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Canadian Immigration Law and Policy: A Study in Politics, Demographics and Economics

Ronald G. Atkey*

HISTORY OF CANADIAN IMMIGRATION POLICY

Canada’s immigration policy dates back to 1869 when the first statute dealing with immigration was introduced two years after Confederation. From the beginning, there were legislative restrictions prohibiting “the landing of pauper or destitute immigrants.”

Whenever immigration was favored by the Canadian government, persons from Britain and the United States were always the most welcome. Up until about 1962 there was some form of legislative restriction on the arrival of immigrants from places other than Europe and the United States.

Canada’s immigration policy has generally attempted to promote immigration, while at the same time attempting to regulate arrivals of immigrants and select those seen as being best suited to evolving conditions in Canada. For example, the Free Grants and Homestead Act of 1868 was designed to help settle western Canada. In subsequent years, numerous other efforts were made to encourage agriculturalists to immigrate to Canada, with particularly aggressive recruitment efforts in the United Kingdom and Europe. Many of the arrivals during the first wave of immigration to Canada from 1895 to 1914 were recruited to provide unskilled labour for early Canadian industrial development. The second immigration wave represented an attempt to bring in persons with specialized skills to contribute to the urban industrial expansion of the post-war era. In neither case were these selective recruitment goals particularly successful, in the sense that the actual economic activities of immigrants, once they were in Canada, often diverged considerably from their intended occupation.2

Following the Second World War, there were conflicting opinions among the people of Canada regarding the appropriate direction for future immigration. In May 1947, then Prime Minister William Lyon Mackenzie King set the government’s policy on immigration, which involved

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1 An Act Respecting Immigration and Immigrants, ch. 10, 1869 Con. Stat. 32.

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a compromise between divergent concerns expressed by the Canadian people. Prime Minister King called for immigration as a support for higher population growth, but cautioned that such immigration should not be in excess of the number that could be advantageously absorbed in Canada. While Prime Minister King recognized the obligation to humanity to help those in distress, he clearly indicated that he would not support a massive immigrant arrival that would alter the "character of our population."3

An important administrative procedure used to admit immigrants into Canada involved the widening of eligibility for the category of "sponsored relatives." This was an interesting political solution, since those who had argued for restricted entries could hardly oppose the arrival of relatives. This policy also served to assure that immigrants would largely be from the traditional "preferred" sources — those who already had relatives in Canada.4

The 1953 Immigration Act of Canada allowed the Governor-in-Council to prohibit the entry of immigrants for a variety of reasons, including nationality, ethnic group and "peculiar customs, habits, modes of life or methods of holding property." In effect, preference was given to persons of British origin, together with those from France and the United States.5

In the early 1960s the Government of Canada became concerned with the issue of discrimination on the basis of place of origin. Consequently the national origin restrictions to immigration were officially lifted in 1962. In 1967 a "points system" for the selection of independent immigrants was introduced. This system reinforced the non-discriminatory aspects of immigration policy, by clearly outlining the "education, training, skills and other special qualifications" under which immigrants were to be selected.

The policy of multi-culturalism, promulgated in 1971, underlined an open attitude in Canada to the arrival of immigrants from various parts of the world. Canadian immigration policy was subjected to a thorough review in the period from 1973 to 1975, culminating in the Immigration Act, 1976, (the "Act") which took effect in 1978 and is still in effect today, as amended from time to time.6 The Act explicitly affirmed the fundamental objectives of Canadian immigrations laws, including family reunification, non-discrimination, concern for refugees and the promotion of Canada's demographic, economic and cultural goals.7

The main change introduced by the Immigration Act, 1976, was the formulation of a target level for immigration, to be set by the Minister

3 Id. at 5.
4 Id.
5 Id.
7 Id. § 3
responsible for immigration, on an annual basis. This level is to be determined by the Minister of Immigration after consultation with the provinces concerning regional demographic needs and labour market considerations, and after consultation with such other persons, organizations and institutions as the Minister deems appropriate. It is an indication of the importance placed on immigration, that the Act requires an annual "statement to Parliament" on the government's goals with respect to immigration, and is reflective of the Government's desire to promote a planned and demographic immigration policy.

Changes introduced in the Immigration Regulations, 1978 following the Act involved adjustments to the points systems, giving more emphasis to technical training and occupational demand in Canada, and slightly less weight to general education, in the selection of immigrants.

The Immigration Act, 1976 permits the setting of priorities for the processing of immigrant visas and allows a mix of the various categories of immigrants which come to Canada each year. Applications for immigrants visas are processed in the following order of priority:

1. members of the family class, Convention refugees and the displaced and persecuted (humanitarian category);
2. entrepreneurs, investors and self-employed persons (business category);
3. persons who are qualified for and are willing to engage in employment in a designated occupation;
4. persons who have arranged employment in Canada and are able to meet the prescribed criteria for that employment;
5. retired persons;
6. occupational demand (independents); and
7. others.

In 1989, of the total immigrant landings for Canada, 32% were family class; 27% independent; 14% designated class; 11% relative assisted; 7% business entrepreneurs; 5% conventional refugees; 2% retired; 1% self-employed; and 1% investors.

Canada's international obligations and philosophy necessarily lead to non-discriminatory immigration policies, humanitarian concerns for refugees, and strong support for family reunification to allow previous immigrants to sponsor dependant kin. Thus, the large multi-ethnic immigration stream in Canada arises from broad values. Yet, both volume of new immigrants and its ethnic diversity are viewed with hesitation by

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8 Id. § 7.
9 Regulations Respecting Admission and Removal from Canada of Persons Who Are Not Canadian Citizens, SOR/78-172 (1978) [hereinafter Immigration Regs.].
10 Immigration Act, supra note 6, § 115(1).
40% or more of Canadians.\textsuperscript{12}

**SPECIFIC CATEGORIES OF IMMIGRANTS TO CANADA: STATUS**

Status is a key concept under the Immigration Act, 1976. Essentially, every individual who seeks to enter or remain in Canada must do so in relation to a particular legal status which is accorded to the individual by the Act.

**Citizen**

The highest legal status which can be achieved under the Act is that of Canadian citizen. A "Canadian citizen" is defined as "a citizen within the meaning of the Citizenship Act."\textsuperscript{13} Under the Citizenship Act, citizenship can be acquired either by birth or through the naturalization process. The Immigration Act, 1976 recognizes the absolute right of Canadian citizens to come into and remain in Canada.\textsuperscript{14} The legislation and regulations also recognize certain rights of Canadian citizens within the immigration structure which are not available to persons without citizenship status. For example, Canadian citizens are able to sponsor wider classes of relatives for immigration purposes.\textsuperscript{15}

**Indian Status**

The second type of legal status recognized under the Act is that of an Indian\textsuperscript{16} registered pursuant to the Indian Act.\textsuperscript{17} Such persons, regardless of their citizenship status, are provided with the same rights and obligations as Canadian citizens under the Immigration Act, 1976.

**Permanent Resident**

"Permanent resident" is another type of status recognized under the Act. A person with permanent resident status is, in effect, a landed immigrant, or an immigrant who has settled permanently in Canada,\textsuperscript{18} but has not acquired Canadian citizenship. A permanent resident can abandon or lose this status by absence from Canada or other personal conduct.\textsuperscript{19} A permanent resident has a right to come into and remain in Canada,\textsuperscript{20} but may be disentitled to this right if a deportation order is successfully made.

\textsuperscript{12} Simmons, *Global Trends Affecting Immigration Law and Policy*, CAN. IMMIG. L. & POL'Y (Feb. 15, 1990) [hereinafter Simmons].

\textsuperscript{13} Immigration Act, supra note 6, § 2(1).

\textsuperscript{14} Id. § 4(1), (2); CANADIAN CHARTER OF RIGHTS AND FREEDOMS, § 6.

\textsuperscript{15} Immigration Regs., supra note 9, § 5(1).

\textsuperscript{16} Immigration Act, supra note 6, § 4(3).

\textsuperscript{17} Indian Act, R.S.C. ch. 1-6, § 11-12 (1970) as amended.

\textsuperscript{18} Immigration Act, supra note 6, § 2(1)

\textsuperscript{19} Id. § 2(1), 24(1)

\textsuperscript{20} Id. § 4(1)-(2)
against him. Although permanent residents are subject to deportation from Canada, the grounds for deportation are, generally speaking, of a more serious nature than those applicable to visitors and other persons.

**Convention Refugee**

"Convention refugees," are those persons who have fled persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion, in their country of nationality or habitual residence. Convention refugees do not have a right to come into Canada, but they are provided with the right, while lawfully in Canada, to remain in Canada, except where they have been convicted of serious offenses or engaged in activities contrary to national security. A person outside of Canada may be granted an immigrant visa for admission to Canada as a "Convention refugee seeking resettlement" if he meets the relevant regulatory criteria. In addition, persons outside of Canada who do not meet the definition or criteria for classification as a "Convention refugee" may be granted admission if they fall within special humanitarian classes designated by the Governor in Council. The status of "Convention refugee" is not really an ongoing status in most situations, but rather is an interim status which normally leads to eventual status as a permanent resident.

Canada is currently experiencing an immigration and refugee crisis in its failure to resolve the backlog of refugee claimants. The number of new refugee claimants in 1989 was approximately 21,686, a far greater amount than was anticipated. In the last six months of 1989, the inflow of refugees rose to over 2,600 per month. If this new high level of refugee claims continues to grow, the total inflow of new claimants in 1990 will exceed 31,000.

**Immigrant**

The status of "immigrant" under the Immigration Act, 1976, has a technical statutory meaning and does not refer to the common notion of one who has already immigrated to Canada. Rather, an "immigrant" is defined under the Act as a person who seeks landing, or "lawful permission to come into Canada to establish permanent residence." Thus, normally an immigrant is a person who has obtained an immigration visa outside of Canada and seeks admission or landing at a port of entry.

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21 *Id.* § 2(1)
22 *Id.*
23 Immigration Regs., *supra* note 9, § 7.
24 Immigration Act, *supra* note 6, § 6(2).
25 Simmons, *supra* note 12.
26 Immigration Act, *supra* note 6, § 2(1).
Visitor

The status of "visitor" refers to a general category which encompasses any "person who is lawfully in Canada, or seeks to come into Canada, for a temporary purpose. . . ." Although certain types of visitors, such as temporary workers and foreign students, are singled out for detailed statutory and regulatory treatment, different types of visitors, such as tourists, are not specifically dealt with as separate entities. Generally, visitors are not required to obtain visas outside of Canada prior to seeking admission or entry into Canada. In addition, visitors who intend to engage in employment or attend an educational institution must obtain appropriate authorization prior to seeking entry.

Canadian Immigration and Population Growth

Immigration has always played an important part in Canadian population growth, and with a reduced contribution of fertility phenomenon in Canada, this role is likely to be even greater in the future. Fertility has continued below the replacement level in Canada for approximately fifteen years and there is no indication that it will increase in the near future. Thus the relative contribution of immigration to population growth will necessarily increase.

Two periods of population growth stand out in Canadian immigration history: the three decades after the turn of the century, and the three decades from 1951 to 1981. In each of these six decades, approximately 1.2 to 1.5 million persons immigrated to Canada. Even though in each period the wave was roughly of the same magnitude, the immigration rate in relation to the total population was considerably higher during the first period (1901-31), than during the second period (1951-81).

As a component of population growth, the net migration of 3.9 million persons since the turn of the century comprised 20.3% of the population growth over this period. The relative contribution of immigration to population growth was highest between 1901 and 1911, when it reached 44.1%. Immigration in this period was used to promote national growth particularly in Western Canada. Because the populations in the Prairie provinces were growing from such a small population base, their relative population growth was phenomenal. The population in the province of Saskatchewan quintupled: in 1901 Saskatchewan had 90,000 residents, and in 1911 it had 490,000 residents.

Population growth was also particularly high in the period from 1971 to 1981, when it amounted to 28.6%. However, large numbers of immigrants have generally been offset by significant increases in emigra-

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27 Id. § 2(1).
28 Id. §§ 9(1), 10; Immigration Regs., supra note 9, § 13 & Schedule II.
29 Immigration Regs., supra note 9, § 15-20.
tion, so the part of the population that is foreign-born has varied less, staying around 15-20% for the last half century.31

FLOW OF CANADIAN-BORN PEOPLE FROM REGION TO REGION WITHIN CANADA

Census figures on province of birth provides some indication on life-time migration flows by comparing the number of persons born in a given province with their present province of residence. Such figures apply only to the Canadian-born population presently living in a given province.

According to the 1986 Canadian census, 85% of persons born in Canada and still living in Canada resided in their original province of birth.

Data from the 1986 census reveal that Ontario, Alberta, British Columbia, Yukon and the Northwest Territories, had net gains of life-time migrants from other provinces, while the remaining provinces had net losses. In the provinces of Quebec and Newfoundland, only 4.4% and 4.5% of their respective populations were born in other parts of Canada, outside their province of residence. At the other extreme, 62.3% of Canadian-born residents of the Yukon were born elsewhere in Canada. These percentages reflect the relatively low rate of in-migration among Canadian-born residents to Quebec and Newfoundland and a high rate to the Yukon. At the same time, however, due to emmigration, 54% of persons born in the Yukon were living elsewhere in Canada. In contrast, just 8% of Quebec-born population, and 9% of Ontario-born persons lived outside their province of birth, a reflection of relatively low out-migration rate for these two provinces.

According to the 1986 census results, Ontario was the most favoured destination for migrants from other provinces (30.9%), followed by Alberta (19.2%), and British Columbia. Alberta was the largest single provincial source of inter-provincial migrants (22.2%), resulting in a net internal migration loss of 27,670 people. Ontario, British Columbia, Nova Scotia and Prince Edward Island, experienced net internal migration gain. The remaining provinces, Yukon and Northwest Territories, recorded losses.

Both the level and direction of inter-provincial migration tend to relate to regional economic conditions. This was most apparent in the period from 1976 to 1981 when, as a direct consequence of the Alberta resource boom, all provinces east of Alberta experienced net outflows of population to the benefit of Alberta and, to a lesser extent, British Columbia. Falling international oil prices in the early 1980s brought an abrupt end to the resource boom and the westward shift of population. In the first half of this decade, Ontario replaced Alberta as the preferred

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destination of persons moving from elsewhere of Canada.\textsuperscript{32}

\textbf{IMMIGRATION STATISTICS}

\textit{Numbers}

The changes in official attitudes to immigration in Canada over the years are visible by the variations in the annual intake of immigrants. The highest year on record is 1913, with 400,000 recorded arrivals. In comparison, the figures for 1933 to 1943 were all below 20,000 per year. In the more recent period, there was a high of 218,000 in 1974, and a low of 86,000 in 1978.\textsuperscript{33}

\textit{Source Countries}

As a result of changes in Immigration Regulations since 1962, the origins of immigrants have changed remarkably over the years. Traditionally, the majority of immigrants came from Europe, especially England. However, the range of source countries has recently broadened. The proportion of immigrants who arrived from countries other than Europe and the United States in 1956 to 1962 was 8\%, but rose to 60\% from 1971 to 1984. The arrivals from Asian countries amounted to 4\% of the total immigrant population from 1956 to 1962, but increased to 40\% in the period 1977 to 1984. Consequently, the proportion of immigrants from Europe declined from 84\% to 32\% of the total, respectively. In 1988, of Canada's 159,437 immigrants, 79,868 came from Asia, 39,868 came from Europe, and 22,140 came from North, Central and South America.\textsuperscript{34}

\textit{Class of Immigrant}

As previously indicated, not all immigrants are admitted under the same criteria. The Immigration Act, 1976 specifies various classes of immigrants, including family class, independent immigrants, assisted relatives and refugees.

The "family class" consists of close relatives of permanent residents of Canada. Immigrants falling in this class are not assessed under the points system, and their sponsoring relatives agree to provide them with lodging and care for up to ten years.\textsuperscript{35}

The "independent and other immigrants" category includes individuals who must meet all the criteria for admission. Within this group, there is an "assisted relatives" subcategory for family class members who have relatives in Canada willing to support them for up to five years, and who received points on this basis. Notwithstanding such support, the oc-

\textsuperscript{32} MINISTER OF INDUS., TRADE & COMMERCE, CANADA YEARBOOK 2-16 (1990).
\textsuperscript{33} BEAUJOB & BASAVARAJAPPA, supra note 2, at 6.
\textsuperscript{34} Id. at 6-7.
\textsuperscript{35} Immigration Act, supra note 6, § 2(1); Immigration Regs., supra note 9, §§ 4-6.
occupational skills of such potential immigrants must be in demand.\textsuperscript{36} During the period from 1961 to 1970, the proportion of independent immigrants amounted to 62.7\% of the total.\textsuperscript{37}

Between 1971 and 1981, the totals by immigration category were: 33.9\% family class; 37.8\% independent immigrants; 20.5\% assisted relatives; and 7.7\% refugees.\textsuperscript{38}

\textit{Province of Residence}

Immigrants tend to be distributed by province differently than the Canadian born population. There are relatively more immigrants in Ontario and British Columbia, and fewer in the Atlantic Provinces, Quebec and the Prairie provinces. Most immigrant groups show higher than expected concentration in Ontario. According to the 1981 census, 53\% of immigrants were living in Ontario. In 1986, over half of Canada’s immigrant population resided in Ontario, where immigrants represented almost one-quarter of the provincial population. In British Columbia, immigrants represent almost one-quarter of the population. These figures are well above the national average of 15.6\%. Groups from Africa and Western Asia showed higher relative proportions in Quebec. The proportions of the groups from the United States, Central, Eastern and Northern Europe, Oceania and Southeast Asia were disproportionately higher in the Prairies.\textsuperscript{39} In 1988, 159,437 individuals immigrated to Canada, and of that group, 87,858 settled in Ontario, 25,310 settled in Quebec and 22,905 settled in British Columbia.\textsuperscript{40}

Along with being disproportionately distributed in Ontario, the immigrant population tends to be concentrated in larger cities. While proportion of people living in cities of 500,000 or more in 1981 was 37\% for those born in Canada, this proportion was 64\% for immigrants. In 1986, less than one-third of the total population of Canada lived in the three largest metropolitan areas (Toronto, Montreal and Vancouver), whereas over half of the immigrant population lived in these urban centres\textsuperscript{41}. The most urbanized groups tended to be those among the new immigrant categories; 80\% of immigrants born in the Caribbean, East Asia, Africa and Western Asia were living in the largest cities. On the other hand, immigrants derived from some of the more traditional sources were least urbanized; for instance, 26\% of immigrants born in the United States and in Western European countries were living in rural areas.\textsuperscript{42}

\textsuperscript{36} Immigration Regs., \textit{supra} note 9, §§ 2(2), 2(3), 2(4).
\textsuperscript{37} \textsc{Beaujob & Basavarappa}, \textit{supra} note 2, at 7.
\textsuperscript{38} \textit{Id.} at 10.
\textsuperscript{39} \textit{Id.} at 30.
\textsuperscript{40} Historical Supplement 1946-88, \textit{Canadian Economic Observer}, at 97 (1989).
\textsuperscript{41} \textsc{Beaujob & Basavarappa}, \textit{supra} note 2, at 29.
\textsuperscript{42} \textit{Id.} at 30.
Summary

In summary, immigrants in Canada are now selected from a wider pool of potential immigrants than before, and the criteria for selection has varied considerably throughout history. Earlier selection was mostly based on ethnic criteria, while today it is based more heavily on economic criteria. However, the number of persons recently in Canada arriving as “sponsored relatives” and in the “family class” has enlarged — thus not all immigrants are selected on economic criteria. Consequently, there is considerable diversity among immigrants in both ethnic and economic terms forming Canada’s unique “immigrant mosaic.” Canada’s cultural philosophy fosters the retention of distinct cultural identities, controlled by the “melting pot” philosophy in the United States.

Labor and Employment

It is interesting to examine certain characteristics of the Canadian immigrant population in the context of labour and employment. For the labour force as a whole, 20% were immigrants in 1971, and 19% in 1981. The labour force expanded by 3,241 persons during this decade (1971-81) and of this group, 20.2% had arrived from other countries.

Characteristics of Immigrants

When compared with Canadian-born men and women, the 1981 Census revealed that there were higher proportions of immigrants in the prime working ages of twenty-five to fifty-four years; higher proportions in managerial and professional occupations (except for immigrant women); higher proportions living in urban areas; and higher proportions with university education. This situation stems from the points system and other selection procedures which are specially designed to give rise to selectivity of immigrants with respect to age, education and occupational demands. Thus, their profile of characteristics would tend to give immigrants an advantage in the labour market. Consequently, higher proportions of immigrants were in the labour force, and higher proportions were working full-time, as compared with Canadian-born populations. These characteristics, in turn, had a positive impact on their average incomes.

With the exception of those arriving in recent periods, women from developing countries showed higher participation rates in the Canadian labour force than did Canadian-born females.43

Employment Income

In 1980, immigrant men earned 4.9% more than the average earned by Canadian-born men; and immigrant women averaged 1.8% less than the average earned by Canadian-born women. When the effects attributa-

43 Id. at 25-48.
ble to differences in age composition and educational attainment were removed, statistics revealed that immigrant men and women earned 3.1% and 4.5% less than did Canadian-born men and women, respectively.

While immigrant groups from traditional sources, particularly the United Kingdom, the United States and Northern and Western Europe, earned equal or more than that of their Canadian-born counterparts, the new immigrant groups from Asia, South and Central America, and Africa earn 5% to 22% less. While immigrants from "traditional sources" achieved parity or exceeded the incomes of their Canadian-born counterparts after short durations of stay in Canada, those from Southern Europe and non-traditional or non-European sources took longer — up to twenty years — to achieve parity. As length of residence in Canada increased, all immigrant groups improved their economic position.44

**Low Income Status**

In 1980, immigrant families overall had a lower prevalence of low income status (11.6%) than did families of Canadian-born persons (13.1%). However, immigrant families that arrived after 1969, showed a higher prevalence (19%) of low income status than did those that arrived earlier. Caribbean immigrants formed the greatest portion of low income status immigrant families which was three times the proportion of low income status compared to the group from the United Kingdom which had the lowest portion of low income status. Unattached immigrant individuals had a higher prevalence of low income status than did similar Canadian-born individuals (42% vs. 37.3%).45

**Business Immigrants**

Canada encourages visitors to Canada for the purpose of "boosting trade, commerce, tourism, cultural and scientific activities and international understanding."46 Everyone who is not a Canadian citizen, permanent resident of Canada, or an immigrant to Canada is a visitor. As a visitor, such a person must make application for and obtain a visa prior to appearing at a port-of-entry, except in such instances as are prescribed by statute or regulations.47

Business immigration is an important component of Canada's immigration movement. In 1989, some 17,035 business immigrants, representing approximately 9% of Canada's total immigration population coming into Canada that year, brought with them over $381,105,000. The largest influx of business immigrants in 1989 came from Hong Kong (representing 32% of all business immigrants). Forty-two percent of all business

44 Id. at 65-78.
45 Id. at 83.
46 Immigration Act, supra note 6, § 3(e).
47 Id. §§ 2(1), 9(1).
immigrants settled in Quebec, 25% settled in British Columbia and 23% settled in Ontario, primarily in Montreal, Vancouver and Toronto.\(^48\)

The Act requires every person seeking entry to Canada for employment to apply to a visa office for employment authorization to enter Canada for such purpose prior to appearing at a port-of-entry,\(^49\) unless an exemption has been established\(^50\).

There are three categories of business immigrants under the Immigration Regulations, 1978:

1. Entrepreneur;
2. Investor (Immigrant Investor Program); and

In 1986, the Canadian Ministry of Employment and Immigration introduced the Immigrant Investor Program.\(^51\) This program has the overall objective of providing a means for admitting people into Canada who have business skills and experience that will benefit Canada, and who are prepared to make a minimum investment in a small to medium sized business in Canada that the provinces consider important to their economic development. The investment must create or maintain employment opportunities in Canada.

The Immigrant Investor Program provisions of the Immigration Regulations were recently amended to allow qualified immigrant applicants to choose among three minimum investment levels (i.e. $150,000; $250,000; or $700,000). The previous Regulations had provided for a single $250,000 minimum investment level.\(^52\) Under the first investment level, qualified business persons with a personal net worth of $500,000 may be eligible for immigration to Canada with a minimum investment of $150,000 (locked in for three years) in a province that has received less than 3% of all business immigrants in the year preceding the provincial approval of the investment proposal. The first investment level ($150,000) is designed to allow all provinces fair access to the benefits of the Immigrant Investor Program and to reduce regional disparities in the operation of the Program. Under the Immigration Investor Program provided for under the original Regulations, the favoured destinations for business immigrants were Quebec, Ontario and British Columbia.

According to a Regulatory Impact Analysis Statement, "of the 3,952 business immigrants who arrived in 1988, Quebec was the intended province of destination for 40%; Ontario accounted for 26%; and British

\(^{48}\) Business Immigration, supra note 11.

\(^{49}\) Immigration Act, supra note 6, § 10(c); Immigration Regs., supra note 9, § 18.

\(^{50}\) Immigration Regs., supra note 9, § 19.


\(^{52}\) Id. at 4943.
Provinces currently eligible for the first investment level, as defined by the 1989 amendments, are Saskatchewan, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland, as well as the Yukon and the Northwest Territories.

The Immigration Regulations with respect to the Immigrant Investor Program creates three categories of business immigrants: “investors,” “entrepreneur” and “self-employed.” “Investors” are required to have a proven business record and personal net worth of $500,000 to $700,000 (depending on the investment level being applied for) and are required to make a minimum investment of $150,000, $250,000 or $500,000, locked in for three to five years, that will contribute to the creation or maintenance of jobs for Canadians. “Entrepreneurs” are required to invest in and actively manage a business in Canada. “Self-employed” immigrants are required to gain employment by establishing or purchasing a business in Canada and making a significant contribution to the economic, cultural or artistic life of Canada.

According to the Regulatory Impact Statement, of the 4,243 visas issued to business immigrants in 1988, 3,081 were issued under the entrepreneur category, 840 under the self-employed category, and 322 under the investor category. The average dollar amount declared for transfer by an individual investor was approximately $1.7 million. Preliminary figures for 1989 indicated that the business immigration movement was continuing to grow and that the target level of 4,000 business immigrants was met. In 1989, 325 investor applicants were granted visas. The average dollar amount declared was a total of $550 million in funds for transfer, averaging $1.7 million per investor. Preliminary figures also indicated that the favoured provinces of intended residence are Quebec, British Columbia and Ontario.

According to the Regulatory Impact Statements, the Immigrant Investor Program has resulted in the direct creation and maintenance of approximately 11,000 jobs.

On October 18, 1989, the Minister of Employment and Immigration announced to Parliament the immigration levels for 1990. Of the anticipated 165,000 to 175,000 immigrants, it is expected that business immigrants will total 4,000 (excluding spouses and dependents).

The main economic impetus for Canada to enter into Canada-U.S. Free Trade Agreement was the growing protectionist measures in the United States in the 1980s, reflecting the United States’ perception that foreign producers had more open access to U.S. domestic markets than U.S. producers abroad. While U.S. concerns were primarily directed to-
wards third countries rather than Canada, these measures lead to several unilateral trade actions by the United States that had significant and harmful consequences for a number of Canadian industries.

There was concern among Canadian producers that decreased access to U.S. markets might reduce their ability to service the full North American market rather than solely the Canadian market. Similarly, there was concern in Canada that foreign producers, when deciding to locate productions facilities in North America, would increasingly decide to locate in the United States rather than Canada in order to avoid the risk of future trade barriers in the far larger U.S. market. In this environment, a Free Trade Agreement with the United States seemed, from a purely economic stand point, an attractive solution to Canada because it would provide assured access to the large U.S. market.54

Immigration and labour policies in Canada and the United States had previously been designed with a view toward universal application to foreigners with no recognition of a unique inter-relationship and inter-dependence between the two countries. The governments in power in the two countries felt that economic activities were being unnecessarily impeded as a result of this failure to recognize and capitalize on this unique relationship. Consequently, the Governments of Canada and the United States began to jointly re-examine their joint policies in this regard. The commencement of the Free Trade negotiations provided an opportunity and a forum for the discussions on the cross-border movement of temporary workers to be expanded.

The responsibility for reaching a bilateral immigration agreement with the United States became the responsibility of the Trade Negotiations Office under the Minister for International Trade where, in the context of negotiating an Agreement which encouraged and supported bilateral investment and trade in goods and services, the facilitation of the cross-border travel of business persons became an important concept of the Free Trade Agreement.55 The result of these efforts is Chapter 15 of the Canada-U.S. Free Trade Agreement, entitled “Temporary Entry for Business Persons” (“Chapter 15”).

**BUSINESS TRAVEL UNDER CHAPTER 15 OF THE FTA**

The negotiations between Canada and the United States were premised on the theory that North America represents a single market place and therefore goods, services and investment activity must flow freely between the two countries. In order to achieve these articulated goals, Chapter 15 of the Free Trade Agreement recognizes the increasing need

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54 Free Trade Agreement: One Year Retrospective, ECONOSCOPE, Jan. 18, 1990 [hereinafter ECONOSCOPE].

to facilitate the free movement of business travellers and between the two
countries to make sales, manage investments, and provide skills and
services.

An important and unique feature of Chapter 15 is its status as a
stand-alone chapter. Article 1505 provides that, "no provision of any
other Chapter of this Agreement shall be construed as imposing obliga-
tions upon the Party's immigration measures." Therefore, no provision
of any other Chapter of the Free Trade Agreement can have any effect on
the delivery of the provisions of Chapter 15.

Chapter 15 of the Free Trade Agreement, entitled "Temporary En-
try for Business Persons," deals only with "temporary entry" for "busi-
ness persons." "Temporary entry" is defined at Article 1506 to mean,
"entry without the intent to establish permanent residence." Thus, the
Free Trade Agreement is intended to facilitate temporary entry only; and
does not facilitate in any way permanent immigration admission to Can-
ada and the United States. The provisions of the Immigration Act and
Regulations are still applicable to that situation.

To qualify under Chapter 15, an individual must be a "business per-
son" which is defined in Article 1506 to mean, "a citizen of a party who
is engaged in the trade of goods, services or in investment activities." Thus, the Free Trade Agreement only applies to citizens (landed immi-
grants or permanent residence do not qualify); and only those persons
whose employment activities are connected to trade in goods, services or
investment. However, those applicants who do not qualify under the
Free Trade Agreement are still eligible for consideration under the Immi-
gration Act and Regulations governing the entry of temporary foreign
workers. Thus the effect of Chapter 15 is to give the citizens of Canada
and the United States expanded opportunities for employment between
the two countries.

Annex 1502.1 of Chapter 15 organizes coverage into four general
categories of business persons:

(1) Business Visitors (Schedule 1);
(2) Traders and Investors;
(3) Professionals (Schedule 2); and
(4) Intra-company Transferees. Also, under the Free Trade
Agreement.

Under Chapter 15 of the Free Trade Agreement both countries are
required to adopt immigration procedures which "reflect the special
trading relationship between the Parties, the desirability of facilitating
temporary entry on a reciprocal basis and of establishing transparent cri-
teria and procedures for temporary entry," subject to the need to protect
border security and domestic employment.56

Furthermore, Article 1502.5 provides that all measures governing temporary entry of business persons shall be applied and enforced expeditiously to avoid undue interference with trade and investment activities under the Free Trade Agreement.

To facilitate the temporary entry of business persons covered in these four categories, Annex 1502.1 prohibits the parties from imposing certain administrative or legal requirements which have the consequence of delaying or preventing a business person from engaging in a covered profession, occupation or activity. Thus, if one of these four categories applies, no Canadian employment validation or U.S. labour certification is required. Notwithstanding this general prohibition, the parties are not precluded from imposing immigration procedures to implement the provisions of the Free Trade Agreement. Canada has implemented Chapter 15 by drafting special administrative guidelines in its Immigration Manual and by amendment to section 19 of the Immigration Regulations.

In June 1988, the Business Immigration Directorate of Employment and Immigration Canada assumed responsibility for developing procedures which would implement the provisions of Chapter 15 of the Canada-U.S. Free Trade Agreement. The result of their efforts is the Employment and Immigration Canada Operations Memorandum: IS 406 ("Operations Memorandum") which contains procedures and instructions with respect to Chapter 15 of the Free Trade Agreement. The Operations Memorandum forms Chapter IS 16 in the Employment and Immigration Canada Immigration Manual.

Business Visitor

The "Business Visitor" category appears to be a catch-all provision covering most business travellers. There are two general categories of business visitors: those engaged in specific occupations or activities listed in Schedule 1 to Annex 1502.1 of the Free Trade Agreement; and those not set out in Schedule 1.

Schedule 1 sets out seven areas of business, including:

(1) research and design;
(2) growth, manufacture and production;
(3) marketing;
(4) sales;
(5) distribution;
(6) after-sales service; and
(7) general service.

Generally, the listed activities in Schedule 1 represent an expansion of the permissible activities for foreign workers under Canada's Immigration Regulations.57

Business visitors under the Free Trade Agreement are specifically

57 Immigration Regs., supra note 9, § 19(1).
included in the Immigration Regulations,\textsuperscript{58} and as a result will not be required to obtain a Canadian employment authorization to engage in their business in Canada.

To be admitted as a business visitor, a person must be working for an employer in his home country, or, be otherwise receiving remuneration from a home country source.

Application for admission as a business visitor must be made at a port-of-entry. Such applicant may be admitted by either a customs officer or an immigration officer and generally no confirming document is issued.

\textbf{Professionals}

By virtue of Chapter 15, "Professionals" listed in Schedule 2 are permitted to enter each country and be employed, regardless of the source of remuneration, and without prior approval of a petition or labour certification application or other documentation.\textsuperscript{59}

This category represents a departure from the current immigration procedures for foreign professionals. Most professionals seeking entry into Canada under the Immigration Act, 1976 are required to have their employers undergo the job validation process of obtaining a Confirmation of Offer of Employment. Under the Free Trade Agreement this procedure does not apply to qualifying professionals who are U.S. citizens.

Under the Free Trade Agreement, to gain entry as a "Professional," a business person must have the qualifications to engage in an occupation or in a business activities at a professional level in one of the professions listed in Schedule 2 to Annex 1502.1 of the Free Trade Agreement. Unless otherwise stated in the Schedule, "business activities at a professional level" means those activities which require that, for successful completion the applicant has at least a baccalaureate degree, unless otherwise indicated.\textsuperscript{60} The Canadian Immigration Operation Manual stipulates that the degree need not necessarily be in the professional field for which entry is sought.

The applicant must have the intention to work temporarily in the profession for which qualification is held. The applicant must also meet all provincial/state laws and licensing requirements for profession. Professionals may be admitted to Canada for up to one year initially. Extensions of status may be granted for a maximum of one year on each occasion.\textsuperscript{61}

The Schedule 2 list of professionals was initially fairly selective and imposed specific qualification requirements on the individual professions. On November 30, 1989, the Canada-U.S. Trade Commission recom-

\textsuperscript{58} Immigration Regs., \textit{supra} note 9, \S~19(1).

\textsuperscript{59} Free Trade Agreement, \textit{supra} note 56, annex 1502.1(c).

\textsuperscript{60} Operations Memorandum, \textit{supra} note 55, at 17, para. 4(c) n. 1.

\textsuperscript{61} Id. at 20, \S~9.
mended a number of amendments to Schedule 2 to Annex 1502.1, including that it be amended to incorporate the minimum standards for qualifications in each of the professional groups listed in the Schedule. The Commission also recommended the addition of more professionals to the current list contained in Schedule 2 where inclusion had been sought by that professional group. Also, at the request of members of the journalism profession, the Commission recommended that journalists be removed from the list of professions which qualified for easier temporary entry.  

Intra-Company Transferees

An “Intra-Company Transferee” is a business person who is seeking temporary entry to render services to the same employer or a subsidiary or a affiliate thereof, in a capacity that is managerial, executive or involves specialized knowledge. In order to qualify under this category, the business person must have been continuously employed by the same firm or corporation or other legal entity or an affiliate or subsidiary thereof, for one year immediately preceding the time of the application for admission.

The Free Trade Agreement introduces the new concept into Canadian immigration procedures of qualifying for intra-company transferee treatment based upon the employee’s possession of “specialized knowledge,” which means knowledge possessed by an individual including level of expertise and proprietary knowledge of the organization’s product, service, research, equipment, techniques management or other interests of the employer.

The United States will grant intra-company transferee visas to Canadians for up to three years initially; Canada will permit a duration of initial status not to exceed one year and extensions of status will normally be granted for a maximum of one year each. Both Canada and the United States impose a maximum duration of temporary entry of five years.

Traders and Investors

The provisions in Annex 1502.1(B) of the Free Trade Agreement give special status to U.S. and Canadian citizens, “seeking temporary entry to carry on substantial trade in goods or services, in a capacity that is supervisory or executive or involves essential skills, principally between Canada and the United States of America, or solely to develop and direct the operations of an enterprise in which the business person has invested, or is actively in the process of investing, a substantial amount of capital.”

63 Free Trade Agreement, supra note 56 annex 1502.1(8).
64 Operations Memorandum, supra note 55, at 30, para. 4(c) n. 3.
These provisions of the Free Trade Agreement are significant due to the fact that they recognize that services, in addition to goods, are within the definition of trade.

The meaning of "substantial" appears to be a significant criteria for the application of this category and the exemptions from prior approval which flow from it. The word "substantial" is not defined in the Free Trade Agreement, and therefore its interpretation depends upon administrative discretion. The Canadian Immigration Operations Memorandum determines whether trade is "substantial" by looking at the volume of trade conducted as well as the monetary value of the transactions. The requisite continuing course of international trade may be established by proving numerous transactions even if each is individually small in value. A visa officer must also be satisfied that the business person's predominant activity in Canada is international trading.\(^65\)

An applicant for trader/investor status may be self-employed or be employed by another individual or firm conducting such activities. If the employer is an individual, he must be a national of the country which is maintaining trader/investor status himself. If the employer is an organization, at least half of the ownership must be by nationals of the same country who either reside abroad or are maintaining trader status themselves. The nationality of the owner is controlling, not the place of incorporation. In parent-subsidiary situations, ownership of the parent controls.

The employee's duties must be executive or supervisory in nature, or if in a minor capacity, have special qualifications that make the services to be rendered essential to the sufficient operation of the enterprise. The purpose behind this rule is to balance the legitimate business interests of the employer and the furtherance of international trade against the likelihood that unemployed local workers will be deprived of jobs they could otherwise fill.

Included in the "executive or supervisory employees" category, are employees whose primary function will be to direct the company's operations or to supervise other company personnel. There are no clear tests for deciding who fits this description. It will depend on the circumstances of each case. Similarly, there are no clear tests for satisfying the criterion of applicants of "applicant with essential skills."

Unlike business visitors, investors and traders applicants wishing to work temporarily as traders or investors must make application at a Canada-U.S. consulate for prior approval (i.e. employment authorizations and confirming documentation), but are not required to obtain labour certifications or employment validations.\(^66\) Since the paper burden in the "trader and investor" category is more significant than for "business visi-

\(^{65}\) Operations Memorandum, supra note 55, at 35, para. 4(b) n. 1.

\(^{66}\) Free Trade Agreement, supra note 56 annex 1502.1(B.5).
tors," traders who fall within any of the business visitor activities may prefer to claim status under the category.

SOME TENTATIVE CONCLUSIONS ON FTA

Canada will face difficulties competing with the United States in the area of labour costs. In 1989 (third quarter reports), seasonally adjusted average hourly earnings (including overtime) in Canada was $13.42 Canadian per worker, which is roughly $1.00 higher than comparable earnings in the United States.

Much of the deterioration in Canada’s wage competitiveness is attributable to the appreciation of the Canadian dollar during the last year and a half and higher rates of wage inflation in Canada during the same period. 67

However, it is too early to assess the effects of the Free Trade Agreement in Canada. Employment statistics growth for 1989 and the first two months of 1990 do not show any notable changes when compared to 1988 figures. 68 Yet investment levels are up in both countries for the same period, and Canadian investment in the United States is increasing at a faster rate than U.S. investment in Canada. What does seem clear at this early point is that the flow of business travelers between Canada and the United States is increasing significantly as tariff reductions and border measures come into place, and business persons seek out the economic opportunities that are bound to result.

67 ECONOSCOPE supra note 54.