Available Funds in Government Secured Investments & Mortgage-Backed Investments” and “27% in Equity Ownership of Quality Real Estate” which falsely suggests that a large portion of the portfolio would be invested in highly secured investments. This marketing information also identified certain hotel projects as potential investments which were already approved for another immigrant fund, and therefore would not be available for investment by that particular fund. These misrepresentations of material information clearly circumvented Program Guidelines.

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were not fully paid due to foreign securities regulations) who invested $150,000 each, with fully paid capital available for investment of $9,750,000. Deloitte & Touche, *Bison Fund*, supra note 97, at 2.

107 See id. at 15.

108 Other problems related to relationships between the Bison Fund and Lakeview were a lack of legal documentation and registration for Lakeview investments and the fund manager’s failure to act separately from Lakeview. Loans were given at below market rates. No due diligence was performed on Lakeview projects and no follow-up or monitoring was performed regarding utilization of funds given to Lakeview projects. *Id.* at 16-18.

109 *Id.* at 3.

110 *Id.* at 15.

111 *Id.* at 20.

112 One project listed was the aforementioned Ramada Renaissance Hotel. *Id.*

113 *Id.*

D. Non-Compliance with Applicable Foreign Securities Laws

The auditors also found that certain immigrant-funded businesses were not in compliance with applicable foreign securities laws. Federal statistics show that during 1992, as in previous and subsequent years, the top three sources for business immigrants were Hong Kong, Taiwan, and South Korea. While applicable security regulations vary depending on the country involved, fund managers are responsible for abiding by the security regulations of the countries in which they market the project.

In Taiwan, as long as the offering is marketed privately, no securities approvals are required. "However, the funds must come from outside Taiwan, otherwise the offering may be in contravention of monetary exchange regulations, the consequences of which are severe." In other countries, such as South Korea, domestic regulations do not allow transfer of the investor's money until a visa is issued. This is problematic, because as previously noted, visas for an immigrant investor will not be issued until the minimum investment has been irrevocably committed to an approved project.

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115 These problems were associated with Lakeview's Winnipeg Ramada Renaissance Hotel Limited Partnership. Deloitte & Touche, Ramada L.P., supra note 102, at 2-4.
116 PROGRAM STATISTICS 1993, supra note 67, at schedule III. Hong Kong and Taiwan, the top two sources, accounted for 83.5% of immigrant investors. Id.
117 PROGRAM GUIDELINES 1993, supra note 46, at 1.
119 Deloitte & Touche, Ramada L.P., supra note 102, at 16. In practice, after a potential Korean immigrant investor has met all applicable security, medical, and selection criteria, the Canadian Embassy in Seoul issues a letter stating same. The applicant then takes this letter to the Korean Ministry of Foreign Affairs, at which time permission is granted for the applicant to exchange Korean won for Canadian dollars for the amount of the investment. After the investment has been made, the Canadian Embassy issues the visa. Letter from David L. Thomas, The David L. Thomas Law Corporation, Vancouver, B.C., a firm specializing in immigration law, to James DeRosa (Mar. 1, 1995) (on file with author) [hereinafter Letter from David L. Thomas].
120 PROGRAM GUIDELINES 1993, supra note 46, at 3. See infra note 54. In Quebec, there is the possibility of an investor pledging an investment to a bank and immediately borrowing up to 80% of the amount of his investment. In effect, the client may have access to the 80% by paying the difference between the investment return and the bank's interest charges. This method is particularly appealing to South Koreans because of their domestic restrictions. Questionnaire completed by David L. Thomas (Mar. 21,
Hong Kong has enacted the most stringent regulations affecting the marketing of foreign securities. Pursuant to the Code on Immigration-Linked Investment Schemes Intended to be Advertised or Offered to the Public,\textsuperscript{121} enacted in March 1990, any offering that is marketed in Hong Kong must be approved by the Hong Kong Securities and Futures Commission (SFC).\textsuperscript{122} This Code sets out and explains the policy and criteria which is applied by the SFC for the authorization of "documentation which advertises or offers to the public immigration-linked investment schemes."\textsuperscript{123} In addition to full disclosure of all material facts,\textsuperscript{124} the auditors noted that the SFC also requires that 91.3753 percent of all Hong Kong immigrant investors' funds be held in trust under the control of a trustee pending construction of the project.\textsuperscript{125} This money can only be withdrawn from the account by the promoter "as costs are incurred on the project and such withdrawals are subject to certification by the project architect as to the percentage of completion of the project."\textsuperscript{126} These Hong Kong regulations were clearly violated by certain fund managers.\textsuperscript{127}

\textsuperscript{121} \textit{Securities \\& Futures Commission, Code on Immigration-Linked Investment Schemes Intended to be Advertised or Offered to the Public} (Mar. 1990) [hereinafter SFC Code] (this code was enacted pursuant to section 4(2)(g) of the \textit{Protection of Investors Ordinance}).

\textsuperscript{122} Id. at i.

\textsuperscript{123} Id. at i.

\textsuperscript{124} The SFC scrutinizes the details of a fund's marketing information to ensure adequate disclosure of relevant information in the scheme's documentation. It does not address, nor could it address, the quality or merits of the schemes from an investment point of view. If the fund is small enough, the SFC will not investigate it. After the initial approval, there is no monitoring of the fund or the fund's compliance with Hong Kong's securities laws. See id. at 12. See also Telephone Interview with Eric Wai, partner in the law firm Curtis, Mallet-Prevost, Colt \\& Moslé, Hong Kong (Feb. 28, 1993) [hereinafter Wai Interview]; Securities \\& Futures Commission, \textit{Press Release: SFC Warning on Immigration-Linked Investment Schemes, in PAC. Rim Investment \\& Bus. Immigr. 3.1.09} (Continuing Legal Education Society of British Columbia, 1989) [hereinafter SFC, \textit{Press Release}].

\textsuperscript{125} Deloitte \\& Touche, \textit{Ramada L.P.}, \textit{supra} note 102, at 4.

\textsuperscript{126} Id.

\textsuperscript{127} In light of this regulation, the Lakeview business promoter was obligated to transfer $9,594,406 (91.3753\% of Hong Kong investor's money) into a "Payment and Administration Account" under the control of a trustee. However, only $7,440,790 was
Such foreign security regulations were enacted upon the realization that the primary objective of investors is not investment, but emigration from their home countries and that the primary objective of the promoters and managers is to raise capital for investment, not the ultimate immigration by investors. This reality, coupled with each country's lack of extraterritorial application of its security laws and a nearly unchecked opportunity for personal monetary gain, lead to such abuses in the Immigrant Investor Program.

E. Summary

Deloitte & Touche concluded that the Program Guidelines “do not clearly define the promoters' and developers’ obligation to disclose (to investors) all financial benefits accruing to them, including recoveries of expenses and overhead costs, and transactions with the fees earned by related parties.” Additionally, the auditors stated that “[t]he investor has no assurance that the project costs incurred were reasonable and in accordance with the offering memorandum. There is no final accounting required as to the promoter’s fees, expense and overhead recoveries, profits, and transactions with related parties.”

As a result of these findings, the province of Manitoba announced in late May 1993, that it would completely withdraw from the Program until sufficient program reforms were enacted. This withdrawal came after Bill C-86 introduced one set of regulatory changes in February 1993. Additional amendments were expected in August 1993. While Bill C-86 provided the authority to better regulate the Program, including the creation of enforceable offenses and penalties specific to the Program, the Manitoba government recognized that further changes were needed for the Program to be successful.

VI. BILL C-86

The most conspicuous problem with the Program was the failure of legislators to give the Investor category a statutory base. As it will be shown, this meant that no enforceable rights accrued to anyone involved in the Program.
Only a visa officer has the ability to grant a visa and only a port officer can grant landing. Applicable case law shows that these decisions cannot be delegated to another party. Admission decisions by these officers must be based upon considerations enumerated under Section 114(1)(a) of the Immigration Act, such as personal attributes and attainments, demographics, and labor market considerations.

The Investor category, however, was established such that entry was based primarily on the foreigner placing money in a business or fund fostering the development of "significant economic benefit." To afford government supervision, provinces have been the authorities which have approved funds in accordance with their economic priorities. A problem arose, therefore, because an investment in a fund having certain characteristics does not come within the personal attainment category a visa officer must review under Section 114(1)(a) of the Immigration Act. Thus, because this determination which by law must be made by the visa officer was actually being made by provincial authorities, it can be seen that virtually everything about the Investor category was therefore ultra vires.

In addition, because the Program was governed merely by official Guidelines instead of enforceable regulations, no additional obligations could be placed upon fund managers, operators, or promoters to provide specific business information to immigration authorities. There could
be found no authority for the federal government to become involved in the approval of a fund or enter into any agreement to limit its activity.\textsuperscript{139} Greed overwhelmed the investor category in a manner that has been suggested to be similar to the lack of morality created by the Reagan deregulation years in U.S. banking practices; major misrepresentations were made by fund managers, lawyers, consultants, and provincial and municipal officials to fraudulently encourage immigrants to participate in poor business ventures.\textsuperscript{140} Large commissions were earned on each subscription and often the immigrant’s money was never invested into a legitimate business.\textsuperscript{141}

Recognizing that “[a]buse of these programs undermines the public’s confidence in the value and effectiveness of these vital national programs,”\textsuperscript{142} the 1993 regulatory changes finally provided a statutory framework for the Program and established monitoring and enforcement regulations. All previous changes had made the Program less attractive to investors, yet more beneficial to Canada. For example, in 1990, the amount of time an immigrant needed to keep his money invested was raised from three years to the current level of five, as well as raising the minimum investment amount in certain provinces from $250,000 to $350,000.

In tandem with Bill C-86, the first series of amendments came into force on February 1, 1993,\textsuperscript{143} followed by a second set of amendments that went into force on August 9, 1993.\textsuperscript{144} Bill C-86 introduced the most substantial changes to Canada’s immigration law since 1976 when the federal \textit{Immigration Act} was drafted. Notably, Section 114(1)(a) of the \textit{Immigration Act} was amended by section 102 of Bill C-86 (commonly known as the Rotenberg Amendments) which provides explicit statutory underpinnings for the Program. Bill C-86 also converted many of the administrative guidelines contained in the federal Guidelines into readily enforceable regulations, as well as outlined offenses and penalties specific to the Program.\textsuperscript{145} These changes were the fruit of many months of

\textsuperscript{139} \textit{C-86 and the Immigrant Investor Program}, 18 IMM. L.R. (2d) 227, 227-28, Case No. 183a (1993).

\textsuperscript{140} \textit{Rotenberg Questionnaire}, supra note 47.

\textsuperscript{141} \textit{See}, e.g., \textit{David Baines, Police Digging Into Prairie Immigrant Fund, VANCOUVER SUN}, June 11, 1994, at A14.


\textsuperscript{143} SOR/93-44, 1993, C. Gaz. Part II.

\textsuperscript{144} SOR/93-412, 1993, C. Gaz. Part II.

\textsuperscript{145} \textit{Id.} at 3443.
intensive evaluation of the Program and were meant to provide the rigorous regulatory framework needed to protect the integrity of the Program in Canada and abroad. Bill C-86 provides assurances of added transparency of the workings of the approved businesses and funds and improves the protection of Program participants. Approved businesses and funds must submit annual audited financial statements to the Minister, as well as quarterly reports containing particulars of use. Through Bill C-86, the federal government has the authority to conduct an examination of a fund’s business records purportedly to determine that,

Every person who operates, manages or promotes an approved business or fund [ensures] that all records that relate to transactions involving the business or fund are kept in Canada, including the original of all books, papers, documents and correspondence and copies of all electronic data and communications that relate to those transactions.

As this is the only obligation placed on an operator, manager, or promoter of an approved business or fund in the Immigration Act, Bill C-86, or the Regulations, it is worth noting that the powers of examination given to the Minister are far beyond those necessary to ensure that the business or fund is abiding by this one provision. While it has been argued

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146 Id. at 3453-54.
147 Id. at 3443.
148 See id. at 3440-42 (fully outlining in Schedule XI the exact contents required of an approved business or fund quarterly report).
149 "The Minister may conduct an examination of any business or fund approved by the Minister in order to ensure that it is being operated, managed and promoted in accordance with this Act and the regulations." Section 102.001, enacted by § 88 of Bill C-86. The Minister need not conduct an in-depth investigation into all business records, and indeed there is no guidance as to what the Minister should be examining or investigating in the operation of the business or fund. Rotenberg & Lam, supra note 138, at 236.
150 Section 102.003, enacted by § 88 of Bill C-86.
151 Rotenberg & Lam, supra note 138, at 236.
In conducting an examination, the Minister may (a) inquire into the affairs of the business or fund, or of any person who manages, operates or promotes it, and examine (i) any books, papers, documents, correspondence, electronic data, communications, negotiations, transactions, loans, borrowing or payments that relate to the business or fund, (ii) any property or other assets that are at any time held or controlled by or on behalf of the business or fund, (iii) any liabilities, debts, undertakings or obligations that exist, and any financial or other conditions that prevail, at any time, in relation to the business or fund, (iv) any relationship that exists at any time between the business or fund and any person by reason of investments, commissions promised, secured or paid, interest held or acquired, the lending or borrowing of money, stock or other property,
that such regulations impose too harsh a burden on investor funds and businesses, the government apparently wanted to make a strong statement that disregarding the spirit of the Program would no longer be tolerated.

Managers of funds approved after January 31, 1993, who fail to comply with the Immigration Act are subject to the possibility of prosecution. Maximum penalties of fines of $500,000 and imprisonment for five years may now be imposed for specific Program-related offenses. Offenses include: “failure to comply with terms and conditions governing approvals, submitting false information in relation to an application for approval and making misleading representations about an approved business or fund.” Approved businesses and funds must also afford investors all civil remedies available under provincial securities legislation for misrepresentation in an offering memorandum. As previously noted, deceptive fund managers had little to fear before Bill C-86. In the past, fund managers who directly or indirectly abused the program would only lose the right to offer future investment opportunities under the Program. This past practice cannot be seen as a real penalty since dishonest fund managers already made their money; there was no threat of

the transfer, negotiations or holding of stock, interlocking directorates, common control, undue influence or control or any other relationship; (b) required the business or fund, or any person who operates, manages, promotes or audits it, to provide information and explanations, to the extent that they are reasonably able to do so, in respect to the business or fund or of any entity in which it has investment; (c) . . . at any reasonable time, enter and inspect any building, receptacle or place in which the Minister believes on reasonable grounds there is any thing referred to in paragraph (a); and (d) seize any thing that the Minister believes on reasonable grounds will afford evidence in respect of the commission of an offence under this Act.

Section 102.001(2), enacted by § 88 of Bill C-86.

152 "The new investor Regulations constitute an attempt to lock the barn doors after the horse has left. Indeed they are so strict that practical creation and marketing are virtually impossible." Rotenberg Questionnaire, supra note 47.


154 Every person who is guilty of an offence under subsection (1) is liable (a) on conviction or indictment, (i) for a first offence, to a fine not exceeding one hundred thousand dollars or to imprisonment for a term not exceeding two years, or to both, or (ii) for a subsequent offence, to a fine not exceeding five hundred thousand dollars or to imprisonment for a term not exceeding five years, or to both; or (b) on summary conviction, (i) for a first offence, to a fine not exceeding fifty thousand dollars, or (ii) for a subsequent offence, to a fine not exceeding one hundred thousand dollars or to imprisonment for a term not exceeding two years, or to both.

Section 94.6(2), enacted by § 85 of Bill C-86.


156 Id.

157 Id.
IMMIGRANT INVESTOR PROGRAM

prosecution.158

The 1993 revisions also placed restrictions on passive real estate investments. This was aimed at correcting the fact that by 1992, sixty-nine percent of the money invested under the Program was real estate-based.159 In the past, real estate was used to lure investors to a particular province. Some provinces would regularly approve real estate development projects which assured security for the investor, yet provided little or no economic benefit to the province.160 Investment in real estate generally has negligible economic benefit because it largely creates jobs in construction and the low wage service sector which could be financed through conventional sources.161 Land speculation by foreign purchasers also cause public disdain as housing prices rise and retailers and those who rent office space suffer from rising commercial rents due to the escalating price of office buildings.162

To remedy these problems, Bill C-86 established that immigrant investor projects may no longer develop, renovate, or own residential real estate, or invest immigrant funds in commercial real estate property solely for the purpose of deriving lease or rental income, or benefit from increases in property value.163 Additionally, existing commercial real estate property may only be purchased for use in the operation of a business (not for lease or rental income), provided that not more than fifty percent of the subscriptions are used for the purchase.164 In practice, if a project is developed to derive lease or rental income, all Program funds must be used for improvements or construction (not the purchase of land); in the case of the operation of an active business, no more than fifty percent of the Program funds may be used for the purchase of

158 Again, some practitioners argue that the new regulations come too late, saying that those who have abused the system have already made their money and gotten out. Yang questionnaire, supra note 15.

159 Susan Henders & Don Pittis, Hong Kong Capital Flows Into Canada, CANADA & HONG KONG UPDATE, Summer 1993, at 1.

160 For example, one Tier I province approved an investment into an office building which was substantially leased to the provincial government. This assured the investor of a return on the investment, but provided negligible benefit to the province’s economy. Fairey, supra note 60, at 3.2.02.

161 Id.


164 Id. at 3449.
 existing land and buildings.¹⁶⁵

While Bill C-86 transforms the previous Guidelines into enforceable regulations and contains authorizing legislation for the Investor category, such measures in and of themselves are inadequate to correct the type of problems that have become commonplace in the Program.¹⁶⁶ Though an important step, these amendments should have been enacted many years before, along with regulations that addressed several other problem areas. Also, many offerings which have not yet repaid investors will continue to have scandals because these new regulations do not apply retroactively.¹⁶⁷

These amendments fail to protect investors from unscrupulous profiteering in foreign jurisdictions and did not attempt to dispel the common illusion of a government seal of approval on the business or fund. Bill C-86 also does not correct abuses of policy inherent in the Program. In particular, the new regulations do little to ensure long-term benefits to Canada’s economy or increased development of poorer provinces. It also fails to address the overwhelming sense of bureaucratic confusion that has arisen among the provinces and the federal government with respect to the Program. In the following sections, this Note will explore each of these remaining problem areas, concluding that such regulatory changes need to be made before the Program is reinstated in 1996.

¹⁶⁵ PROGRAM GUIDELINES 1993, supra note 46, at 11.
¹⁶⁶ If the Government is really serious about the promotion of risk capital in relation to immigration to Canada, let us have a regulation which sets forth the criteria in plain and simple language. Let us have a wording which can neither obfuscate intent in favour of slick marketing operators nor defeat the innocent who happen to have become involved with the policy in an untimely or different way. Let us not leave commercially vital and expensively prepared material to the whim of whoever it is who happens to be in power at the moment and to the vagaries of bureaucracy.

¹⁶⁷ Section 109 of the Transitional Provisions of Bill C-86 cannot be interpreted as applying to businesses or funds approved prior to January 31, 1993. See Rotenberg & Lam, supra note 138, at 235. “I am of the opinion that unless the government is proactive in its enforcement and auditing [of] the Immigrant Investor Fund, fraud will be a norm.” Questionnaire completed by Mendel M. Green, partner with Green and Spiegel, Toronto (Mar. 25, 1994) (on file with author) [hereinafter Green Questionnaire].
VII. CANADA'S UNEVEN REGULATORY ENVIRONMENT

Competition among the provinces to attract the best immigrants has traditionally been facilitated by the status of Canada's immigration laws. Immigration law is a field of administrative law which is uniquely situated in Canada's federal system.\textsuperscript{165} From as early as the \textit{Constitution Act, 1867},\textsuperscript{169} immigration has been an area that is subject to concurrent federal-provincial powers of legislation, contingent upon federal paramountcy if a conflict between the two arises.\textsuperscript{170} Essentially, the federal government enacts the overall immigration policy and the provinces decide how to best implement that policy and attain its stated goals.\textsuperscript{171} Under the Program, where immigrants are allowed to invest and the way in which the money is invested is within the realm of provincial regulation, subject to a few federal limitations. Each province, for example, has the role of assessing the economic impact of the specific investment proposals.\textsuperscript{172} It is only after the province approves an investment proposal, that it is referred to the federal government for review.\textsuperscript{173} The federal government will then determine whether the eligible business or fund "fosters the development of a strong and viable economy and re-

\textsuperscript{165} There are two fundamental principals of Canadian administrative law. (1) There can be no power or authority exercised by an official without a statutory or a prerogative source, and all grants of power are generally to be narrowly construed. (2) Where a discretion is granted to an official, the courts will not review his decision on its merits, but only to see if he stayed within the bounds of his authority and exercised it in a reasonable manner. GREY, supra note 26, at 1 (emphasis added).

\textsuperscript{169} Constitution Act, 1867, 30 & 31 Vict., ch. 3 (U.K.).

\textsuperscript{170} In each Province the Legislature may make Laws in relation to ... Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time make Laws in relation to ... Immigration into all or any of the Provinces; and any Law of the Legislature of a Province relative to ... Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada. \textit{Id.} § 95.

\textsuperscript{171} YOUNG, CANADA'S IMMIGRATION PROGRAM, supra note 41, at 21.

\textsuperscript{172} Provincial guidelines typically identify preferred economic sectors for immigrant investment. Alberta, for example, encourages investment in manufacturing; tourist facilities; oil and gas ventures; plastics; high technology; forestry; food processing; chemicals; petro chemicals; agribusiness; and value added real estate development. ALBERTA CAREER DEVELOPMENT AND EMPLOYMENT IMMIGRATION AND SETTLEMENT BRANCH, BUSINESS IMMIGRATION PROGRAM, ALBERTA GUIDELINES - INVESTOR CATEGORY, \textit{in PAC. RIM INVESTMENT & BUS. IMMIGR. 3.2.23} (Continuing Legal Education Society of British Columbia, 1989).

\textsuperscript{173} PROGRAM GUIDELINES 1993, supra note 46, at 13.
Not only did the use of this concept of significant economic contribution introduce an unprecedented level of unpredictability as to whether funds would be approved, provincial freedom under the Program heightened competition and induced each province to offer its own incentives to investors. These incentives come in the form of provincial guidelines which are more or less stringent depending upon the type of investor it is trying to attract - those seeking higher returns or those seeking greater stability. As previously noted, however, provinces may not reduce the actual amount of investment by applying governmental subsi-
ment has resulted. Quebec in particular is seen by many as a “back door” to Canada because of its eagerness to attract wealthy immigrants and its unparalleled degree of autonomy in immigration matters. While all provinces have the ability to take concurrent legislative power over immigration under Section 95 of the Constitution Act, 1867, only Quebec has exercised this power and in 1986 established its own ministry for immigration.

In addition to taking concurrent legislative power over immigration, all provinces are also able to enter into agreements with the federal government under the Immigration Act for the purpose of facilitating the formulation, coordination and implementation of immigration policies and programs. Although all provinces except Ontario, British Columbia, and Manitoba have entered into such agreements with the federal government, the Canada-Quebec Accord (which came into effect in April 1991 and replaced the Cullen-Couture Agreement of 1978) gave Quebec unprecedented control over immigration. While other provinces are

dies on top of the immigrant’s investment. In most other respects, the provinces have a broad spectrum of regulatory power. See Fairey, Immigrant Investor Program, in INBOUND INVESTMENT INTO CANADA, supra note 14, at 1.3.09-10. Both the Task Force and the Standing Committee recognize the need to “level the playing field,” so that internal competition does not destroy the Program. See generally INTERIM REPORT, supra note 9; TASK FORCE supra note 9, at 5-10.


This agreement came out of Quebec’s refusal to sign Canada’s constitution because of its concern for Quebec’s ability to preserve its ethnic diversity and uniqueness. Upon the failure of the Meech Lake Accord, this agreement was enacted to accomplish what would have taken place in the area of immigration had the Meech Lake Accord passed. MARAGRET YOUNG, RESEARCH BRANCH OF THE LIBRARY OF PARLIAMENT, BACKGROUND PAPER NO. BP-25E, IMMIGRATION: THE CANADA-QUEBEC ACCORD 1 (1991) [hereinafter YOUNG, THE CANADA-QUEBEC ACCORD].

It expressly allows Quebec to choose its immigrants based on cultural and linguistic considerations alone; it guarantees that Quebec will receive 25% of all immigrants allowed into Canada in any given year [20% derived from Quebec’s share of total Canadian population and 5% to compensate for Quebec’s historic inability to attract immigrants]; and it grants Quebec a one-third share of Canada’s total immigration budget.

able to establish their own guidelines concerning investment proposals, Quebec not only set up its own Program Guidelines, but it also adopted its own regulations governing the Program.\textsuperscript{183}

Although Quebec agreed in an annex to the Cullen-Couture Agreement\textsuperscript{184} to abide by the spirit, if not the letter, of the Program, it nonetheless liberally uses its regulatory power to recruit wealthy immigrants who would otherwise be unable to enter Canada. It can, for example, admit any immigrant who passes the medical and security examinations even if they do not attain the federal government’s minimum point system selection criteria.\textsuperscript{185} Quebec’s independence from the federal government allows investors to obtain their required approval at a fraction of the time than that of other provinces.\textsuperscript{186} Also, some immigrant investors prefer to put money in Quebec because its business immigration program allows more direct control of their money, as well as a guarantee on all investments.\textsuperscript{187} The introduction of Tier III, the $500,000 category to the federal Program, was largely the result of pressure from other provinces for the federal government to compensate for Quebec’s ability to permit risk-free, guaranteed investments under the original $250,000 category.\textsuperscript{188}


\textsuperscript{184} Annex D has been in effect since January, 1990, and was incorporated into the Canada-Quebec Accord as APPENDIX D. PROGRAM GUIDELINES 1993, \textit{supra} note 46, at 2.

\textsuperscript{185} Quebec has developed its own point system for independent immigrants. While Quebec’s point system has many of the same features as the federal system, it differs in many respects. Quebec, for example, liberally rewards immigrants with knowledge of French as well as those who have relatives or friends residing within Quebec with extra points. Young, Canada’s Immigration Program, \textit{supra} note 41, at 21. For more information about Quebec’s authority over other areas of immigration, see generally Young, \textit{The Canada-Quebec Accord}, \textit{supra} note 182.

\textsuperscript{186} Fairey, \textit{Some Realities of the Investor Programme}, in PAC. RIM INVESTMENT \& BUS. IMMIGR., \textit{supra} note 60, at 3.2.05. \textit{See also} Canada, House of Commons, Standing Committee on Labour, Employment and Immigration, \textit{Minutes of Proceedings and Evidence}, Issue No. 18 (11 June 1992), at 18:63-64 [hereinafter House of Commons, Issue No. 18].

\textsuperscript{187} In Quebec, the full investment amount is irrevocably placed in an escrow account with a securities dealer, which allows the investor to manage the portfolio by investing in ventures as desired, within broad guidelines. PROGRAM GUIDELINES 1993, \textit{supra} note 46, at 2.

\textsuperscript{188} Fairey, \textit{supra} note 60, at 3.2.01. What Quebec believed to be the economic benefit from such a guarantee policy is not clear, but Quebec’s investment statistics improved upon implementation. Even in its present form, offerings under the Tier III
The problem with policy differentials between provinces is twofold. First, bureaucratic confusion arises because of overlapping jurisdiction in immigration matters, leading to inaction and inefficiencies. Second, such a scheme serves to frustrate both investors who are unable to predict which "Canadian" immigration law would be applicable and policy makers whose efforts at fostering greater regional economic development and job creation are circumvented by provincial regulations.

VIII. REGIONAL ECONOMIC DEVELOPMENT AND JOB CREATION

The Constitution Act, 1982 emphasizes that Parliament, together with the legislatures and federal and provincial governments, is committed to furthering economic development to reduce disparity in opportunities among the provinces. The Program is one way in which Canada encourages regional development. Bill C-86 failed to correct certain policy abuses that frustrate regional economic development and job creation. This problem can be attributed to inter-provincial competition and, some would argue, to the failure of the tiered investment scheme.

Canadians benefit from Program investment in a number of ways: fund managers receive a fee based on a percentage of the fund’s assets; eligible Canadian businesses get low-cost capital (e.g., term loans below the prime interest rate); people with assets to sell often get a higher price for their companies and real estate; and jobs are created. Incoming category are still most commonly from Quebec. Id.

One recent example was verbalized when consultants recommended to Saskatchewan to “take on more responsibility for monitoring and enforcing program regulations concerning the marketing and investment of funds.” The manager for business immigration programs for that province said “there’s one small problem with that recommendation. It’s a federal matter. We don’t have legal jurisdiction to do anything in the compliance area.” Baines, supra note 14, at 32.


(1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to . . . (b) furthering economic development to reduce disparity in opportunities . . .


For more information about earlier policies concerning regional economic development, see Peter Aucoin & Herman Bakvis, Regional Responsiveness and Government Organization: The Case of Regional Economic Development Policy in Canada, in REGIONAL RESPONSIVENESS AND THE NATIONAL ADMINISTRATIVE STATE 51 (Peter Aucoin ed., 1985).

Deigan, supra note 163, 409-10.
immigrant investors are presenting Canada with a fantastic chance to bolster national economy and spur immense regional growth. Yet, it is questionable how much regional development has actually been attained and how many long-term jobs have been created through the Program. One study raised questions as to the legitimacy of the number of jobs created (claiming one-third less than what the federal government asserted) and the relevancy of government statistics on the amount of investment (claiming that less than half of the investments came into Canada solely as a result of the Program).\textsuperscript{194} Others point to Canada's offshore trust provisions of the \textit{Income Tax Act}\textsuperscript{195} which allow immigrants to circumvent income tax collection on their wealth for up to five years, which deprives the national economy of its intended benefit.\textsuperscript{196} Also, although investments have been made in numerous types of industry, another government study group concluded that a good number of investments were of questionable value and far too many were in real estate ventures.\textsuperscript{197}

While the 1993 amendments prevent further investment in real estate acquisition, monitoring of investments should actively be taken up at the provincial level so that regional agencies can better target growth areas and ensure that investments actually flow into the province to which they are intended.\textsuperscript{198} This appears to be a problem across Canada, especially in Tier I provinces where the amount of money constituting the minimum investment is less. The Manitoba Program auditors, for example, discovered that certain funds made investments outside the province without governmental approval.\textsuperscript{199} In particular, the auditors found that one fund did not initiate any new investments in Manitoba within the fourteen months preceding the audit.\textsuperscript{200} Instead, all projects focused on opportuni-
ties in British Columbia or the United States. During this time, provincial approval had never been formally sought, which allowed for profitable investments to have little effect on the economic development of the intended province.201

The auditors also discovered in an audit of three privately administered investment funds controlled by a single manager, that after several unsuccessful investments in Manitoba, the manager ceased to invest within the province. At the time of the audit, the manager of these syndicates operated out of Ontario and had no representative in Manitoba.202 It is doubtful that significant investment in Manitoba could be achieved under such a system of operation. Provinces should consider requiring fund managers to reside within the province of investment. Also, if the province was obligated to review and provide acceptance based upon the feasibility of the intended economic benefit to the province, it is likely that funds would be maintained and managed within that province. This would enable more investment opportunities to be found that would enrich provincial business growth.203

It has been argued that the Program’s tiered system is at the root of its failure to achieve regional economic gains. A tiered system artificially redirects funds in a manner contrary to market forces, which some argue may not necessarily result in “effective or efficient economic development in Canada of a nature to enable Canada to compete in the world market.”204 But despite possible shortcomings, the tiered system has conveyed vast benefits to certain provinces which otherwise would not have been afforded them. Money from the Program is the largest source of venture capital available in poorer provinces.205 Saskatchewan, for example, with just 1/25th of Canada’s population, was able to attract $464,800,000 in subscriptions between January 1986 and December 31, WinnFuture].

201 Id. In Saskatchewan, as another example, fund managers of International Capital Corp. invested immigrant money in development projects in Malaysia and restaurant chains in the United States. See Baines, Police Digging, supra note 141, at A14.

202 Deloitte & Touche, WinnFuture, supra note 200, at 8.

203 Id. at 32-33.

204 Fairey, supra note 60, at 3.2.03.

205 In 1992, the Standing Committee on Labour, Employment and Immigration recognized that over 90% of development capital available in Newfoundland came through the Program; over 90% in Prince Edward Island; 80% in Nova Scotia; about 60% in New Brunswick; and 70% in Saskatchewan. Canada, House of Commons, Standing Committee on Labour, Employment and Immigration, Minutes of Proceedings and Evidence, Issue No. 14 (8 June 1992) at 14:10 [hereinafter House of Commons, Issue No. 14].
1993, second only to Quebec.\(^{206}\)

Although they receive large quantities of investments, provinces like Saskatchewan are concerned that investors rarely reside outside British Columbia, Ontario, or Quebec.\(^{207}\) More investors living in the province of investment would improve consumer activity which would increase the local tax base. While some advocate that investors should be required to reside in the province of their investment for several years before gaining permanent residency, it appears that this residency requirement may not only be unconstitutional, but could also serve to stop investments into such provinces all together.\(^{208}\) While ninety-two percent of the immigrant investors choose to live in British Columbia, Ontario, and Quebec,\(^{209}\) the structure of the Program channels their money to other provinces. Without the Program, it is likely that investors would invest all their money in the region in which they settle.\(^{210}\)

Another concern is that although investment opportunities have been successfully channeled into poorer provinces through the tiered system, investments tend to focus on metropolitan areas instead of rural zones within those provinces.\(^{211}\) Across Canada, most money is invested in provincial capitals and urban areas, which shows that there is trouble getting funds to poorer, rural regions. This could be remedied by re-orienting tiered investments by regional area, not by province, which would ensure more investment in rural areas.\(^{212}\) It would also be highly recommended

\(^{206}\) PROGRAM STATISTICS 1993, supra note 67, at schedule V.

\(^{207}\) Id. at schedule IV.

\(^{208}\) Chris Varcoe, Selling Saskatchewan: Their Dollars Flow into This Province but Their Bodies Usually Go Elsewhere, LEADER-POST (Saskatchewan), May 21, 1994.

\(^{209}\) PROGRAM STATISTICS 1993, supra note 67, at schedule IV.

\(^{210}\) Policy makers insist that one should not look at the investor category separately, but rather as a complement to the entrepreneur category, providing benefits to those provinces which have not enjoyed high levels of immigration. House of Commons, Issue No. 14, supra note 206, at 14:8.

\(^{211}\) TASK FORCE, supra note 9, at 30. See also Canada, House of Commons, Standing Committee on Labour, Employment and Immigration, Minutes of Proceedings and Evidence, Issue No. 16 (9 June 1992), at 16:8-10 [hereinafter House of Commons, Issue No. 16].

\(^{212}\) TASK FORCE, supra note 9, at 35. Under the current system, for example, the entire provinces of Ontario and Quebec are in Tier II. But under a regional tiered system, Ontario’s eastern and northern regions would qualify as Tier I, as would Gaspe and Lac St. Jean, in Quebec. House of Commons, Issue No. 17, supra note 11 at 17:46. Problems would arise, however, if regions crossed provincial borders because applicable financial legislation is provincially based. Provinces would have to support the fund jointly for such a regional system to be effective. House of Commons, Issue No. 14, supra note 206, at 14:26.
to apply indices of economic disparity to decide if a province should be in Tier I or Tier II, instead of being based on immigrant landings.\textsuperscript{213}

In addition to improving the tiered system, economic development could also be gained by fine-tuning the Program to facilitate an increase in the amount of risk capital flowing to small and medium-sized businesses.\textsuperscript{214} Investment should be encouraged in higher-risk projects. Currently, after an investor has received a return on the investment (generally, three percent) and managers collect their fees (generally, four percent), any remaining profit goes to the investment fund.\textsuperscript{215} This creates an incentive for money to go towards low-risk projects so that the fund can realize a greater amount of money as profits.\textsuperscript{216}

To aid in encouraging investment into higher risk businesses, Tier III investments and Quebec’s guarantees should be eliminated from the Program because while they give the investor confidence in the investment, such guarantees provide little or no economic benefit to Canada.\textsuperscript{217} The following quote is particularly illustrative:

The benefit to the “bank” is not having to deploy funds yet still obtaining a spread and additionally possibly pleasing a high net worth client or potential client. The benefit to the Investor is that he is fully secured. The effect on the borrower is absolutely neutral or may result in a slight saving in that the Investor may provide funds at a slightly lower cost than a “bank” due to the privilege of the visa. The benefit to the province or Canada is obscure. No new economic activity is created. The province does not even necessarily benefit from having the Investor reside and invest other funds within the province as of course mobility throughout Canada cannot be restricted.\textsuperscript{218}

\begin{thebibliography}{9}
\bibitem{213} Id.
\bibitem{214} \textit{Deigan}, supra note 163, at 410.
\bibitem{215} Fairey, \textit{supra} note 60, at 3.2.01-03.
\bibitem{216} Id.
\bibitem{217} \textit{Task Force}, \textit{supra} note 9, at 53-54. \textit{But cf.} \textit{Interim Report}, \textit{supra} note 9, at 17-18. As Steven Green, Member of the Business Immigration Committee of the Canadian Bar Association (Ontario) emphasized:

\begin{quote}
I submit that you have to look to the practicalities. The practicalities of today’s market state that we need third-party guarantees. The United States of America has now entered this game; Australia is in the game; Singapore is in the game. People are looking elsewhere. Perhaps before, Canada was the only alternative. Few countries provided this type of program and now everyone’s in the game. I submit to you that third-party guarantees are important, that in practical fact there are third-party guarantees and people have been able to get around them.
\end{quote}

\bibitem{218} Fairey, \textit{supra} note 60, at 3.2.01-02.
\end{thebibliography}
The majority of investment subscriptions have gone to Quebec because of its ability to offer secured investments. It is unfortunate that the provinces which have abided by the spirit of the Program and used it as a source of capital in sectors of the economy where capital is scarce, have in effect been penalized because investors are able to choose less risky ventures in Quebec.219

IX. THE "SEAL" OF GOVERNMENT APPROVAL

The 1993 regulations provided further assurances of protection of Program participants and added transparency of the workings of the Program. But, some practitioners insist that by merely codifying the Guidelines, the same loopholes exist for unscrupulous marketing techniques.220 It is argued that as the Program is becoming more ingrained in Canada's immigration program, "it is being upgraded philosophically, but Canada is not concurrently increasing regulations."221 One reason perhaps is public misperception of the Program's problems.

Contrary to public perception, immigrant investors are protected from fraud and misrepresentation as well as, if not better than, Canadian investors.222 There are only two notable exceptions which give immigrants less protection than resident Canadian investors. First, many investors are solicited "blind pools" where the investor does not know how the money will be invested. This practice is not permitted under most provincial securities laws except with regard to mutual funds.

219 Thomas Questionnaire, supra note 120. As Member of Parliament Simon de Jong (Regina - Qu'Appelle) remarked before the Standing Committee on Labour, Employment and Immigration:

What I'm hearing is that Ontario hasn't been able to sell full investment funds since 1990. You have been playing it very conservative, very straight, no special little bells and whistles and come-ons and suggestions of guarantees and so forth, and others have not. . . . Others have a lot of the pie and you're not getting anything. Basically what you're saying is, hey, let's straighten this out.

House of Commons, Issue No. 17, supra note 11, at 17:76. Because of political sensitivity towards the Province of Quebec, no action is likely to be taken by Ottawa to level the playing field among provinces.

220 Wai Interview, supra note 124; Green Questionnaire, supra note 168.

221 Wai Interview, supra note 24.

222 Questionnaire completed by Peter D. Fairey, partner with McCarthy & Tétrault, Vancouver, B.C. (Mar. 21, 1994) (on file with author) [hereinafter Fairey Questionnaire].

One notable exception is Alberta, which lists blind pools on the Alberta Stock Exchange (ASE). These blind pools, called junior capital pools, were first introduced to the ASE in 1986. Canada: ASE "Blind Pool" Successes Outweigh the Scams, Flops, FN. POST Oct. 15, 1990, at P13.
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for which there are vigorous rules to prevent abuse.\textsuperscript{224} The second exception relates to the fact that marketing takes place in jurisdictions outside Canada. This is a problem because the Canadian government is unable to apply its domestic security laws extraterritorially. While it has been shown that countries like Hong Kong have enacted laws to regulate marketing activity, they cannot effectively regulate how the money is used once the investor has decided to invest. Ultimately, however, problems arise because neither the Canadian government nor the foreign investor's government reviews the economic feasibility of a given project.

Most immigrant investors encounter difficulties because they have entered into poor business contracts. Often, the fund or business manager will have done exactly what he represented he would do in the offering memorandum, but because of high commission and management fees, and because of other disclosed factors, success of the project was never likely to be achieved.\textsuperscript{225} When money is lost in this fashion, there is no actionable negligence involved. While immigrant investors may appeal to the fairness of this situation, these circumstances are similar to resident Canadian investors who have not carefully analyzed the business terms under which they have invested. With proper counsel, such foolish business decisions could have been prevented.\textsuperscript{226} Another possible way to prevent this situation would be for the Canadian government to impose a cap on the amount of commission an agent can earn, so that an investment will be sold on its merits not the kick-back received.\textsuperscript{227}

Prospective investors get inundated by the promotional activities of the business or fund in their home country. Seminars are often held by investment dealers in Asia to outline the Program and possible investment opportunities.\textsuperscript{228} These seminars, however, often focus on a sales pitch for Canada itself, including emphasis on Canadian lifestyles, political climate, homes, education, and scenery rather than the fine print of the

\textsuperscript{224} Fairey Questionnaire, \textit{supra} note 222. \textit{See} Haslam v. Haslam, 114 D.L.R. 4th 562 (Ont. 1994) (emphasizing that only certain federal acts allow for investment in mutual funds and that these investments can only be made by institutions that are subject to governmental regulation).

\textsuperscript{225} Fairey Questionnaire, \textit{supra} note 222.


\textsuperscript{227} Thomas Questionnaire, \textit{supra} note 120. The range of an agent's fee is between $3,000 and $18,000 per subscription secured. House of Commons, Issue No. 15, \textit{supra} note 36, at 15:31.

\textsuperscript{228} Gordon Jaremko, \textit{Fresh Start: Jim Louie's Passion is to Ensure Everything's on the Up-and-Up When Immigrant Investors Come to Canada}, CALGARY HERALD, Sept. 13, 1993, at Cl.
Potential immigrants are also often not told the specifics of Canada's immigration laws, such as the strict law that permanent residency will be lost if the person resides outside of Canada for more than 183 days per year. Overall, there seems to be a lack of governmental responsibility attached to the marketing of investment opportunities because of the inability of its laws to apply extraterritorially. It has been the Canadian government's presumption that prospective investors are knowledgeable business people. As such, it is believed that the requirement of complete disclosure of material facts in the offering memorandum allows the investor ample opportunity to attain all relevant information.

The problem is that because the Canadian government gives each available business or fund its initial approval, many investors look no further. Immigrants often do not realize that this approval carries no weight with it. Investors are under the "illusion that the programs are very 'safe' since they are government-approved (or worse still that they are 'guaranteed' by the Federal Government)." Despite the media exposure that has been centered on mismanaged investment opportunities, many investors still believe that because the investment is governmentally approved in Canada, there is no need to have investment counsel determine the economic soundness of the project.

One of two options needs to be enacted for the Program to effectively neutralize the persistent illusion of a governmental seal of approval: (1) the government could discontinue looking at the investment proposals and cease to give its approval to funds; or (2) the government could continue to give its seal of approval, yet begin regulating the Program more efficiently. The United States has chosen not to regulate its Investor's Visa Program. It is the American belief that market forces take care

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229 Id.; House of Commons, Issue No. 17, supra note 11, at 17:49.
230 This comes in part from the uneven regulatory scheme which has developed through Canada's overlapping provincial and federal authority. The provincial governments insist it is the federal government's responsibility, but the federal government does not have the expertise to police the funds for immigrant investors. Kentridge, supra note 179, at 47.
232 Yang Questionnaire, supra note 15.
233 The prevalence of this illusion is seen by the Hong Kong Securities & Futures Commission's warning to Hong Kong citizens in 1989: "The fact that a government or regional authority in an overseas country has approved a scheme for linkage to immigration does not necessarily indicate that the investment itself has been subjected to detailed scrutiny by that Government or authority." SFC Press Release, supra note 124, at 3.1.09.
234 See generally Robert L. DeMoss II, Citizenship for Sale or Incentive for
of problems such as misrepresentation and fraud. In the United States, fund managers present an offering memorandum and investors take it to their financial advisors who look at its legitimacy. Investors do not automatically assume that the project is good, because it carries no governmental approval. Market forces could similarly eliminate problems with the Canadian program.

If, however, Canada chooses the second option and continues to approve investment opportunities, Bill C-86 was not enough to make the Program run effectively. Changes that should be targeted include the enactment of off-shore monitoring and regulations. It would not be advisable to prohibit marketing activity from occurring abroad, because it is unlikely that many of the prospective investors would travel to Canada to choose an appropriate investment. While it would be difficult for Canadian policy makers to protect investors extraterritorially without harming the marketing efforts of Canadian businesses or funds, some protection is needed.

The government needs to analyze its options because as the Program is currently structured, it appears that on ethical and moral grounds, or perhaps implied contract theory, the government should be responsible for its approval of the projects. As one investor in Western Canadian asserted, "[t]he government was not responsible for our loss, but we feel the government had an obligation to ensure the honesty of the fund’s management."

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235 Wai Interview, supra note 124.
236 Id.
237 Fairey Questionnaire, supra note 223. Others insist that if investors were given conditional visas allowing entry for several months in order to find an appropriate investment (based upon the system used for entrepreneurs), participants would still invest and all marketing strategies would be under Canadian control. House of Commons, Issue No. 15, supra note 36, at 15:24.
238 Wai Interview, supra note 124. Cecil Rotenberg has remarked, "[i]s government liable? . . . They sure are. Anybody with gumption enough to sue them should be able to recover." Reiman, supra note 76, at 54. See also Kentridge, supra note 179.
239 Swardson, supra note 11. In another situation, the federal government approved the amendment of an offering memorandum to permit the immediate release of funds, instead of waiting until all subscriptions were made and visas were issued for all investors. Investors were never told of this change, which led one investor to note that "an immigrant investor program without the contingency of the issuance of the visa is just a regular investor program. . . . Your branch owes investors an explanation on why your branch made such an approval and what was the back-up to protect investors.
The outcome of such suits would depend upon which grounds the investors are suing. Most arguments, such as failure to perform proper due diligence before approving funds, are likely to fail because when these projects are approved, the federal and provincial governments require the signing of a waiver of government responsibility. "It is a buyer beware situation essentially, and the compliance with the full disclosure documentation should be sufficient for the sophisticated investor." There may be other grounds upon which to bring suit. Recent cases unrelated to the Program indicate that investors might be successful under a claim of breach of statutory duty.

One might query why there are no law suits against the government and few suits against funds and/or fund managers. Before Bill C-86 there were no regulations that could be enforced. Also, it must be remembered that an immigrant has an overriding concern of getting a visa and becoming a permanent resident. If one's money is still in escrow because the minimum offering has not yet been met or because it has been frozen due to a governmental investigation, a visa has not yet been issued. Only after the immigrant receives residency are lawsuits likely to be brought. Another problem for troubled investors is that the Canadian Privacy Act does not permit the government to release the names of other investors in the same fund. This is considered financial information that must remain confidential after disclosed to the government by the fund managers. This law thus frustrates an immigrant's ability to


240 As Member of Parliament, Simon de Jong (Regina - Qu'Appelle) postulated before the Standing Committee on Labour, Employment and Immigration, "[c]an the investors . . . then take the government to court, saying that due diligence has not been observed, that the immigration department has only six people, totally inadequate? They are rubber-stamping [these investment funds]." House of Commons, Issue No. 16, supra note 212, at 16:26.

241 Id. at 16:27. But "not even a sophisticated investor can protect himself from a lie. And it's not completely a caveat investor situation because there is federal and provincial approval." Kentridge, supra note 179, at 48.

242 Consider the implications of Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans) (T.D.) 3 F.C. 54 (1992) and Kealey v. Canada (Attorney General) 1 F.C. 195 (1992), where the government was held liable on the theory of breach of statutory duty.

243 PROGRAM GUIDELINES 1993, supra note 46, at 3. The suit involving Western Canadian was brought after most investors had received their visas and were assured that the suit would not affect their immigrant status. Yeung Interview, supra note 11.

244 Wai Interview, supra note 124.


246 Thomas Questionnaire, supra note 120; House of Commons, Issue No. 15, supra
bring an effective class action suit, which while not the fault of the Program’s drafters, is nonetheless a concern for potential investors that should be recognized.

Even if investors do not find adequate grounds to bring suit against the government, federal and provincial governments should recognize a moral obligation to improve the Program so that Canada’s credibility in the international market is strengthened. The Program should not merely “sell” visas to unwitting immigrants. Rather, money should be placed into fair investments that will give the immigrant a return on the investment and a favorable impression that would facilitate future business transactions in Canada. If handled properly, the immigrant’s investment would be the first, not the last, investment made in the Canadian economy.247

X. CONCLUSION

When the investor category was created in 1986, it was anticipated that capital would be channeled into Canadian businesses, jobs would be created, and provincial industrial and economic development would be increased, thereby fulfilling one of the primary objectives of Canada’s immigration policy: “to foster the development of a strong and viable economy and the prosperity of all regions of Canada.”248 Assuredly, these goals have been achieved to a certain extent and Canada has benefitted from the Program. Federal statistics show that immigrant investors with personal funds totaling $6.8 billion - the highest amount on record - came into Canada in 1993.249

Although investors and their dependents accounted for only five percent of all immigrant landings in 1993,250 the economic impact they provided is obviously considerable. From the Program’s inception in January 1986 to December 31, 1993, Quebec has received the largest share of investment, at 30.7%; Saskatchewan received 20.5%; British Columbia received 11.8%; and Manitoba received 9.7% of the total distribution of subscribed funds.251

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247 “That’s what this program is really all about. It’s a short-term economic development financing program, but it should be a long-term trade and investment linkage program for Canada and for the rest of the world.” House of Commons, Issue No. 18, supra note 187, at 18:16.


249 PROGRAM STATISTICS 1993, supra note 67, at schedule I. The amount of money is calculated as “the total amount of money the family has available for settlement in Canada and for the rest of the world.” Id.

250 Id.

251 Id. at graph IV. Nova Scotia received 7.5%; Prince Edward Island 5.4%; Ontario
Since the Program’s inception, Canada has attracted investments totaling more than $2.25 billion and the government estimates that the Program created approximately 14,300 jobs by December 31, 1993. Garment factories, jewelry stores, hotels and other hospitality developments, electronics companies, plastics plants, motion picture distribution companies, fish-processing plants, horse-breeding farms, and film processing shops are just a sampling of the approved businesses into which immigrants have invested - all of which increased provincial economic growth and helped create diversification from provincial single commodity economies. Important intangible benefits also flow from this program. People come to Canada with a unique knowledge of international business and foreign languages and cultures that add a new dimension to how Canadian businesses operate in a global economy. In addition to money invested through the Program, it has been estimated that each investor typically has a net worth of two million dollars for personal use in such expenditures as homes, cars, securities, or businesses. With the possibility of such a large influx of new capital, it is understandable why keen competition has developed among provinces to attract immigrant investors.

High profile cases of mismanagement have made nations around the world aware of Canada’s Investor category for business immigration. The shortcomings of the Canadian system have been laid bare, but the potential for great economic benefit is also obvious. Questions are now being asked about the Program which need to be answered for Canada. These Program changes will undoubtedly become the centerpiece of political discussions in countries which have recently enacted business immigration programs, such as the United States and Mexico, as well as nations such as Australia and New Zealand with already well-established investor programs. It is important for Canada to improve the attractiveness of

4.8%; Alberta and New Brunswick each received 3.7%; Newfoundland 2%; and Yukon/Northwest Territories received 0.2% of the total distribution of subscribed funds. Id. at schedule V.

252 Id. at schedule V.
253 Id. This figure does not include jobs created in the province of Quebec.
254 See generally DERMONT & FENNELL, supra note 35. Specifically, 33.8% of investment went into the accommodation, food and beverage service industry; 21.6% in the construction industry; 13.9% in the manufacturing industry; and 7.8% was invested in the finance and insurance industry. Quebec totals were not included in these percentages. PROGRAM STATISTICS 1993, supra note 67, at schedule VII.
255 DERMONT & FENNELL, supra note 35, at 20.
257 House of Commons, Issue No. 17, supra note 11, at 17:93.
258 Interim Report, supra note 9, at 5. For comparison on the U.S. and Australian
the Program to ensure its longevity in an increasingly competitive international market. As the House of Commons interim report concluded, "The Program represents an enormous economic development opportunity for Canada. Rather than abandoning or stifling the opportunity due to difficulties in its realization, there is an obligation to address the problems and improve the Program for the economic benefit of Canada."^{259}

To be a continued success for the Canadian people, the federal government must make decisions regarding its goals and priorities for the Program. If sectoral development is important, reforms will need to be enacted to ensure regional economic growth. The government may also wish to address social issues of cultural integration of new immigrants which would lessen tension upon landing. As confirmed by the 1994 moratorium, the Canadian government believes that further structural changes are needed. One hopes that comprehensive revisions, not merely cosmetic changes, are made to the Program before its reinstatement in 1996. Policy makers should strive to enforce governmental monitoring of investment money, dispel the illusion of a government guarantee, and ensure greater regional economic development. If these refinements are accomplished, the Immigrant Investor Program's tarnished image may be restored in time and all Canadians could more equally share in the benefits of the Program.

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^{259} *Interim Report, supra* note 9, at 22.