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IMMIGRATION: CONSTITUTIONAL ISSUES

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IMMIGRATION: CONSTITUTIONAL ISSUES

The purpose of this paper is to set out and analyze the various constitutional options that are possible in the field of immigration. For each constitutional configuration, benefits and drawbacks will be suggested that may make it possible to draw conclusions about the suitability of the options. The existence of administrative arrangements that may modify rigidities under the various legislative options will also be noted. First, however, the scope of Canada's current immigration program will be described in order to make clear what is comprised under immigration jurisdiction.

SCOPE OF CANADA'S CURRENT IMMIGRATION PROGRAM

A. The Administrative Framework

The scope of the activities carried out as part of Canada's immigration program is extremely wide. A network of Canada Immigration Centres exists in every province in Canada, and there are over 60 full-service immigration facilities in posts abroad. In addition, the Immigration and Refugee Board of Canada (IRB), the largest administrative tribunal in the country, adjudicates claims to refugee status and hears appeals relating to immigration matters.

Although the two departments and the IRB are the most visible, other federal departments and agencies are involved as well. Canada Customs provides the primary inspection on behalf of Immigration Canada for all people wishing to enter the country. Health and Welfare Canada has certain domestic responsibilities relating to the health of refugee claimants and others, and supervises the system of medical checks that is mandatory for all immigrants to Canada and for certain visitors. The Canadian Security and Intelligence Service are responsible for security clearances of prospective immigrants. The RCMP investigates possible violations of the immigration laws. The immigration program also affects the court system. The Federal Court of Canada has jurisdiction over most immigration matters, a very litigious field.

In his Report for the fiscal year ended 31 March 1990, the Auditor General devoted four chapters to virtually all aspects of the immigration program. After outlining the scope of the program, he concluded that the information provided to Parliament (and hence the public) was "incomplete and fragmented." He noted that, collectively, the Estimates of the various departments and agencies involved in the delivery of the immigration program did not begin to disclose its full costs because the services provided by Customs and the RCMP were not identified separately, and costs incurred by External Affairs (at that time responsible for overseas posts) were only partially disclosed. Nor were the various components cross-referenced to each other in the Estimates.

The Auditor General's conclusion that it is very difficult to obtain a complete picture of Canada's immigration program should be borne in mind throughout this paper. "Immigration" consists of more than brief questions asked at the border of people desiring to enter the country. Of course, the scope and complexity of Canada's current program is made necessary in part by an active policy of reasonably high immigration; if that policy were to change as a result of a decision by Canada, or by an individual province, should it assume jurisdiction, the administrative structures would no doubt change somewhat as well.

B. The Legal Framework

1. The Constitution

Immigration is one of the few areas of explicitly concurrent jurisdiction (along with agriculture and old age pensions) in the *Constitution Act, 1867*. Section 95 states that provincial legislatures may make laws in relation to immigration into the province, and that the Parliament of Canada may make laws in relation to immigration into all or any of the provinces "and any law of the legislature of a province relative to ... immigration shall have effect in and for the province as long and as far only as it is not repugnant to any Act of the Parliament of Canada."

Whether a provincial law was repugnant to a federal law would ultimately be up to a court to decide, but the current judicial trend in cases where legislative competencies overlap is to permit wide latitude to each jurisdiction. It may be predicted that a provincial law relating to immigration that is otherwise constitutional (that is, that did not offend the *Canadian Charter of Rights and Freedoms*) would likely be found "repugnant" to the federal law only if it were patently contradictory to it.

Quebec is the only province with current immigration legislation and with a provincial immigration department. The scope of its statute will be described below.

2. The *Immigration Act*

The most important federal legislation governing immigration is the *Immigration Act* (R.S. 1985, c. I-2), which came into effect in 1978 and was amended significantly in 1988, primarily with respect to refugee determination matters.(1) Its current length – 122 pages – illustrates the complexity of modern immigration regulation.(2) The following topics, all covered by the Act (in addition to many others), illustrate its scope:

- the goals of the immigration program;
- the establishment of the general classes of immigrants;
- rules governing the admission of immigrants and visitors;
- arrest and detention provisions;
- offences and punishment;
- removal criteria and procedures;
- establishment of the Immigration and Refugee Board of Canada;
- procedures for determining refugee status;
- special procedures for security risks;
- appeal procedures for sponsors and certain people ordered deported or refused entry;
- appeals to the Federal Court of Canada;
- rules regarding transportation companies bringing people to Canada, including seizure of vehicles under certain circumstances; and
- regulation-making powers and other administrative procedures.

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(1) Bill C-86, given first reading in the House of Commons on 16 June 1992, would amend virtually all aspects of the Act. The scope of the Act would, however, be unchanged.

(2) Canada's first immigration statute in 1869 had 14 pages; by 1952, it had reached 34 pages.

3. The Regulations

The *Immigration Act* authorizes regulations to be made by the Governor in Council. The main regulations made pursuant to section 114 of the Act deal, among other matters, with the following:

- the points system for independent immigrants;
- medical requirements;
- the priority in which immigrants should be processed;
- membership in the family class;
- visitor visas;
- student and employment authorizations;
- refugees seeking resettlement;
- terms and conditions regarding entry to Canada;
- rules regarding the holding of inquiries and hearings; and
- the obligations of transportation companies.

Separate regulations govern the system of cost recovery (whereby charges for specified immigration processes are imposed) and the establishment of categories of people who are worthy of admission on special humanitarian grounds ("designated classes").

4. The Immigration Manuals

Employment and Immigration Canada maintains a comprehensive set of immigration manuals to guide domestic and overseas processing and enforcement. These are updated regularly and serve to interpret the Act and Regulations, provide procedural rules, and establish forms. Three of the four manuals are available to the public.

The *Immigration Act* also refers to the provinces in a number of respects; these will be outlined below in the next section of the paper.

JURISDICTION OVER IMMIGRATION: THE *STATUS QUO*

A. Description

As noted above, constitutionally, the provincial legislatures and Parliament have concurrent jurisdiction over immigration, with Parliament being paramount in case of conflict. In 1968, Quebec passed a statute, now known as An Act respecting the *Ministère des Communautés culturelles et de l'Immigration*, which established a ministry, set out the duties of the Minister in relation to immigrants and visitors, established certain procedures for entry into Quebec, and permitted the government to make regulations on a number of matters, including selection criteria. Several provisions of the law stress the goals of integration of immigrants into the francophone majority culture and their acquisition of the French language.

The *Immigration Act* refers to the provinces in several respects. Section 3 states that one of the objectives of Canadian immigration policy shall be "to encourage and facilitate the adaptation of persons who have been granted admission as permanent residents to Canadian society by promoting cooperation between the Government of Canada and other levels of government ... with respect thereto."

Section 7 grants the provinces a voice in setting levels of immigration each year:

> The Minister, after consultation with the provinces concerning regional demographic needs and labour market considerations ... shall lay before Parliament ... a report ...

Section 108 also requires consultation on the adaptation of immigrants and the patterns of settlement, and permits agreements with the provinces on policies and programs:

> Consultations and Agreements with Provinces
>
> 108 (1) The Minister shall consult with the provinces respecting the measures to be undertaken to facilitate the adaptation of permanent residents to Canadian society and the pattern of immigrant settlement in Canada in relation to regional demographic requirements.
>
> (2) The Minister, with the approval of the Governor in Council, may enter into an agreement with any province or group of provinces for the purpose of facilitating the formulation, coordination and implementation of immigration policies and programs.

At the present time, all provinces except British Columbia, Manitoba and Ontario have immigration agreements with Canada. By far the most extensive of the agreements is the Canada-Quebec Accord, under which, among other things, Quebec selects independent immigrants pursuant to its own points system (subject to the federal statutory criteria relating to medical, criminal and security requirements). Quebec also selects refugees destined to the province. Although members of the family class are not "selected" in the same sense as independent and refugee applicants, Quebec nevertheless plays a role in interviewing applicants abroad and providing counselling. Quebec also sets the financial criteria that sponsors in Canada must meet.

In order to fulfil its objectives relating to the selection of immigrants, Quebec has established offices in nine countries.[3] In three cases, the offices are located in the Canadian embassy; in the other six, the offices are in separate buildings.

The Canada-Quebec Accord came into force on 1 April 1991, replacing the former Cullen-Couture Agreement. Much of the thrust of Cullen-Couture was maintained, but, in addition, integration services were completely taken over by Quebec, and a transfer of federal money was made to the province for this purpose.

B. Advantages of the *Status Quo*

A National View of Immigration – The current arrangements, whereby the federal government is primarily responsible for immigration to Canada, reflects an important fact: people by and large immigrate to a country, not a province. Thus, it follows that it should be the federal government that presents the face of Canada to prospective immigrants and sets selection standards that apply to most of the country.

The fact that immigrants come to Canada, rather than to a specific province, is, however, more than a mere statement of the intentions of most immigrants. It reflects the legal status and rights of the immigrants once they arrive. This is so by virtue of numerous statutes, including the *Citizenship Act* and the *Immigration Act*, which do not allow any requirement to be placed on the residence of an immigrant,[4] and, most importantly, is reflected in the *Canadian*

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(3) These offices are in: Bangkok, Brussels, Buenos Aires, Hong Kong, Lisbon, London, Mexico City, New York and Paris.

(4) Section 114(4) of the *Immigration Act* states: "For the purpose of this Act and the regulations, whenever a person is granted landing and terms and conditions are imposed, no such term or condition may specify the area in which that person shall reside." Bill C-86 contains a provision that would permit conditions relating to occupation and place of residence to appear on an immigrant visa.

Charter of Rights and Freedoms. Section 6(2) of the Charter states that every citizen of Canada and every person who has the status of a permanent resident of Canada has the right to move to and take up residence in any province.[5]

Only the Federal Government has the Resources – From the preceding section of this paper describing the scope of Canada's current immigration program, it is clear that only the federal government has the resources to maintain such a system. The federal government has the infrastructure in place to process immigrant and visitor applications in over 60 posts abroad. Computer systems are in the process of being installed in a number of those posts, and an extensive computer network in Canada links immigration offices and border points across the country. These systems are very costly, and need to be linked nationwide to be effective.

Similarly, it may be that the federal government is best placed to carry on the wide consultations with every region of the country and many interest groups that precede the setting of immigration levels and other aspects of immigration policy.

Flexibility – The present system offers enormous flexibility to both levels of government. At the one end of the spectrum, Quebec, the province that has wished to take a very active role in immigration, has been able to do so to the extent of selecting a large number of immigrants directly and maintaining an immigration presence abroad. At the other extreme, Ontario, the province of destination of approximately 50% of all immigrants to Canada, has not (to date at least) even felt the need of an immigration agreement with the federal government. Ontario has no separate immigration criteria and does not participate in immigrant selection abroad. The same is true of the other provinces, even those with immigration agreements, with the exception of Quebec.

The present system offers scope for such activities if the thinking of the provinces were to change. Ontario, British Columbia and Alberta might ultimately wish to move in the direction of Quebec, and the present constitutional configuration would permit that. On the other hand, the smaller provinces, for which an immigration presence abroad would probably be impossible, are under no pressure to establish one; yet these provinces still participate in the benefits of immigration by receiving the immigrants who choose to reside in them.

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(5) This provision is subject to section 1 of the Charter regarding reasonable limits, but cannot be overridden by Parliament or a legislature because the notwithstanding clause (section 33) does not apply to it.

Quebec Benefits – Quebec benefits in two major ways from the present arrangements. As noted, the province has been able to establish its own points system for independent immigrants. Thus, it is able to emphasize certain selection factors that are not as important in the federal scheme or that do not form part of it. Knowledge of the French language, employment prospects of a spouse, the existence of friends or relatives who reside in Quebec and the presence of young children in a family are all examples of such factors. Quebec also chooses refugees and sets its own financial criteria for sponsors.

While controlling a number of selection factors, Quebec benefits from Canada's extensive infrastructure, both internationally and domestically. At home, investigation and enforcement activities, including examinations at ports of entry, are carried out by federal employees. Abroad, Canadian posts cooperate with Quebec regarding immigrants destined to that province. Files are forwarded to the Quebec offices from Canadian posts where the applications may have originated. Each jurisdiction screens on the other's behalf, and prospective immigrants are referred between offices. Medical screening is performed under federal supervision, as are criminal and security checks. If Quebec, or any other individual province, had to handle all aspects of immigration on its own, the financial implications would clearly be enormous.

C. Disadvantages of the *Status Quo*

Administratively Cumbersome – There is no doubt that the existing arrangements for sharing immigration jurisdiction can be cumbersome and can lead to delays. For example, a sponsor in Quebec must deal with two authorities rather than just one, as would be the case in the rest of Canada. Abroad, delays can occur at posts where no Quebec officer is stationed permanently while files travel between posts. Sometimes candidates for interviews must await the arrival of a Quebec officer on a periodic trip to the region. Alternatively, candidates might have to travel long distances to meet an officer. The involvement of two jurisdictions can lead to overlap and duplication, particularly when, for example in the case of the family class, both jurisdictions wish to interview the applicant.

Federal Control – There is no doubt that joint jurisdiction leads to some loss of federal control over the program as a whole. For example, in January 1991 the federal government announced that no new applications for independent immigrants would be accepted because the 1991 quota could be filled by processing existing applications. The mechanism for achieving this

position was the points system. Quebec, however, has its own points system for independents, so the federal government's action could not affect immigrants processed by that province. At the present time the degree of loss of federal control may be acceptable, but that could change in the future (see below).

Provincial Control – From the point of view of a province, the existing system might be, or become, constraining because it is not subject to provincial control. For example, membership in the family class is established federally, as are the criteria that govern the admission of entrepreneurs and investors. A province that wished to expand family immigration by broadening the qualifying relationships would thus not have the tools to do so. Similarly, a province can take measures now to attract economic immigrants to the province, but the ultimate criteria and admission decisions remain federal. Finally, in general, immigration levels are set by the federal government. Although consultation with the provinces takes place, a province could find itself out of step with the prevailing opinion.

Pitfalls of Flexibility – One of the reasons why the present system works reasonably well is that, to date, only Quebec has fully utilized the flexibility it offers. Thus the main reason for the success of the system could, ultimately, lead to significant problems, depending on the actions of the other provinces. In large part, Canada currently has two immigration systems – that governing immigration to Quebec, and that governing immigration to the rest of Canada. What would happen if British Columbia, Alberta and Ontario all wished to develop their own points systems and establish processing offices abroad? The resulting "checkerboard" of rules and administration might well make national policies relating to immigration and control of immigration levels impossible. Further, in view of the Charter mobility rights, the actions of one province could have unforeseen effects on another, as immigrants admitted under one system moved to a province whose different rules might have excluded them in the first place.

EXCLUSIVE FEDERAL JURISDICTION

A. Description

In order to achieve exclusive jurisdiction for the federal government in the area of immigration, section 95 of the *Constitution Act, 1867* would have to be amended. Amendment of the *Immigration Act*, however, would not appear to be necessary, since its provisions refer only to

consultation with the provinces. Immigration agreements such as those that exist at present between Canada and the provinces other than Quebec and that provide for consultation and joint committees and so on would continue to be possible. It would not appear possible, however, for a province to pass legislation and regulations, establish a points system and regulate other aspects of immigration in the same way as Quebec has done. Presumably, provinces that wished to encourage immigration could establish foreign offices and advertise for that purpose; they might even take applications for forwarding to Canadian officials for processing.

B. Advantages of Exclusive Federal Jurisdiction

A Reflection of Reality – Exclusive federal jurisdiction over immigration, if combined with provincial consultation regarding policies and levels,(6) would mirror the reality as it exists in Canada today, whereby the federal government makes and administers all laws relating to immigration for nine of the ten provinces. It would also reflect the fact that people immigrate primarily to a country, rather than a province, and would be consonant with the mobility rights guaranteed to permanent residents by the Charter.

Maintenance of National Standards – Exclusive federal jurisdiction would prevent the possible situation described above, whereby a number of provinces exercising their immigration jurisdiction would make it very difficult, if not impossible, for the federal government to manage a coherent national program, and, in particular, to set and deliver target immigration levels. There would be one set of rules under which people could enter Canada, regardless of their province of destination, although the federal government could certainly take provincial requests and needs into account.(7)

Avoidance of Duplication – Exclusive federal jurisdiction would ensure that all applicants abroad, and all sponsors in Canada, would need to deal with only one level of government. It would therefore eliminate the duplication of resources that results from the stationing of provincial officials abroad and the extra staff at home.

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(6) Not to consult the provinces would be to ignore the fact that they are directly and substantially affected by immigration by virtue of its impact on schools, social services, the demand for housing, employment, and so on.

(7) For example, the present system allows for the federal government to adjust admission criteria of independent workers to target regional labour market needs.

C. Disadvantages of Exclusive Federal Jurisdiction

A Poor Reflection of Quebec Reality – Although a situation of exclusive federal jurisdiction would reflect the current situation vis-à-vis nine of the ten provinces, for Quebec the reality is entirely opposite. As discussed above, Quebec has been able to achieve a significant degree of autonomy under the present system, which it would be politically unthinkable for it to relinquish. The province has been able to achieve this while benefiting from the delivery system established and maintained by the federal government.

EXCLUSIVE PROVINCIAL JURISDICTION

A. Description

In order to achieve exclusive jurisdiction for the provincial government in the area of immigration, section 95 of the *Constitution Act, 1867* would have to be amended and the subject matter of immigration conferred solely on the provinces. The federal *Immigration Act* would require replacement (or adoption) by each of the provinces. Domestic enforcement systems would have to be instituted within the provinces, and facilities established abroad by those provinces that wished to select immigrants. Provincial measures for dealing with refugee claims in Canada would have to be put in place.

B. Advantages of Exclusive Provincial Jurisdiction[8]

Control – Exclusive provincial jurisdiction would ensure that provinces could directly control both the number of immigrants admitted to the province and the composition of the immigrant flow. Provinces that wished to concentrate on business immigrants or workers with particular skills could do so. Provinces whose economies were expanding could choose to accept more immigrants, and vice versa. New classes of immigrants could be created, or existing classes expanded, according to the desire of the individual province.

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(8) It is interesting to note that the Quebec Liberal Party's Allaire Report, *A Quebec Free to Choose*, January 1991, does not list immigration on the list of powers that should belong exclusively to the province. (It goes without saying, however, that complete control over its borders would be an essential attribute of a modern independent state.)

C. Disadvantages of Exclusive Provincial Jurisdiction

Multiplicity of Laws and Policies – The "checkerboarding" suggested as a possibility, if more provinces were to use the flexibility available in the present system, would be almost inevitable under this configuration, unless provinces agreed to pass uniform laws (in which case, what would be gained?) Three, seven or even ten different immigration laws would be likely to make control of immigration levels, policy, and national enforcement impossible.

Expense – Provinces administering an active immigration program would face both domestic and foreign costs that are now incurred by the federal government. Although the province of Quebec incurs some of these costs under its present arrangements, there would be additional costs relating to medical, security and criminality screening, functions now performed by the federal authorities. Quebec might also find it necessary to open more offices abroad, because the Canadian offices would no longer be available to forward files to them. For the other provinces, all the domestic and foreign costs would be new.

Limited Scope of Program – No individual province could begin to provide the overseas immigration delivery service currently provided by the federal government. Provinces would therefore have to choose overseas locations very carefully; inevitably, prospective immigrants would face more difficulties (and their present difficulties are numerous, even with over 60 posts). Pressure from Canadians wishing to sponsor relatives might be predicted to increase, as would charges of discrimination that would follow a reduction in the number of posts abroad.(9)

Duplication – The potential for duplication seems great under such a system: Would each large province wish to establish an immigration presence abroad? Would the smaller provinces co-operate and establish a joint office? Would each province, or group of provinces, establish separate medical, security and criminality screening systems? Would a person from another country wishing to travel across Canada be required to obtain 10 different visitor visas? Would provincial offices compete among themselves to attract the most desirable immigrants?

Enforcement Problems – The current *Immigration Act* contains numerous inadmissibility provisions whose purpose is to exclude undesirable immigrants and visitors or to provide for their removal from the country. The rules are enforced nationally. A situation in which all (or a number) of the provinces had different inadmissibility criteria would create confusion and

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(9) Even with its many posts, the federal government is regularly criticized for having a more limited presence in India and Africa than in Europe and the United States.

significant loopholes as entrants sought to be admitted to the most lenient jurisdiction and then moved freely to the real province of destination.

Loss of National Identity – It is possible that too great a provincial role in immigration might encourage provincial loyalties to the detriment of national patriotism.

ASYMMETRY

A. Description

"Asymmetry" in relation to federal/provincial jurisdiction might be defined as an arrangement in which one province would enjoy powers that other provinces would not. As will be clear from the preceding portions of this paper, the current immigration jurisdiction is already exercised in a manner that may be described as asymmetrical: Quebec has its own selection criteria for independent immigrants, sets it own sponsorship financial criteria, maintains its own offices abroad, and so on. The other provinces do none of those things (although it has been noted that it would theoretically be possible for some or all of them to initiate similar arrangements with the federal government).

Could, or should, the current *de facto* asymmetry become a *de jure* one? Section 95 of the *Constitution Act, 1867* could be amended to provide for federal jurisdiction over immigration generally, with concurrent jurisdiction reserved for Quebec alone. In this scenario, it will be assumed that paramountcy is reserved to the federal government.

B. Advantages of Constitutional Asymmetry

Checkerboard Averted – This option would avert negative consequences described above, if all, or a significant number, of provinces exercised the same powers over immigration as Quebec now does. Thus, there would continue to be national laws, policies and administration, with the proviso that immigrants to Quebec would be handled differently. In essence, this has been the case for over 20 years.

C. Disadvantages of Constitutional Asymmetry

Change Precluded – The other provinces do not at present participate in overseas selection, but should participation seem advantageous to some of them in the future, it would not be possible.

Politically Unacceptable? – Although provinces other than Quebec do not currently exercise significant powers in relation to immigration, enshrining a *de facto* situation into the Constitution might be politically impossible, on grounds of principle, for most of the English-speaking provinces.

ASYMMETRY WITH PROVINCIAL PARAMOUNTCY

A. Description

The preceding section posited concurrent jurisdiction over immigration to continue for Quebec alone, along with federal paramountcy. Provincial paramountcy, on the other hand, would provide that if a federal and a Quebec law conflicted, that of Quebec would take precedence with regard to that province.

B. Advantages of Asymmetry/Provincial Paramountcy

Increased Control – From its point of view, Quebec would be able to introduce criteria relating to such matters as admissibility, health or criminality that differed from those of the rest of Canada. It might be able to block certain immigrants who would be otherwise acceptable under Canadian law (e.g., if Quebec enacted a definition of family class that was narrower than the federal one).

C. Disadvantages of Asymmetry/Provincial Paramountcy

Loss of Control – To the extent that Quebec enacted conflicting laws, federal control over immigration law and policy would be diluted. If Quebec's admission laws were more lenient, the tendency would be for immigrants to gain entry to Canada through that province. If criteria relating to criminality, security, or health were to differ, enforcement problems would arise.

Politically Unacceptable? – The comments made above in relation to asymmetry with federal paramountcy remain true – and even more so – in relation to this configuration.

CURRENT CONSTITUTIONAL DEVELOPMENTS

In *Shaping Canada's Future Together*, published in September 1991, the federal government made two proposals regarding immigration. The first was that the government was prepared to negotiate bilateral agreements with all provinces, appropriate to the circumstances of each. The other proposal was that the agreement with the Province of Quebec, the Canada-Quebec Accord, would be constitutionalized, as would be any other agreements that were negotiated.

The *Consensus Report on the Constitution*, reached at Charlottetown on 28 August 1992, reflected these proposals. As fleshed out in the draft legal text of 9 October 1992, the immigration provisions closely followed those that had been contained in the Meech Lake Accord of 1987, with two additions and one change. The first addition specified that negotiations for a federal-provincial immigration agreement requested by any province should be concluded within a reasonable time; the other addition specified that provinces would receive treatment equal to that of any other province with an agreement, taking into account the needs and circumstances of the provinces.

The change in the 1992 wording would have allowed the immigration provisions of the Constitution to be amended using the normal formula; the Meech Lake Accord would have given a veto on such amendments to any province with an immigration agreement that had been given the force of law pursuant to its provisions.

The failure of the Charlottetown Agreement on 26 October 1992 means, of course, that existing and future immigration agreements cannot be "constitutionalized"; however, there is nothing to impede the signing of additional or expanded agreements between Canada and the provinces. Indeed, Bill C-86 provides an expanded framework for such agreements.