

CRS Discussion of Bill C-86

Participants:

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The Centre for Refugee Studies (CRS) held a discussion of the new amendments to the Immigration Act. A transcript of the discussion is presented.

RETROACTIVITY

[Anyone whose application is already in progress at the time the legislation is proclaimed could be subject to new rules.]

MB: The provisions for retroactivity have two parts: dealing with cases in the future and those in process at the time the legislation comes into force. There are moral and practical limits on applying the retroactivity provisions.

If the management of immigration works as intended, we shouldn't need the retroactivity provisions. They are really a backup—for use if things get out of hand—if there are too many cases in the system that we don't want to come forward as subsequent landings.

We might apply the retroactivity criteria to a situation in which a person has submitted an application, but has not yet heard from the government. As long as people understand the system, I would argue that the system is fair and able to withstand challenge. We do need more precise language, for instance, we should limit ourselves by class. We could say that we won't apply retroactivity to immediate families or Convention refugees. Concerning groups already in process, we should say that it shouldn't apply to people past a certain stage in the process.

Concerning the existing case-load, the intent is to permit a policy shift to rebalance the program. Over the past few years there was a huge inflation in the

family-based movement that squeezes out other immigration. Broadly, the legislation seeks to increase opportunities for policy redirection. Retroactivity can speed that process. We are not going to disqualify refugees or immediate family. The only group that may be subject to retroactivity is the independent, point-tested group. I'm only referring to those who have not been already encouraged by us. The smaller the group, the less our rationale for applying retroactivity provisions. We have given ourselves broad authority in these amendments. It could be limited in the legislation by class and the stage in the process.

CONTROL/ENFORCEMENT

Detention

[A senior immigration officer (SIO) may order individuals detained pending execution of a deportation order or exclusion order if it is possible that they might endanger public safety or if they are not likely to appear for removal. Individuals may be detained for failing to comply with a departure order. The weekly review of detainees by an adjudicator has been eliminated. Reviews will now occur only every thirty days. The initial forty-eight-hour review remains unaffected.]

GJ: The thirty days concerns me as being a particularly long period of time. [What happens if] a lawyer was unable to get to someone in the first seventy-two hours? From a practical perspective, seventy-two hours is not a long time. I wonder if there could be any flexibility?

JB: The flexibility is there—one could request an adjudicator to review detention before the thirty-day time period.

JH: It strikes me that there should be some specified criteria an adjudicator might consider on an earlier review. The legislation could make provision for an earlier review in the event that information of type x, y or z were to be presented, so that it's not a matter of absolute discretion.

JB: I could see that it would be useful to have some criteria, either in the legislation or regulations.

JH: I think the Act should at least make reference to the duty of adjudicators to examine the merits of an application for review over the course of the thirty days.

Medical Inadmissibility

[The medical criteria would exclude only those whose health condition is a danger to Canadians or who would cause excessive demands on health or social services. Specification of what conditions may cause such dangers/demands (including disabilities) would no longer be included in the Act.]

AR: I see a general tendency to relegate a number of critical decisions to regulations. Is there any assurance of protection against abuse regarding medical inadmissibility? For example, I'm thinking of the British case where medical examinations have been used to determine whether or not female fiancées are virgins. If they're not, they are excluded on the grounds that they're not genuine fiancées at all, that they are

just people coming in for a pseudomarrriage in order to get into the country. That's been a matter for some serious concern. There are other ways that medical exams can be intrusive and abusive, and there are new technologies that open up all kinds of possibilities. I know that the intent is quite benign, but when you're writing legislation, you have to ensure that some person in the future will not abuse it.

I wonder if we could explore the use of regulations a little more. It seems a lot of things are left to discretion. Could you tell us what protections or safeguards there might be?

JB: The reference to the regulations was intended not to relegate from the Act to the regulations, but to [acknowledge in the regulations] what is currently medical examiners' administrative practice. It should provide further protection against not abuse, perhaps, but the possibility of capricious decision making. The purpose of the examination is to identify medical conditions that may endanger society or cause excessive demand [on health or social services].

AR: There is potentially an enormously wide ground on which people could be excluded if it is deemed that they might make excessive demands on a service, and the term "social service" is not even as precise as "health service." I think that whole section is potentially open to all kinds of interpretation and, therefore, of abuse.

JB: Let me give you an example. One case I can think of is of a child who was suffering from a mental disability, who was seeking admission as a visitor. She was initially refused on the basis of demands on social services, without a distinction made between her being a visitor as opposed to an immigrant. In the wording of the amendments, you could prescribe not only which social services are in short supply or expensive, but also distinguish between the type of status a person is seeking, which right now the Act doesn't do.

JH: I have a question about medical inadmissibility as it relates to Convention refugees. There is a clause indicating that a medical exam may be required of everyone who applies as a

Convention refugee. Is this simply to identify conditions for the purpose of treatment, or is this linked to the issue of admissibility in a way that I haven't yet divined from the rest of the Bill?

JB: I can assure you it's the former—to identify medical conditions that ought to be treated for the benefit of the claimant and in some cases for the general benefit of society, but not to exclude those determined to be Convention refugees.

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They do not have to meet the medical inadmissibility requirements.

This provision responds to the concern, especially here in Toronto, of some instances of tuberculosis transmitted among school children who were not medically examined upon arrival. The provision sets a time limit for the examination to be conducted as soon as the person arrived and not, as is currently the case, at the time of referral to the Refugee Division.

Criminal Inadmissibility

[Individuals without criminal records would be barred from Canada if it is determined that there are reasonable grounds to believe they have committed a serious crime outside Canada. People who are or were members of an organization involved in serious crime anywhere in the world would be barred from Canada. Similar provisions would apply to suspected terrorists and terrorist organizations. Those who are believed to be involved in espionage, subversion, terrorism or who are members of an organization that might in the future engage in these activities would be barred from Canada.]

HA: We know there are jurisdictions where this has been abused.

JH: I think this may raise a void for vagueness argument. The courts may find [such a broad] generic description of persons who have associated with

criminal organizations to offend the Charter. This language is unusually broad. I think that's the risk—not the concept itself, which makes sense to me, but the language, which is very sweeping.

MB: If you have an idea of how to confine the sweep, while maintaining the ability to deal with gangs and those types of things, we would like to get your advice.

BA: On a separate issue, there appears to be a technical drafting problem on page 21 that crops up two or three times. You're talking about an indictable offence in S.19(2)(a), for which the defendant would be prosecuted by summary conviction. I'm not sure if what is meant here is what's known as a mixed or hybrid offence.

JB: That's what we are referring to.

BA: It could be interpreted ambiguously as either an indictable offence or a summary offence. If it really does refer to summary cases, as is not currently the case, it could have substantial implications for refugees, for instance those convicted of shoplifting offences.

JB: The intent is to cover the hybrid offences, regardless of which process is used. The judicial interpretation right now is that a hybrid offence, if proceeding by summary conviction, is a summary conviction for the purposes of the section.

EV: Particularly with reference to terrorists—do these criteria apply to overseas visa officers as well, or just people coming to Canada?

JB: Yes, they apply to visa officers as well, in that they cannot issue a visa to someone who is inadmissible.

AA: How would this provision have applied to Mugabe, the Prime Minister of Zimbabwe, when he was the leader of the liberation movement in Rhodesia? Would he have been admitted?

JB: There are quite a lot of people who would have been or still are covered by this provision, but for whom admission would be reasonable. That's why there's also a provision for the Minister to authorize a person to come in. That is to cover exceptions. It was suggested that there are a lot of world leaders that would be caught within those provisions because the organizations they once

belonged to still advocate violence in one form or another.

GJ: I cannot think of a terrorist act that is not covered somewhere in the Criminal Code, so why do we need a separate

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provision? It seems redundant. I believe there's a provision in the Act now that deals with people engaged in organized crime, which I gather is the real purpose of the provision. So what was wrong with the old provisions?

JB: The old provisions required that the person be likely to commit an offence within Canada. There is a concern that we ought to protect the broader community against people who would use Canada as a refuge from legitimate prosecution.

AR: Would we be right in assuming that this clause and others had to be read in the context of those relating to international agreements, which, in turn, we ought to be looking at in the context of modern computerized technologies, databanks, sources of information about organizations and individuals that will in the future enable individuals to be identified almost instantaneously as having at one time belonged to an organization, etc.?

JB: You're referring to Section 108.1, I assume.

AR: Well, individually these clauses can be defended, but when you put them in the broader context, particularly in relation to the international agreement, there are some philosophical questions that this raises, which make some of us feel very uneasy. The present government perhaps doesn't want to pursue McCarthy-like witch-hunts, but we don't know what some future

government of Canada or any other country might wish to do. These clauses, combined with the international agreements and the technologies that are now available, have some serious consequences that may not always be benign.

HA: One of the big issues is human rights in the interstate sphere. If a person is alleged to belong to a terrorist organization or a criminal organization [and enters the country], Interpol informs Canada. People have no way of defending themselves and suddenly they can't move. They get frozen and there's no protection of their rights—a hearing or anything. That's the dilemma for a country that believes in protecting human rights. The question I think Tony is leading to is not the legitimate desire to keep criminals out of the country, but the potential for abuse. I don't think this is dealt with. If it's not, can we do something to improve that?

JB: It is dealt with to the degree that a person cannot be removed from Canada without an opportunity to defend himself against the allegation.

HA: But that's once they're here. What about applicants? What about the case of someone who has no rights to access the information, to appeal the information, to have independent adjudication or any protection while the country is carrying out a very legitimate intention? Some countries, including Canada, can potentially abuse it. Any group could be branded as terrorists at any time. That's a danger, and one of the traditions of human rights is to protect people from the dangers of the excesses of government. Can you put in some protective mechanisms to prevent abuse? Do you have to depend on goodwill and good judgement?

GJ: If membership is enough, there doesn't have to be any nexus between them and the alleged activity. At what point do organizations become contaminated by individual members? At what point is an organization seen to have a common intent? There are all kinds of questions, regardless of the process they are entitled to.

MB: But do you have any specific proposals? There is no intent on behalf of

the Department to catch someone who is not likely to cause any sort of threat. The problem is trying to develop the language.

GJ: My first suggestion is that there be some nexus between the actual activity and the individual, rather than the individual and the organization.

MB: Of course, membership is something you can objectively ascertain, whereas activity puts a much greater burden on the person who's looking at the case and on the government.

JB: It's been done to some degree in S. 19(1)(l) provisions, where individuals are identified as senior members or officials of governments engaged in terrorism, etc. We have been able to identify criteria there.

MB: Is there another way of narrowing, [specifying instead] the kinds of people we would not want to apply this to, the kinds of situations that demand a different kind of protection?

JH: I actually have sympathy for using membership as a ground for exclusion because in many instances, such as organized crime, it is virtually impossible to pin a particular deed to a

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particular individual. I think the problem is the use of the word “terrorism,” which is not a precise term. It is not a term of art. I would keep the membership principle, but try to define precisely what we are concerned about in terms of collective behaviour that ought to lead to exclusion. There are other standards whose meanings are clear, as opposed to terrorism. A terrorist, a freedom fighter—how do you tell the difference? It depends on who you are at what point in history. I think that is a point we need to resolve.

JB: We have a definition of a terrorist that would say that your freedom fighter and my terrorist are the same person. It doesn't make a distinction.

JH: That's my concern.

HA: I think Jim has made a very good suggestion, reconsidering the term "terrorism" and using more standard, internationally accepted terms that are clearer and better defined in law.

JH: Ironically, I think you can actually find some guidance in substantive refugee law, where we have had to [distinguish between] legitimate versus illegitimate use of force in addressing exclusion issues. Some of the substantive standards in Canadian case law would actually lead to a more precise definition.

EV: I'm curious as to the intent behind the new 19(1)(k) regarding persons constituting a danger to the security to Canada. Who are you talking about?

JB: It refers to those who don't fall within one of the other groups, but who would still pose a danger, as assessed by the federal court.

GJ: With respect to the definition of terrorism, you might want to think about whether it is redundant, or whether it could be phrased in terms of the Criminal Code so that specific acts are covered. Secondly, a more narrow definition of the word "organization" or a clarification might be a way of narrowing it, so that we don't capture people on the periphery of an organization. Perhaps some kind of common intent requirement?

Carrier Responsibilities

[Airlines would be required to pay the removal costs of someone not admitted. They would be required to ensure that their passengers have valid travel documents up to the time they approach an immigration officer. Airlines would be charged administrative fees for transporting individuals with improper documents. They would be required to put up security deposits. Aircraft could be confiscated if fees are not paid. The Act provides for penalties for knowingly or unknowingly abetting in the transport of those with invalid documents.]

HA: Trying to get the carriers to carry out immigration policy is an old pattern. This

is much more drastic—what are our concerns?

ML: I am surprised that the Canadian government would expect and be able to put faith in passenger agents having the ability to screen documents. With the number of airlines there are in the world, this is almost unenforceable. It sounds extraterritorial.

JH: We're dealing with something much bigger than Canada. This is something common to virtually every industrialized state. I've heard everyone make the comment that more refugee determination is done by airline officials than by formal determination authorities. That is clearly true. The issue

who ought to be screened out? It does sound like a delegation of our Convention responsibilities to airline officials, who are clearly not adequately trained to perform that task. What kind of training is provided vis-à-vis persons without documents who may have a genuine refugee claim?

JB: [The airline's] job is to identify whether the person has the document or not. If not, they are not supposed to let that person on the plane.

JH: That's a really fundamental problem. It's completely illegitimate to engage in this kind of indirect refoulement. There has to be a distinction made between a visitor or immigrant who is undocu-

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is whether or not Western states are prepared to see territorial claims being made, or do they wish to see all persons stopped abroad?

BA: In the past, the airlines have flouted the old provision. Many have ignored them because they were so awkward and difficult. If we're going to have provisions, one would hope that they would be reasonable. I favour beefing up enforcement provisions, provided that actual provisions are reasonable in terms of expectations of airlines and what they can do.

JB: Certainly the Department has made a great effort to assist in training airline passenger agents with respect to what documents are acceptable in Canada. We are moving towards machine-readable documentation that should make it easier on the airlines. The major change is to move the process of penalties from prosecuting on a case-by-case basis to an administrative policy.

JH: Has there been some thought given to the process of ensuring that passenger agents do not screen out persons who may have legitimate Convention refugee claims, but who don't possess valid travel documents? Does the training emphasize that these are not the people

mented versus people who are legally entitled to make refugee claims.

JB: They are entitled to make a refugee claim where they are, not in Canada, not somewhere they hope to be. Very few people come directly to Canada from their state of origin. The screening we're doing is by and large not anywhere near their state of origin—the screening that's done in Europe and the U.S. I'm not talking about screening done in Sri Lanka or in Kenya or wherever people first start their journey by air to Canada.

JH: I just think it's important that people get the same message in their training that I try to give to the IRB members, which is, in many cases, that the absence of adequate documentation is indicative of a genuine refugee claim, and hence people who are at the front line ought to be taking that into account.

HA: I would argue that you can't put that onus of responsibility onto someone who is doing visas.

JH: That's my point.

HA: Yes, the question becomes not what the carrier should do, but what protection can be afforded and what responsibility Canada has for people who are in other jurisdictions or who may indeed be refugees, but who can't

access our system because they don't have proper documents, etc.

JH: Until we get to the point of a new refugee regime that is premised on genuine burden sharing, each signatory state has an independent responsibility. It may be different in five years or even two, but today each signatory has an independent responsibility, and it is inappropriate for any signatory state to deny entry to a person who may have a genuine claim to Convention refugee status. We may be moving to another position, but we're not there yet. I think that, unfortunately, the harmonization of procedures is preceding the substantive agreement on burden sharing.

Inquiries, Fingerprinting

[Inquiries are to be public, but, where considered necessary, confidentiality will be assured.]

HA: I think it's a very good provision to make inquiries public, if nobody objects.

EV: What about the fingerprinting issue? What's the thinking behind that?

JB: Yes, the vast majority are fingerprinted or could be. At a port of entry you can fingerprint those who don't have documentation or those against whom you make removal orders. The claimants who are not fingerprinted today are in-status claimants and those with conditional departure notices. We're making fingerprinting a universal system.

HA: Apparently the Minister will be proposing a change, announced on "Cross-Country Checkup," that fingerprinting records will be destroyed once a refugee is landed. Once they're through the process, they are treated as any other Canadian, which I thought was a very reasonable suggestion.

GJ: Those who work frequently with refugees react to the hype that surrounds [the provision]. We know that 65 percent of claims are accepted. It seems negative and unfortunate. The rationale is misplaced.

MB: It is a big provincial issue, though—the issue of multiple welfare claims. There are indications of duplicate and

triplicate claims. There is a broader problem that needs to be addressed.

HA: It's really a marketing problem. In Sweden, businessmen are fingerprinted, allowing them elite processing. If it's thought of as a right, as opposed to a criminal sanction, there would be no problem.

GJ: I agree that criminality ought to be a red herring. The concern is that it's not seen that way in the public eye.

Family Class and Independent Immigrants

AR: I am concerned about the stereotypical definition of a family. As a demographer, I don't think it's one that applies to most people born and raised in Canada and certainly doesn't apply to immigrants and refugees, in terms of generations and other relationships, including plural marriages. I doubt if we can entrench anything that defines the family class unless it recognizes the variety of different arrangements. We seem to be using an anachronistic concept.

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MB: The definition of family class appears in the regulations, not the legislation. It's clear that the line will shift over time, but it's a separate question from management of the streams, which is affected by this legislation. There is presently no policy intent to expand the family class.

ML: I understand why you're doing that in terms of encasing the family in regulations, but some advances were made during the 1986 Hawkes Committee concerning the definition of family and dependents. Is there going to

be a parallel process where these advances are going to be examined again?

MB: There have been changes. As a result of some of the changes implemented after that committee's report, there was a huge increase in the number of parents coming to Canada. However, we are not proposing to change the definition of family class, only the management of it.

REFUGEES

Inland Refugee Claims

[Admissibility: Once a claim has been made, a senior immigration officer or adjudicator determines whether the claimant is admissible to Canada. No inquiry will be held in conjunction with the SIO's determination. A senior immigration officer has the authority to decide on "straightforward" issues of admission, while more complex cases will be referred to an immigration inquiry for a decision by an adjudicator. If the claimant is inadmissible due to criminal inadmissibility provisions, a deportation order is issued by an adjudicator. If the claimant is inadmissible due to any other provisions, a conditional deportation order or departure order is made. The federal government will no longer provide designated counsel to claimants and others appearing at an inquiry. Claimants and others whose admissibility is determined by a SIO without an inquiry will not have legal access to a lawyer at all.

Eligibility: A senior immigration officer will determine whether the claimant is eligible to make a claim. Under the current legislation, eligibility is determined at the preliminary inquiry by an adjudicator and a member of the Refugee Division. Under the proposed amendments, while considering whether claimants are eligible for a hearing in the Refugee Division, the SIO will not assess whether claims have a credible basis. The claimant will no longer have right to counsel at the determination of eligibility, since such determination will not be made at an inquiry. The grounds for ineligibility would include refugee status in another country, arrival from a safe third country, repeat claims, and criminal and security reasons. These criteria are not substantially different from the

current legislation, except as they reflect changes to criminal inadmissibility. Where the claimant is alleged to belong to a criminally inadmissible class, the SIO cannot make the determination until the allegation is confirmed by an adjudicator.]

JB: The criminality provisions are adapted to the eligibility criteria in a way so that you cannot exclude a person from the refugee status determination process because of the possibility that the person has committed an offence. The person has to be convicted in order to be excluded.

GJ: There are provisions for exclusion [with regard to] serious nonpolitical crimes, crimes against humanity and war

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crimes. There’s also a prosecution as opposed to persecution element in the definition itself, so there are safeguards built into the definition that would have the effect of barring the person from having his or her refugee claim determined on its merits.

JB: But the eligibility criteria are linked to the requirements of Article 33 of the Convention. Basically, we take the approach that if a person can be removed, notwithstanding the fact that he’s determined to be a Convention refugee, then we do not need to make a determination.

JH: A big part of the three years they spent drafting this Refugee Convention was spent dealing with these kinds of problems—the criminality exclusions. The reason that criminality exclusion was built into the definition was to ensure that the authority examining the merits of the claim to protection be the body that determines whether or not the criminality outweighed or failed to

outweigh the need for protection. So I think Greg is raising quite an important issue of principle: whether these issues ought to be determined at the outset in the absence of all the facts that may constitute the refugee claim, or whether now that Canada finally has the Convention-derived exclusions built into our domestic definition, it isn’t better to simply leave that determination as the Convention proposed: to the determination authority.

HA: That’s the key issue.

JB: That’s a philosophical question that was answered by Parliament in 1987-88.

JH: It was and it wasn’t. At the same time as these exclusionary requirements were established, Parliament gave the Board the jurisdiction to deal with issues of this kind in the context of refugee status determination. I think that is a problem—the Board’s role is very unclear, given that the upfront exclusion appears to fall to other parties.

HA: One of the interpretations of the provisions is that it has given immigration officers much more power to deny people access to the refugee determination system. The way the Act is worded appears to affect eligibility and who can get into the system. Tell us what you think it says and what authority the immigration officers do and do not have.

ML: Would you also indicate where your default position is? If in doubt, does it mean the SIO gets the case or the adjudication officer?

JB: The jurisdiction of the senior immigration officer is very precisely defined with respect to admissibility: lack of documentation; persons who return without consent; and persons without status in Canada. All other cases go to inquiry, by default, with no discretion. With respect to the eligibility criteria on criminality, the SIO makes the ultimate determination on whether the person is eligible to make a claim, but it’s based on the adjudicator’s determination of whether the person is criminally inadmissible to Canada, so there’s no discretion on the part of the officer.

GJ: Can I paint a picture of what I extrapolate from the Bill about what will happen at the port of entry when people come in? They will get off the plane and

go to first primary immigration. They will then be referred to secondary immigration for inspection and will be examined by an immigration officer who will write a report indicating that they came to Canada for whatever reasons, and that they don’t have proper documentation, or whatever. The immigration officer will then refer the case to a SIO who will interview the person further and then conclude with respect to eligibility. Conceivably this could all happen in a couple of hours. It would all take place within the confines of the airport immigration offices, without any right to access counsel, whether a lawyer, a friend or parent.

There are two very substantive issues. The officer makes a determination with respect to the allegation in the report, and also respecting eligibility. What concerns me about this situation is that the allegation might be straightforward, but the factual basis for the allegation may not be. For example,

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just off the top of my head, if an immigration officer finds in the airport washroom a passport or a travel document issued by the Federal Republic of Germany and that person in that photograph might be the person sitting in front of him, then that senior immigration officer may conclude that this person is not eligible because they have status in a prescribed, safe third country. If the person denies having held the passport, it could be a serious factual dispute over which the SIO has jurisdiction without any input from counsel, any assistance to the person concerned, etc.

JB: I don't doubt that there may be disputes of fact. But they are still straightforward issues. If you have a passport that appears to have your picture in it and you appear at an airport at the same time, chances are you came together.

HA: I agree with giving the immigration officer the right to make a judgement like that. If they can't make that kind of a judgement, what kind of a judgement are you giving them to make? As a lawyer you could contend that every fact is a disputable thing and as a philosopher I would agree, but that doesn't mean in practice every fact can be disputable. I am interested in situations that are problematic or that would allow an immigration officer to exclude a genuine refugee claimant. These new accessibility and eligibility provisions strengthen the officers' hands, don't they?

JB: It gives jurisdiction to the officer that he doesn't have today to make decisions of whether the person is eligible to make a claim. The questions of eligibility may not be that straightforward.

AR: Your earlier point, Jim, as I understand it, was that the present legislation, by allowing more time to inquire into evidence, do more research and cross-examinations, etc., gives a little bit of breathing space. This is in contrast to the proposed amendments, under which someone can say you're going to get on the next plane to leave, on the basis of potentially incomplete information.

JB: There is only one situation where that can happen with respect to a person claiming refugee status: if the person has come from a country with which we actually do have a burden-sharing agreement.

If a person comes to Canada from a country that is prescribed under S.114(1)(s), that person is ineligible. Concerning removal, a claimant can only be removed immediately if the country through which he travelled is a prescribed country under S.114(1)(s) and Canada has an agreement with that country. Otherwise the removal order cannot be executed for seven days. I think the most likely scenario is that there will be a prescription only where there is an agreement.

JH: I have a couple of queries on aspects of eligibility. The Bill as it is now drafted doesn't appear to take account of the following scenario: a refugee from country A finds protection in country B and at some subsequent stage becomes at risk in country B, and comes to Canada. The way the criteria of S.46.01 are now drafted, this person is returnable to country B, which will still admit him, even though he may have a well-founded fear of persecution there. That's got to be a mistake. I'm sure that could not have been the intent of the draft, assuming that a person cannot safely return to a state in which he formerly found asylum. The easy answer to this

JH: If the person finds protection in state B, he is ineligible to come to Canada so long the state B protects him. That's clear and I have no problem—that's the way it should be. But if the person is a national of A, has resided in B, and has a fear of persecution in each, he is absolutely entitled to have his claim determined in Canada or any other state.

JB: I disagree. On the basis of the Convention, it says that not having a country of nationality is outside the country of the person's former habitual residence. If the person is a citizen of country A, then he is not without a country of nationality.

"The whole refugee community is afraid of this. That the government's intention is to send people back, not giving a damn if they are protected or not, to countries where they do have a well-founded fear of persecution."

problem is the retention of Section 46.01(2) of the Act as it exists today, which makes it clear that a person who claims a fear of persecution in the second state will have his claim determined by Canada. I think we certainly need to reinsert that in this draft.

JB: Well, there is no mistake.

JH: You're intending to return that person?

JB: We are intending to return that person.

JH: Well that's breach of international law and you can't do that. If a person has a well-founded fear of persecution, either in a country of nationality or of former habitual residence...

JB: Only if he is no longer a citizen of his country.

JH: No, we are presupposing that he has a well-founded fear of persecution in state A. We are now saying that there is no longer protection in state B. He can safely return neither to A nor to B, but you're suggesting that he is not eligible to have his claim adjudicated in Canada?

JB: Even if he were eligible, the Board could not find him to be a Convention refugee with respect to country B.

JH: So what is the solution for the individual that I just put before you? You ship him into orbit, or back to the country where he was persecuted?

HA: It's against the very principle of the Act.

JH: This is not right, John. I mean the drafting is not right.

JB: It is not a mistake. The intent will be to give the person a Minister's permit.

JH: Why are you going to go that route rather than recognizing that this is a person who has a well-founded fear of persecution in state A and can't live in the state where he formerly had protection?

JB: The question is whether the person can make a claim and whether it makes a difference if he can make a claim and the answer is, given the definition of the Convention refugee, it would make no difference. The Board could not find him to be a Convention refugee with respect to country B.

HA: You are just dead wrong on that. I was just reading some decisions sent to me from Australia.

JH: You're saying that giving a person a permit is the legal, factual equivalent of granting that person refugee status, which is just wrong.

JB: I don't suggest that.

JH: Well, you're granting a person a very inferior form of discretionary protection that carries with it none of the rights of the Refugee Convention, nor the rights that accrue to refugees under this Act, which allow access to permanent residence. I won't pursue this, I assumed this was a simple point, that you just left out 46.01(2), which was in the Act—which was there intentionally last time around—to protect against this situation.

HA: The point is, why not do it properly? What you are doing is telling us that the intention is to not enforce the spirit and, I would also argue, the law of the Convention. The whole refugee community is afraid of this. That the government's intention is to send people back, not giving a damn if they are protected or not, to countries where they do have a well-founded fear of persecution.

JB: No, it is not our intent. I am saying that the person cannot be determined to be a Convention refugee with respect to country B if he is a citizen of country A.

HA: Is it possible that your legal interpretation in that regard is wrong? Is that possible?

JB: I suppose it is always possible.

HA: Now if it is possible that it is wrong, would you agree to review it just that much, to say let me raise a reasonable doubt in my mind that I may be wrong and we consider the other possible interpretations of the Act that I just heard and consider whether this section should go back in?

JB: If it went back in, it certainly would not be in the form that it is in right now.

JH: Okay, it only needs a three-word change: "A person is eligible to have claim determined by the Refugee Division if the person claims a well-founded fear of persecution ... in the country that recognized the person as a refugee." Very straightforward—you change three words in the existing provision and it works. Look, the number of people we are talking about is very small in any event. The whole rationale of this Convention is that where the person is formally returnable to some state, you have to assess whether or not there is a good reason to prevent that

return; if the person is formally stateless and has no state to which he is returnable, the claim is to be examined under the Statelessness Convention. An individual who is formally returnable both to A and to B, under my scenario, has to have his claim assessed to determine whether or not there is a good reason based on fear of persecution for a Convention reason to grant that person protection. It is logical to protect him, it is humane to protect him and the downside cost is negligible because we are not talking about a big group.

MB: If I am from Sri Lanka and have been living in Germany, I applied for my claim and suddenly I find that there is an outbreak of violence. I acknowledged that Germany has given me protection, but the conditions are no longer safe and some of the regions are not so keen on encouraging the police to protect, so now I would like Canada to accept my claim.

"Concerning the existing case-load, the intent is to permit a policy shift to rebalance the program. Over the past few years there was a huge inflation in the family-based movement that squeezes out other immigration."

Under the scenario that you described, does that mean that the claim would not be adjudicated?

JH: It would be adjudicated. One has to consider the adequacy of protection in terms of Convention standards. These questions have to be looked at, that's all I am suggesting.

HA: But it can't be done by an officer.

JH: This is the kind of situation that ought to be dealt with by the Board.

JB: That would require a lot more amendments to the Act because we have to give the jurisdiction to the Board to make those decisions and they don't have it now.

JH: Well, the Board perceives itself to have that jurisdiction and has exercised it

over the last two years. Section 46.01(2) specifically addresses the scenario of a refugee who is at risk in the country in which he has found asylum.

JB: They can only adjudicate the claim with respect to the country of origin. They may find the person to be a refugee in Sri Lanka.

JH: Currently, if an individual applying as a refugee vis-à-vis state A by virtue of 46.01(2), state B is excluded as a site of removal, hence the person would be protected as a refugee from A.

JB: But if they're making an assessment with respect to whether the person has a valid claim with respect to the country of asylum, then they do not have jurisdiction.

JH: If 46.01(2) effectively eliminates B as a site of removal, then assessment of the claim against A is all that is required in order to protect a person. The Board should provide protection for the person who can be returned to no country safely, and that's the bottom line here.

JB: I'm not saying that it is not an issue—but a much greater issue than the one you suggest.

JH: It is and it isn't. I am questioning whether, given that the prescribed list concept is going to be superimposed on the Convention, the Board ought not to retain the residual jurisdiction to entertain the claims of people who cannot be returned to a prescribed country by reason of fear of persecution?

JB: Well, I guess that is the issue here then.

JH: I think the prescribed list concept is highly problematic; that is a much bigger question. But if a person cannot safely be returned to any state—A or B—then the Board not only can, but has a duty to determine that claim.

JB: I think you mixed the two provisions here. Let's talk about the U.S. You have a person who comes up here from the U.S. and who has never made a claim to the U.S. The U.S. is prescribed, so that person is ineligible and that person goes back. This person's brother happens to be a Convention refugee in the U.S. He comes up and is ineligible because he has protection in the U.S. But say he fears persecution in the U.S. and in your scenario he goes on to the Board.

JH: He should be heard by the Board, but that doesn't guarantee he will be recognized as a refugee. It depends on whether he is adequately protected in the U.S.

JB: Well, under the wording of the Act as it stands right now, if he went on to the Board, the Board could only make a decision with respect to his country of origin and that's all they do now. No dispute on that.

JH: I am not disagreeing. You determine a claim of a person who has a country of nationality with regard to that country. Then one comes to the issue of whether

opening to serious abuse? My sense is that the number of people who might abuse it could not be that large, and that the judgement should be made by a Refugee Board.

JH: Even if John's interpretation were right, we come to the second question: does it make any sense not to retain S.46.01(2), given that it provides an easy safeguard?

JB: I think it is too easy a safeguard, that is my concern.

JH: I don't think that a safeguard can be too easy.

to schooling. Article 33 is the wrong standard. The intent expressed in Section 114 (8) is more appropriate. You really want to know whether this a state that complies with its obligations under the Convention. There are a lot of countries in the world that don't send people back, but they do very brutal things to them. Technically, these states meet the test of Article 33 compliance, the broader concern of S. 114 (8) notwithstanding.

JB: But when you're deciding to prescribe, you're looking at other things.

HA: Then why make the reference to 33? What he is saying is that there is no congruence in the Act. It is bad drafting. You don't say Article 33, which is just a nonrefoulement clause, and then say in another section that you have to comply with Article 33 and refer to all kinds of other factors that aren't part of Article 33. That's just bad drafting, it's bad legislation.

JH: It seems to me that we should be looking, first, at whether they respect the human rights of refugees and refugee claimants; secondly, do they have a procedure to look at refugee claims that meets basic international standards; third, will they in fact admit the person and let him into their process? Those are the three questions. That's what you need to say, and you can say it in a straightforward fashion and achieve your intent without this incongruent reference to Article 33.

MB: You have lots of suggestions and some of them I gather you are going to use as testimony when you go to legislative committee. We have our own ideas about some things that need to be modified. It would be very helpful if you gave us whatever ideas you have before you present them.

JH: I think that's fair, but I think we should have a two-way exchange, with you explaining the thinking behind certain provisions. Obviously the best route is to have you guys walk in with changes.

AR: I may be way off base, but it is still my opinion at this stage that when you combine the delegation of certain powers to officials through regulations, international agreements and provincial agreements, with changes in the

"I see a fundamental contradiction in this Act between shared responsibility and safe third countries. Safe third country is a beggar-thy-neighbour ideology. It's a way of unilaterally saying that the problem is not ours."

or not there is a second state to which the person is returnable. Section 46.01(2) effectively prohibits consideration of the U.S. as such a country in the event the Board is convinced the person has a well-founded fear of persecution in country B.

JB: That is not what the Act says.

JH: Rather than being technocratic and legalistic, all I want you to do is to think about my scenario of a person who has a well-founded fear of persecution in A and who had protection in B, but now has become at risk in B. Is it logical to say that such person may not be protected? That is my only question.

MB: That person could be dealt with under a Minister's permit or it could be some kind of public policy provision. So in those instances the real issue is should you apply a lesser kind of test, and what are the policy issues that are at stake?

HA: You translated it back to a political and administrative problem! It is an issue of human rights and an international Convention to which we are subject. We are obligated as a country to provide protection if returning that person to country A or B would endanger that person. Further, the determination of that situation should not be at the discretion of an immigration officer or even the Minister. Does this give an

JB: You can look at it again, but I just think that the solution is a much more complex one than is suggested.

HA: Let's get into the safe third country provision. We clearly have a very profound difference on this.

GJ: There is one difference from the current Act—the safe third country will not have to be a country that has a refugee determination system.

HA: What was the intent behind that? I object to the whole side.

JB: That the country has to respect its obligations under Article 33 in the Convention. That's the key, isn't it?

JH: No, it's not. That's my first point. A country can be prescribed if it complies with Article 33, and then you define compliance with Article 33 by means of four other things. This is a very poorly drafted section because complying with Article 33 doesn't require the four other things you're told to look at. Article 33 is only one article in the Refugee Convention. It is not the Refugee Convention. A state that fails to comply with *any* of its obligations under the Convention is an inappropriate site for return. In other words, you can have a state that doesn't "refoule" people, but which starves them to death, tortures them, or denies refugee children access

Constitution regarding powers of provinces, we are going to end up within the next decade losing central federal control of immigration. The federal Parliament will have very little effective power—it will be in somebody else's hands.

JB: The provinces have expressed an interest in immigration and there's no question that they will play a greater role in the future. We have made provisions for that; it is part of the Constitution.

HA: I see a fundamental contradiction in this Act between shared responsibility and safe third countries. Safe third country is a beggar-thy-neighbour ideology. It's a way of unilaterally saying that the problem is not ours. Shared responsibility says that decisions about how we adjudicate such things are done by open agreements. This Act tries to wed the two—and it does so poorly. Technically and philosophically, they are two separate ideologies. I'd like to have some rationale for that kind of marriage. If you have shared agreements, why do you need safe third country? And if safe third country can only be implemented in real terms with shared agreements, why not delete the whole section on safe third countries? My final argument is that it is the worst public relation vis-à-vis the refugee support community. It is waving the red flag. Why not get rid of it?

JB: As I suggested before, I don't think that we will see a prescribed country list that does not parallel a list with which we have agreements.

HA: So why have it? It reads like scissors-and-paste legislation. It stands out as if somebody has said, "Put this in the Act. I need it for the Reform Party" or something like that. It's totally unnecessary and not a good thing at all.

JH: Take one step backwards. You're saying shared responsibility may be a good thing, but safe third country is definitely the wrong approach. I think shared responsibility, as it is currently being conceived, is an equally bad idea.

HA: It may be.

JH: Of everything I object to in this Bill, my concerns are greatest in regard to S. 108.1 The generic idea of everybody collaborating is one thing, but the particular forms that exist in Europe,

and that we are talking about joining, are extremely dangerous and should never be adopted by Cabinet acting alone. Any treaty of this importance should be presented to Parliament.

ML: It seems to me that the specifications of safe third country and shared responsibility have a gap concerning Canada's geographic position and our position re refugee flows. We do not have many people migrating from Canada to elsewhere. This is nothing new. But shared responsibility agreements have to look at the size of refugee flows. If there is a huge refugee flow coming from

America—in terms of how do those countries as a group and individually deal with the phenomena in order to protect themselves and meet their obligations. That is a different problem with quite a different set of solutions. What Section 108.1 does is give legislative authority for Canada to participate in agreements designed to deal with that problem, certainly to Canada's benefit, and obviously also to the benefit of the countries with which we reach agreements, but not to the detriment of migrants.

"The provinces have expressed an interest in immigration and there's no question that they will play a greater role in the future. We have made provisions for that; it is part of the Constitution."

country X and two countries would agree to share that flow—how would that be divided up? You would have to be concerned about not breaking up families, etc. That is what I would call shared responsibility: taking a refugee flow and making some sense of how that can be divided. I don't see anything in here that addresses these questions. The fact is that Canada is the end point, so the question is only one of turning people back, not sharing. That means that the language we have is really not fitting with the kind immigration and refugee flow problem that we seem to have.

JB: There's a different question being asked by Michael here and that is what is the objective of Canada and the objectives of most European countries with respect to worldwide migration pressures. The proposal here, in the Dublin Convention, and everything else that has been raised in recent years with respect to questions of countries of first asylum have not been addressing the type of problem that Michael is talking about, which is how do you deal with particular flows from particular places. The question the legislation is addressing is how do you deal with the overall growing flow of asylum seekers into the countries of Europe and North

HA: Shared responsibility is lifted out of some of our writing, along the lines that Michael talked about and what Jim was referring to, as a vision of the receiving countries assuming a collective responsibility and allocating responsibilities by mutual agreement among themselves. In order to get rid of beggar-thy-neighbour, we started to talk the language of shared responsibility, etc. The language is now incorporated into the legislation. Jim's point is that the phrase is being used not to mean shared responsibility but to mean another form of beggar-thy-neighbour. It's particularly important for Canada for two reasons. First, we are a leading country setting the standards. On the other hand, we're still a country that gets less than our burden share. We are the last country that needs to do this stuff—we are geographically at the end of the pipeline. We're the last one in that section and we're the bearer of refugee standards. To start doing this kind of thing is horrible and bad.

JH: There is even a more fundamental assumption underlying Michael's question. As the Dublin Convention is drafted, if Italy or Germany or some other participating state takes a disproportionate share of the overall

refugee flow into the contracting states' territory viewed as a whole, then that state will be compensated by the other contracting states. Now if you factor in our geographical position at the end of the long route to asylum, it could effectively mean that burden-shared responsibility in an agreement like Dublin means both fewer people coming as refugees to Canada, and potentially hundreds of million of dollars in payments to our partners who receive those people. It will be the Italians in the case of the Africans, the Americans in the case of the Central Americans etc., who ultimately run the determination procedures and either receive or reject the claimants. This scenario is very different from the idea of looking at relative resources, looking at the extent of cultural homogeneity, etc., and coming up with a formula that shares the responsibility broadly. It's saying, "How do we limit the options of claimants to site A as the one and only place where they can make a claim?" and the rest of us pay a price to those states that carry the burden. The end point of this is that Canada might not receive many claims at all.

The Hearings

[The preliminary inquiry would be eliminated. A unanimous positive decision on the part of the Refugee Division members is required to accept claimants who have without valid reason destroyed identification papers, those from a nonrefugee-producing country, and those who have returned to the country of alleged persecution during the processing of their claim. Most hearings will be open, but the panel may decide to close a hearing or restrict publicity about the case. If the Minister chooses not to participate, the Refugee Division may decide in the claimants favour without a hearing.]

GJ: I have a couple of problems with this provision. In more than one place in the Act there seem to be penalties or a higher burden placed on refugee claimants that arrive without documents. It's part of the section on carrier responsibilities, and it even affects landing. And yet as Jim has already said, in many ways the hallmark

of valid refugees is the inability to get valid documentation from the country where they fear persecution.

JB: I don't buy the myth, but go on.

GJ: From my experience with clients, it does not seem to be a myth. The fact is that the Refugee Board refuses refugee claimants if they applied for and obtained travel documents from their own government. So you might not buy the myth, but the Refugee Board buys the myth. Already identification is an issue, so I don't understand the rationale for the new standard. It seems as if the public is angry at people who come without documents because they think that they are abusing the system, so the politicians have put it into the Bill.

HA: For someone who arrives without documents, the question is should Canada put all kinds of incentives and penalties for producing whatever

HA: That's a separate issue. I could understand it.

JH: The problem is that we're creating disincentives for people to be honest, either because their credibility is questioned at the hearing on the ground of false documents, or because they may be found ineligible upfront before they even get to the refugee hearing because they are carrying a passport of a prescribed country. Refugee claimants do dumb things because we've created such a maze of obstacles that ultimately the claimant doesn't know the right way to go about getting to Canada.

GJ: I don't understand the connection between the control problem mechanism and the destruction of the documents. If the person has a well-founded fear of persecution in his country of origin, the fact that he destroyed his documents on the airplane does not change that fact.

"My concern is with the method. I'm concerned that there are some people who come to this country who destroy their documents but who are genuine refugees, who are in need of assistance or protection, who are going to run into a system where they are put to a much higher standard of proof."

documents they have? Leave aside for now whether they are proper documents because that is a source of confusion. People often have to use all kinds of purchased and forged documents to get out of a country—I don't have any problem with that. If you come on with a forged document, get off with a forged document, show it so they can say you're a refugee. I have no problem with the government demanding that that be done and putting all kinds of inducements and penalties in the Act to ensure that it is done. I don't think we should condone the destruction of documents.

JH: In theory you are absolutely right. But we know that we have visa controls on the majority of the world's refugee-producing countries, so if you're carrying the passport of such a state, you are not going to be able to get on a plane to come to Canada.

HA: Well, I will tell you why it affects it. There is a problem of identification. If you're having refugee hearings, you don't want an unidentified guy coming up—he could be a criminal—making a refugee claim. You have no way of tracing him, you have all the mechanisms available to find out who he really is and where he comes from. I think the Canadian government should have the extra leverage to find out who that person is. I think Jim's critique is right—that we now send the message out that encourages people to disguise their documents. On the other hand, the government should be able to find out who in fact is sitting in front of them.

GJ: I'll tell you something else. In the last week I've had two people tell me that your officers at the appeal office are alleging people committed serious nonpolitical crimes for having forged documents. Those people got off the airplane and handed their false

documents over to the immigration officers.

JH: If you really want to deal with this, first, you reassess the visa policy on all refugee-producing states. Number two, it should be clearly understood that false documents do not negatively impact the credibility of the claimant.

JB: That's not a reason for having to destroy them.

JH: The process creates so much confusion that you do whatever you need to get on the plane and then get rid of whatever it was that let you get on board.

HA: I think it should be the reverse. The idea is to get people to keep the documents, not destroy them.

JH: If you want to eliminate that industry, eliminate the visa requirements on known refugee-producing states.

HA: Well, there are other kinds of factors. I would argue that documents should not influence eligibility or accessibility to a refugee claim. This should be spelled out in the Act so that everyone will know it. It would alleviate the fear that people will be guilty of a criminal offence for holding false documents. Does that make sense to you?

JB: It certainly does. The principle behind all the references to keeping documentation is designed to get people to produce their documents, not to their detriment but to the benefit of the system.

JH: My concern is not with the intent. I think that the intent in trying to identify people who are otherwise undocumented is valid. My concern is with the method. I'm concerned that there are some people who come to this country who destroy their documents but who are genuine refugees, who are in need of assistance or protection, who are going to run into a system where they are put to a much higher standard of proof.

HA: It didn't say they can't be, it says they may not be. The Bill says there will be higher hurdles unless you produce your documents. There has to be a clear message to the immigration officer that you cannot use false documents to deny accessibility or eligibility to enter the refugee system. It has to be explicit in the law.

JH: The bottom line is that everyone in these countries of origin know that with their genuine documents they don't have a hope in hell of getting on an airline.

HA: I believe that the inducement system will work. I don't think carriers should be penalized for transporting genuine refugees—if you could put that in, it changes the whole picture. It would say that we're open to genuine refugees, but we're not open to the others.

evidence that the system is at risk of abuse. Why don't we leave it the way it is and treat all refugees similarly whether they are the exception or the rule?

GJ: I have found from my practical experience that the unanimity requirement is redundant. A client who breaks any of these three requirements is probably going to lose. If they come from one of those obvious countries like the United States or West Germany, they're

"It seems to me that the specifications of safe third country and shared responsibility have a gap concerning Canada's geographic position and our position re refugee flows. ... The fact is that Canada is the end point, so the question is only one of turning people back, not sharing."

JB: The standard is there, quite frankly, because, as you just said, you don't want airline check-in clerks assessing Convention refugee claims.

JH: If you tie Howard's idea with Section 45, I think you would have a workable piece of legislation. Part (b) is also a problem: persons having returned to their state of origin. In principle, everyone understands that you may undermine a well-founded fear by going back to the place where you came from. I think all you need here is the exact language that you have in (a), referring to those cases without a valid reason. If you go back to visit your dying mother, or to rescue your children, the international law criteria for cessation have not been met.

Part (c) is also problematic: requiring a unanimous decision for persons coming from states declared by Cabinet to respect human rights. It codifies a skepticism towards claims that come from states that have not traditionally produced large numbers of people by imposing a higher adjudicative threshold. Why would we want to make the change just for refugees who are exceptions to the rule? Why impose a higher adjudicative threshold? If you look at the IRB's record, I don't think we've accepted a single American refugee claimant. There is no real

going to lose. And if they return to their country of origin for any reason, including to see their sick mother before she dies, there's a very good chance they're going to lose. I think it's redundant, from my practical experience.

HA: The amendments Jim suggested are quite reasonable.

JB: Certainly adding the valid reason is a legitimate point to raise, and the lack of criteria certainly ought to be reviewed.

JH: I think you have to look to see if there really is a problem. If there were 1,000 claims accepted from the U.S. that appeared to be bogus, I might understand your preoccupation, but I've looked at the IRB stats, and there hasn't been a refugee from the U.S., or Great Britain or France, none of the obvious countries.

GJ: And I think it shows a real lack of faith in the Board members.

JB: I think the original intent was to try some form of exclusion for those types of people, but we moved away from it, maybe to the point where it becomes of questionable value.

HA: Maybe rather than trying to spell it out, it's better to drop it. It's unnecessary overkill.

JB: You're right. Ultimately when you get into a hearing, you won't save any time with this unanimity provision.